ORISSA HIGH COURT: CUTTACK

CRLA No.29 of 2002

From the judgment of conviction and order of sentence dated 01.07.2002 passed by Shri M.C. Ray, Sessions Judge, Kandhamal-Boudh, Phulbani in Sessions Trial Case No.34 of 1998.

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1. Ranjan Kumar Bisoi
2. Kalu @ Ranjit Kumar Gauda ..... *Appellants*

-versus-

State of Orissa ..... Respondent

For Appellants : M/s. D. P. Dhal, Senior Advocate,
R. Dash, S.K. Tripathy
P.K. Routray, K. Dash &
B.K. Panda

For Respondent : Mr. A.K. Nanda (A.G.A.)

P R E S E N T :

SHRI JUSTICE S.K.MISHRA
AND
SHRI JUSTICE P. PATNAIK

Date of Hearing:- 11.11.2020 & 11.06.2021
and
Date of Judgment:- 11.06.2021

S.K.Mishra, J. In this appeal, both the appellants, namely Ranjan Kumar Bisoi and Kalu @ Ranjit Kumar Gauda assail their conviction under Sections 302 and 201/34 of the Indian Penal Code, 1860 (hereinafter referred as the 'Penal Code', for brevity) and sentence to

undergo imprisonment for life by the learned Sessions Judge, Kandhamal-Boudh, Phulbani in Sessions Trial No.34 of 1998, as per the judgment dated 01.07.2002.

2. The prosecution case in brief is narrated as follows: The deceased Dhoba Muli, son of P.W.8 Sasi Muli and P.W.7 Bilas Muli was called by the appellant no.1 Ranjan Kumar Bisoi from his house and thereafter Dhoba Muli was not found for several days. A missing report was lodged. Thereafter, P.W.1, medical officer at Daringibadi Community Health Centre (C.H.C.), informed the police on 03.01.1995 that he was informed by some children that something was floating inside the waters of the well. He along with staff found a gunny bag floating in the waters of the well. The police came to the spot and brought out the floating object and found that a dead body was inside. Then, he prepared inquest over the dead body. The dead body of Dhoba Muli was identified by the witnesses. Hence, the O.I.C., Daringibadi Police Station on his own information drew up the formal F.I.R., registered the case and took up the investigation.

In course of investigation, he visited the spot, examined the witnesses and recovered the dead body of the deceased Dhoba Muli from the well situated inside the campus of Daringibadi Community Health Centre (C.H.C.) in presence of the Executive Magistrate. He seized the wearing apparel of the deceased, discovery the weapon of offence on the recovery statement made by

both the appellants separately. After completion of investigation, he submitted charge sheet against the accused persons.

3. The defence took the plea of simple denial and false accusation due to political rivalry.

The prosecution has examined 12 witnesses in this case. P.W.12, Niranjan Patra happens to be the informant as well as investigating officer in this case. P.W.7, Bilas Muli, happens to be mother of the deceased Dhoba Muli. Her evidence is pivotal in this case, as the prosecution relied on her evidence to prove the previous incident as well as the last seen theory. P.W.8, Sasi Muli happens to be father of the deceased and husband of P.W.7, he has searched for some and he could not find his son and submitted missing report. P.W.1 Golak Bihari Samantaray is the doctor, who reported about the floating of the gunny bag in the well situated in the campus of Daringibadi Community Health Centre (C.H.C.). P.W.3, Yaksha Nayak, P.W.4, Prasanta Kumar Sahu, P.W.5, Santosh Kumar Sahu and P.W.6, Ajit Kumar Sahu are residents of the same village. They deposed about the bringing of dead body from the well, and seizure, on the discovery statement of the accused of the wooden merah. P.W.10, Upendranath Patnaik, the then forester, D.F.O., Office, Angul was examined to prove the alleged confession made by the appellants before the Investigating Officer and the leading to discovery of the weapon of offence. However, this witness has not supported the case

of prosecution and he turned hostile to it. P.W.11, Sanyasi @ Sania Muli happens to be the uncle of the deceased. He and P.W.8, father of the deceased searched for the deceased but could not get any trace of him. In addition to examination of 12 witnesses, prosecution has relied upon 15 exhibits and 11 material objects, M.Os. VII to VII/5 being some photographs.

4. One witness was examined on behalf of defence, namely, Sankar Beheradalai to prove the political rivalry between the appellants and one Sanyasi @ Sania Muli, who happens to be the relative of Bilas Muli and Sasi Muli.

5. Admittedly, there is no direct evidence in this case. The prosecution case is based on circumstantial evidence and they are as follows:

(1) Homicidal nature of the dead of the deceased.

(2) The previous incident stated by P.W.7 that the appellant no.1 Ranjan Kumar Bisoi tried to rape her, 6 to 7 months prior to the occurrence and on the protest of the said witness and her deceased son, appellant no.1 ran away from her house.

(3) He remained absconding for 7 to 8 months. On the date of occurrence, he came to the house of

the deceased and asked him to accompany and both of them went away.

(4) Finding of the dead body, after 7 to 8 days, in a well situated in premises of the C.H.C., Daringibadi.

(5) Absconding of the accused person.

(6) Confession of accused/appellants before the Investigating Officer.

(7) Leading to discovery of the weapon of offence, i.e., 'Wooden Medha'.

6. Mr. D.P. Dhal, learned senior counsel appearing for the appellants argued that the circumstances, relied upon by the trial Court, have not been conclusively established by the prosecution. While not challenging the findings of the learned Judge with respect to the homicidal nature of death of the deceased, the learned senior counsel for the appellants very emphatically challenges the findings of the learned Trial Judge regarding attempt to rape made by the appellant no.1 Ranjan Kumar Bisoi on P.W.7, the last seen of the deceased with the appellant no.1 and the confessional statement allegedly recorded by the Investigating Officer. He would also argue that the recovery weapon of offence has not been connected to the crime. Hence, the same cannot be taken into consideration as 'the

fact discovery' under Section 27 of the Indian Evidence Act, 1872 (hereinafter referred to as the 'Evidence Act', for brevity).

7. Mr. A.K. Nanda, learned Additional Government Advocate appearing for the State, on the other hand, would argue that the various circumstances in this case has been conclusively established by the prosecution and the learned Sessions Judge has a perspicacious view of the materials and evidence. Hence, he urged the court not to disturb the conviction of the appellants by the learned Trial Judge.

8. As far as the homicide nature of the death of the deceased is concerned, there appears to be no dispute regarding the same at the stage. Moreover, from the materials available on record like evidence of P.W.9, Rakhal Chandra Behera, contents of Exhibit 6 and contents of Exhibit 7/1, i.e., the opinion of Medical Officer on the examination of the weapon of offence, this Court considers it inexpedient to further analyse the material available on record to come to a finding that the learned Session Judge was correct in holding that the death of the deceased was homicidal in nature.

9. The first circumstance in this case is that P.W.7 has stated that 7 to 8 months prior to the date of occurrence the appellant no.1, Ranjan Kumar Bisoi tried to commit rape on her. She has stated that in paragraph-4 of the Examination-In-Chief, on oath, at about 7 to 8 months prior to the departure of his son with the

accused Ranjan Kumar Bisoi tried to rape her. She and her son protested. Hence, he ran away. The accused Ranjan Kumar Bisoi absconded for 7 to 8 months. After 7 to 8 months thereafter on his return to the village accused Ranjan came to their house and called her son. At that time, (from paragraph-1) her son Dhoba Muli with other two minor sons was present in their house. Her husband had been to Surada in the morning of that day. Her deceased son Dhoba Muli accompanied accused Ranjan and went along with him. From that night of his going along with Ranjan Kumar Bisoi her deceased son did not return. Her husband came home on the next day of departure of her son Dhoba with accused Ranjan. He told her husband that deceased Dhoba Muli did not return home since the night before. He went along with accused Ranjan but did not return home.

10. This witness has been relied upon by the learned Sessions Judge. In fact, entire paragraph-10 of the impugned judgment has been devoted to discussion of the evidence of P.W.7, Bilas Muli. The learned Judge has held that she is a reliable witness. The learned trial Judge further observed that her evidence has not been challenged in any way in cross-examination. However, a reference to evidence of P.W.7 reveals that she has been cross-examined by the defence and she has denied the defence suggestion that he has not stated before the Investigating Officer that prior to 7

years back accused Ranjan Kumar Bisoi came to his house in the evening hours and called her son Dhoba Muli, who accompanied the accused Ranjan Kumar Bisoi and went away; and that thereafter her deceased son did not return home; and that she searched for her missing sons about 7 to 8 days; and that her brother told that the accused Ranjan has killed her deceased son Dhoba Muli and threw the dead body into a well at Daringibadi, C.H.C.; and that the accused Ranjan has disclosed this fact before her brother, who communicated to her. She has further denied the defence suggestion that she has not stated before the Investigating Officer in her statement recorded under Section 161 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code', for brevity), that accused Ranjan came to her house about 7 to 8 months prior to the incident; and that he attempted to rape her; and that on protest on herself and her son, accused ran away; and that accused Ranjan remained absent for 7 to 8 months thereafter.

11. A reference to the evidence of P.W.12, I.O. in this case reveals that at paragraph-12 he has stated about contradictions of P.W.7 Bilas Muli. He has stated that the said witness did not state before him that 7 years back accused Ranjan Kumar Bisoi came her house and being accompanied by the deceased left her house and thereafter her deceased son did not return home; and that she searched for her missing son; and that she heard from her brother

that accused Ranjan killed her son and threw the dead body in the Community Health Centre, Daringibadi well at Daringibadi; and that accused disclosed this fact to her brother who communicated this fact to her. The witness has further proved that P.W.7 Bilas Muli has not stated before him that on 24.12.1994 accused Ranjan came to their house when she along with her three sons were present at home; and that called deceased Dhoba to accompany him; and that thereafter left her home. It is also borne out that she has not stated before the investigating officer that about 7 to 8 months prior to the incident, accused Ranjan came to her house and attempted to rape her; and that on the protest of her and her son, accused Ranjan fled away from the spot; and that accused Ranjan remained absent for 7 to 8 months thereafter.

12. Thus, as far as the circumstance of attempt to rape is concerned, no witness is speaking about any such evidence except P.W.7. P.W.7 has not stated this fact in her statement recorded under Section 161 of the Code by the I.O. Moreover, a contradiction in the shape of major omission in the previous statement made by her has been stipulated by the defence. Moreover, no F.I.R. was lodged for such an incident, investigation has not been made in this direction. So, we are of the considered opinion that the prosecution has failed to prove that the appellant no.1 Ranjan Kumar Bisoi made an attempt to rape P.W.7, about 7 to 8 months prior, to the incident of the

murder of the deceased Dhoba Muli. So, prosecution endeavor to attribute motive on the part of Ranjan to kill the deceased because of such previous enmity has not been established in this case.

13. As far as the last seen theory is concerned, there is a major contradiction in the evidence of P.W.7 with respect to this aspect. From the evidence of I.O., it is well established that P.W.7 has not stated before the I.O. that the accused Ranjan came to their house, she along with her sons were present, he called the deceased to accompany and thereafter they left her home. There is no other material to establish last seen theory of the prosecution. The evidence of P.W.7 is not reliable enough as there is a major contradiction in her evidence with respect to the previous statement recorded under Section 161 of the Code. So, this circumstance is also not established by the prosecution.

14. Next circumstance is the recovery of the dead body of the deceased, which is not disputed by the defence and it is also made out from the record that the dead body was first seen by some children, who informed P.W.1. P.W.1 then informed the police. The recovery of dead body of the deceased on 03.01.1995, is therefore well made out. Regarding the confession of the appellants before the investigating officer, the learned senior counsel for the appellants very emphatically argued that such a confession made before the I.O. is not at all admissible. Confessions leading to discovery of weapon of

offence, has been marked as Exhibits 11 and 12. The learned Trial Judge committed the gross error in appreciation of evidence by taking into consideration the in culpatory portion of such statements. Reliance on the entire confessional statement is not proper. Section 26 of the Evidence Act provides that no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. In this case, it is not the case of the prosecution that the confessional statement of Exhibits 11 and 12 has been made in the immediately presence of the Magistrate. So, the confession made by the appellants should have not been included in the evidence. Only the portion of such statement leading to discovery of 'fact', in this case the weapon of offence, in Exhibits 11 and 12 should have been taken into consideration.

15. Taken into consideration the material fact stated in Exhibits 11 and 12, it is seen that both of appellants have on the same day gave two statements before the Investigation Officer. On 08.01.1995, while in police custody, they stated that they have concealed the weapon of offence, i.e., 'Wooden Medha' (M.O.-I), in the field of Kalidas Nayak and gave recovery of the Wooden Medha. The Medha (M.O.-I) was seized in presence of witnesses.

In order to establish the information received from the accused while in police custody against the accused, section 27 of the

Indian Evidence Act provides an exception to Sections 25 and 27 of the Indian Evidence Act. The said section provides that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

In the case of ***Pawan Kumar Alias Monu Mittal and Another and other cases, Vs. State of Uttar Pradesh and Another*** (2015) 7 Supreme Court Cases 148, the Hon'ble Supreme Court has held that it is settled principle of law that the statement made by an accused before the police officer which amounts to confession is bar under Section 25 of the Indian Evidence Act. This prohibition has however relaxed to some extent by Section 27 of the Indian Evidence Act, which is quoted below:-

> **"27. How much of information received from accused may be proved**.- Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved".

The Hon'ble Supreme Court further held that in the light of Section 27 of the Indian Evidence Act, whatever information given by accused, in consequence of which a fact is discovered, only would be admissible in evidence, whether such information amounts to confession or not. The Hon'ble Supreme Court further held that basic idea embedded in Section 27 of the Evidence Act is the confirmation upon consequence information given by the accused. It is further held by the Hon'ble Supreme Court that the doctrine of confirmation is founded on the principle that if any fact is discovered in a search made on strength of any information obtained from accused, such a discovery is a guarantee that the information supplied by accused is true. The Hon'ble Supreme Court taking into earlier reported case of ***State of Maharastra v. Damu***, (2000) 6 SCC 269, held that the information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact, it becomes a reliable information.

The Hon'ble Supreme Court further held at paragraph 13 of the said judgment that the 'fact discovered' in Section 27 of the Evidence Act, embraces the place from which object was produced and knowledge of accused as to it, but information given must relate distinctly to that effect.

16. Judging from this angle, it is seen that two witnesses i.e. P.W.10 Upendranath Patnaik and P.W.4 Prasanta Kumar Sahu

have not supported the case of the prosecution as far as the discovery statement being recorded by the investigating officer. They have been cross-examined by the prosecution having granted the permission by the court under Section 154 of the Evidence Act. It has been established by the prosecution that these witnesses, in fact, stated before the investigating officer, under Section 161 of the Code, regarding such statement being recorded and recovery of the weapon. However, they have not supported the prosecution case. So, whatever has been stated to by the P.W.12 the I.O. has been taken by the learned trial judge, as to have been established by the prosecution. Whether such evidence is admissible in evidence as circumstances of discovery of the weapon of offence at the instance of the appellants has to be seen.

First of all, it is seen that the appellant no.1 Ranjan Kumar Bisoi gave a discovery statement recorded under Exhibit 11. The same fact has been stated to by the appellant no.2 Kalu @ Ranjit Gauda which has been Exhibited as Exhibit 12. As there is no submission with regard to this aspect, we do not consider it expedient in this case to discuss the question of giving discovery of ‘a fact’ by two persons and its probative value. Moreover, we find from the material on record that the weapon of offence (M.O.-I) was recovered from an open field which is accessible to all. P.W.12, Investigating Officer has stated that he did not send the weapon of offence (M.O.-I)

for chemical test as the blood stains contain in a M.O.-I has been washed away from the rain water at the time of seizure. In order to establish the fact discovered which is relevant for proving a charge of commission of offence, the prosecution, must connect by cogent evidence, the crime and the fact discovered. In this case, the weapon of offence. Then the prosecution must establish that it is the weapon that was used for the commission of the crime or also 'fact discovered' is related to the offence alleged to have been committed. Then, there is a presumption that the offence is connected to the accused. However, it is seen that there is no establishment of the connection between the weapon of offence and the death of the deceased. Such a connection can be easily established by proving the DNA of the dead body of the deceased match with the DNA sample found on the weapon of offence. It may also been established by proving the blood that was found on the weapon of offence belonging to human blood and to the same group of dead body of the deceased. In such case, the court may safely conclude that the connection between weapon of offence, i.e., 'the fact discovered', and the crime has been established. However, in this case, the I.O. has admitted that he has not sent the weapon of offence, (M.O.-I), for chemical examination.

The prosecution has attempted to establish this connection between the crime and weapon of offence by relying upon

the evidence of P.W.9 Dr. Rakhal Chandra Behera, who on police requisition, after examining the weapon of offence opined that the injuries noticed on the dead body of the deceased Dhoba Muli could have been possible by the wooden metha, M.O.-I. There is no certainty in his opinion and in fact such a certain opinion cannot be given in any case. So, the efforts of the prosecution to establish connection between weapon of offence i.e., 'the fact discovered' and murder of Dhoba Muli has not been established in this case. So, Section 27 of the Evidence Act cannot be pressed into service in this case.

17. Thus, on analysis of the entire materials available on record, we are of the firm opinion that the circumstances like the previous attempt of rape on P.W.7, last seeing of the deceased in the company of the appellant no.1, confession of the appellants and discovery of weapon of offence (M.O.-I) on the discovery statement made by the appellants are not established conclusively in this case. So, there is no chain of circumstances complete in all respect, unerringly pointing towards guilt of the appellants. We are of the opinion that the learned Sessions Judge committed error on record by accepting prosecution case, convicting the appellants for the offence under Sections 302 and 201/34 of the Penal Code and awarding various sentences.

18. Hence, the appeal is allowed. The conviction of both the appellant no.1 Ranjan Kumar Bisoi and appellant no.2 Kalu @ Ranjit Kumar Gauda for offences under Sections 302 and 201/34 of the Penal Code by the learned Sessions Judge, Kandhamal-Boudh, Phulbani in Sessions Trial No.34 of 1998 and sentences of imprisonment for life and imprisonment for two years are hereby set aside. The appellants are acquitted of the offences. They are on bail. They be set at liberty forthwith. Their bail bonds be cancelled.

Accordingly, the CRLA is disposed of.

The Trial Court Records (T.C.Rs) be returned back to the trial court forthwith along with copy of this judgment.

As the restrictions due to resurgence of COVID-19 are continuing, learned counsel for the parties may utilize the soft copy / downloaded copy of this order available in the High Court's website or print out thereof at par with certified copies, subject to attestation by Mr. D.P. Dhal, learned Senior Advocate for the appellants, in the manner prescribed, vide Court's Notice No.4587, dated 25.03.2020 as modified by Court's Notice No.4798 dated 15.04.2021.

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S.K.Mishra, J.

P. Patnaik, J. *I agree*

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P. Patnaik, J.

Orissa High Court, Cuttack
The 11th June, 2021/**TDTUDU**