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HIGH COURT OF ORISSA: CUTTACK

CRLA No.19 of 2003

(From the judgment dated 20.12.2002 passed by learned Sessions Judge, Khurda at Bhubaneswar in S.T. Case No.82 of 2002.)

Benga @ Imam Mahammad ... **Appellant**

Versus

State of Orissa ... **Respondent**

ForAppellant: Mr. Dharanidhar Nayak, Senior Advocate,
M/s. Akash Bhuyan, R.K. Pradhan, M. Mohanty, P.K. Mohanty, N.K. Mohanty, B. Rout and P.K. Deo, Advocates

For Respondent: Mr. Sk. Zafarulla,
Additional Standing Counsel

PRESENT:

THE HONOURABLE KUMARI JUSTICE S. PANDA

AND

HON'BLE SHRI JUSTICE S. K. PANIGRAHI

Date of Hearing – 19.05.2021Date of judgment – 19.05.2021

S. K. Panigrahi, J.

1. The present appeal has been directed against the judgment of conviction and order of sentence dated 20.12.2002 passed by the learned Sessions Judge, Khurdaat Bhubaneswar in S.T. Case No.82 of 2002, whereby the appellant has been convicted for commission of offence punishable under Section 302 of the I.P.C. and sentenced to undergo imprisonment for life.

2. Shorn of unnecessary details, the substratum of the matter presented before us remain that the deceased was a fish vendor at Unit-IV Fish Market, Bhubaneswar and used to reside nearby. The appellant used to sell mutton in the said market. The appellant was married to the sister (Ranju) of the deceased and they had one son and two daughters. Ranju allegedly deserted the appellant and left with another man, whereafter, the appellant refused to take care of the children. The mother of the deceased who also used to reside in the same colony brought the children to her house and started looking after them. Thereafter, there was regular quarrel between the appellant and the deceased over the maintenance of the children. On 31.07.2001 at 8:15 P.M., there was a heightened quarrel between the appellant and the deceased, in course of which the appellant attempted to strike at the abdomen of the deceased with a knife (M.O.-1) but the blow struck his thigh just below the abdomen as the latter tried to ward it off. The appellant charged again and this time struck the deceased on his forehead. Thereafter, the wife of the deceased (P.W.6) came to the rescue of her husband and wrenched away the knife (M.O.I) from the appellant and threw it on the ground and in the process she sustained injuries on her right palm.

3. The I.I.C., Kharavelanagar Police Station (P.W.7) after receiving an anonymous phone call about the occurrence, alerted the police patrol team over V.H.F. and proceeded to the scene of occurrence. When they reached at the spot, they found the deceased lying on the ground in pool of blood. The deceased was immediately shifted to Capital Hospital, Bhubaneswar in a police Jeep by the S.I. B.K. Aich. The doctor on casualty duty declared the deceased as 'brought dead'. Charan Biswal (P.W.2), the brother of the deceased who was present at the spot lodged the F.I.R. with the I.I.C.(P.W.7), Kharavelanagar P.S.,Bhubaneswarwhereupon Kharavelanagar P.S. Case No.189 dated 31.07.2001 was registered.

4. During the course of investigation, the I.O. proceeded to the village and took the appellantinto his custody. The body of the deceasedwas sent for post mortem examination. The appellant was then arrested and forwarded to the court. The I.O. (P.W.8) also effected seizure of knife (M.O.I), a pair of blood stained chappal belonging to the deceased (M.O.IV), another pair blood stained chappal belonging to the accused (M.O.V), blood stained earth (M.O.VII) and sample earth (M.O.VIII). After post-mortem examination, the informant (P.W.1) produced the wearing apparels of the deceased; a lungi (M.O.II) and a napkin (M.O.III) before a police constable (P.W.3) who thereby

produced it before the I.O. After completion of investigation, charge sheet was submitted against the accused.

5. To bring home the charges, the prosecution examined as many as 8 witnesses. P.W.1 is the Medical Officer who conducted autopsy over the deadbody of the deceased.P.W.2 is the brother of the deceased and the informant in the present case. P.W.3 is the police constable who carried the dead body to the hospital and the seizure witness of M.O.II and M.O.III. P.W.4 is an independent witness who has a vegetable shop in Unit IV market and also a seizure witness. P.W.5 is the Medical Officer who has treated P.W.6 who is the wife of the deceased. P.W.7 is the I.I.C. of Kharavelanagar P.S. and P.W.8 is the Investigating Officer. P.W.2 (informant) and P.W.6 (injured witness) are the only eye-witnesses.On the other hand, defence has examined two witnesses.

6. Mr.Dharanidhar Nayak, learnedSenior Counsel for the appellant submits that out of the two eye-witnesses, P.W.2 (informant), the brother of the deceased has turned hostile. He even denied to have lodged the F.I.R. and given any statement to the Investigating Officer. On the other hand, conviction cannot be established only on the basis of the sole testimony of P.W.6 without any proper corroboration from any other independent witness. Additionally, the injury sustained by the

appellant has not been explained by the prosecution which vitiates the prosecution story. Further, P.W.4 on his deposition before the Court stated that the police took his signature on some written papers. He further stated that he has not been examined by the police and nothing has been seized in his presence. Therefore, without any seizure, the prosecution case cannot be established. Further, P.W.5 in her evidence opined that she tried to rescue her husband from the appellant and thereby sustained injuries. However, in the cross-examination she has admitted that both the injuries could not have been inflicted by the same weapon. P.W.6 in her 161 CrPC statement has not mentioned at which part of the body the appellant made an assault. This casts aspersions on her role as an eye-witness. Therefore, the prosecution should not rely on her deposition. The Investigating Officer (P.W.8) has admitted in his cross-examination that he has not reflected in the C.D. or in the seizure list that he has sealed the M.O.I and M.O.VI and neither has he produced the seal before the court. Therefore, after seizure without any seal on the material casts doubt on the prosecution case. Moreover, the depositions and evidences of the prosecution witnesses are contradictory to each other. In view of the above, he urged that the accused be entitled to the

benefit of doubt as the prosecution has failed to prove the case against him beyond reasonable doubt.

7. The plea of the appellant is that on the night of occurrence, he and the deceased had a liquor bout during which the deceased had quarrel with some people and those people came to the Unit IV market and attacked both of them.

8. Per contra, learned Counsel for the State has submitted that the report of the Medical Officer reveals that the deceased suffered homicidal death due to the injury inflicted by the seized weapon (M.O.I). Further, he relied upon the evidence of P.W.6(wife of the deceased) who is one of the eye-witnesses and also sustained injuries while trying to save the deceased from the onslaught.Hence, he submits that the prosecution hassufficiently proved the motive of the accused in committing such a heinous crime. Having made the aforesaid submissions,learned Counsel for the State submits that the prosecution has been successful in establishing the truth beyond reasonable doubt that the appellant herein is the author of the crime and that the present appeal ought to be dismissed being devoid of merit.

9. Heard learned Counsel for the parties.It can be summarised that the learned Court below, in order to bring home the culpability of the appellant, has relied upon the following

circumstances namely (I) Statement of eye-witnesses (II) Corroboration of witnesses' depositions. While doing so, the Trial Court has proceeded to hold that these circumstances establish a complete chain which prove beyond reasonable doubt that the appellant has committed the murder of the deceased.

10. Upon perusal of the evidence produced before the Trial Court, with regard to the first circumstance, i.e., statement of the eye-witness stated hereinabove, the evidence of P.W.6 has been relied upon.The evidence of an eyewitness, if credible, constitutes, needless to say, the best possible evidence. There is wealth of judicial authority for the proposition that conviction may rest on the sole testimony of an eyewitness sans any other evidence, provided, always, the evidence of the eyewitness is absolutely credible. In a recent case of ***Dalip Kumar v State of Delhi***[1], Delhi High Court iterated that:

> *"**14.** As the value of evidence increases, however, so does the rigour and strictness of the scrutiny to which the evidence is required to be subjected. While, therefore, upholding the principle that conviction can rest on the sole testimony of an eye-witness, without any supportive evidence whatsoever, the Supreme Court has, been at pains to also hold that, in all such cases, the credibility of the evidence of the eye-witness is required to be conclusively established. For this, the court is required to assess, among other things, the evidence of the eye-witness, as tendered during investigation, when compared with his evidence during trial, and to examine whether the evidence, tendered*

[1]CRL.A.45/2002 &Crl. M.A.10587/2019

> *during trial, is cogent and coherent, and free from any disabling inconsistencies, as well as the extent to which the evidence of the eye-witness is consistent with the evidence of other witnesses, tendered during trial. While embarking on this exercise, needless to say, the court is required to be mindful of the distinction between minor, and major, inconsistencies, and may only take cognizance of those inconsistencies which dent the case of the prosecution. At the same time, inconsistencies, even if minor, may, if they are sufficiently large in number, substantially weaken the credibility of the testimony of the witness concerned.*
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> ***15.*** *In the ultimate eventuate, these are all factors of which the criminal court is bound, by oath, to be duly sensitised. At all times, the court is required to be alive to the fact that the facts, cumulatively seen, and the evidence, holistically assessed, may exonerate the accused, or may cast doubt on his guilt, and to the legal position that, in either case, the accused is entitled to acquittal."*

Further, the Supreme Court in the case of **Amar Singh vs The State (NCT of Delhi)**[2], iterated that:

> ***"16.****..... There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act, 1872. But if there are doubts about the testimony Courts will insist on corroboration. It is not the number, the quantity but quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. On this principle stands the edifice of Section 134 of the Evidence Act. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise.*
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> ***32.*** *The conviction of the appellants rests on the oral testimony of PW-1 who was produced as eye witness of the murder of the deceased. Both the Learned Sessions Judge, as well as High Court have placed reliance on the evidence of PW-1 and ordinarily this Court could be reluctant to disturb the concurrent view but since there are inherent improbabilities in the prosecution story and the conduct of eye witness is inconsistent with ordinary course of human nature we*

[2]Criminal Appeal No.335 of 2015 and Criminal Appeal No.336 of 2015

> *do not think it would be safe to convict the appellants upon the incorroborated testimony of the sole eye witness. Similar view has been taken by a Three Judge Bench of this Court in the case of* ***Selveraj v. The State of Tamil Nadu***[3]*. Wherein on an appreciation of evidence the prosecution story was found highly improbable and inconsistent of ordinary course of human nature concurrent findings of guilt recorded by the two Courts below was set aside."*

11. In the present case,however, the statements given by P.W.6 to the Investigating Officer and the statements deposed in the trial Court may have been dotted with some minor inconsistencies but the factum of her injury while saving the deceased from the onslaught cannot be taken so lightly. Further, the Trial Court has believed that the evidence of P.W.9 receives grand support from the evidence of P.Ws.2 and 5, which further enforces the statement of P.W.6 though some minor inconsistencies may have been crept in. If the evidence of those witnesses are read together, it can very well be said that the deposition of P.W.6 is a clinching evidence as she herself had seen the assault on her husband by the appellant and while saving her husband, she had sustained injuries. In fact, the fact of related witness cannot always be negated if it is sufficiently corroborated by other witnesses as well as the circumstances surrounding the occurrence.

[3] (1976) 4 SCC 343

12. In the instant case, with a view to base a conviction on the evidence of an ocular witness and circumstantial evidence, the prosecution has rightly established all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances also leads to a perfect flow of the chain of events which would permit no other conclusion than the guilt of the accused. The circumstances present in the cases are not dependent upon any hypothesis. The present case is not based on suspicion and it cannot falsify the statement of an ocular eye-witness even if she is related or interested witness. Further, if it is found that the appreciation of evidence in a case, which is entirely based on circumstantial evidence, is on a different footing than a case like the present one wherein an ocular witness is present and stated what she has been at the time of occurrence. Had it been a case of only on circumstantial evidence this would have vitiated by serious errors and the Court would have certainly interfered.

13. The Hon'ble Apex Court in the case of ***C.Chenga Reddy and Ors. v. State of A.P.***[4] has dealt with a case where suspicion has been allowed to take the place of reason and has held in no uncertain terms that;

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[4](1996) 10 SCC 193

> *"21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In the present case the courts below have overlooked these settled principles and allowed suspicion to take the place of proof besides relying upon some inadmissible evidence."*

But in the instant case, the circumstantial evidence is intercepted by the testimony of one ocular witness which itself is sufficient to complete the chain without any 'ifs' and 'buts' or any kind of hypothetical premise.

14. Thegeneral presumption that governs the criminal prosecution is that related witness would not falsely testify against an innocent person as they would prefer to see the real culprits getting punished as held in ***Jarnail Singh vs. State of Punjab***[5]. However, testimony of such witnesses should be analysed with caution for its credibility as held in ***Gangadhar Behera & Others vs. State of Odisha***[6]**.** It is well settled that the testimony of a related witness cannot be discredited mechanically because relationship of the witness cannot be a ground to determine the credibility of the testimony as held in

[5](2009) 9 SCC 719
[6] 2003 SCC (Cri) 32

Raju alias Balachandran vs. State of Tamil Nadu[7] and reiterated in ***A. Alagupandian vs. State of Tamil Nadu.***[8] In ***Balraje vs. State of Maharashtra***[9], the apex Court has succinctly held that :

> *"If after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same".*

Hence, it is the truthfulness of the statement that the law takes into account and the credibility of a related witness is not dependent upon its relationship with either party, and the court should exercise care and caution to determine the admissibility of its testimonial, by relying only on the truth. A mere relationship of the witness would be no ground to reject it. A close relative who is a natural witness to the circumstances of the case cannot be regarded as an interested witness.

15. Similarly, in ***Bhagwan Swarup V.State of U.P.***[10], ***State of U.P. V. Paras Nath Singh***[11] and ***Swarn Singh V.State of Punjab***[12], the Apex Court held that:

> *"The fact that the witnesses are related to each other is no criterion for disregarding their evidence. Relative should have no interest to*

7. AIR 2013 SC 983
8 Criminal Appeal No.1315 OF 2009 (SC)
9 (2010) 6 SCC 673
10 AIR 1971 SC 429
11 AIR1973 SC 1073
12 1976 Cri. L.J. 1757

> *falsely implicate the accused or protect the real culprit. There is no general rule that the evidence of the relations of the deceased must be corroborated for securing the conviction of the offender. Each case depends upon its own facts and circumstances..”*

16. The Investigating Officer has been successful in corroborating the prosecution story. The seized weapon used in the crime and other articles at the instance of the accused, the testimony of P.W.6 does form a formidable chain establishing that the accused is the real brain behind the crime. The entire circumstantial evidence and the testimony of P.W.6 show beyond reasonable doubt regarding the involvement of the accused without any iota of doubt.

17. For evidence introduced and to be made admissible in courts, requires a degree which should exclude falsity and help expose the correct facts in a trial. Witnesses disputably stand at the pinnacle of the justice delivery sequence. The testimony should be such that it clarifies the situation while maintaining a favourable attitude towards the side for whom the statement is being given. When the witnesses are not able to depose correctly or turn ‘hostile’ in the court of law, it shakes public confidence in the criminal justice delivery system. Accentuating this view, Bentham said: “witnesses are the eyes and ears of justice”. However, it seems the ‘eyes and

ears' have defied the prosecution in so far as prosecution witnesses Nos.2and 5 have turned hostile. Their alleged statements made to the police Under Section 161 of Code of Criminal Procedure were not confronted to them and marked as exhibits and further the I.O. has not spoken in his evidence anything about the alleged statements of the above hostile witnesses recorded Under Section 161 of Cr.P.C. as held by the Apex Court in three Judges Bench in the case of **V.K. Mishra v. State of Uttarakhand**[13]:

> *"**16.** Section 162 Cr.PC bars use of statement of witnesses recorded by the police except for the limited purpose of contradiction of such witnesses as indicated there. The statement made by a witness before the police Under Section 161(1) CrPC can be used only for the purpose of contradicting such witness on what he has stated at the trial as laid down in the proviso to Section 162(1) CrPC. The statements under Section 161 CrPC recorded during the investigation are not substantive pieces of evidence but can be used primarily for the limited purpose: (i) of contradicting such witness by an accused under Section 145 of the Evidence Act; (ii) the contradiction of such witness also by the prosecution but with the leave of the Court; and (iii) the re-examination of the witness if necessary.*
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> ***17.** The court cannot suo motu make use of statements to police not proved and ask questions with reference to them which are inconsistent with the testimony of the witness in the court. The words in Section 162 CrPC "if duly proved" clearly show that the record of the statement of witnesses cannot be admitted in evidence straightway nor can be looked into but they must be duly proved for the purpose of contradiction by eliciting admission from the witness during cross-examination and also during the cross-examination of the investigating officer. The statement before the*

[13](2015) 9 SCC 588

investigating officer can be used for contradiction but only after strict compliance with Section 145 of the Evidence Act that is by drawing attention to the parts intended for contradiction."

18. Nonetheless, even at the advent of hostility, the court expects the prosecution to endeavour in corroborating the 'hostile' testimonies as a last-ditch effort into buttressing its side of the story and has rightly done so. However, the prosecution has taken the aid of the solitary ocular witness along with the circumstantial evidence and avoided the onset of 'defeatism'. Consequentially, the testimonies of the witnesses in this case are not inadmissible in its entirety. The seizure witness P.W.5 turned hostile during cross- examination and clearly denied the seizure of articles but the use of the M.O.I in the crime is certain and not otherwise negated.

19. With the above backdrop and discussion, this Court comes to an irresistible conclusion that the prosecution has been successful in bringing home the charges against the appellant beyond reasonable doubt and that the Court below has appropriately dealt with the evidence and the attuning circumstances in proper perspective. Mere fact that the solitary witness is related to the deceased or did not state the incident in the same language or in a manner which is

natural, in the opinion of the court does not affect in any way the credibility of the witness.

20. In view of the discussion made hereinabove, the court below has maintained a positive judicial attitude towards victim justice, and while considering the credibility of evidence or testimonial, the court has also exercised due care and caution to arrive at the truth. There seems to be absence of any bias or presumptions while connecting the chain and have perfectly corroborated with the circumstantial evidence.

21. Accordingly, the Criminal Appeal filed by the appellant is dismissed. The judgment of conviction and order of sentence dated 20.12.2002 passed by the learned Sessions Judge, Khurda atBhubaneswar in S.T. Case No.82 of 2002 is hereby upheld.

22. It is brought to the notice that the appellant is on bail by order of this Court dated 02.07.2008. In such view of the matter, the bail bonds stand cancelled and the trial court is directed to issue warrant of arrest against the appellant to suffer remaining part of the sentence.

The LCR be returned forthwith to the court from which it was received.

(S.K. Panigrahi, J.) **(S. Panda, J.)**

Orissa High Court, Cuttack
The 19th day of March, 2021 /AKK/LNB/AKP