A.F.R.

IN THE HIGH COURT OF ORISSA AT CUTTACK
JCRLA No.1 of 2020

(An appeal U/S.383 of the Code of Criminal Procedure, 1973 against the judgment passed by B.K. Mishra, Sessions Judge, Puri in ST Case No.541 of 2013 arising out of Puri Sadar PS Case No.163 of 2013, corresponding to G.R. Case No.1400 of 2013 of the Court of SDJM, Puri)

Ashok Nayak @ Banku *…* ***Appellant***

-versus-

State of Odisha *…* ***Respondent***

For Appellant : Mr. B.C. Ghadei, Advocate
For Respondent : Mr. G.N. Rout, ASC

CORAM:
HON'BLE MR. JUSTICE D. DASH
HON'BLE MR. JUSTICE G. SATAPATHY

DATE OF HEARING :16.01.2024
DATE OF JUDGMENT:22.01.2024

G. Satapathy, J.

1. This appeal is directed against the judgment passed on 19.09.2019 by the learned Sessions Judge, Puri in ST Case No.541 of 2013 convicting the appellant for offences punishable U/Ss.458/302 of Indian Penal Code, 1860 (in short "the IPC") and sentencing him to undergo imprisonment for

life and pay a fine of Rs.10,000/- in default whereof, to undergo Rigorous Imprisonment (RI) for a further period of six months for offence U/S.302 of IPC and to undergo RI for a period of three years and to pay a fine of Rs.1,000/- in default whereof, to undergo RI for a further period of two months for offence U/S.458 of IPC with direction of running of the sentences concurrently.

2. The background facts of the prosecution case are that one Ashok Nayak @ Banku (hereinafter referred to as the "appellant") was residing with his wife (PW9) and children in the house adjacent to the house of one Kalia @ Narasingha Nayak (hereinafter referred to as the "deceased") and the appellant was regularly assaulting his wife under the influence of liquor and on the afternoon of 15.07.2013, there was a quarrel between the appellant and his wife, as a result, the wife of the appellant went outside, but when she returned back in the evening, she finding her house to be locked, went to the house of the deceased and stayed there along with his son (PW12), but in the

night, the appellant returned and knocked the door of the house of the deceased and when the deceased opened the door of his house, there was a quarrel between the appellant and the deceased. In said quarrel, the deceased dealt a blow by means of an iron rod to the appellant, whereas the appellant dealt a blow by means of a beer bottle to his wife causing injury on her head when the later tried to separate both of them. The wife of the appellant left the house along with her son and sometimes thereafter, she returned to the spot house with police only to find the deceased lying dead with a pull of blood.

The land owner of the house of the deceased lodged an FIR against the appellant at about 1 PM on 16.07.2013 before the IIC, Sadar Police Station, Puri paving the way for registration of Puri Sadar PS Case No.163 of 2013 and, accordingly, in absence of the regular IIC, the ASI PW20 Sarbeswar Bhuyan after registering the case, took up the investigation of this case, but later on, PW18 took charge of the investigation. In the course of

investigation, PW18 examined the witnesses, seized the incriminating articles, obtained the injury report of PW9, arrested the appellant, recovered the weapon of offence i.e. a small stone (MOI) and the shirt of the appellant in presence of the witnesses pursuant to the disclosure statement of the appellant. PW18 also obtained the post mortem examination report of the deceased and sent the incriminating materials to the SFSL, Rasulgarh, Bhubaneswar for chemical examination. Finally, on conclusion of investigation, PW18 submitted charge-sheet against the appellant for offences punishable U/Ss.302/460/307 of IPC, but finding prima facie material and evidence, the learned trial Court framed charge against the appellant for commission of offences punishable U/Ss.458/302 of IPC resulting in trial in the present case.

3. In support of the charge, the prosecution examined PWs.1 to 20, proved certain documents under Exts.1 to 17 and identified material objects under MOI-XII as against no evidence whatsoever by the defence. Of the witnesses examined in this case, PWs.1

and 5 are the son and son-in-law of the deceased, PWs.2 and 6 are the witnesses to the seizure, whereas PWs.14 and 15 are the witnesses to the seizure of weapon of offence stone (MOI) as well as witnesses to the disclosure statement of the appellant. PW19 is the medical officer who conducted autopsy over the dead body of the deceased. PWs.9 and 12 are the wife and son of the appellant, whereas PWs.3 and 7 are the witnesses to the inquest of the dead body of the deceased. PWs.8 and 13 are the independent witnesses. PW4 is the informant and PW10 is the neighbor of the appellant, whereas PW11 is the father-in-law of the appellant and, lastly, PWs.18 and 20 are the two IOs.

4. The plea of the appellant in the course of trial was denial simplicitor and false implication.

5. Appreciating the evidence on record and upon hearing the parties, the learned trial Court has convicted the appellant mainly relying upon the evidence of circumstance as to last seen and recovery of the weapon (MOI) pursuant to the disclosure

statement of the appellant. The learned trial Court has relied upon the evidence of PWs.9 and 12 to hold that the deceased was last seen with the appellant.

6. In assailing the impugned judgment of conviction and order of sentence, Mr. B.C. Ghadei, learned counsel for the appellant has submitted that although the learned trial Court has relied upon the last seen theory and recovery of stone to convict the appellant the fact remains that there was absolutely no evidence to hold that the deceased was last seen together with the accused-appellant, rather the evidence as tendered by PWs.9 and 12 are wholly unworthy of credit and there being suppression of the genesis of the case by these two witnesses, the last seen theory falls flat. It is further submitted by him that although the learned trial Court has relied upon the recovery evidence, the same having been not found established through any acceptable evidence, reliance on such evidence by the learned trial Court is misplaced and, therefore, the conviction being recorded on unacceptable and unreliable evidence is unsustainable

in the eye of law. In summing up his argument, learned counsel for the appellant has prayed to allow the appeal by setting aside the impugned judgment of conviction and order of sentence to acquit the appellant of the charge for the offences.

7. On the contrary, Mr. G.N. Rout, learned ASC has, however, supported the impugned judgment of conviction and he *inter-alia* by drawing the attention of the Court to the evidence of PWs.9 and 12 has submitted that since the appellant and the deceased were quarreling with each other and the appellant having dealt a blow on the head of the PW9 by means of a beer bottle, which itself speaks about the conduct of the appellant and the deceased being last seen together with the appellant in the circumstances, there cannot be any doubt that the appellant was the author of the crime. It is further submitted by him that not only the time gap between the deceased last seen together with the appellant and the death of the deceased was small and proximate, but it also automatically rules out the involvement of any third

person and, therefore, the conviction of the appellant being found to have been established beyond all reasonable doubt by the prosecution through legally admissible evidence, such conviction cannot be interfered with. In summing up his argument, learned ASC has prayed to dismiss the appeal.

8. In the aforesaid premises, this Court being duty bound has given anxious and careful reading to the impugned judgment of conviction together with the evidence on record. Having a glance upon the impugned judgment, there appears no doubt in the mind of the Court that the learned trial Court has recorded the conviction of the appellant mainly relying upon two circumstances; firstly, the last seen theory and secondly, the recovery of MOI (weapon i.e. a stone). Additionally, the learned trial Court has also taken into consideration the failure of the appellant to offer any explanation when the incriminating circumstances were put to him during his examination U/S.313 of Cr.P.C by only taking a plea of complete

denial as an additional link to establish the guilt of the appellant.

9. On the first issue of nature of death of the deceased, it transpires from the evidence of doctor-PW19 that the cause of death of the deceased was haemorrhage and shock due to injury to the brain and multiple bleeding injuries on abdomen and other parts of the body and all of the seven injuries mentioned in the post mortem report were ante mortem in nature. According to PW19, injury Nos.1, 2 and 7 were fatal injuries and sufficient to cause death in ordinary course of nature. It is the specific evidence of PW19 that injury Nos.1 and 2 can be caused by broken beer bottle, whereas injury No.7 could be caused by a stone (MOI), but in the cross examination, the defence although unsuccessfully suggested to the doctor that he cannot rule out the accidental death of the deceased, but it is elicited from his mouth(PW19) that he has not mentioned as to whether the death was homicidal or suicidal or natural, however, taking into consideration the evidence of doctor together with the evidence of

inquest witnesses and the evidence of IO as well as documentary evidence of FIR under Ext.5 & post mortem report under Ext.12, this Court does not entertain any doubt with regard to prosecution establishing the homicidal death of the deceased beyond all reasonable doubt. Thus, the finding of the learned trial Court with regard to deceased suffering from homicidal death is confirmed by this Court. However, the next finding of the trial as to the responsibility of the accused-appellant causing death to the deceased requires to be re-examined by re-appreciating the evidence on record.

10. There is no dispute about non-availability of any direct evidence to the occurrence, but the guilt of the offender can always be established through circumstantial evidence. Since, the learned trial Court has relied upon the circumstance of "last seen theory", this Court now proceeds to scrutinize the available evidence on record to examine the sustainability of such finding of the learned trial Court. The learned trial Court has, of course, relied upon the evidence of PWs.9

and 12 to base its finding with regard to last seen theory, but the evidence of PW9 never transpires that the deceased was last seen with the appellant only. Although, PW9 has stated that her husband returned back to the house at night and at that time, she was taking sleep in the house of the deceased with her child aged about five years, but when the accused came near to the house of the deceased and shouted, the deceased opened the front door and the accused again quarreled with the deceased as to why he allowed her to stay in his house. It is the specific evidence of PW9 that out of anger, the deceased dealt two blows upon her husband by means of an iron rod and her husband dealt a blow on her head by a beer bottle and out of pain, she came outside and she, thereafter, told the police on duty at Atharanala about the incident and the police had telephoned to Sadar Police Station and sometime thereafter, police staff reached at the spot and saw the deceased lying in his room with deep cut injury on his neck and other injuries on different parts of his body and the accused-appellant was not present

in the room. The son of PW9 who is examined as PW12 has also stated more or less like PW9. According to PW12, at about 11.30 PM, his father came to the spot house and the deceased woke up and there was a quarrel between them.

11. It appears from the evidence of the first IO, PW20-Sarbeswar Bhuyan that he received FIR on 16.07.2013 at about 1 PM, but he received a phone call about murder of the deceased at about 9 AM and he sent ASI-D.K. Panda to verify the information, but he did not make any Station Diary Entry about the phone call and after registering the case, he went to the spot. It, therefore, appears that the police had reached to the spot after registering the case at 1 PM in the afternoon. It is the specific evidence of PWs.9 and 12 that after arrival of the police, they came along with them to the house of the deceased and found the deceased lying dead. It is, therefore, very clear that since mid night till the FIR was lodged which is more than twelve hours, the police had not been to the spot. PW9 has, of course, stated in her evidence that she had approached

the police on duty at Atharanala soon after the occurrence, but such fact is not forthcoming from the mouth of the Investigating Officer, rather the evidence of IO reveals that he reached to the spot after receiving the FIR at 1 PM. No evidence is also forthcoming to the effect that where the accused went after assaulting his wife-PW9 who was found to have sustained some injury and sent to DHH, Puri for medical examination after 3.45 PM on 16.07.2013. Had PW9 approached the police in the mid night, why the police would not come to the spot because soon after receipt of such information and in such situation, the police must have to come to the spot and, therefore, it appears that PW9 is not revealing the true genesis of the case, rather she is found to have deposed selectively by withholding some facts which might incriminate her. According to the prosecution case, the deceased was also found to be with PWs.9 and 12 before the occurrence. In the sequence of events keeping in view the existing evidence of PWs9 and 12 and without anything more, these two witnesses cannot be believed to hold that the

deceased was last seen together only with the appellant, rather at best their evidence would go to show that the appellant had only assaulted PW9 by means of a beer bottle, but their evidence is conspicuously silent with regard to assault to the deceased. Neither PW9 nor PW12 had seen the appellant assaulting the deceased in any manner and their evidence can only goes to demonstrate that there was a quarrel between the deceased and the appellant, but what happened to the deceased from the mid night till his dead body was found in his bed room in the morning at 9 AM, nobody has stated as to how the deceased died and who was in the company of the deceased during that time.

12. The doctrine of last seen theory which emanates from Section 106 of the Indian Evidence Act, 1872 (In short the 'Act') is an exception to the burden of proof as provided in Section 101 of the Act, but the initial burden of proof in a criminal case never shifts by invoking the provision of Section 106 of the Act, unless the prosecution establishes the foundational facts by

clear, cogent and acceptable evidence. In other words, Section 106 of the Act never relieves the prosecution from establishing prima facie guilt of the accused beyond all reasonable doubt and once the same is established, the burden would shift to the accused to explain the facts which are within his personal knowledge and in case, he fails to explain or establish those facts, an adverse inference can obviously drawn against the accused.

13. In this case, neither PW9 nor PW12 has stated anything except the appellant picking up quarrel with the deceased for providing shelter to his wife and son and the deceased giving a blow to the appellant by one small size of iron rod and when PW9 intervened, the appellant gave a blow on her head by one broken beer bottle and, thereafter, what happened has not been stated by any of the witnesses nor is it stated by any of the witnesses as to whether the appellant remained there or went away. It also appears from the evidence of PW20, the IO,that the dead body of the deceased was found in his bed room, but the evidence

of PWs.9 and 12 transpires that the quarrel took place between the deceased and the appellant at the entrance of the house of the deceased. Further, the deceased being found not only with the appellant, but also with PWs.9 and 12 at the time of quarrel. Hence, it cannot be conclusively said that the deceased was only last seen together with the appellant to invoke the provision of Section 106 of the Act against the appellant to offer explanation for the death of the deceased. It is also not forthcoming that even after sustaining injury by PW9 on her head, what she was doing from the mid night till she was sent by the IO for medical examination at 3.45 PM on 16.07.2013 and the aforesaid circumstance creates a genuine doubt with the prosecution case.

14. In view of the aforesaid circumstance and discussions and re-appreciation of evidence, this Court does not find the prosecution to have established the foundational facts to press the service of Section 106 of the Act against the petitioner to explain about the death of the deceased inasmuch as there is a clear cut

deficiency of evidence to establish that the deceased was last seen together with the appellant just immediately before his death.

15. Addressing the next limb of circumstance i.e. discovery of the weapon of offence which is a piece of stone under MOI, it appears that the prosecution has examined two independent witnesses PWs.14 and 15 to prove the recovery of MOI, but the evidence of PW14 transpires that the appellant brought out the blood soaked shirt and one stone which he had kept concealed near a latrine and the police seized the articles, but PW14 has not spoken about the manner and circumstance of recovery and his evidence with regard to place of recovery does not tally with the place of recovery as allegedly stated by the appellant in the disclosure statement which was a bush on the ridge of a tank as per the prosecution case. Similarly, PW15 has only stated in his evidence that police seized one blood soaked shirt and one piece of stone in his presence and, therefore, the said evidence is of no avail to establish the recovery in terms of Section 27 of the Act.

Further, the evidence of IO is also suspicious with regard to recovery of MOI since the IO-PW18 has stated about the accused only taking him to the place and giving recovery, but at the same time, the prosecution intends to prove the recovery by citing PWs.14 and 15 to be witnesses to the recovery of MOI. In the above factual backdrop, this Court is unable to persuade itself to hold that the prosecution has established the recovery of MOI beyond all reasonable doubt.

16. A careful conspectus of evidence on record together with discussions made hereinabove, this Court is unable to hold that the prosecution has proved the circumstances firmly to give rise to any inference unerringly pointing towards the guilt of the accused-appellant and, therefore, the two circumstances "last seen theory" and recovery of "weapon of offence" as relied on by the learned trial Court having not established in the norms of standard of proof as required in a criminal case, the same cannot be relied upon to convict the appellant and, therefore, the

conviction of the appellant being unsustainable in the eye of law is liable to be set aside together with the sentence as awarded to the convict. The convict, therefore, is acquitted of the charge.

17. In the result, the appeal stands allowed. No order as to cost. As a logical sequitur, the impugned judgment of conviction and order of sentence passed on 19.09.2019 by the learned Sessions Judge, Puri in ST Case No.541 of 2013 are hereby set aside.

18. Since the appellant appears to be in jail custody, he shall be released from the custody forthwith, if his detention is not otherwise required in any other case.

(G. Satapathy)
Judge

I Agree

(D.Dash)
Judge

Signature Not Verified
Digitally Signed
Signed by: SUBHASMITA DAS
Designation: Sr. Stenographer
Reason: Authentication
Location: High Court of Orissa
Date: 24-Jan-2024 10:34:49

Orissa High Court, Cuttack,
Dated the 22nd day of January, 2024/Subhasmita