

Chenia Alias Dhanar Domb Vs. State

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Court : Orissa

Decided On : Oct-14-1965

Reported in : AIR1966Ori156; 1966CriLJ789

Judge : R.K. Das and ;G.K. Misra, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 173(4), 207A(4), 207A(6) and 367; [Evidence Act, 1872](#) - Sections 114

Appeal No. : Death Reference No. 1 of 1965 and Criminal Appeal No. 157 of 1965

Appellant : Chenia Alias Dhanar Domb

Respondent : State

Advocate for Def. : Govt. Adv.

Advocate for Pet/Ap. : H.G. Panda, Adv.

Disposition : Appeal partly allowed

Judgement :

MISRA, J.

1. 20th October, 1964 (Tuesday) was the day of Kumar Purnima, Moti Majhiani (the deceased) wore a number of gold and silver ornaments and went to the weekly market at Katagam. Amongst others she was wearing 3 gold Dhanamalis,

1 gold Ginimali and a gold Ball (a type of ear-ring). With these ornaments on she went to bed after taking her meals. Next morning on 21-10-64 she was found dead in the room in which she was sleeping.

Dalbandhu Majhi (P. W. 1), son of the deceased lodged F. I. R. Ext. 1 at 11-30 A.M. on 21-10-64 at Kodinga P. S. 12 miles away from Landuguda, the village of the deceased. In the F. I. R. it was clearly mentioned that 3 gold Dhanmalis, 1 gold Ginimali and gold Bali had been taken away from her body. P. Ws. 11 and 12 caught hold of the accused and produced him before P. W. 13, the Officer-in-charge, Nawrangpur P. S., who arrested him at 4 p.m., on 26-10-64. At the time of apprehension, 2 gold Dhanamalis (Mos. VI & VI-1) were seized from the body of the accused. The accused was in the village in the night of occurrence and left for village Bansiaagunda in the morning of 21-10-64 where he stayed with P. VV. 18. (whose sister Kumari was married to the accused), who saw some gold and silver ornaments with the accused.

After staying there for 2 days, he left Bansiaagunda on 23rd morning and came to Nawrangpur. There he sold a gold Bali to P.W. 3. That very day he went to Nuakot which is the village of his sister P. W. 17 and her husband P. W. 16. On 24-10-64 he went to Ampani weekly hat and purchased some new clothings and soaps. He gave P. Ws. 16 and 17 the gold Ginimali (M. O. V), the new cloth and two soaps purchased from the weekly hat. On 25-10-64 he left Nuakot and returned to Nawrangpur. On 24-10-64 he sold a portion of a Dhanamali and was apprehended by P. Ws. 11 and 12 while he was moving in the market.

That accused admits that he is a very poor man and did not own any gold or silver. He was formerly a farm servant under P.W. 1.

On the aforesaid facts the prosecution case is that the accused murdered the deceased by striking the head with a stone (M.O. XIII) and removed the ornaments, a portion of which he sold away and the rest of which was recovered from him. The defence is one of complete denial of the prosecution case. The possession of the ornaments was also denied. The learned Sessions Judge convicted him under Sections 457, 397 and 302, I. P. C. and sentenced him to death under Section 302. No separate sentence was passed under Sections 457

and 397. The reference has been made by the learned Sessions Judge under Section 374 Cr. P. C. for confirmation of the sentence of death. The Criminal appeal has been filed by the accused against the order of conviction.

2. Admittedly nobody had seen the occurrence. The conviction has been based on the following findings:

(i) The deceased was murdered while she was asleep with M.O. VIII being thrown on her head.

(ii) The accused, a co-villager of the deceased, was in the village in the night of occurrence.

(iii) Next morning he left the village and went to different villages until he was arrested on 26-10-64.

(iv) The deceased went to bed with many ornaments on her body amongst which were the Ginimali (M.O. V) and three Dhanamalis including M.Os. VI and VI-1 and a gold Bali.

(v) The gold Ginimali (M.O.V) was handed over by the accused to P. Ws. 16 and 17 and two Dhanmalis (M.Os. VI and VI-1) were recovered from the body of the accused while he was apprehended by P.Ws. 11 and 12.

(vi) The judicial confession Ex. 2 made by the accused on 5-11-64 before the Magistrate P. W. 7 was voluntary and true. Therein the accused admitted to have killed the deceased on Tuesday night and removed the ornaments.

(vii) In his examinations under Section 207A(6), Cr. P. C. in the Committing Court the accused admitted that he entered into the house of the deceased and removed a Bali, a Ginimali and Dhanmalis and that the deceased was dead by the time of removal of the ornaments.

3. It is not disputed that the death was homicidal. The doctor (P.W. 10) stated that a blow with M.O. VIII on the left temporal region, while the deceased was lying on right side of her head, could cause all the injuries mentioned in the Post mortem Report (Ex. 12). The injuries were sufficient in the ordinary course of nature to

cause death within 4 to 5 minutes of their infliction and that the injuries were homicidal. Mr. Panda did not rightly assail the finding of the learned Sessions Judge. We have no doubts in our mind that death was caused by the striking of M.O. VIII on the head of the deceased.

4. The confessional statement (Ex. 2) shows that it related to the death of one Ramuka and not of Moti Majhiani (the deceased). The learned Government Advocate was called upon to point out any evidence on record to show that Moti Majhiani had another name as Ramuka. He made a clear statement that there is absolutely no material on record to show that the deceased had another name Ramuka. It is extremely surprising that neither the Public Prosecutor nor the learned Sessions Judge noticed this defect in the course of trial.

As there is no evidence that Ex. 2 relates to the deceased it is wholly irrelevant. In the circumstances, it is unnecessary to examine if Ex. 2 is voluntary and true. Ex. 2 must, therefore, be ruled out of consideration on the simple ground that there is nothing in it to show that the accused confessed to have killed Moti Majhiani and to have removed ornaments from her body. We very much regret to say that the confessional statement has to be excluded from consideration on account of the gross negligence on the part of the Investigating officer, the Public Prosecutor and the learned Sessions Judge. Had there been a careful perusal of the confessional statement, some evidence could have been led to show that the deceased had another name as Ramuka.

5. The Ginimali (M.O. V) and the Dhanmalis (M.Os. VI and VI-1) have been identified, as being worn by the deceased before she went to bed, by her son P.W. 1, her step-daughter-in-law P.W. 2 and her step son P. W. 21. The learned Sessions Judge's finding that the identification evidence is unassailable has not been attacked by Mr. Panda.

P. Ws. 16 and 17 satisfactorily establish that the Ginimali (M.O. V) was given by the accused to them. The evidence of P.Ws. 11, 12 and 13 establishes beyond reasonable doubt that the Dhanmalis (M.Os. VI and VI-I) were recovered from the person of the accused. Nothing substantial has been urged before us to discredit the testimony of the aforesaid witnesses. The accused does not claim these

ornaments as belonging to him. He on the other hand disowns them and admits that he is extremely poor and does not possess any gold or silver ornaments. The finding of the learned Sessions Judge that the ornaments worn by the deceased before she went to bed were in possession of accused after the murder is well founded and was not rightly attacked with any seriousness by Mr. Panda.

6. Much importance cannot be attached to the circumstance that the accused was present in the village in the night of occurrence. There is nothing strange to find him to be present in his village. This cannot be treated as an incriminating circumstance. Nobody had seen him entering into the room of the deceased or hovering in its vicinity. The disappearance of the accused next morning cannot also be treated as an incriminating circumstance with reference to the offence of murder. These 2 features are, therefore, of not much significance in determining whether the accused committed the offence of murder.

7. Thus besides this statement of the accused in the Committing Court, the only incriminating evidence available against the accused relating to the offence of murder is the recovery from the accused of the ornaments worn by the deceased at the time she went to her bed.

8. The question put in the Committing. Court and the answer obtained thereto may be noticed--

Ques : It appears from the prosecution evidence that on 20-10-64 you entered into the house of Moti during mid night and smashed her head with a big stone while she was asleep and after murdering her you removed one Ginimali three Dhanmalis and one Bali. What have you got to say?

Ans. At first I entered into the house of Moti during night. I committed theft of a Bali, a Dhanmali, a Ginimali and again a Dhanmali. At the time I committed theft she alone was sleeping in that room. I had seen Moti near village market and I saw her wearing ornaments. After committing theft I came to Rausaguda and thereafter to Nowrangpur. When I snatched away the necklaces that old lady was dead. After I purchased new cloth I threw away my old cloth at the Nowrangpur market.

There is no admission in the answer that the accused killed the deceased. He, however, unequivocally admitted that he had entered into the room of the deceased and had removed the ornaments from her body. The learned Sessions Judge has taken into consideration that answer. If the answer is taken into consideration, the conviction under Section 302, I. P. C. is well founded.

Under Section 114, Evidence Act, the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of that particular case. Illustration (a) appended to the section is as follows:

The Court may presume that a man, who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.

It has been authoritatively pronounced in (S) AIR 1956 SC 54 Sanwat Khan v. State of Rajasthan that no hard and fast rule can be laid down as to what inference should be drawn from a certain circumstance. Where, however, the only evidence against an accused person is the recovery of stolen property and although the circumstance may indicate that the theft and the murder must have been committed at the same time, it is not safe to draw the inference that the person in possession of the stolen property was the murderer, as suspicion cannot take the place of proof. The solitary circumstance of unexplained recovery does not necessarily indicate that the theft and the murder took place at one and the same time. In that case, the only evidence available was the recovery and their Lordships acquitted the accused of the charge of murder.

In (S) AIR 1956 SC 400, Wasim Khan v. State of Uttar Pradesh some further circumstances were available besides mere possession by an accused of the articles which were on the person or in the custody of the murdered man and the conviction was upheld. Some kind of connecting link, however remote it may be, must be made out between the movement of the deceased and the accused at about the time of murder, ILR (1964) Cut. 752 : (AIR 1965 Orissa 33 Dukhi Bai v. State, is an illustration of a case covered by (S) AIR 1956 SC 400.

In *In re Thangaswami*, AIR 1963 Mad 473 all relevant decisions have been reviewed. Their Lordships made the following observations.

'In brief, the inference or presumption of guilt, upon the main charge of murder can safely be drawn, where the accused is in unexplained possession of jewels or articles of the victim after the crime, and where in addition, there is some evidence at least connecting the movements of the accused with those of the victim, either before or after the crime, and in some manner or another establishing the nexus between the accused and the offence. The mere unexplained possession or production of the jewels of the victim by the accused may not constitute a safe basis for a conviction upon a charge of murder, when that is the only bare circumstance proved in evidence. The reason for that is fairly obvious. The test of circumstantial evidence must be satisfied. The chain of links in that evidence must lead to only one reasonable inference, namely, that the accused was the murderer, and all other probable hypothesis must be excluded. But how can that be done where the sole evidence is that the accused was in unexplained possession of the jewels of the murdered woman? Since the murder was for the sake of robbery of the jewels that motive would apply to every person, known or unknown, who could have come across the woman at that particular spot. As we have already stated the murderer might have delivered the jewels to the appellant for disposal, shortly after the crime. Again, it is even conceivable that the murderer might have fled when some one approached, and the jewels might have been taken away by the accused from the body, or from the spot of crime.'

We are in respectful agreement with the aforesaid enunciation of law.

If the statement of the accused in the committing court is taken into consideration, then the nexus is established between the accused and the offence. The accused admitted to have gone inside the room and removed the ornaments of the accused with those of the victim near about the time of the commission of the crime of murder. The recovery from the accused of the ornaments worn by the deceased, when she went to bed, and the admission of the accused in the Committing Court that he removed the ornaments from her body by entering into the house would be sufficient to draw the larger presumption that the accused not only committed the

theft but also committed the murder as enunciated in (S) AIR 1956 SC 400.

9. To get over the difficulty arising out of the admission of the accused in the Committing Court, Mr. Panda contended that the question put by the committing court was not permissible in law and, as such, the answer given to the question must be ruled out from consideration. This necessitates an examination of the scope of Section 207-A (6) Cr. P.C. which lays down:

When the evidence referred to in Sub-section (4) has been taken and the Magistrate has considered all the documents, referred to in Section 173 and has, if necessary, examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him..

There was some controversy as to whether the evidence referred to in Section 207-A, is to be confined only to the oral evidence recorded by the Magistrate, or would be extended to the documents referred to in Section 173(4). The majority view in AIR 1964 SC 949 Ramnarayan Mor v. State of Maharashtra has settled the controversy that the evidence referred to in the section would cover both.

10. Under Section 287 Cr. P. C. the examination of the accused recorded by or before the Committing Magistrate shall be tendered by the prosecutor and read as an evidence. The statement before the Committing Court was tendered by the prosecution and was read as evidence. This fact has been endorsed by the learned Sessions Judge and the position is not disputed. Mr. Panda, however, contended that excepting the recovery from the accused of the ornaments worn by the deceased there was no evidence that the accused entered into the bedroom of the deceased in the night of 20-10-64 and murdered her with a big stone, while she was asleep, and that after murdering her removed the ornaments.

This contention appears to be well founded. The learned Government Advocate, however contended that the confessional statement (Ex. 2) was before the Committing Court as a piece of evidence, and though it now transpires to be wholly irrelevant to the case, it was then open to the Committing Court on the basis of the confessional statement to frame the question as has been done by it. I am unable to accept such an argument. In AIR 1964 SC 949 it has been laid down

that besides what is evidence within the meaning of Section 3 of the Evidence Act, documents referred to in Section 173(4) can be treated as evidence though those might not have been formally proved. Even if the confessional statement was formally proved, it is irrelevant as it did not at all relate to the murder of the deceased. It did not furnish an incriminating circumstance against the accused before the Committing Court. Under Section 207-A (6), Cr. P.C. it is not open to the Committing Court to ask the accused to explain his confession (Ex. 2), or any incriminating circumstance arising therefrom. We are clearly of opinion that excepting the recovery from the accused of the ornaments worn by the deceased, there was no other incriminating circumstance requiring an explanation from the accused.

Thus the only incriminating circumstance which the Committing Court would have put to the accused to explain is the recovery from the person of the accused of the ornaments worn by the deceased at the time she went to the bed. What questions should have been put by the Committing Court to the accused relating to the recovery, under Section 207-A (6) Cr. P. C. Those questions may be enumerated herein below :

(i) There is prosecution evidence that some of the ornaments worn by the deceased were recovered from your person and others were recovered from P.Ws. 16 and 17 to whom you had handed over the same. What have you got to say?

(ii) You were in possession of the stolen goods soon after the theft. A presumption of fact can be drawn against you that you are either the thief or have received the ornaments knowing them to be stolen, unless you account for your possession. What have you got to say ?

If, in answering the second question, the accused had given the reply that he entered into the room of the deceased and removed the ornaments from her body, such an answer would be taken into consideration for a finding that the accused was at the place of murder near about the time of occurrence. The question however, has not been put in the aforesaid form and has been put as if there was positive evidence on record showing the activities of the accused in house-

breaking, theft and the murder.

In this connection, it would be pertinent to refer to AIR 1943 Mad 408. If we may say so with respect, the learned single Judge has correctly and succinctly explained the legal position thus :

'If there are no circumstances appearing against the accused in evidence, then unquestionably the Judge should not put him any question at all under Section 342, Criminal Procedure Code. If any statement is made by an accused person as a result of questions improperly put to him, it cannot be taken into account against him. If, however, a question is properly put to an accused person and he chooses to make a statement which implicates himself, then his answer be not strictly necessary for the explaining away of the circumstances appearing against him'.

On the aforesaid analysis, we are of opinion that the question put by the Committing Court cannot be justified under Section 207-A

6. Cr. P. C. The question was of an inquisitorial nature. It purported to entrap the accused and to extract from him damaging admissions upon which the prosecution case can be built up. When there was no evidence implicating the accused with reference to the various matters embodied in the question, the section has no application. The question should not have been put, and the answer given to such a question must be excluded from consideration. The answer given by the accused in the Committing Court admitting that he entered into the room of the deceased during the night of 20-10-64 and removed the ornaments must accordingly be excluded from consideration. It is noteworthy that the accused was not defended by any lawyer in the Committing Court. Clear prejudice had been caused to him by the question put without any evidence for the prosecution in support of such facts.

11. Thus the only evidence incriminating against the accused, with reference to the charge of murder is the recovery from him of the ornaments worn by the deceased at the time she went to bed. The case would come directly within the dictum in (S) AIR 1956 SC 54 and AIR 1963 Mad 476. The accused is entitled to an acquittal of the charge of murder under Section 302 I. P. C. The conviction

under Section 302 I. P. C. is set aside. So also the conviction under Sections 457 and 397 cannot be maintained.

12. From the recovery of the ornaments the presumption under Section 114, illustration (a), Evidence Act would arise. There was a short interval between the murder and the recovery of the ornaments. In the particular facts and circumstances of this case, the better presumption would be that the accused was the thief and not the receiver of the stolen property. He is therefore convicted under Section 379 I. P. C.

13. In the result, the conviction and sentence passed on the accused under Sections 302, 457 and 397, I. P. C. are set aside and he is convicted under Section 379 I. P. C. and sentenced to undergo rigorous imprisonment for three years. The Death Reference is discharged and the Criminal appeal is allowed as indicated above.

14. DAS, J. I agree.