

Mathias Kullu Vs. State of Orissa

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Court : Orissa

Decided On : Feb-04-2002

Reported in : 2002(I)OLR292

Judge : C.R. Pal and ;P.K. Misra, JJ.

Acts : Indian Penal Code (IPC) - Sections 201 and 302

Appeal No. : Death Reference No. 2 of 1999 and Jail Criminal Appeal No. 264 of 1999

Appellant : Mathias Kullu

Respondent : State of Orissa

Advocate for Def. : Jairaj Behera , Addl. Government Adv.

Advocate for Pet/Ap. : A.K. Nanda, ;J. Nayak, ;B.B. Khatri and ;G.S. Pani

Disposition : Appeal allowed

Judgement :

C.R. Pal, J.

1. The appeal preferred against the judgment dated 28.10.1999 passed by the learned Sessions Judge, Sundargarh in Sessions Trial No. 170 of 1997 convicting the appellant under Sections 201 and 302,1.P.C. and sentencing him under

Section 201, I.P.C. to undergo R.I. for five years and under Section 302, I.P.C. to capital punishment and the reference made by the learned Sessions Judge under Section 366 of the Code of Criminal Procedure, 1973 were heard together and are disposed of by this common judgment.

2. The facts of the case which gave rise to this appeal are as follows :

The appellant and two others, namely, Jabhiar Soreng and Sylvestar Lakra stood charged for the offences under Section 302, 201 read with Section 34, I.P.C. for committing murder of Lajrus Kullu, the brother of the appellant, Katirna Kido alias Kullu, the wife of Lajrus Kullu and Ruben Kullu, the son of Lajrus Kullu sometime in the month of August, 1996. The case against the appellant is that he was not pulling on well with his brother Lajrus Kullu as there was dispute between them relating to landed property. In the month of August, 1996 the co-villagers of the appellant found Lajrus Kullu, his wife and son missing from the village. Initially they thought that as usual Lajrus with his wife and son might have gone to some other village for work. On enquiry the appellant also told the villagers that his brother with his wife and son to have gone to some other village for work. Some months thereafter, the villagers saw this appellant cutting the paddy crop from the land of his brother. When they asked him as to why he was cutting the paddy from his brother's land, he told them that he would give the paddy to his brother on his return. A few months subsequent thereto when they saw the appellant removing the door frame and shutters from the house of his brother, they suspected foul play. So they convened a meeting of the villagers which was also attended by the appellant. There in the meeting before the villagers the appellant confessed that he along with two of his male cousins Jabhir Soreng and Sylvestar Lakra assaulted his brother, brother's wife and son to death by means of a lathi. He also disclose, that they buried their dead bodies along with the lathi used in assaulting them little away from the house of Lajrus Kullu in a pit. It is also alleged that he led the villagers to the place where the dead bodies of the three deceased persons were buried. Coming to know about the incident, one of the villagers, namely, Khristarfar Barua went to the police station and lodged a written report. The matter was investigated into and the appellant with the other two co-accused named above were charge-sheeted for the alleged offences under Sections 302 and 202

read with Section 34, I.P.C. After commitment, they were charged for the above offence to which they pleaded not guilty.

3. The prosecution in order to prove the charges against the appellant cited 14 witnesses and exhibited as many as 30 documents. Out of the witnesses examined P.W. 1 is the informant. This witness and P.Ws. 2,3,4,5 and 6 are the co-villagers of the appellant and have deposed about the extra judicial confession made by the appellant. They have also deposed about the ill- feeling between the deceased and his brother and removal of paddy crop and door leaves besides stating that the appellant showed them the place where the dead bodies were buried. P.W.7 is the Executive Magistrate in whose presence inquest was held over the dead bodies. P.W. 8 is a witness to the recovery of the dead bodies and seizure of the wooden bar, P.W.9 is a witness to the seizure of the door leaves and P.W. 10 is a witness to the seizure of the wearing apparels of the deceased. P.W. 11 is the constable of police who has deposed to have accompanied the dead bodies to the Government Hospital, Rajgangpur for post mortem examination and produced the same before the medical officer, P.W. 12, who conducted P.M. examination. He also brought back and produced the wearing apparels of the deceased before the I.O. P.W. 12 is the medical officer who conducted post mortem examination over the three dead bodies and has proved the P.M. reports, Exts. 14, 15 and 16. P.W. 13 is the A.S.I, of Police who received the F.I.R. in absence of the O.I.C. of Kutra Police Station and took up investigation. P.W. 14 is the Officer-in-Charge who took over charge of investigation from the A.S.I, and on completion of investigation submitted charge-sheet. In course of hearing they have also exhibited the F.I.R. and inquest reports, seizure lists etc. The trial Court after conclusion of hearing has convicted and sentenced the appellant as stated earlier. Being aggrieved by the aforesaid order of conviction and sentence the appellant has preferred this appeal. Here it may be mentioned that during pendency of trial one of the accused, namely, Jabhiar Sbren expired and the case against him abated. The other co-accused oSyjvestar Lakra was acquitted under Section 232, Cr.P.C. on 10.8.99 and the present appellant is convicted and sentenced as aforesaid basing on the circumstantial evidence including the extra judicial confession said to have been made by the appellant before the villagers.

4. The learned counsel appearing for the appellant contended that the finding recorded by the learned Sessions Judge regarding the guilt of the appellant on the basis of the circumstantial evidence including the extra judicial confession is highly improper and is the outcome of his failure to appreciate the evidence in its proper perspective. It is submitted that the learned Sessions Judge has failed to take into consideration the evidence adduced by the witnesses which show that the entire prosecution case against the appellant is a concocted one. He further submitted that there is no reliable evidence to come to a conclusion that the appellant confessed before the villagers to have killed his brother, brother's wife and son. According to the learned counsel, the circumstances relied on by the prosecution having not been proved satisfactorily, the learned Sessions Judge should not have accepted the same to come to the conclusion about the guilt of the accused. The learned Addl. Government Advocate, however, argued in support of the findings recorded by the learned Sessions Judge.

5. Before coming to the contentions raised by the learned counsel of the appellant, it is necessary to see whether the death of the deceased was homicidal. In this context, it is noticed that all the three dead bodies were sent for post mortem examination. The Medical Officer, P.W. 12 conducted post mortem examination over all the three dead bodies. On examining the dead body of Katrina Kido, the wife of Lajrush Kido he found a depressed fracture over the left temporal region just above the left pinnae 'C shaped, of size 8 cm. x 2c.m. x 3 cm. He also found a depressed fracture over the right fourth, fifth and seventh ribs at the mid clavicular line. From his evidence it appears that on the dead body of Ruben Kulu he found a fracture over the scalp at the occipital region making the skull in to multiple fragments. All the internal brain matters are completely absent. Similarly, on the person of Lajrush Kulu he found a fracture on both the parietal bones near the sagittal suture. In all the three dead bodies he found the brain matters adhering to form a dark brown substance. The P.W. 12 has however deposed that the injuries were possible by means of weapon like M.O.I, and the injuries were sufficient in the ordinary course of nature to cause death. He has stated that as the dead bodies were mummified, it was not possible to opine about the cause of death and as to whether the injuries were ante mortem or post mortem in nature. However, it is noticed from the evidence that the deceased belonged to one family and were

found buried in one place in a suspicious circumstance. The P.W.13 has deposed that he found¹ blood stains inside the house of the deceased. He also collected samples of blood stained earth which was found to be human blood on chemical examination. From the nature of the injuries, it cannot be said that they were self inflicted or accidental. Had it been a case of accidental or self inflicted injury, the same could not have escaped the notice of the villagers and the dead bodies could not have been buried in suspicious manner. Thus, the circumstances indicate that all the three deceased died homicidal death. Therefore it is now to be seen whether the appellant is responsible for the same.

6. Since it is contended that there are evidence to show that the case against the appellant is riot free from concoction, it becomes necessary to see how far the contention is sustainable. It is the prosecution case that sometime in the month of August, 1996 the deceased were found missing from the village. It is the further case of the prosecution that finding the appellant removing the door leaves and the frame from the house of his deceased brother, they suspected foul play and convened a meeting in the village on 26.2.97. The witnesses have deposed that in that meeting the appellant confessed to have killed his brother, brother's wife and son whereafter a report, Ext. 1 was lodged at the police station by P.W. 1. The P.W. 1 in his cross-examination has stated that after[^]the meeting they took the appellant and produced him before the Police Officer of Kutra Police Station and lodged the F.I.R. According to P.W.I, the four villagers who accompanied him to the police station also put their signatures in the F.I.R. The F.I.R. Ext. 1 does not contain the signature of any other villager excepting the P.W. 1. The P.W. 1 has specifically stated that Ext. 1 was given two days after the lodging of the first F.I.R. From his evidence it appears that police came to his village with the appellant before the F.I.R. Ext. 1 was lodged. The visit of the police to the village prior to the lodging of F.I.R., Ext. 1 as has been stated by P.W.I shows that police had the information about the incident prior to the lodging of Ext.I. P.W. 1 has also deposed that he lodged an information two days prior to the lodging of Ext.I. In his examination-in-chief he has also deposed that in the meetng this appellant did not tell the names of the other two accused persons whereas in Ext.I it has been mentioned that the appellant stated that he along with his cousins Jabhiar Soreng and Sylvestar Lakra killed his brother, brother's wife and son. The testimony of

P.W.I to the effect that he lodged an F.I.E. two days prior to the lodging of Ext. 1 and that in the meeting accused did not name the other two co-accused persons give rise to doubt about the genuineness of the F.I.R.. Ext. 1 as the same contains the names of the other two co-accused.

Another circumstance which creates doubt about the genuineness of the F.I.R. is the deployment of P.W. 11 much prior to the receipt of the F.I.R. Ext. 1 at the P.S. to guard the place where the dead bodies were buried. P.W. 13, the A.S.I, of Police has stated that he received the F.I.R., Ext. 1 at 9.P.M. and after registering the case he issued Command Certificate to the Constable 186-D. Kishan and Havildar M. S. Kua, the P.W. 11 to guard the spot. From the testimony of P.W. 11 it appears that on 26th February, 1997 he along with the other constable arrived at the spot during day time. He has also deposed that the Investigating Officer (P.W. 13) had also gone there and arrived there during day time sometime after the arrival of the P.W. 11. This- also suggests that much prior to Ext. 1, information was lodged as has been deposed by P.W. 1 which has been suppressed. The learned Sessions Judge, it appears, had not attached any importance to the testimony of P.W.I as far as it relates to the lodging of an F.I.R. prior to lodging of Ext. 1 and has discarded the same solely on the surmise that probably the witness stated so referring to some missing report though there is no iota of evidence to suggest that any missing report was lodged at the police station. The above evidence creates sufficient doubt about the genuineness of the F.I.R., Ext. 1 and as such it is difficult to rule out the possibility of concoction of the prosecution case against the appellant.

7. Since there is no direct evidence and the conviction is based on circumstantial evidence it becomes necessary to scrutinise the evidence and see how far the prosecution has come out successful to establish each of the circumstances by clear and cogent evidence. It is well settled that when a case rests on circumstantial evidence, such evidence must satisfy three tests :

(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; and

(iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion what within all human probability the crime was committed by the accused and non-else.

In view of the above proposition of law, it is necessary to examine the evidence adduced by the prosecution to establish each of the circumstances on which it places reliance. One of those circumstances on which the prosecution places reliance to prove motive behind the crime is the ill-feeling between the brothers. In the above context, it is noticed that the P.Ws. 1 to 6 298 ORISSA LAW REVIEWS 2002 (I) have stated that both the brothers were not pulling on well as there was dispute between them relating to landed property. The prosecution relied on the above circumstance to show the motive behind the crime. It is a well known principle that the prosecution is not bound to establish the motive in a criminal case and motive is known only to the perpetrator of the crime and may not be known to others. Where there is clear proof of motive for the crime that lends additional support to the finding of the Court that the accused is guilty, but the absence of clear proof of motive does not necessarily lead to the contrary conclusion. Here in the instant case, the witnesses have deposed that both the brothers were not pulling on well due to land dispute. Accepting the evidence led by the prosecution even if it is held that the appellant had a motive for the crime, the same alone cannot be of any help to the prosecution to arrive at a conclusion about the guilt of the appellant unless there are other evidence to find the accused guilty of the alleged offences. In the instant case from the discussion made hereinafter, it can be seen that the prosecution has failed to prove any of the circumstances to find the appellant guilty and as such motive as a circumstance cannot be of any help to the prosecution.

8. One of the other circumstances is the abscondence of the appellant from the village after the lodging of information. In this connection, the only evidence available is the evidence of the Investigating Officer who has deposed that when he went to the house of the appellant during investigation he found him absent.

There is no other evidence to corroborate the evidence of the Investigating Officer though it appears from the evidence of P.W.9 that on 28.7.97 when the Investigating Officer seized the door leaves and frame from the house of the appellant, the appellant was absent in his house. But from the evidence of P.W. 1, the informant, it appears that when he along with other villagers went to the police station to lodge information, they took the appellant with them and produced him before the police officer at the P.S. In this context, the informant has deposed 'After the meeting was over we took the accused Mathias Kullu and produced him before the Police Officer of Kutra Police Station and also lodged F.I.R'. It shows that the appellant was available to the Investigating Officer. From the evidence of this witness, it also appears that the accused was kept detained at the police station after the lodging of F.I.R. The evidence of the Investigating Officer shows that the accused was arrested from his house. Under the above circumstances, it cannot be held that the appellant absconded from the village after the occurrence or after making the alleged confession. It may also be stated that though the conduct of an accused in absconding immediately after the occurrence of the offence is relevant, it is not conclusive of his guilt because even innocent person may be tempted to such conduct to avoid arrest.

9. Harvesting of paddy crop from the land of the deceased Lajrus Kullu by the appellant it relied upon as another circumstance to implicate the appellant with the murder of his brother Lajrus Kullu, brother's wife and son. It is noticed that the villagers of the accused who have been examined in this case as prosecution witnesses have deposed that when they saw the accused harvesting paddy crop from his brother's land they asked him why he was harvesting the same to which the appellant replied that he would give the same to his brother on his return. The appellant in his statement given under Section 313, Cr.P.C. while admitting to have cut the paddy crop has stated that his brother told him to do the same while leaving the village. It appears from the evidence of those witnesses that the brother of the appellant used to remain absent from the village intermittently as he was going outside for work. In this context, P.W.2 Agustin Tete has stated that when they found the deceased persons absent in the village they thought that they might have gone to some other place to work as labourer. The P.W.3 has deposed that the deceased Katrina Kido, Lajrus Kullu and Ruben Kullu were earning their

livelihood as daily labourer and they used to go to different places to work as labourer. The P.W.4 has also stated that when he found the deceased absent he thought that they might have gone to some other place for earning their livelihood as labourer. It appears probable that the appellant harvested the paddy crop to save the same from destruction and to restore the same to his brother on his return. As a circumstance, no conclusion can be drawn from it about the complicity of the appellant in the commission of the alleged offences.

10. Another circumstance on which the prosecution places much reliance is the alleged removal of door leaves and frame of the house of the deceased by the appellant;. In this context, it is noticed that P.Ws. 1 to 6 have deposed that when the appellant moved the door leaves and frame of the house of his brother, they began to suspect foul play and called a meeting of the villagers. From the evidence of the witnesses, it also appears that the appellant attended the meeting where he confessed to have committed the murder of his brother, brother's wife and son. From the evidence of P.Ws. 9 and 13, the Investigating Officer and Ext. 10, the seizure list, it appears that a pair of door leaves and a frame were seized by the Investigating Officer from the house of the appellant. The appellant in his statement under Section 313, Cr.P.C. has denied the seizure. According to the P.W. 13, Investigating Officer the seized door leaves and the frame were given in zima 300 ORISSA LAW REVIEWS 2002 (I) of P. W. 1, the informant under Ext. 5/ 1, the zimanama. But the said witness denied to have taken any door leaves or frame in zima. This witness has not been cross-examined by the prosecution on this point. No attempt was also made to produce the seized door leaves and frame in Court for their identification. Denial of P.W. 1 to have taken the door leaves and frame in zima and their non-production in the Court create doubt about the genuineness of the seizure.

11. The prosecution also relied on the conduct of the accused- appellant in showing the place where the dead bodies of his brother, brother's wife and son were buried. In this connection the P.Ws. 1 to 6 have deposed that after making confession before the villagers the appellant also led them and showed the place where the dead bodies were buried. They have not given the description of the place. P.W.8 has deposed that the dead bodies were disinterred from an open

space of village Pahchara. The witnesses have also deposed that after lodging the F.I.R. when the Investigating Officer came to the village, they showed the place to him. The Investigating Officer who has been examined as P.W. 13 has also deposed that he proceeded to the spot along with the informant as the informant wanted to show him the place where the dead bodies were reported to have been buried. Agastin Tete, the P.W.2, Jookim Tete, the P.W.3, Claiment Barua, the P.W.5 also went with him along with the informant. P.W. 13 has further deposed that the informant and aforesaid persons took him to the village Panchara (Reunapada) and showed him a heap in the land of the deceased Lajrus Kullu as the place where the dead bodies were buried by the accused persons. But later on, in his examination-in-chief itself P.W. 13 has deposed as follows :

'.....There was no heap over the pit and it was almost in ground level and til flower had already been grown and harvested from that land but the relevant spot was little depressed.....'

The above evidence of the P.W. 13 shows that the place shown by the witnesses which was a heap was not the place wherefrom the dead bodies were recovered. On the other hand, from his evidence it appears that the dead bodies were recovered from a place which was little depressed and was not in the same level with the surrounding land of that place. In the above situation, it is difficult to believe that the appellant showed the place to the witnesses. Hence, it cannot be said that the prosecution has come out successful to establish the conduct of the appellant in showing the place by clear and cogent evidence.

12. The extra judicial confession on which the prosecution lays much emphasis in support of the finding of the trial Court about the guilt of the appellant the learned counsel of the appellant contended that P.Ws. 1 to 6 who have deposed about the extra judicial confession having been confronted with their statements to the police given in course of investigation wherein they did not state that the appellant stated that he alone killed the deceased, the trial Court should not have placed reliance on the evidence of those witnesses. It is also contended that since the witnesses, namely, P.Ws. 1 to 6 have resiled from their previous statements and have come forward with a case that the appellant confessed before them that he alone killed

.his brother, brother's wife and son, the same gives rise to serio-us doubt about the actual words used by the appellant in admitting his guilt. The learned Addl. Govt. Advocate, on the other hand, contended that when the P.Ws.1 to 6 have consistently stated that the appellant made a confession before the villagers stating that he alone killed his brother, brother's wife and son and the evidence by them is sufficient to show that the appellant admitted his guilt in terms of the offence, the trial Court has rightly relied on the same and convicted the appellant. In the above context, it is noticed that the trial Court has completely ignored the F.I.R. case. In the F.I.R. Ext. 1, which was lodged by the P.W. 1. it has been specifically mentioned that the appellant being questioned by the villagers stated that he along with his cousins Jabhiar Soreng and Syivestar Lakra caused the death of his brother, brother's wife and son by means of a Makidi (wooden bar). It has already been pointed out earlier that the genuineness of the F.I.R. is not free from doubt. The P.W. 1 it appears, has also been confronted with his previous statement to the police where he stated that the appellant confessed before the villagers that he along with his cousin Jabhiar Soreng and Syivestar Lakra killed his brother, brother's wife and son. Resiling from F.I.R. case as well as his earlier statement to the police, the P.W.1 has come up with a case during trial that the appellant confessed before the villagers that he alone killed his brother, brother's wife and son. He has been confronted with his previous statement made before the police where he did not state that the appellant confessed in the meeting held by the villagers that he alone caused the death of his brother, brother's wife and son. Attention of the investigating officer has been drawn to the statement of the P.W. 1 and it appears from the evidence of the investigating officer that the P.W. 1 did not state before him that in the meeting the appellant confessed that he alone killed all the deceased. The evidence of P.Ws.2,3,4, 5 and 6 are also of similar nature. All of them have deposed in the Court that the appellant confessed to have killed his brother, brother's wife and son. They have been confronted with their statements made to the police where they did not say that the appellant confessed that he alone killed the deceased. The F.I.R. shows that while making confession the appellant implicated the other two accused persons with the offences. The P.W. 1 has specifically stated in his evidence that in the meeting Mathias Kulu did not tell the names of other two accused persons. But the F.I.R. Ext.1 is to the

contrary. It is noticed that the trial Court has laid much emphasis on the recovery of the weapon of offence M.O.I, (wooden bar) and has held that, the recovery of the same from the place where the dead bodies were buried lends support to the genuineness of the extra judicial confession. According to the trial Court in absence of any confession there could not have any mention in the F.I.R. about the presence of the wooden bar in the pit along with the dead bodies. But as has been discussed earlier the genuineness of the F.I.R., Ext.I does not appear to be free from doubt. In addition it, there is also no clear and cogent evidence to come to a conclusion that the dead bodies and the wooden bar were recovered from the place shown by the accused to the villagers. It may also be mentioned here that though the dead bodies were disinterred in presence of a Magistrate and the said Magistrate has been examined as P.W.7 he has not whispered a word about the recovery of the wooden bar from the pit. From the evidence of P.W. 13 it also appears that the informant and the villagers who took him to village Panchara (Reunapada) showed him a heap on the land of the deceased Lajrus Kully to be the place where the dead bodies were buried. But from the evidence of P.W. 13 it appears that the place wherefrom the dead bodies were recovered was little depressed. If the informant and the villagers showed him a heap as the place where the dead bodies were buried stating that the same was shown to the villagers by the appellant, the recovery of the wooden bar and the dead bodies from a shallow land cannot be said to have been recovered from the place shown by the appellant. So placing of reliance on the recovery of the wooden bar from the pit to come to a finding about the genuineness of the confession does not appear to be proper. In the above circumstances, the evidence of the witnesses about the extra judicial confession in absence of exact words does inspire confidence to come to a conclusion that in fact the appellant made such a confession before the villagers. The finding of the learned Sessions Judge to the contrary, therefore, cannot be supported.

13. The discussions made above clearly show that the prosecution had failed to establish any of the circumstances on which it relied to bring home the charges under Sections 302 and 201, I.P.C. against the appellant. It is no doubt a matter of regret that such a cruel cold blooded murder should go unpunished. There may also be an element of truth in the prosecution case against the appellant.

Considering as a whole, the prosecution story may be true, but between 'may be true' and 'must be true' there is inevitably long distance to travel and the whole of this distance must be covered by the prosecution by legal, reliable and unimpeachable evidence before an accused can be convicted. In absence of any reliable evidence we, therefore, are inclined to allow the appeal and set aside the order of conviction and sentence and acquit the appellant of the charges under Sections 302 and 201, I.P.C. and direct that the appellant be set at liberty forthwith if his detention is not required in any other case.

In view of our order allowing the appeal, the reference is discharged.

Ch. P.K. Misra, J.

I agree.

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