

Subash Samal. Vs. State of OrissaA.

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Court : Orissa

Decided On : Jan-22-2010

Judge : Pradip Mohanty; B.P.Ray, Jj.

Acts : Indian Penal Code (IPC) - Sections 302, 304 (1); Code of Criminal Procedure (CrPC) - Section 313.

Appeal No. : CRIMINAL APPEAL No.14 of 2001.

Appellant : Subash Samal.

Respondent : State of OrissaA.

Advocate for Def. : Mr. J.P. Pattnaik, Adv.

Advocate for Pet/Ap. : Mr. Sangram Das, Adv.

Judgement :

1. This Jail Criminal Appeal is directed against the judgment and order dated 5.12.2000 passed by the learned Sessions Judge, Khurda at Bhubaneswar in S.T. Case No. 21 of 2000 convicting the appellant under Section 302 I.P.C. and sentencing him to undergo imprisonment for life.

2. The case of the prosecution is that in the night of 15/16.04.1999 the deceased and his wife (P.W.1) slept on the verandah of their house, as they were cementing the floor, and their son (P.W.2) slept in the house of their daughter. In the midnight, the accused came to the house of the deceased wearing a black trouser

(M.O.II) and a red 'T' shirt (M.O.III) holding a cricket bat (M.O.I) and woke them up. The appellant informed them to have broken their cabin and took the deceased towards the cabin by dragging him. Some time thereafter, the appellant alone came to the house of the deceased holding the cricket bat (M.O.I) and asked P.W.1 to follow him to her husband. As P.W.1 declined to accompany him, the appellant persuaded her saying that he had assaulted the deceased by the cricket bat and required her help to carry the deceased home. Saying so, he dragged P.W.1 by holding her hand, as a result of which her bangles were broken. As she raised hullah and called her son, son-in-law and daughter, the appellant went away. The wife of the deceased along with her son (P.W.2), daughter and son-in-law went in search of the deceased. They found the deceased lying dead on the road near Nageswartangi Daily Municipal Market. There was profuse bleeding from his ear. The I.I.C., Lingaraj Police Station (P.W.5) along with other police personnel had already arrived there. The wife of the deceased, P.W.1 orally reported the incident to P.W.5, who registered the case and after due investigation submitted charge sheet against the appellant under Section 302, IPC.

3. The plea of the appellant is one of complete denial.

4. In order to prove its case, prosecution examined as many as nine witnesses including the doctor and the I.O. and exhibited twenty five documents. Defense examined none.

5. The learned Sessions Judge on conclusion of the trial convicted the appellant under Section 302, IPC and sentenced him to undergo rigorous imprisonment for life with the finding that the chain of circumstantial evidence is so complete that it does not leave any reasonable ground for a conclusion consistent with the innocence of the accused and shows that within all human probability the accused has committed the murder of the deceased.

6. Mr, Das, learned counsel for the appellant assails the judgment of the trial court on the following grounds (i) In this case, no eye witness has been examined by the prosecution and the appellant has been convicted by the learned Sessions Judge basing upon the circumstantial evidence without ascertaining whether the chain of circumstances is complete.

(ii) The evidence that the appellant while in police custody made disclosure, led the police and gave recovery of the weapon of offence, i.e., the bat (M.O.I) in presence of P.W.4, a police Havildar, cannot be believed since no independent witness has been examined in regard to that and moreover the straw heap wherefrom M.O.I was allegedly recovered was stacked in an open area.

(iii) The extrajudicial confession said to have been made before P.W.1, wife of the deceased, is not acceptable in absence of any independent corroboration. Under no stretch of imagination, it can be presumed that one will make confession before the wife after committing the murder of her husband.

(iv) The learned Sessions Judge should not have accepted the testimony of interested witnesses that the appellant and the deceased were last seen together just before the occurrence.

7. Mr. Pattnaik, learned Additional Government Advocate vehemently contends that although there is no eye witness to the occurrence, the circumstances unerringly establish the guilt of the accused. It is evident from the evidence of P.W.1, who is none else but the wife of the deceased, that the accused and the deceased were last seen together by her in the night of occurrence. It is also established from her evidence that after a little while the accused alone came back to her holding the cricket bat (M.O.I) and confessing to have assaulted the deceased requested her to follow him to the deceased. P.W.1 along with her son (P.W.2), son-in-law and daughter immediately rushed to the spot and found the dead body lying with profuse bleeding. While in police custody, the accused made disclosure, led the police and other witnesses to the place of concealment and gave recovery of the weapon of offence, i.e., the cricket bat from the straw heap stacked in the backyard of one Upana Behera. On chemical examination, blood stain of human origin was found on the wearing clothes of the accused and with respect to that no explanation was given by him in his statement recorded under Section 313 Cr.P.C.. Therefore, there is no illegality or infirmity committed by the learned Sessions Judge in convicting the accused.

8. Learned counsel for both the parties in support of their respective cases cited the decisions in *Rahim Beg v. State of U.P.*, AIR 1972 SC 343, *State of Haryana v.*

Ved Prakash, AIR 1994 SC 468, Rakesh Singha v. State of H.P., AIR 1996 SC 3173, Heramba Brahma v. State of Assam, AIR 1982 SC 1595, State of U.P. v. Ashok Kumar Srivastava, AIR 1992 SC 840, Ramreddy Rajeshkhanna Reddy v. State of Andhra Pradesh, AIR 2006 SC 1656 and Kusuma Ankama Rao v. State of A.P., AIR 2008 SC 2819.

9. Perused the LCR and the decisions cited by the parties. P.W.1 is the informant and the widow of the deceased. She orally reported the incident before the I.I.C., Lingaraj Police Station which was reduced to writing. P.W.1, her daughter and son-in-law put their signatures on the FIR (Ext.1). She specifically stated that in the night of occurrence her husband returned home after closing the cabin. After dinner, her son (P.W.2) went to sleep in the house of P.W.4. She along with her deceased husband slept on the outer verendah of their house. In the mid night, the accused came to her house and called her husband. They got up from sleep. The accused was holding a cricket bat. The accused informed them that he had broken the cabin of her husband and called the deceased to see the cabin. Then the accused caught hold of the hand of the deceased and dragged him towards the cabin. Some time after, the accused returned to their house alone holding the cricket bat and told her that she should accompany him. When she declined to accompany him, the accused dragged her as a result of which her bangles were broken. Thereafter, the accused confessed before her that he had assaulted her husband with the bat and went away. P.W.1 called her son and son-in-law, went towards the cabin and found the cabin lock broken. As her husband was not there, they went to search him. Ultimately, they found the dead body of the deceased lying on the road near Nageswar Tangi Municipal Market. She orally reported the matter before the Inspector of police, who had already arrived at the spot beforehand. He reduced it to writing. P.W.1 proved the FIR marked Ext.1 and her signature thereon as Ext.1/1. Nothing has been elicited in cross-examination by the defense.

P.W.2 is the son of the deceased. He deposed that his father was running a betel and vegetable shop in a cabin at Nageswar Tangi. In the night of occurrence, his father returned home at 9.00 PM. After dinner he (P.W.2) went to sleep in the rented house of his sister in front of their house. His mother (P.W.1) called and

informed them that the accused came to their house holding a cricket bat and informed that he had broken their cabin and dragged the deceased towards the cabin. Fifteen minutes thereafter, the accused again came and informed that the deceased was calling P.W.1 and dragged her. He also stated that P.W.1 informed them that the accused told her that he had assaulted his father with the bat and he was lying there and asked his mother(P.W.1) to help him to shift the deceased to their house. Thereafter, the accused went away. He along with his mother (P.W.1), sister and brother-in-law went to the cabin and found the lock of the cabin broken, but his father (deceased) was not there. They went in search of the deceased and found his dead body lying on the road in front of Nageswar Tangi daily market with bleeding from the right ear. Nothing has been elicited from him in cross-examination by the defence.

P.W.3 is an inhabitant of Nageswar Tangi. He is an independent post-occurrence witness. He deposed that in the night of occurrence at about 3.00 am the Havildar (P.W.4) called him from his house and he found the dead body of the deceased lying on the road near the daily municipal market. There was bleeding from the ear of the deceased. At that time, when they were there, ASI of police, Lingaraj P.S. came and thereafter went to the house of the Inspector to call him. When they were standing there, they found a person wearing black trouser and red T shirt and holding a cricket bat coming from Rashmi tower side. He ran away at their sight. He along with the Havildar and others chased the person. But it was not possible to catch hold of him. After some time they reached near the transformer. There the accused tried to hide and when they focused the torch, the accused ran towards the Lewis road. At that time he was not holding the bat. Ultimately, the Havildar (P.W.4) caught hold of the accused. After he was captured, P.W.3 recognized him to be the accused. Thereafter, they went to the spot and at that time P.Ws.1, 2 and daughter and son-in-law of P.W.1 arrived there. They recognized the deceased to be Gadadhar Sahu. P.W.1 lodged information relating to the incident and the Inspector reduced it to writing, read over and explained the contents to P.W.1 and knowing the same to be true P.W.1 put her signature. At about 6.00 am the accused was brought to the spot, P.W.1 identified the accused to have gone to their house in the previous night and dragged the deceased towards their cabin. The S.I. of police arrested the accused. The accused while in

police custody gave information to have concealed the cricket bat in the straw heap of Upana Behera near the transformer. The information given by the accused was reduced to writing by S.I. of Police and read over and explained to the accused, who put his signature. He also put his signature thereon under Ext.3/3 and he proved Ext.3. Thereafter, the accused led them to the straw heap of Upana Behera near the transformer and brought out the cricket bat kept concealed in the straw heap. This witness also identified M.O.I, the cricket bat which was seized in presence of him and one Ram Prasad Patra vide seizure list Ext.4. He proved his signature in the said seizure list as Ext.4/1. He was also a witness to the seizure of blood stained earth from the spot vide Ext.5. He was also a witness to the seizure of broken bangle pieces lying on the verandah of the deceased. At about 5.30 pm on the very day the police seized the wearing apparels of the deceased, i.e., one black colour trouser and a red colour T shirt under Ext.7. He also proved his signature thereon. In cross-examination he admitted that Upana Behera was the owner of the straw heap. The straw heap in question was situated inside the compound wall of Upana Behera and the compound wall was there in three sides and people also visit Upana Behera to purchase milk and the house was situated near the road. He specifically stated in his cross-examination that people visit the house of Upana Behera to purchase milk in the morning and evening. It has been brought out in cross-examination that the cricket bat was stained with blood. Nothing has been elicited by the defence to disbelieve the testimony of this witness.

P.W.4, who is a police Havildar, in his examination-in-chief stated that in the night of occurrence he along with Homeguard Rabindra Kumar Kandi and Bulaki Mallick was performing patrol duty at Nageswar Tangi area. At 2.30 am they found a dead body lying on the road near Nageswar Tangi daily market with bleeding injury. They could not identify the dead body. They called P.W.3 for the identification of the dead body. But P.W.3 could not recognize the dead body as his face was stained with blood. This witness also supported the version of P.W.3 with regard to chasing of the accused and catching hold of him and also with regard to leading to discovery. He proved Ext.8, the command certificate, and Ext.9, the dead body challan. He is a witness to the seizure of wearing apparels of the deceased vide seizure list Ext.10 and proved the same in Court. Nothing has been elicited in

cross-examination to demolish his evidence.

P.W.5, who was the I.I.C. of Lingaraj P.S. at the relevant time, deposed that on receiving information from A.S.I., K.C. Naik, he along with S.I. Nisanka reached the spot at 4.15 AM and found a dead body lying in a pool of blood on the road near Nageswar Tangi Municipal market being guarded by Home Guard R.K. Kandi. 3 to 4 outsiders had gathered there and he sent for P.W.3. At that time, P.Ws.1, 2, daughter and son-in-law of the deceased arrived at the spot and they identified the dead body. P.W.1 informed him that in the night at 2 AM the accused had dragged her deceased husband from the verandha of the house towards the cabin and had again reappeared some time thereafter and tried to drag her towards the cabin. He reduced the information of P.W.1 to writing, read over and explained the contents to her and admitting the same to be correct she put her signature. He proved the FIR Ext.1.

P.W.6 is the R.I. who prepared the sketch map of the place of occurrence as well as the house and cabin of the deceased. He proved the said sketch map marked Ext.11. P.W.7 is a witness to the seizure of wearing apparels of the deceased vide Ext.10 and he proved the same.

P.W.8 is the doctor who conducted autopsy over the dead body of the deceased. He found no external injury over the dead body. However, on dissection he found the following internal injuries:

- "(i) Haematoma over the head (subcutaneous) over temporalis muscles.
- (ii) Fracture of the right temporal bone over right ear, extending up to right middle cranial fossa.
- (iii) Tip of the left temporal lobe of the brain contused.
- (iv) Under surface of frontal poles of brain were contused.
- (v) Middle brain was contused"

He opined that the cause of death was due to injury to brain. The injuries were ante mortem in nature and caused by hard and blunt object. They were sufficient

in ordinary course of nature to cause death. He further deposed that to the query made by the I.O. he had opined that the injuries noticed could be caused by the bat (M.O.I). He also stated that the I.O. had made the second query regarding cause of the bleeding from the right ear of the deceased and he had opined that the bleeding was due to internal injuries. He also stated to have collected nail clippings of the accused on police requisition. He denied to the suggestion given by the defence that internal injuries noticed could be caused by vehicular accident and by fall on a stone. This apart, nothing has been elicited in cross-examination from the mouth of this witness.

P.W.9, the S.I. of Police who was posted at the relevant point of time at Lingaraj P.S., is the I.O. in this case. He proved the FIR (Ext.1) and the endorsement of P.W.5, the I.I.C., Lingaraj P.S., thereon directing him to take up investigation. He stated to have examined P.Ws.1 and 2 at the spot and arrested the accused on being produced by Havildar (P.W.4). He proved Ext.3, the disclosure statement made by the accused while in custody, and stated that the accused led him and the witnesses to the place of concealment and brought out the cricket bat (M.O.I) concealed inside the straw heap of one Upana Behera. He seized M.O.I vide seizure list Ext.4, wearing apparels of the deceased vide seizure list Ext.10, broken bangles lying on the verandah of the deceased vide seizure list Ext.6, and wearing apparels of the accused vide seizure list Ext.7. He also collected blood stained earth and sample earth from the place of occurrence and nail clippings of the accused from the doctor. He sent the material objects to the Chemical Examiner and proved Ext.24, chemical examination report, and Ext.25, the Serologist report. In cross-examination he stated that the height of the straw heap was about 6 feet and the bat was completely concealed inside the straw heap. At the time of recovery and seizure of the bat, Upana Behera was absent from the house. Questions were put by the defence to demolish his evidence, but nothing has been elicited from the mouth of this witness.

10. On careful evaluation of the evidence, it is crystal clear that nobody has seen the accused assaulting the deceased. The prosecution case is based on circumstantial evidence. The accused and the deceased were last seen together in the night of occurrence by P.W.1, the wife of the deceased. At that time the

accused had held a bat in his hand and worn a trouser and a red 'T' shirt. After some time, the accused came alone to P.W.1 holding the selfsame cricket bat (M.O.I) and requested her to accompany him to the deceased. As she declined, the accused made extrajudicial confession saying that he had hit the deceased with the cricket bat and required her help to bring the deceased to home. When P.W.1 refused to go with him, the accused dragged her as a result of which her bangles were broken. When P.W.1 wanted to call her son, daughter and son-in-law, the accused went away. Then P.W.1 called her son (P.W.2), daughter and son-in-law and narrated the incident. All of them went near the cabin and found its lock broken but the deceased was not there. On search, they found the deceased lying dead on the road near Nageswar Tangi Municipal Market with profuse bleeding from his ear. By that time, the police had already arrived at the scene of occurrence. The accused seeing the police ran away from the spot with the cricket bat, but thereafter he was captured by the police. While in police custody the accused gave information leading to discovery of the cricket bat from the straw heap of one Upana Behera. The cricket bat was identified by the wife of the deceased (P.W.1) and the Havildar (P.W.4). All these facts have been proved by the evidence of P.W.1, wife of the deceased, P.W.2, son of the deceased, P.W.3, an independent witness, and P.W.4, the Havildar. Ext.24, the chemical examination report, reveals that the cricket bat (M.O.I) was stained with blood but its origin and group could not be ascertained. From Ext.25 it appears that blood stains of human origin were found on the wearing apparels of the accused and also on his nail clippings. P.Ws.3 and 4 saw the accused holding the cricket bat while approaching the scene of occurrence. The extrajudicial confession of the accused has been proved by P.W.1, although it has not been corroborated by any witness. It is established from the evidence of the I.O. (P.W.9), P.W.3 and P.W.4 that the accused while in custody gave information to have concealed the cricket bat in the straw heap of Upana Behera. There is also no infirmity in recording the information under Ext.3 which has been signed by the accused, P.W.3 and P.W.4. There is nothing on record to disbelieve the evidence of P.Ws.3, 4 and 9. Therefore, it is crystal clear that the accused was holding the cricket bat (M.O.I) while he was dragging the deceased and thereafter again when he approached P.W.1. P.Ws.3 and 4 saw the accused holding the cricket bat while approaching

the scene of occurrence after returning from the house of the deceased and running away with the cricket bat. No explanation has been given by the accused under Section 313 Cr.P.C. about the presence of blood stains in his wearing apparels. It has been held in State of U.P. V. Ashok Kumar Srivastava, AIR 1992 SC 840 that the circumstances relied upon must be found to have been fully established and cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt. But it does not mean that prosecution must meet any and every hypothesis put by the accused. With the above touchstone, this Court examined the circumstantial evidence adduced/produced by the prosecution and this Court is of the opinion that the chain of circumstantial evidence is so complete it does not leave any reason for conclusion consistent with the innocence of the accused.

11. Now, the question arises whether the act committed by the accused comes within the ambit of section 304(I), IPC or section 302, IPC. By applying the ratio decided in Rakesh Singha v. State of H.P., AIR 1996 SC 3173, this Court examined the medical evidence and the ocular evidence. According to the doctor (P.W.8), who conducted autopsy over the dead body of the deceased, there was no external injury on the person of the deceased. The weapon of offence used by the assailant is a cricket bat. No motive has been proved by the persecution in this case. Therefore, this Court converts the conviction of the appellant from section 302 IPC to section 304(I) IPC and sentences him to undergo rigorous imprisonment for ten years and pay a fine of Rs.10,000/-(ten thousand) in default to undergo rigorous imprisonment for one year.

12. The Jail Criminal Appeal is allowed in part.

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