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IN THE HIGH COURT OF ORISSA AT CUTTACK

JCRLA No. 95 of 2010

(Arising out of the Judgment of conviction dated 14th September, 2010 passed by Shri S.P. Rao, Addl. Sessions Judge, (FTC) Jeypore in Criminal Trial No.100 of 2009 (C.T. 8/09), for the offence under Section 302/34 of the Indian Penal Code, 1860).

***Kharjim Lachhna Rao & ...
Another***

Appellant

Mr. Rabindra Nath Nayak,
Advocate

-versus-

State of Odisha

...

Respondent

Mr. Arupananda Das,
Addl. Government Advocate

CORAM:

THE HON'BLE MR. JUSTICE S.K. SAHOO

THE HON'BLE MR. JUSTICE CHITTARANJAN DASH

Date of Judgment : 25.09.2024

Chittaranjan Dash, J.

1. The Appellants, namely Kharjim Lachhna Rao and Kharjim Bandhu (hereinafter referred to as "Appellant no. 1" and "Appellant no. 2" respectively), faced the trial on the charges under Sections 302/201/34 of the Indian Penal Code (in short, hereinafter referred to as "IPC") before the learned Addl. Sessions Judge (FTC), Jeypore for committing the murder of the ex-wife of Bandhu, Kharjim Kumari, wherein the learned Court found them guilty in the offences under Sections 302/34 IPC, sentenced them to undergo Rigorous



Imprisonment for life and to pay a fine of ₹5,000/- (Rupees five thousand only), in default, to undergo further Rigorous Imprisonment for 6 (six) months. They were, however, not found guilty u/s 201 IPC and were acquitted thereafter.

2. The prosecution case, in brief, is that the deceased, the sister of the Informant (P.W.4) got married to Appellant no. 2 as his second wife for about 12 years before the occurrence. The couple was blessed with two sons. It is alleged that after the marriage, Appellant no. 2 used to inflict torture upon his sister both physically and mentally, which she reported to him (P.W.4) whenever she visited him. Despite the concerns, her family kept sending her back to her husband. One day Appellant no. 2 accused her of having an affair with one Badakura Pushkar (P.W.5), her cousin, whereupon, a meeting was convened by the village committee. It was decided in the meeting that Kumari would divorce Appellant no. 2 and shall live with Pushkar (P.W.5), following which Pushkar paid Rs. 2202/- as a penalty to Appellant no. 2. Although Kumari complied with the village committee's decision to divorce Appellant no. 2, she did not choose to be with Pushkar, instead, stayed at her brother's home with her sons. After about a week of the said divorce, it is alleged that Appellant no. 2 and Kumari used to meet stealthily at night which attracted the notice of the villagers and P.W.6 in particular. As a result, P.W.6 made complaint before the Informant and his mother. On being warned in this matter by the Informant and her mother, in order to avoid the situation, Kumari was found wandering in the village aimlessly during the day, and was returning to her brother's home in the night. Soon after, on one occasion, Appellant no. 2 threatened both the Informant and Kumari that if she did not join him again, he would commit murder of



them both and having said so, while leaving their place, damaged the asbestos roof of their house. The prosecution case also reveals that on 02.06.2008, Kumari told her mother that she did not want to live in the village, and subsequently left their house and did not return. The family thought she might be visiting her relatives or involved in selling Pendum (a type of intoxicant) tablets again as she used to go in the past and would not return for about a fortnight. However, after several weeks, a report was received by P.W.8, the ASI attached to Sunki beat house from a Gramarakhi - Chetti Penta upon finding human bones and clothing fragments near Kawarangini Jholla (Nala). P.W.8 registered U.D. Case No. 1 dated 06.07.2008 and seized the bones and clothing fragments. As the information came to light, the Informant (P.W.4) visited the spot and identified the saree to be that of her sister's. On 10.07.2008, P.W.9, S.I. of Pottangi P.S. received a written report from the Informant and in absence of the IIC, got the case registered as Pottangi P.S. Case no. 31/08. Following registration of the case, on the written report in respect to the death of the Informant's sister accusing the present Appellants, P.W.8 closed the UD case and handed over the case records and connected documents and materials to the IIC Pottangi P.S. to form part of the investigation and accordingly, further investigation commenced.

3. In the course of investigation, P.W.9, the S.I. of Pottangi P.S. visited the spot at Kawarangini Jholla in Laudi Jungle, located 28 km southwest of the police station in Beat No. V, and prepared the spot map under Ext. 7. He examined the witnesses, recorded their statements, and seized incriminating materials such as Appellant No.1's clothing, a comb with hair alleged to have been used by Kumari, and the weapon of the offense a 'Kati' recovered at the



instance of Appellant no. 1. Subsequently, Appellant no. 1 was forwarded to the Court on 14.07.2008 since the Appellant no. 2, who was in custody in G.R. case no. 358/08 was under remand. The seized weapon and remnants were sent to FM&T, Berhampur for examination. All the Exhibits were subsequently sent to RFSL Berhampur for examination and opinion on 04.11.2008. As the material collected during investigation prima facie reveals a case under sections 302/201/34 IPC, charge-sheet was submitted against the Appellants in the aforesaid offences to face the trial in Court.

4. The case of the defence is one of complete denial and false accusations.

5. To bring home the charge, the prosecution examined 9 witnesses in all. The prosecution began with P.W.1 and P.W.2, who are projected as eye-witnesses, P.W.3 and 7 are seizure witnesses, P.W.4 is the Informant, P.W.5 is the co-villager who was alleged to have had affair with the deceased. P.W.6 is a co-villager and P.W.5's aunt, P.W.8 is the ASI of Sunki beat house who registered the U.D. Case and finally, P.W.9 is the I.O.

6. The learned trial Court leaning to the side of prosecution, believing the sole evidence of P.Ws.1 and 2 found the prosecution to have proved its case beyond all reasonable doubt and held the Appellants guilty and convicted them awarding sentence as described above.

7. Mr. Nayak, learned counsel appearing on behalf of the Appellants, argue that the prosecution has failed to establish their guilt beyond reasonable doubt, presenting several key points in their defense. Firstly, he challenges the credibility of the eyewitnesses,



P.W.1 and P.W.2, highlighting significant delays in their reporting and inconsistencies in their testimonies. The fact that these witnesses only came forward after discovery of the bones, and their failure to provide clear and detailed accounts of the crime, casts serious doubt on the reliability of their statements. Moreover, the testimonies of P.W.1 and P.W.2 are contradicted by the medical and scientific evidence, which reveals no antemortem injuries on the bones, thereby undermining the assertion that Kumari was beheaded. According to Mr. Nayak, the medical evidence does not suggest any conclusive cause of death that can be determined from the bones. He drew the attention of this Court into the situation prior to the registration of the FIR, wherein, on the basis of a report lodged by the P.W.1, Appellant no. 2 was taken behind the custody. Facts leading to this registration were that Appellant no. 2 came to P.W.1, broke the asbestos roof of his house, besides assaulting P.W.1's wife, as he was under the suspicion that P.W.1 and his wife were spreading rumours of Appellant no. 2 to have caused the murder of the deceased. According to Mr. Nayak, if P.W.1 could submit a report against Appellant no. 2 for his alleged overt act, nothing prevented him to disclose the serious fact that he is an eyewitness to the occurrence wherein the Appellant no. 1 and Appellant no. 2 to have committed the murder of the deceased. Absence of any such effort made by P.W.1 and subsequently disclosing to have seen the occurrence in the buildup of unidentified bones recovered from the nearby Nala raises a doubt to his testimony. Mr. Nayak further adds that the absence of conclusive identity of the bones as Kumari's and the dissimilarity between the hair in the comb and the hair tested from the bones raise further doubts as to the nexus between the crime and the criminal. The defense also points out that



the delay in the investigation and the lack of corroborative evidence linking the Appellants to the crime weaken the prosecution's case. Given these significant infirmities and contradictions, he argued that the Appellants should be acquitted as the evidence against them does not meet the standard of proof required for a conviction, so much so that the Prosecution even failed to establish the death of Kumari and further this death, if any, to be homicidal.

8. Mr. Das, learned AGA, on the other hand, contended that the evidence, when considered in its entirety, supports the conviction of the Appellants for the murder of Kumari. He emphasized the testimonies of P.W.1 and P.W.2 as crucial eyewitness accounts that place the Appellants at the scene of the crime. Despite the delay in reporting, the witnesses' statements provide a detailed narrative of the circumstances surrounding the murder, including the involvement of the Appellants in the brutal act. Mr. Das argued that the discovery of the bones and associated items, such as the saree and the weapon (Kati), establishes a link between the death of the deceased and the Appellants. He also pointed out that although the medical evidence does not specify the exact cause of death, it confirms that the remnants are of a female aged approximately 25 years, which aligns with Kumari's profile, and the circumstantial evidence including the seizure of the weapon at the instance of Appellant no. 1 and the wearing apparel of the Appellants, supports the testimonies provided by the witnesses. He further argued that the delay in reporting and the testimonies should be weighed against the backdrop of the threat extended to them by the Appellants. Mr. Das asserted that the cumulative effect of the evidence through the eye-witnesses'



testimonies and the circumstantial evidence, is sufficient to uphold the conviction.

9. In order to appreciate the aforesaid submissions, the relevant provisions with respect to the charges are required to be referred to –

300. Murder.—Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or—

2ndly.—If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or—

3rdly.—If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or —

4thly.—If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

302. Punishment for murder. — Whoever commits murder shall be punished with death or [imprisonment for life], and shall also be liable to fine.

34. Acts done by several persons in furtherance of common intention. — When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

10. Before analysing the culpability of the Appellants vis-à-vis the alleged murder, it is incumbent to examine if Prosecution could successfully establish the factum of death of Kumari and that the same to be homicidal in nature.



11. The events leading to the alleged murder of Kumari depicts a tragic picture. Upon analyzing the evidences put forth, it is noted that Kumari was living with her brother and mother when tensions began to rise within her family and she left her home. Several weeks later, when some bones remnants were found, the witnesses P.W.1 and P.W.2 claimed to have seen Kumari being hacked by the Appellants near the Kawarangini Jholla (Nala) jungle area. Several witnesses have described the spot where the remnants were discovered. Witnesses mentioned that the spot was relatively secluded, but it wasn't entirely isolated, since the Nala passes between the M.E. school and the village and the Pottangi road passes through the side of the Nala and there is a cement factory nearby. Even though the school and village are at a considerable distance from the Nala, it is still visible. The road was also used by village locals and cement factory labourers making the spot less inaccessible than it might initially appear. Despite this, the jungle itself was thick and extended a little far beyond the path, creating a space where activities could go unnoticed. The presence of the school and cement factory contributed to the local activity around the area, but did not necessarily provide direct surveillance or monitoring over the jungle where the alleged crime took place. The water level of the Nala is that of the level of the road, however, during rain, the water stream passes in a scattered way covering a large distance. By the time the remnants were discovered by the Gramarakhi a month later, the body had already deteriorated into skeletal fragments. The state of the remnants, combined with the fact that no immediate identification was possible, led to a complicated investigation. Even the aftermath of Kumari's disappearance was marked by fear and silence, as P.W.1 and P.W.2



were threatened by the Appellants. It was only after human bones were discovered that an official case was lodged. However, the prosecution's reliance on circumstantial evidence, including the seizure of the bones and the alleged recovery of the weapon, is faced by significant challenges. Even with the evidence on record, the body's identity and cause of death, establishing "corpus delicti", the fact that a crime had indeed been committed, becomes a key issue. Corpus delicti, which refers to proving the occurrence of a crime beyond the mere suspicion of wrongdoing, remains uncertain due to the inability to definitively link the remnants to Kumari.

12. In the instant case, the medical and scientific evidence as per Ext. 10, 10/1, 10/2, and Ext. 13 presented, plays a pivotal role and significantly undercuts the prosecution's theory.

Opinion of the Professor-HOD, (FM&T), M.K.C.G. Medical College, Berhampur (Ext. 10, 10/1, 10/2):

1. "The above-mentioned bones belong to human being of female aged around 25 (twenty-five) years of body length 160 cms \pm 5 cms
2. No antemortem mechanical injury in any form could be detected on any part of the bones
3. The time since death is within 3 to 6 months from the time of examination
4. In the absence of any antemortem mechanical injury in the available portions of the bones, no definite opinion as regards cause of death could be formed. As such, the investigating officer is advised to settle the question of cause and nature of death basing on circumstantial evidence
5. The exhibits were returned through constable of Arjuna Banka, Pottangi P.S. in properly sealed and labelled condition after proper examination

A 'kati' having a wooden handle and metallic blade bearing the identical dimensions and shape as mentioned by the I.O. Some brownish coloured stains



were detected over the metallic blade which gives positive result for screening test of blood done in the departmental laboratory.

Opinion: No antemortem mechanical injury in any form could be detected in the available portions of the bone in connection with the case referred to. However, possibility of injury to the soft tissues by the above-mentioned weapon of offense is this same 'Kati' cannot be ruled out."

The Result of Chemical Examination (Ext. 13):

"Blood stains could not be detected in the exhibits marked as A, B, B-1, C, C-1, D and E.

On the basis of morphological and microscopic examination, the exhibits marked and A and exhibit marked as E are found to be human scalp hairs dissimilar in characteristics."

13. It is very clear from the evidence as per Ext. 10, 10/1, 10/2, and Ext. 13 that, in the absence of any antemortem mechanical injury in the available portions of the bones, no definite opinion as regards the cause of death could be formed. The examination of the bones revealed that they belonged to a female of around 25 years of age, matching Kumari's description. However, it was impossible to confirm whether the cause of death was decapitation, as alleged by P.W.1 and P.W.2. This finding contradicts their testimonies that Kumari was beheaded, because such a violent injury would have left detectable marks on the bones, particularly the neck area. The absence of such injuries is a critical blow to the prosecution's narrative, suggesting that either the cause of death was different or even that the remnants might not even belong to Kumari.

The Chemical Examination report as per Ext. 13 reveals that blood stains in the Exhibits could not be detected; however, in the observations made by the Professor and HOD of Forensic Medicine &



Toxicology at M.K.C.G. Medical College, it is noted that the “Kati” recovered during the investigation had brownish-coloured stains on the metallic blade was tested positive for blood. However, the presence of blood stains alone does not establish the weapon’s connection to Kumari’s murder specifically and conclusively. The blood stains merely suggest potential involvement rather than definitive proof of the weapon being used in Kumari’s murder or any murder for that matter. The Professor further observes that “Kati” could have been used to injure soft tissue, but since no soft tissue was available for examination, determining the death of the deceased remains speculative at best. Therefore, the evidence fails to convincingly support the claim that the death of the deceased was homicidal.

14. In the decision of *Raveendran and Anr. vs State of Kerala* reported in **1994 CRILJ 3562**, it was observed that –

“4. At the outset, it is necessary to observe that the entire case of prosecution is rested on inferential evidence which is otherwise called ‘circumstantial evidence. The matrix of the case is that the first accused murdered his wife Yeshoda and the dead body was recovered from ravine after a period of about one month. It was in a decomposed state when it was recovered and hence the identification of the dead body was not immediately possible. Therefore, what is required primarily in the instant case is to find out the proof regarding ‘corpus delicti’ literally means the ‘body of the offence’, that is to say, the facts which constitute it. Until the proof regarding ‘corpus delicti’ is established, the question as to the identity of the culprit may not arise. Legally ‘corpus delicti’ means the crime apart from the criminal - the deed apart from the doer. In order to establish ‘corpus delicti’ the Court is bound to examine whether the dead body discovered in this case was that of Yeshoda. It was P.W. 1 who



had happened to see the dead body first in the ravine near a place called Nedumpoyil. His evidence has higher degree of probative, value when compared to the evidence of other witnesses in as much as he is the first person who saw the dead body. His testimony bestows somewhat vivid picture of the dead body and the materials found on it. He said, it was a dead body of a woman having long hair. He had seen blouse (M.O. 2), skirt (M.O. 1), padasaram on the light leg (M.O. 4) and bangle on the right hand (M.O. 5). P.W. 35 Investigating Officer had of course recovered in addition to the above articles, M.O. 3 (brassiers), M.O. 6 (plastic cord) and M.O. 7 (match box). P.W. 1 being a stranger will not normally go very near the dead body and take note of all the articles found on it. However, at present we are concerned with the articles noticed by P.W. 1 on the dead body namely, M.O. 1, M.O. 2, M.O. 4 and M.O. 5. The probative value of rest of the articles recovered by P.W. 35 will be dealt with later, as we are not immediately concerned with those articles. P.W. 6 Sivaraman is the direct brother of the deceased and P.W. 16 is the mother. Both were brought by P.W. 35 to the office of the Revenue Divisional Officer, Tellicherry where the aforesaid articles, were kept. They easily identified the aforesaid articles noticed by P.W. 1 on the dead body as that of the deceased. They have also tendered evidence in the trial Court in this regard while they were examined. The inference that could be drawn from the oral evidence of P.Ws. 1, 6 and 16 coupled with the recovery of M.Os. 1, 2, 4 and 5 is that the dead body recovered from ravine was that of deceased Yeshoda. Of course, this is only an inferential evidence and not direct evidence. It is apposite to say here that the old rule enunciated by Sir Mathew Hale and Lord Coke is, to the effect that nothing short of direct evidence is sufficient to establish 'corpus delicti'. Sir Mathew Hale held the view "I will never convict any person of murder or manslaughter unless the facts were proved to be done or at least the body found." Lord Coke warns the danger of proceeding on 'bare presumptions'. As against this rule of strictness, Sir John Stephen said: "If



the circumstances are such as to make it morally certain that a crime has been committed, the inference that it was so committed is as safe as any other inference.” Straight, J. in *Empress of India v. Bhagirath*, (1881) 1 LR 3 All 383 departed from the rule of strictness and observed that such a rule once admitted would in some instances render the administration of justice impossible. Therefore, the Court said ...it is not imperatively essential, in order to justify a conviction for murder, that the ‘corpus delicti’ should be forthcoming.

The law as to the proof of “corpus delicti” has been laid down by the Supreme Court in **Sevaka Perumal v. State of Tamil Nadu**, thus:

In a trial for murder, it is not absolute necessity or an essential ingredient to establish corpus’ delicti. The fact of death of the deceased must be established like any other fact,. Corpus delicti in some cases may not be possible to be traced or recovered.

The Apex Court further said that there should be reliable and acceptable evidence that the offence of murder like any other factum of death was committed and it must be proved by direct or circumstantial evidence although the dead body may not be traced.”

15. While appreciating the evidence in the instant case, it is incumbent for the court to see if identification of the bones found its connection firstly, with the alleged victim and secondly, with that of the Appellants, must be so clinching to prove beyond reasonable doubt that it was the Appellants to have the victim done to death and there is no other way to release the Appellants from any doubt whatsoever. For the same, the circumstantial evidence must be examined as laid down in *Sharad Birdhi Chand Sarda vs. State of Maharashtra* reported in **AIR 1984 SC 1622** –

“3:3. Before a case against an accused vesting on circumstantial evidence can be said to be fully



established the following conditions must be fulfilled as laid down in Hanumat's v. State of M.P. [1953] SCR 1091.

1. The circumstances from which the conclusion of guilt is to be drawn should be fully established;
2. The facts so established should be consistent with the hypothesis of guilt and the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
3. The circumstances should be of a conclusive nature and tendency;
4. They should exclude every possible hypothesis except the one to be proved; and
5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

These five golden principles constitute the panchsheel of the proof of a case based on circumstantial evidence and in the absence of a corpus delicti.

Hanumant v. The State of Madhya Pradesh [1952] SCR 1091; Tufail (Alias) Simmi v. State of Uttar Pradesh [1969] 3 SCC 198; Ramgopal v. State of Maharashtra AIR 1972 SC 656; and Shivaji Sahabrao Babode & Anr. v. State of Maharashtra [1973] 2 SCC 793 referred to.

3:4. The cardinal principle of criminal jurisprudence is that a case can be said to be proved only when there is certain and explicit evidence and no pure moral conviction.”

16. Here, the prosecution attempted to link the remnants to Kumari by testing the hair found with the bones, against a comb provided by Kumari's mother to have been used by Kumari. However, the report revealed that the hair samples though are found to be of



human scalp, but are dissimilar in characteristics. This calls into question the very identity of the remnants, as it raises the possibility that the bones discovered at the scene may not belong to Kumari at all. Moreover, the duration suggested by the FM&T in its report indicates the bone to be of a person who possibly died three to six months prior to the examination. Therefore, it cannot be held to be that of Kumari, as the proximate time is missing and the remnants of bones discovered does not commensurate to the report, as she was seen to be alive only one month ago. Had the timeline been less than two months, it might have been reasonable to consider the remnants as Kumari's. However, since that is not the case, this raises the possibility that the bones may belong to another individual. Hence, without any reliable evidence confirming the identity of the remnants, this inconsistency adds further uncertainty to the case and weakens the link between Kumari's alleged disappearance and the bones recovered, to conclude the death of Kumari much less to accept the theory of the prosecution that Kumari was murdered within the timeline that they have presented and it cannot be reached to a conclusion that the bones recovered near the Nala are truly to be that of her and no one else. Without a positive identification, the prosecution's case loses its foundation, as it cannot be conclusively proved that Kumari is the deceased.

17. Next comes the Perpetrator. In order to establish a nexus between the death of Kumari, if at all, and the Appellants, the statements of P.W.1 and P.W.2 serve the core of the prosecution's attempt. However, a detailed examination of their testimonies reveals significant weaknesses, including inconsistencies, contradictions with medical and forensic evidence, delayed reporting, and potential



external influence. These factors severely undermine the credibility of their accounts.

One of the most glaring issues with the testimonies of both P.W.1 and P.W.2 is the considerable delay in revealing the fact that they were eyewitnesses to the alleged murder. They both claim to have witnessed the brutal murder of Kumari but came forward with their statements several weeks after the supposed day of occurrence and much after the discovery of human bones at Kawarangini Jholla, which raises serious doubts about the authenticity of their claims. It is highly unlikely that two individuals who witnessed such a horrific event would remain silent for so long. If they had truly seen Kumari being murdered, the natural and reasonable expectation would be for them to help, or immediately inform the authorities, or alert the villagers, whereas, even in the event of P.W.4's first enquiry regarding them having any knowledge about any incident after finding the alleged dead body, both P.Ws.1 and 2 flatly denied to have any information. Such conduct more likely suggests a fabrication of their statements after the fact to fit the narrative being constructed around the discovery of the remnants,

18. P.W.1, in his testimony, mentioned that he had not disclosed about the incident to anyone, not even his wife. On the other hand, P.W.2, who corroborated P.W.1's claims about witnessing the Appellants with Kumari, provided additional details that further complicate the matter. P.W.2 has stated that Appellant No. 2 had previously assaulted P.W.1's wife and damaged their roof, accusing them of spreading rumors about him in connection to Kumari's death. This was never disclosed by P.W.1. This indicates prior hostility between the Appellants and P.W.1's family, which may have



motivated P.W.1's testimony. Furthermore, P.W.2 was a witness in the case involving the said assault, giving him a direct involvement in a prior conflict with the Appellants. This previous enmity raises concerns about the objectivity of his testimony, as the ongoing dispute could have influenced their statements, making them interested witnesses.

The contradiction between P.W.1's claim that he had not informed his wife about the alleged murder and P.W.2's testimony about the Appellants' violent reaction to rumors, presents a glaring inconsistency. If P.W.1 had not told his wife about Kumari's death, then how such rumors could have spread to the extent that Appellant No.2 felt compelled to retaliate violently ? This gap in the story suggests either that P.W.1's version is incomplete or that the rumors about the Appellants' involvement were circulating for reasons unrelated to his direct knowledge of the alleged crime.

Further, both P.W.1 and P.W.2 offer vague and incomplete narration of the crime. Neither witness provides a clear timeline, failing to specify the exact date or time of the murder. While they claim to have seen the Appellants committed the murder, they offer no substantive details regarding the sequence of events leading up to or following the crime. The vagueness of their testimonies is troubling, especially when considering the seriousness of the crime they allege to have witnessed. Eye-witnesses to such a violent event would be expected to recall critical details, such as the precise manner of the murder, the Appellants' actions, and their own reactions.

19. A key issue with the testimonies of P.W.1 and P.W.2 is their contradiction with the medical evidence. Both the witnesses assert that



Kumari was beheaded by the Appellants. However, the examination of the bones, conducted by the Professor and HOD of Forensic Medicine & Toxicology at M.K.C.G. Medical College, found no antemortem mechanical injuries on the bones. The lack of injury directly attributes to the credibility of the witnesses. If Kumari had indeed been beheaded, the chemical examination would have revealed clear signs of trauma to the neck bones. The absence of such injuries strongly suggests that the crime did not occur in the manner described by P.W.1 and P.W.2. Their insistence on the beheading is, therefore, either a falsehood or an exaggeration, casting significant doubt on the validity of their testimonies.

Moreover, a critical point to examine is why neither P.W.1 nor P.W.2 took any action to help Kumari, despite allegedly witnessing her being dragged, held by the tuft of her hair and eventually hacked by means of a Kati. Their passive behavior, coupled with their delayed reporting of the incident, makes their testimonies appear less credible. If they had genuine concerns for Kumari's safety given their good relation with her family, one would expect them to raise an alarm, attempt to intervene or, at the very least, report the matter to the authorities immediately. Their failure to do so suggests that either they did not witness the events as described or were motivated by factors other than pursuit of justice for Kumari. Their inaction suggests that they did not witness the crime and that their statements were fabricated later to fit the prosecution's case.

Furthermore, neither P.W.1 nor P.W.2's testimonies are corroborated by any other direct or circumstantial evidence. The chemical examination findings contradict their statements, and no other witnesses have come forward to support their claims. Moreover,



the P.W.8, the I.O. has stated that except these two witnesses, there is no one else to account for their going to the jungle to collect firewood on the day of supposed occurrence of crime. The absence of corroborating evidence is particularly damaging in a case where the reliability of eyewitnesses is already in question. Without any independent support for their testimonies, the statements of P.W.1 and P.W.2 cannot be considered sufficient to establish the Appellants' guilt beyond a reasonable doubt.

20. The next aspect of consideration is the recovery of "Kati" at the instance of the Appellant no. 1. As in the matter of *Manjunath & Ors. Vs. State of Karnataka* reported in **2023 LiveLaw (SC) 961**, it is so discussed by the Apex Court that –

26. Further discovery made, to be one satisfying the requirements of Section 27, Indian Evidence Act it must be a fact that is discovered as a consequence of information received from a person in custody. The conditions have been discussed by the Privy Council in **Pulukuri Kotayya v. King Emperor 1946 SCC OnLine PC 47** and the position was reiterated by this Court in **Mohd. Inayatullah v. State of Maharashtra (1976) 1 SCC 828**, in the following terms:-

"12...It will be seen that the first condition necessary for bringing this section into operation is the discovery of a fact, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The second is that the discovery of such fact must be deposed to. The third is that at the time of the receipt of the information the accused must be in police custody. The last but the most important condition is that only "so much of the information" as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the



provable information. The phrase “distinctly relates to the fact thereby discovered” is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery...” (Emphasis supplied)

27. Prima facie, in the present facts, the 3 conditions above appear to be met. However, the Trial Court held, given that the discoveries made were either from a public place or from an area where other persons also resided, reliance thereupon, could not be made. We find this approach of the trial Court to be correct.

27.1 This Court has, in various judgments, clarified this position. Illustratively, in **Jaikam Khan v. State of U.P (2021) 13 SCC 716** it was observed: – “One of the alleged recoveries is from the room where deceased Asgari used to sleep. The other two recoveries are from open field, just behind the house of deceased Shaukeen Khan i.e. the place of incident. It could thus be seen that the recoveries were made from the places, which were accessible to one and all and as such, no reliance could be placed on such recoveries.” (Emphasis supplied)

27.2 Also, in **Nikhil Chandra Mondal v. State of W.B. (2023) 6 SCC 605**, the Court held: -

“20. The trial Court disbelieved the recovery of clothes and weapon on two grounds. Firstly, that there was no memorandum statement of the accused as required under Section 27 of the Evidence Act, 1872 and secondly, the recovery of the knife was from an open place accessible to one and all. We find that the approach adopted by the trial Court was in accordance with law. However, this circumstance which, in our view, could not have been used, has been employed by the High Court to seek corroboration to the extrajudicial confession.”

21. In the instant case, the statement made by Appellant no.1 under Section 27 of the Indian Evidence Act, which purportedly led to the discovery of the ‘Kati’ does not seem to have been appropriately



presented before the Court. As per the I.O., Appellant No. 1 disclosed that after committing the crime, his son, Appellant No. 2, concealed the said 'Kati' in his presence, below a heap of stones situated just above the bank of the Nala. However, the law regarding Section 27 of the Indian Evidence Act is well settled that the place of recovery must be one that only the perpetrator of the crime must have had exclusive knowledge of, and the location must not be accessible to the general public. Here, the 'Kati' was recovered from an area near the Nala, which, as the I.O. himself admitted, is in close proximity to a road that leads to a cement factory and a school. The I.O. further noted in the cross-examination that the spot is a public place, where people including those working at the cement factory, frequently pass by or visit. This tends to doubt the exclusivity of the knowledge of the place of recovery. The 'Kati' being hidden in a public place that many people could access, diminishes the evidentiary value of the alleged discovery. The principle behind Section 27 is that the discovery of incriminating material must be based on information that only the perpetrator could have provided. In this case, since the 'Kati' was found in a location accessible to others, the prosecution's claim that this discovery was made solely based on the Appellant's instance is questionable and weakens the probative value of the evidence.

22. Given Kumari's history of being constantly subjected to physical assaults and humiliations, coupled with her relatives' coercive actions to return to the Appellant despite her reluctance and being bought by her own cousin in front of the entire village and again pressurised to go with him, it is plausible that Kumari may have fled away from the village voluntarily. Her consistent mistreatment and the distressing circumstances might have led her to escape to avoid further



abuse. This potential voluntary departure aligns with her subsequent disappearance and absence, despite the settlement meeting and her relative's expectations. The possibility of Kumari leaving the village on her own accord, as she told her mother as well before leaving, could explain her disappearance and does not necessarily point to her being murdered.

23. The evidence put forth in the case does not bring about a nexus between the criminal and the crime. While the clothes found at the scene suggests a connection, there is no direct evidence that conclusively ties the Appellants to the specific act of murder. The absence of clear, direct evidence linking the Appellants to Kumari's death creates a gap in the prosecution's case. Without any cogent evidence or definitive conclusion from the medical as well as scientific results, the connection between the Appellants and the crime remains shaky.

24. The identification of the bones recovered from the jungle as Kumari's remnants is fraught with uncertainty. The chemical examination report indicates that the bones belong to a female approximately 25 years old, which matches Kumari's general description. However, this identification is not definitive. The mismatch between the hair found on the bones and the hair from the comb provided by Kumari's mother undermines the prosecution's claim that the bones are indeed Kumari's. Without establishing this identification conclusively, the foundation of the prosecution's case on Kumari's death remains tenuous.

The prosecution's reliance on circumstantial evidence is, therefore, weakened by the absence of definitive medical and



scientific findings. The examination did not reveal any antemortem injuries on the bones, which would have been crucial in confirming a violent death leaves room for alternative explanations for the death or disappearance of Kumari, and even the remnants discovered.

The discrepancies in the medical and scientific evidence, such as the mismatch in hair samples and no trace of blood found in the clothes fragments, significantly impact the prosecution's ability to build a coherent and credible narrative. The prosecution's case against the Appellants suffers from several contradictions that do not align with the principles set out in the **Sharad Birdhi Chand Sarda** (*supra*). The inability to conclusively identify the bones as Kumari's, coupled with weak circumstantial evidence and inconsistencies in the forensic findings, raises significant doubts about the prosecution's story. The prosecution has not established the Appellants' guilt beyond a reasonable doubt, and these shortcomings provide a strong basis for arguing that the Appellants should be acquitted due to the failure to meet the burden of proof required by law.

25. As a result, the learned trial Court has failed to assess the evidence in its totality and arrived at an erroneous conclusion.

26. While the tragedy surrounding the disappearance and alleged death of Kumari evokes deep sympathy, the imperative in the administration of justice demands that guilt must be proved beyond a reasonable doubt. The Courts must balance the gravity of the allegations with the sanctity of the legal process, ensuring that no individual is convicted on the basis of inconclusive or insufficient evidence. In the instant case, the prosecution has failed to establish the necessary link between the Appellants and the alleged crime. The



medical evidence does not conclusively prove that the remnants were Kumari's, and the witnesses' delayed testimonies lack credibility due to inconsistencies and the significant time lapse. Furthermore, the legal principles surrounding the recovery of the "Kati" have not been adequately adhered to. It is a cornerstone of justice that no innocent person should suffer the fate of wrongful conviction, especially when doubt lingers over critical aspects of the case.

27. In view of the discussions as above, in our considered view, the prosecution has not been able to prove its case beyond all reasonable doubts and it is not sufficient to ascribe the guilt on the Appellants.

28. Accordingly, the judgment and order of conviction dated 14.09.2010 passed by the learned Addl. Sessions Judge, Jeypore in CrI. Trial No.100 of 2009 (C.T. No.8/09) is hereby set aside. In the result, the Appeal is allowed. The Appellants in custody be released forthwith unless their detention is required in any other case.

(Chittaranjan Dash)
Judge

S.K. Sahoo, J. I agree.

(S.K. Sahoo)
Judge

Orissa High Court, Cuttack
The 25th day of September, 2024.
S.K. Parida, ADR-cum-APS