



REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO(s). 1047-1048 OF 2010

KARTIKA @ KIRTAN @

KIRTAN CHARAN JENA & ANR. ETC.

.....Appellant(s)

VERSUS

THE STATE OF ODISHA

.....Respondent(s)

WITH

CRIMINAL APPEAL NO (s). 2223 OF 2010

J U D G M E N T

PRASANNA B. VARALE, J.

1. The present criminal appeals arise out of the judgment and order dated 06.05.2009 passed by the Division Bench of the High Court of Orissa at Cuttack in Criminal Appeal Nos. 78 and 84 of 2004. By the impugned judgment and order, the High Court

dismissed the appeals filed by the Appellants and upheld the order of the Ad hoc Additional District and Sessions Judge, Jajpur **[hereinafter referred to as “Trial Court”]** passed in Sessions Trial No. 158/14/26 of 2002, thereby convicting the Appellants under Sections 148, 506, and 302 read with Section 149 of the Indian Penal Code, 1860 **[hereinafter referred to as “IPC”]**. The Appellants were sentenced to undergo imprisonment for life and pay a fine of Rs. 3000/- each, and in default of payment of fine to further undergo R.I. for 6 months.

BRIEF FACTS

2. The factual matrix of the case is that on 14.05.2001 at approximately 4:00 PM, accused Narendra @ Narahari Behera arrived at the house of the informant (PW-3) and abused the family members in obscene language, specifically threatening to kill Dhruba Pradhan **[hereinafter referred to as “deceased”]**. Later that evening, at approximately 7:00 PM, a body of accused persons armed with deadly weapons including a kata, tenta, stones, and a saw, arrived at the informant’s house, searched for the deceased, and threatened to kill him before departing toward Abhayapur.

3. Around the same time, while the deceased was traveling by motorcycle, he was intercepted at Agi Chhak by the accused

persons. When the deceased attempted to escape, the accused persons forcibly caught hold of him and lifted him into a nearby cultivable paddy field. Thereafter the accused persons assaulted the deceased by throwing laterite stone on his head and with thenga, iron rod, bhujali etc. as a result of which the deceased succumbed to the injury. The accused persons threw the deceased's motorcycle into the pond.

4. The First Information Report came to be lodged at the instance of P.W. 3/Sri Siba Prasad Pradhan at 2:00 AM on 15.05.2001. On lodgment of report i.e., FIR No. 128 of 2001, the criminal machinery was set into motion and the investigating agency proceeded to the spot and seized various articles including chopped up right wrist of the deceased, laterite stone and lathi.

5. The investigation concluded with the filing of a chargesheet against 18 accused persons. Out of the 18 chargesheeted accused, case against one accused abated due to his death and the case of three accused persons was split up (as they were declared absconders). The accused persons pleaded not guilty and claimed trial. Consequently, 14 accused persons were committed to the Court of Sessions for trial.

6. The learned Trial Court framed charges against the 14 accused persons under Sections 148, 506/149, 302/149 of IPC and the Sessions Trial No. 158/14/26/2002 was registered.

7. In order to prove its case, the prosecution presented 26 witnesses. The appellants/accused persons, presented 1 defence witness.

8. On its appreciation of evidence, the Trial Court, vide its judgment and order dated 28.01.2004, convicted 6 accused persons (the present appellants before us) under Sections 148, 506, and 302/149 of the IPC, while acquitting 8 others by granting them the benefit of doubt. The Appellants were sentenced to undergo imprisonment for life and pay a fine of Rs. 3000/- each, and in default of payment of fine to further undergo R.I. for 6 months for the offence under Section 302 IPC. As life imprisonment was awarded for the main offence no separate sentence was awarded for the offence under Sections 148/506/149 IPC.

9. Being aggrieved, the appellants challenged the judgment and order of the Trial Court by way of 2 separate appeals, CRLA 84/04 and CRLA 78/04 before the High Court of Orissa at Cuttack. The High Court on re-appreciation of evidence, discarded the eye

witness testimony holding that the persons who committed assault on the deceased could not have been identified in the pitch dark night merely by the sound of assault. The High Court, however, upheld the conviction of all the six convicted accused persons, holding that though the prosecution failed to prove charges by direct evidence, it has been successful in proving charges from circumstantial evidence.

10. Aggrieved by the judgment and order passed by the High Court, the six convicted accused persons approached this court by filing present appeals. However, during the pendency of the appeal, appellant Upendra Sethi and appellant Madhu Pradhan passed away and, consequently, the appeal stood abated qua them. The present appeals are, therefore, confined to the remaining four appellants.

CONTENTIONS

11. Learned counsel for the appellants namely, Mrs. Rajdipa Behura, Sr. Adv. and Mr. J.K. Das, Sr. Adv. have made the following submissions:

- a. Learned counsel vehemently submitted that once the High Court rejected the testimony of eye witnesses (PW- 3, 4, 10, 11, 17 and 26) specifically holding that they could not have witnessed the incident nor could have identified the accused persons from a distance in a dark night, the conviction upheld*

by the High Court on the basis of this very weak piece of evidence is unsustainable.

- b. Learned counsel further submitted that the version of the so called eye witnesses is unacceptable on two grounds, firstly, they being brothers and sister-in-laws of the deceased and are as such interested witnesses and secondly there is a stark contradiction between the version of these witnesses, particularly, PW-17 (Sister-in-Law) who also claims to be an eye witness contradicts the testimony of other eye witnesses.*
- c. Learned counsel further contended that the High Court overlooked an important factum of the reasonable possibility of alternative suspects while appreciating the evidence. Learned counsel submits that PW-3 (brother of the deceased) and PW-24 (Investigating Officer) stated before the Court in their testimony that the deceased was having a long drawn history of criminal antecedents. The testimony of these witnesses disclosed that the deceased was involved in 13 criminal cases including serious offences like rape and murder and because of his involvement in various crimes, a large number of village folk was carrying a grudge against him and had inimical terms with the deceased. It was also stated before the Court by these witnesses that nearly 200-250 people were searching for the deceased that night and as the Appellants were having some inimical terms with the deceased, their false implication cannot be ruled out.*
- d. Learned counsel further submits that insofar as the appellant-Haladhar Rout is concerned, even the aspect of alleged motive, that is, enmity is not at all proved by the prosecution, on the contrary the evidence is otherwise.*
- e. Learned counsel submits that the testimony of the witnesses PW-3 and PW-26, who are family members of the deceased and other witness Rama clearly established that the appellant Haladhar Rout was on cordial and visiting terms with the deceased family and had no enmity with him. In a case as observed by the High Court based on the circumstantial evidence, motive is a crucial link which the prosecution failed to establish against the appellants.*
- f. Learned counsel further submits that recovery of certain articles namely, chopped right wrist of the deceased, laterite stones and lathi is only at the spot and there is no recovery at the instance of any of the appellants.*
- g. Learned counsel further submitted that though it is the case of the prosecution that as many as 300 persons were searching for the deceased for nearly three hours, the prosecution failed to examine any independent witness and*

only the interested witnesses i.e. the family members of the deceased are examined by the prosecution and non-examination of independent witnesses cast a serious doubt on the prosecution case.

12. *Per contra*, learned counsel namely, Mr. Vishnu Kant, appearing for Respondent/State of Odisha has supported the impugned judgment and order and made following submissions:

- a. Learned counsel contended that the present appeal, which arises from the concurrent findings of the Trial Court and the High Court of Orissa, lacks merit as the prosecution has successfully established murder of deceased through an unbroken chain of circumstances.*
- b. It was submitted that the genesis of the occurrence is well-documented, beginning with an open threat issued by the accused at 4:00 P.M. on 14.05.2001, which was consistently proved by PW- 3, 4, 10, 11, 17 and 26. This threat was carried into execution at 7:00 P.M. when the appellants, forming an unlawful assembly armed with deadly weapons like farsa and katuri, conducted an organized search for the deceased.*
- c. Learned counsel emphasized that the interception and abduction of the deceased at Agi Chhak were witnessed and corroborated by consistent testimonies, showing that the deceased was forcibly taken to cultivable land despite his attempts to flee. The subsequent conduct of the appellants, that is, remaining at the spot for two hours and openly proclaiming the murder constitutes a highly incriminating circumstance that completes the chain of events.*
- d. It was further argued that the medical and physical evidence provides complete assurance to the ocular version. The post-mortem report conclusively establishes a homicidal death consistent with a brutal assault, and the recovery of incriminating articles, including a bamboo lathi, blood-stained earth, and the deceased's motorcycle from pond, rules out any possibility of false implication.*
- e. Regarding the legal framework, learned counsel submitted that under Section 149 of the IPC, once the common object of the unlawful assembly is established, it is not necessary to prove the specific overt act of each individual appellant. The failure of the accused to offer any explanation regarding facts*

especially within their knowledge, such as what happened after they forcibly took the deceased away, provides an additional link in the chain of circumstances. The testimony of hostile witnesses (PW-14 and PW-15) can still be relied upon for the parts that are trustworthy and corroborate the prosecution's case regarding the organized search. The evidence of related witnesses (PW-3, PW-4) should not be discarded merely on the ground of relationship, as their depositions are natural, consistent, and corroborated by surrounding circumstances.

- f. Finally, learned counsel submitted that since the prosecution has established the foundational facts beyond reasonable doubt, and the Courts below have arrived at concurrent findings of guilt based on a careful scrutiny of evidence, there is no ground warranting interference with the sentence of life imprisonment.*

ANALYSIS

13. Heard Learned Counsel for the appellant as well as Learned Counsel for the respondent. We have also perused relevant material on record and the judgments passed by the Courts below.

14. Considering the rival submissions and having carefully examined the evidence on record, we find considerable merit in submission of the learned counsel representing the appellants and as such we are unable to persuade ourselves to concur with the view taken by the High Court.

15. Though the medical evidence clearly established that the deceased died a homicidal death, the question before us is whether the prosecution was successful in establishing the appellants'

authorship of the crime and we find that the prosecution failed to establish its case against the prosecution for the following reasons.

16. At the outset, it is necessary to note that the prosecution case, as unfolded in the FIR and during trial, rested primarily on the testimony of the alleged eyewitnesses, namely PWs 3, 4, 10, 11, 17 and 26. It is pertinent to note that all the aforementioned prosecution witnesses are related to the deceased. PW-3 and PW-4 are the brothers of the deceased, while PW-10, PW-11, PW-17, and PW-26 are his sisters-in-law.

17. Since the prosecution case rests primarily on the testimony of these alleged eye-witnesses, it is necessary to examine their evidence in some detail. The testimony of PW-3 reveals that he was not present at the spot when the incident occurred. Significantly, in the First Information Report lodged by him, he stated that only PW-17 and PW-26 had witnessed the occurrence. However, the testimony of PW-4 presents a materially different version. According to PW-4, he, along with PW-3, PW-10, PW-11, PW-17, and PW-26, was observing the accused persons at the time of the incident. Thus, while PW-3's version indicates that he was not an eye-witness to the occurrence, PW-4's testimony seeks to portray PW-3, along with the other prosecution witnesses, as being present

and witnessing the incident, giving rise to a significant inconsistency in the prosecution case.

18. Further, referring to the testimonies of other eye-witnesses it is evident that the incident took place in a pitch dark night. The question which arises before us is whether it was possible for the eyewitnesses to have witnessed the incident in a dark night from a distance of 60 cubits. In this regard, it is apposite to refer to the decision of the Supreme Court in ***State of U.P. v. Ashok Kumar***¹. In that case, the Supreme Court found the testimony of the alleged eye-witnesses to be unreliable, holding that it was improbable for them to have identified the accused even in moonlight. The relevant extract reads as follows:

“3. The first question which falls for consideration is as to whether or not the witnesses would be in a position to identify the respondents from such a large distance at night. It is true that it was a moonlit night but from a reference to the almanac it would appear that the moon had covered 3/4th distance on the night of occurrence and was to set at 2.23 a.m. Even though there may be some moonlight at that night, it is difficult for the witnesses to identify the respondents or even if they did the possibility of mistake in identification cannot be completely excluded. In this connection, we may refer with advantage to the following passage appearing in Dr Hans Gross's Criminal Investigation at p. 185:

“By moonlight one can recognise, when the moon is at the quarter, persons at a distance of from 21 feet in bright moonlight at from 23 to 33 feet; and at the very brightest period of the full

¹ (1979) 3 SCC 1

moon, at a distance of from 33 to 36 feet. In tropical countries the distances for moonlight may be increased.”

4. The opinion of Gross referred to above fully fortifies our conclusions that it was not possible for the witnesses to have identified the respondents even in moonlight from a distance of about 150 yards. In these circumstances, therefore, the High Court was fully justified in holding that it was not possible for the eyewitnesses to identify the respondents from such a long distance on the night of the occurrence. The prosecution suggested that the witnesses had lighted their torches and it was in the light of torches coupled with moonlight that identification was possible. In the first place, we find it difficult to believe that after Ashok Kumar had given a call and fired, the witnesses would dare to flash the torch light and expose themselves to the risk of being shot themselves. Secondly, even if torches were lighted, in view of the large distance, it would not be possible for the witnesses to identify the respondents with absolute certainty.”

19. Though in the above referred case of **Ashok Kumar (supra)**, the source of light was at least moonlight but in the present case, the testimony of witnesses clearly show that it was a pitch dark night and the source of light was provided by the accused themselves i.e. the torch light to identify the deceased. Considering this very aspect, a categorical finding was recorded by the High Court that it was not possible for the prosecution witnesses to have witnessed the incident on a pitch dark night or to identify the assailants merely on the basis of sound of the assault. The testimony of the alleged witness cannot be relied upon.

20. Further, the testimony of PW-4 reveals that the accused persons focused the torch light to identify the deceased. On this it is important to refer to **Tamilselvan v. State**², which held that:

“8. Before dealing with these glaring inconsistencies it may be pointed out that the incident occurred at 10.30 p.m. on 27-1-1996. It is alleged by the prosecution witnesses that they identified the accused in moonlight. We find it difficult to accept this version of the prosecution witnesses that they could have identified any of the accused merely by the moonlight. In the evidence of the prosecution witnesses it is stated that the accused were carrying torches, but there is no indication whether the victims, including the Forest Guard Swaminathan (the deceased) and Raju, the gardener, who sustained fire injuries, carried torches.

9. Since it was the accused who allegedly carried torches, we find it difficult to believe how the prosecution witnesses could have identified the assailants. The position would have been different if the forest guards had been carrying torches and had been pointing them at the assailants, but here the position is just the reverse. In fact due to the torches of the assailants the prosecution witnesses would have been partially blinded by the light of the torchlight, and would not have been able to identify anybody.”

21. In view of the aforesaid decisions and the categorical finding recorded by the High Court that it was not possible for the prosecution witnesses to have witnessed the incident on a pitch-dark night or to identify the assailants merely on the basis of the sound of the assault, the testimony of the alleged eye-witnesses cannot be relied upon.

² (2008) 7 SCC 755

22. Once the testimony of the alleged eye-witnesses is discarded, the prosecution case necessarily becomes one based solely on circumstantial evidence. However, having discarded the ocular version, the High Court proceeded to examine whether the prosecution had succeeded in establishing the guilt of the accused on the basis of the circumstantial evidence on record and, on that basis, upheld the conviction. The correctness of such an approach must, therefore, be examined in light of the settled principles governing cases resting entirely on circumstantial evidence.

23. Though the law regarding circumstantial evidence has been crystallised by this Court in various judgments but it will not be out of place to refer to an oftenly quoted judgment of this Court in ***Sharad Birdhichand Sarda v. State of Maharashtra***³, wherein this Court has observed a “*panchsutra*” for dealing with the cases of circumstantial evidence. These are as follows:

(1) the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established; (2) all the facts so established should be consistent only with the hypothesis of the guilt of the accused; (3) Again, the circumstances should be of a conclusive nature and tendency; (4) they should be such as to exclude every

³ (1984) 4 SCC 116

hypothesis but the one proposed to be proved; (5) there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.”

24. Furthermore, in ***Kamal v. State (NCT of Delhi)***⁴, it was held that circumstances concerned “must or should” and not “may be” established . It held that it is settled principle that however strong a suspicion may be, it cannot take place of a proof beyond reasonable doubt.

“18. It can thus be seen that this Court has held that the circumstances from which the conclusion of guilt is to be drawn should be fully established. It has been held that the circumstances concerned “must or should” and not “may be” established. It has been held that there is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved”. It has been held that the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty. It has been held that the circumstances should be of a conclusive nature and tendency and they should exclude every possible hypothesis except the one sought to be proved, and that there must be a chain of evidence so complete so 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.

19. It is a settled principle of law that however strong a suspicion may be, it cannot take place of a proof beyond

⁴ 2023 SCC Online SC 933

reasonable doubt. In the light of these guiding principles, we will have to consider the present case.”

25. In the light of these guiding principles, we will have to examine the present case.

26. The circumstances relied upon by the learned High Court are- (i) appellant Narendra @ Nahari Behera visited deceased's house at 4pm and threatened to kill deceased (ii) appellants armed with weapons came to deceased's house at 7pm (iii) statement of PW 14 and PW 15 that about 200 to 250 persons were searching for deceased (iv) appellants waited for the deceased at Agi Chhak and identified deceased with torch light and assaulted him (v) identification of appellants through their voice (vi) eye witnesses who heard the sound of assault (vii) appellants waited for 2 hours to assault family members of the deceased (viii) recovery of weapon from the spot and motorcycle driven by deceased.

27. Insofar as the Circumstance (i), (ii) and (iv) are concerned, it rest substantially on the depositions of PW-3, PW-4, PW-10, PW-11, PW-17 and PW-26. Testimonies of these witnesses suffer from material inconsistency as to who was and who was not present to witness the incident.

28. It may not be out of place to state that the conduct of the witnesses is also beyond the natural conduct. Though PW-3 claims himself to be an eye witness interestingly he is unable to state as to which weapon was carried by which of the accused. He also states that after assault, he had gone to his house and after two hours came back to the spot meaning thereby he makes no attempt to inform about such a serious incident either to the other family members or to anybody else in the village.

29. Insofar as the circumstance relating to the identification of the appellants is concerned, the reliance placed upon it by the High Court appears to be misconceived. We have also discarded the testimony of the prosecution witnesses on this aspect, as it is not possible to safely conclude that they had either witnessed the occurrence on a pitch-dark night or identified the assailants merely on the basis of the sounds of the assault. Once such evidence is found to be unreliable, the circumstance of identification cannot be said to have been proved.

30. We also find no merit in the theory of the prosecution that the deceased died due to hit of a 53 kg laterite stone as there is absolutely no material to show that how this heavy stone weighing 53 kg was brought and who brought it and also the prosecution

was unable to recover this so-called 53 kg laterite stone which was used for commission of offence. It may not be out of place to state that the medical officer PW-18 in his testimony before Court deposed that “there is every likelihood of causing fracture as well as brain hemorrhage, if a laterite stone such as MO3 has been thrown from the height of 2 ft. on the head of the person lying on the ground”. He further deposed that “no weapon of offence including laterite stone like MO3 was sent to me by Investigating Officer for my opinion”.

31. It is worthy to refer to the judgment of this Court in ***Abdul Nassar v. State of Kerala***⁵, which enunciated the principles that courts must adhere to while appreciating and evaluating evidence in cases based on circumstantial evidence. One of the principles enunciated is that each of the circumstance must be proved individually. The relevant extract is as follows:

“30. We deem it essential to enunciate the principles that courts must adhere to while appreciating and evaluating evidence in cases based on circumstantial evidence, as follows:

....(iii). Each of the links of incriminating circumstantial evidence should be meticulously examined so as to find out if each one of the circumstances is proved individually and whether collectively taken, they forge an unbroken chain

⁵ 2025 SCC OnLine SC 111

consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.....”

32. Thus, it is a settled position of law that to convict the accused on the basis of circumstantial evidence each circumstance must be established beyond doubt and collectively point towards the guilt of the accused.

33. Viewed cumulatively, the prosecution has failed to establish a complete and consistent chain of circumstances excluding every hypothesis other than the guilt of the appellants. The evidence on record leaves substantial gaps which create a reasonable doubt as to their involvement. In criminal jurisprudence, where two views are reasonably possible, the one favourable to the accused must prevail.

34. In the circumstances, we are of the considered opinion that the High Court was not justified in affirming the conviction of the appellants. They are entitled to the benefit of doubt.

35. In the result, we pass the following order:

- a. The appeals are allowed;
- b. The judgment and order of the High Court dated 06.05.2009 in Criminal Appeal Nos. 78 and 84 of 2004 and the judgment and order of conviction and sentence

dated 28.01.2004 passed by the trial court in Sessions
Trial No. 158/14/26 of 2002 are quashed and set aside.

36. Pending application(s), if any, shall stand disposed of.

.....J.
[M.M. SUNDRESH]

.....J.
[PRASANNA B. VARALE]

**NEW DELHI;
SEPTEMBER 18, 2026.**