(2016) 02 OHC CK 0037

ORISSA HIGH COURT

Case No: JCRLA No. 18 of 2008

Harihar Patnaik		APPELLANT
	Vs	
State of Orissa		RESPONDENT

Date of Decision: Feb. 2, 2016

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161, Section 167, Section 311
- Evidence Act, 1872 - Section 11, Section 165
- Penal Code, 1860 (IPC) - Section 294, Section 299, Section 302, Section 304, Section 307, Section 325

Hon'ble Judges: S.K. Sahoo, J.

Bench: Single Bench

Advocate: Devi Prasad Dash, for the Appellant; Janmejaya Katikia, Addl. Govt. Advocate, for the Respondent

Final Decision: Allowed

Judgement

S.K. Sahoo, J.

1. The appellant Harihar Patnaik faced trial in the Court of learned Sessions Judge, Puri in S.T. Case No. 400 of 2006 for offence punishable under section 302 of the Indian Penal Code for committing murder of Ganesh @ Gani @ Subash Chandra Mohanty (hereafter ''the deceased'') on 02.05.2006 at about 4 p.m. at Baseli Sahi under Town Police Station, Puri in the district of Puri.

The learned Trial Court vide impugned judgment and order dated 27.11.2007 found the appellant guilty under section 304 Part-II of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for ten years.

2. The prosecution case as per the First Information Report lodged by Subashini Mohanty (P.W.1) on 02.05.2006 before the Inspector-in-Charge, Town Police Station, Puri is that on that day at about 4 p.m. while the deceased after coming out of the house was going on the road, in front of Bishnu Bhawan, the appellant was sitting

there and he started abusing the deceased and also called him. When the deceased asked the appellant about the reason for calling him, the appellant dealt a severe blow on the head of the deceased by means of an iron rod, as a result of which the deceased sustained bleeding injury on his head and he was shifted to the District Headquarters Hospital, Puri for treatment and his condition became alarming. At the time of occurrence, Damodar Behera, Krushna Chandra Barik and Lokanath Roul were present there.

On the basis of the First Information Report, Inspector-in-charge of Town Police Station, Puri registered Puri Town P.S. Case No. 129 dated 02.05.2006 for offences punishable under sections 294/325/307 of the Indian Penal Code and directed P.W.10 Sri Pitabash Das, A.S.I. of Police to take up investigation of the case. During course of investigation, P.W.10 examined the informant, proceeded to the District Headquarters Hospital, Puri, examined the deceased who was in an injured condition and recorded his statement under section 161 Cr.P.C. He also visited the spot, prepared the spot map Ext. 7, examined other witnesses, arrested the appellant on 2.5.2006 and forwarded the appellant to the Court on 3.5.2006. He seized one flat iron rod (M.O.I) from the spot in presence of the witnesses and prepared seizure list Ext. 6/1. The deceased succumbed to the injuries on 10.5.2006 and on receipt of the casualty memo regarding the death of the deceased, P.W.10 proceeded to the District Headquarters Hospital, Puri and held inquest over the dead body of the deceased and then sent the dead body of the deceased for conducting post mortem examination through constable. P.W.5 Dr. Trithabasi Mohapatra, Assistant Surgeon attached to District Headquarters Hospital, Puri conducted post mortem examination over the dead body on 10.05.2006 and submitted his report Ext. 3. P.W.10 submitted a report to the learned S.D.J.M., Puri on 10.05.2006 intimating that the case turned to one under section 302 of Indian Penal Code. After the post mortem examination, the constable produced the wearing apparels of the deceased which were seized by P.W.10 under seizure list Ext. 2. On 20.07.2006 P.W.10 handed over the charge of investigation to Sri Jogendra Kumar Samantaray (P.W.9), who was the Sub-Inspector of Police, Town Police Station, Puri. P.W.9 after taking charge of the investigation made a query to the doctor as to whether the injury sustained by the deceased was possible by the seized flat iron rod and accordingly received the query repot from Dr. Trithabasi Mohapatra (P.W.5). After completion of investigation, charge sheet was submitted against the appellant on 23.08.2006 under section 302 of the Indian Penal Code.

3. After submission of charge sheet, the case was committed to the Court of Session for trial after observing due committal procedure where the learned Trial Court framed charge against the appellant under section 302 of the Indian Penal Code on 15.11.2006 and since the appellant refuted the charge, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

4. During course of trial, in order to prove its case, the prosecution examined eleven witnesses.

P.W.1 Subashini Mohanty is the widow of the deceased and she claimed herself to be an eye witness to the occurrence as well as the witness to the dying declaration. She is the informant in the case.

P.W.2 Lingaraj Rout proved the iron rod (M.O.I) with which the appellant stated to have assaulted the deceased. He did not support the prosecution case, for which he was declared hostile.

P.W.3 Dillip Kumar Sahoo did not support the prosecution case, for which he was declared hostile.

P.W.4 Surendranath Dash was the police constable attached to Puri Town Police Station and he stated about the seizure of one full pant of the deceased by the Investigating Officer under seizure list Ext. 2.

P.W.5 Dr. Trithabasi Mohapatra conducted post mortem examination over the dead body on 10.05.2006 at District Headquarters Hospital, Puri and proved his report Ext. 3. He also gave reply to the query made by the Investigating Officer regarding possibility of the injury by the weapon of offence which was forwarded to him and the query report has been marked as Ext. 4/1.

P.W.6 Prasanta Mohanty is the witness to the inquest who proved the inquest report Ext. 5.

P.W.7 Dangu Behera did not support the prosecution case, for which he was declared hostile.

P.W.8 Purna Chandra Satapathy was the constable attached to Town Police Station, Puri who accompanied the dead body of the deceased for post mortem examination and after post mortem examination, he handed over the wearing apparels of the deceased to the Investigating Officer.

P.W.9 Jogendra Kumar Samantray was the S.I. of Police attached to Town Police Station, Puri and he is the investigating officer who on completion of investigation, submitted charge sheet against the appellant.

P.W.10 Pitabash Das was the A.S.I. of Police attached to Town Police Station, Puri and he is the investigating officer who conducted investigation from 02.05.2006 to 20.07.2006.

P.W.11 Dr. Dhruba Charan Debata was the Asst. Surgeon attached to District Headquarters Hospital, Puri and he proved the injuries sustained by the deceased as reflected in the bed head ticket Ext. C-I.

The prosecution exhibited nine documents. Ext. 1 is the written FIR, Ext. 2 is the seizure list, Ext. 3 is the post mortem examination report, Ext. 4 is the query made

by police, Ext. 4/1 is the query report, Ext. 5 is the inquest report, Ext. 6 is the seizure list of flat iron rod, Ext. 7 is the spot map, Ext. 8 is the casualty memo and Ext. 9 is the injury report.

The prosecution also proved one material object which is an iron rod marked as M.O.I.

The learned Trial Court examined two doctors namely Dr. Pramesh Kumar Mohapatra as C.W.1 and Dr. Ashok Kumar Parida as C.W.2.

The bed head ticket of the deceased was marked as C-I and the statement of the deceased recorded by the police was marked as C-II.

5. The defence plea is one of denial. No witness was examined on behalf of the defence and no document was also proved on behalf of the defence.

6. The learned Trial Court vide impugned judgment and order dated 27.11.2007 held that from the evidence on record, it is seen that the prosecution has not been able to establish its case by ocular testimony as the two eye witnesses namely P.Ws.2 and 3 have turned hostile and did not breath a word against the appellant. However, relying upon the dying declaration as well as the extra judicial confession, the learned Trial Court has been pleased to hold that the prosecution has clearly established that the fatal blows with M.O.I were given by the appellant. However, taking into account the surrounding circumstances and the nature of weapon used in the commission of crime, the learned Trial Court held that there was no intention on the part of the appellant to cause death of the deceased and accordingly convicted the appellant under section 304 Part-II of the Indian Penal Code.

7. Mr. Devi Prasad Dash, learned counsel appearing for the appellant vehemently contended that when there are no direct evidence on record, the learned Trial Court should not have relied upon the dying declaration as well as the extra judicial confession stated to have been made before P.W.1, the wife of the deceased as those facts are not mentioned in the First Information Report. The learned counsel further submitted that the 161 Cr.P.C. statement of the deceased which was recorded by P.W.10 and treated as dying declaration is very suspicious and no reliance should have been placed on it by the learned Trial Court. He further contended that the medical evidence which has been adduced in the case are contradictory and from such evidence, it cannot be said that the deceased died on account of the injury sustained on the head by means of a flat iron rod. The learned counsel for the appellant vociferously emphasized the conduct of the Trial Court in stepping into the shoes of the prosecutor in examining witnesses not named in the charge sheet and also in recalling witness to fill up the lacuna of the prosecution and therefore urged that it is a fit case where benefit of doubt should be extended in favour of the appellant.

Mr. Janmejaya Katikia, learned Additional Government Advocate on the other hand submitted that even though the eye witnesses P.W.2 and P.W.3 have not supported the prosecution case but since the dying declaration made by the deceased is clinching, no illegality has been committed by the learned Trial Court in relying upon such dying declaration to convict the appellant which appears to be truthful. The learned counsel for the State further contended that during cross-examination of P.W.1, the defence has brought out the extra judicial confession made by the appellant before P.W.1 and her mother-in-law and therefore the learned Trial Court has rightly relied upon such evidence to convict the appellant. The learned State counsel contended that the Court has got ample power to recall and re-examine any witness suo motu if his evidence appears to be essential to the just decision of the case and can also summon any witness even if he is not a charge sheet witness if the evidence of such witness appears to be relevant in the interest of justice to arrive at the right conclusion while adjudicating the guilt or otherwise of the accused.

8. Adverting over the nature and cause of the death of the deceased, I find that apart from the inquest report Ext. 5, the prosecution has also relied upon the evidence of P.W.5 Dr. Trithabasi Mohapatra who conducted post mortem examination over the cadaver of the deceased on 10.05.2006 on police requisition at District Headquarters Hospital, Puri and found a fracture injury over the occipital region with subdural haematoma and also a lacerated wound of size 3" x 1" X bone deep on the skull and there was also perforation of stomach wall. The doctor opined the cause of death of the deceased was on account of injury to the most vital organ i.e. brain along with perforation of the stomach. He proved the post mortem report vide Ext. 3 The doctor also gave his opinion regarding possibility of the injury sustained by the deceased by the weapon of offence M.O.I which was sent to him by the Investigating Officer as per query report marked as Ext. 4.

The learned counsel for the appellant urged that since no X-ray plates have been proved, the evidence of the doctor that there was a fracture injury on the occipital region cannot be believed. He further contended that the medical evidence on record rather indicates that the deceased was suffering from ascites (Jalaodari) and C.W.2 Dr. Ashok Kumar Parida has stated that the possibility of death of the deceased because of perforation of the abdominal wall cannot be ruled out and had the patient been shifted to the S.C.B. Medical College and Hospital, Cuttack for better management and treatment, possibility of his survival could have been there.

The contentions raised are not acceptable. P.W.5 has specifically stated that he did not feel it necessary for conducting any X-ray examination as when he opened the skull while conducting post mortem examination; he detected fracture of the skull bone. According to medical science, a skull fracture is any break in the cranial bone, also known as the skull. There are many types of skull fractures, but only one major cause i.e. an impact or a blow to the head that is strong enough to break the bone. A

doctor may be able to diagnose a fracture by simply performing a physical examination of the head. However, to diagnose the extent and exact nature of the damage, more exact diagnostic tools are required.

Section 299 of the Indian Penal Code deals with culpable homicide and in Explanation 2, it is indicated that where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment, the death might have been prevented. In view of such provision, merely on the hypothetical plea that the deceased could have been saved with better treatment, the charge of murder does not get diluted. The submission is clearly untenable in view of Explanation 2 appended to section 299 of the Indian Penal Code.

Thus after perusing the evidence on record, the postmortem examination report Ext. 3 and the statement of P.W.5 Dr. Trithabasi Mohapatra, I am of the view that there is no infirmity in the findings of the learned Trial Court in accepting the evidence of the doctor regarding the cause of death of the deceased.

9. Coming to the evidence on record to determine whether the appellant was the perpetrator of the crime, though in the chief examination P.W.1 deposed that she is an eye witness to the occurrence but in cross-examination, she has stated that she had no direct knowledge about the occurrence. P.W.2 and P.W.3 who are the eye witnesses to the occurrence have not supported the prosecution case. Therefore, there is no direct evidence against the appellant. No motive has also been attributed by the prosecution on the part of the appellant to commit the crime. In cases of circumstantial evidence, motive is very important, unlike cases of direct evidence..

10. Coming to the dying declaration which is stated to have been made before P.W.1, law is well settled that conviction can be based if the Court is satisfied that the dying declaration is true and voluntary even without corroboration. The dying declaration must not be the result of tutoring, prompting or imagination. The Court has to be satisfied that the deceased was in a fit mental state to make the dying declaration for which the Court may look into the medical evidence or the surrounding circumstances.

P.W.1 who is the widow of the deceased has stated that while undergoing treatment in the District Headquarters Hospital, Puri, her husband has disclosed before her, her mother-in-law and the other witnesses that it was the appellant who dealt blows to his head with an iron rod causing bleeding injury. The mother-in-law of P.W.1 and the other witnesses before whom such dying declaration was stated to have not been made have not been examined in this case. P.W.1 is the informant in the case but she has not mentioned about the dying declaration in the First Information Report.

F.I.R. in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence laid at trial. F.I.R. is not the encyclopaedia or be all and

end all of the prosecution case. In the case of Ram Kumar Pande v. The State of Madhya Pradesh reported in , AIR 1975 SC 1026, it is held that no doubt, an F.I.R is a previous statement which can, strictly speaking, be only used to corroborate or contradict the maker of it. But, omissions of important facts, affecting the probabilities of the case, are relevant under Section 11 of the Evidence Act in judging the veracity of the prosecution case.

P.W.1 has stated that when they arrived at District Headquarters Hospital, Puri, she found her husband lying on the bed in the male surgical ward and doctors were treating him and her husband was unconscious as he had sustained severe bleeding injuries and there was heavy loss of blood. P.W.11, the doctor who admitted the deceased in the hospital on 2.5.2006 has stated the patient was found in an irritable and drowsy condition. The patient was not responding to time and place for which he had noted in the bed head ticket as disorientation. In the facts and circumstances of the case, since the oral dying declaration stated to have been made before the informant is conspicuous by its absence in the first information report and particularly in absence of any positive material on record regarding fit state of mind of the deceased at the hospital, I am not inclined to place any reliance on it.

11. The other dying declaration stated to have been made before the A.S.I. of Town Police Station, Puri in the hospital which was recorded in the form of 161 Cr.P.C. on 02.05.2006 vide Ext. C-II is also another doubtful feature.

The said statement even though stated to have been recorded on 02.05.2006 but when the appellant was forwarded to Court on 03.05.2006, such 161 Cr.P.C. statement was not forwarded with the appellant. Even in the forwarding report, there is no whisper that the injured had given any statement implicating the appellant in the crime. With the forwarding report of the appellant, only one sheet of inspection memo and one sheet of seizure list were forwarded.

Section 167 of Cr.P.C. mandates that when any person is arrested and detained in police custody and the investigation cannot be completed within a period of 24 hours from the time of arrest and detention of person in custody and the accusation or the information against such person appears to be well founded then the officer in charge of the police station or the police officer making investigation shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary at the time of forwarding the accused to the Magistrate. This provision has a salutary purpose in as much as the Magistrate has to verify the same to see whether there is any cogent and prima facie material to detain the person in custody. Rule 164 of Orissa Police Rules provides that a carbon copy of the case diary relating to each day''s investigation along with a copy of the statements that might have been recorded under section 161 Cr.P.C. shall be dispatched to the Circle Inspector on the following day. It is incumbent upon the Magistrate before making an order of remand to examine the copies of the case diary submitted under section 167 Cr.P.C.

If it is the prosecution case that a statement of the deceased in the form of 161 Cr.P.C. was available with the prosecution as on 02.05.2006, then there was no earthly reason for the investigating officer not to forward the same to Court at the time of forwarding the appellant on 03.05.2006. Non-forwarding of such material statement creates a doubt that perhaps the same was not in existence as on 02.05.2006 and it has been subsequently created. Fairness in the investigation into crime is an integral facet of rule of law and one of the essential features of the criminal justice delivery system. Moreover the deceased survived for about eight days but no steps have been taken by the Investigating Officer to record the dying declaration by any competent Magistrate or at least by any doctors. In view of such material on record, I am not inclined to place any reliance on the 161 Cr.P.C. statement of the deceased marked as Ext. C-II.

12. The last piece of evidence in the case is the alleged extra judicial confession stated to have been made in presence of P.W.1. P.W.1 has not stated about such confession in the chief examination but she has stated in the cross-examination that while she was in her house, the appellant arrived there being armed with an iron rod and reported to her mother-in-law Radhamani Bewa that he had assaulted the deceased with that iron rod on his head and asked her mother-in-law to report the matter at the police station against him. Radhamani Bewa has not been examined in this case. P.W.1 has not mentioned about the extra judicial confession in the First Information Report. To the question put by the Court, she has stated that it is one Simanchal Lenka of Baseli Sahi who came to her house and informed the incident to her and to her mother-in-law. She again said that since she was a daughter-in-law, she did not know the name of the person who informed incident to them but she heard that it was some Lenka but she cannot say his full name.

In view of such prevaricating statement of P.W.1 made in the cross-examination, it is doubtful as to whether the appellant after committing the crime came to the house of the P.W.1 and told the mother of the deceased that he had committed the crime.

The evidentiary value of the extra judicial confession must be judged in the facts and circumstances of each individual case. Extra judicial confession, if voluntarily made and inspires confidence can be relied upon by the Court along with other evidence in convicting the accused. Extra judicial confession by its very nature is a weak type of evidence and it is for this reason that a duty is cast upon the Court to look for corroboration from other reliable evidence on record. Such evidence requires appreciation with a great deal of care and caution. If such an extra judicial confession is surrounded by suspicious circumstances and its credibility becomes doubtful, it loses its importance. The circumstances under which it is made, the manner in which it is made and the persons to whom it is made must be considered along with the two rules of caution i.e. whether it is reliable and whether it finds corroboration. Reasons must be shown by the prosecution as to why the accused reposed confidence on the persons before whom he made extra judicial confession.

When the extra judicial confession part has not been mentioned by the informant who claims to have heard such confession in the First Information Report; when the mother-in-law of P.W.1 before whom such confession was allegedly made has not been examined to corroborate the evidence of P.W.1 and when it is doubtful that the appellant after committing the crime would go to the house of the deceased to make confession, it is very difficult to place any reliance on such confession.

13. Coming to the contentions raised regarding the conduct of the Trial Court, it is clear that the Investigating Officer P.W.10 was examined, cross-examined and discharged on 11.9.2007 and thereafter the Trial Court suo motu directed P.W.10 for his appearance and examined him on recall on 6.11.2007 and accordingly on that day the 161 Cr.P.C. statement of the injured (deceased) recorded by P.W.10 was proved as Ext. C-II which was used as dying declaration. It is also apparent that on 11.10.2007 the Trial Court on examining bed head ticket available on record found that the injured (deceased) was treated by Dr. Pramesh Kumar Mohapatra, Surgery Specialist and Dr. Ashok Kumar Parida, Medicine Specialist, both attached to the District Headquarters Hospital, Puri and accordingly summoned them and examined them as C.W.1 and C.W.2 respectively.

The 161 Cr.P.C. statement of the injured (deceased) and the bed head ticket were available on record but unfortunately the prosecution overlooked the same and did not prove it and therefore it was the onerous duty of the Trial Court to prove such documents by recalling/calling competent witnesses. If a Public Prosecutor fails in its solemn duty or act in a lifeless and lackadaisical manner, it is the duty of the Trial Court to act in accordance with law to bring relevant materials on record for the just decision of the case and in the ends of justice. Trial Court cannot be expected to be a silent spectator or mute observer. Though he has to play a proper neutral role but he should actively participate in the trial within the boundaries of law in order to elicit the truth inasmuch as he has to deliver the judgment and the entire records should indicate that he has left no stone unturned for the proper dispensation of justice. Court has got ample power to examine a witness even if his name does not find place in the charge sheet. Similarly the Court can recall and re-examine any witness and even order for production of any relevant document if such evidence appears to be essential to the just decision of the case. Court has got ample power and discretion to interfere and control conduct of trial properly, effectively and in a manner as prescribed by law. Section 311 Cr.P.C. and Section 165 of the Evidence Act are some of the provisions which empower the Court in that respect.

Of course, the intention of the Legislature is that a Court should not step into the shoes of the prosecutor but in the present case, I find that the learned Trial Court has not exceeded his jurisdiction and did not take over the prosecutorial role or committed any illegality in recalling P.W.10 to prove the 161 Cr.P.C. statement of the injured (deceased) or examining the two doctors who treated the deceased to prove the bed head ticket.

14. In view of the aforesaid discussion, it is clear that neither there is any direct evidence in the case nor the so-called dying declaration as well as the extra judicial confessional evidence which has been brought on record by the prosecution can be relied upon.

Accordingly, I am of the view that the prosecution has failed to establish the case beyond all reasonable doubt against the appellant and therefore the impugned judgment and order of conviction passed by the learned Trial Court cannot be sustained in the eye of law and same is hereby set aside. Accordingly, the appellant is acquitted of the charge under section 304 Part-II of the Indian Penal Code.

The appeal is allowed. It seems that the appellant is in jail custody since 03.05.2006 and he was not on bail either during trial or during pendency of this appeal. The appellant should be set at liberty forthwith, if his detention is not otherwise required in any other case.

Lower Court Records with a copy of this judgment be sent down to the learned Trial Court forthwith for information and necessary action.

Accordingly, JCRLA is allowed.