

(2002) 04 OHC CK 0030

Orissa High Court

Case No: Jail Criminal Appeal No. 377 of 1994

Ramia Gaudo and Another

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision: April 2, 2002

Acts Referred:

- Penal Code, 1860 (IPC) - Section 302

Citation: (2002) 93 CLT 788 : (2002) OLR 798 Supp

Hon'ble Judges: P.K. Misra, J; B. Panigrahi, J

Bench: Division Bench

Advocate: L.K. Nayak, for the Appellant; G.K. Mohanty, Additional Government Advocate, for the Respondent

Final Decision: Dismissed

Judgement

B. Panigrahi, J.

Both the appellants stood prosecuted for commission of murder of one Lopinga Mallik of village Puila Sahi at Gumapada Patharabania jungle on 4.9.93 at 6.00 P.M. in furtherance of their common intention and further in the same course of action caused disappearance of the evidence of murder by having concealed the dead body inside a bush of that jungle with the intention to screen the evidence of murder.

2. The prosecution story in bravity is as follows ;

That on 4.9.93 at 6.00 P.M. deceased Lopinga Mallik was returning from Puila sahi with Dahala Mallik and his wife. They came to village Barakhamrna. Appellants Ramia Gaudo and Lundu Gaudo of village Sakedi and Gatingia respectively were standing near the house of Rama Pradhan of village Barakhamma. The deceased as well as the appellants so also the wife of the deceased were known to each other prior to the incident. The appellants suggested the deceased Lopinga Mallik to accompany them to village Gatingia. Therefore, Dahaia and his wife left the

deceased in the company of the appellants Ramia Gaudo and Lundu Gaudo. On the way, it appears, both the appellants committed the murder of Lopinga with the help of a stone and concealed the dead body inside a bush to screen the offence of murder. The dead body was discovered by the villagers, who informed the Sarpanch, Neelambar Patra, on 5.9.93 and accordingly a U.D. Case was registered for the death of Lopinga Maliik vide U.D. Case No. 9/93 of Balliguda P.S.. Enquiry was thereafter conducted. Post-mortem examination over the dead body of Lopinga was also held. A stone which was lying near the dead body in addition to a "badi" (stick) was also seized. The I.O. seized the wearing apparel of the deceased. The nail clippings of the accused Ramia Gaudo and Lundu Gaudo were collected. The napkin belonging to appellant Ramia Gaudo containing human blood of "B" Group was also seized. In course of enquiry the police unearthed the involvement of the appellants on the basis of the eye witnesses account so also the extra-judicial confession and accordingly a case was registered Under Sections 302, 201\34 I.P.C..

3. In course of investigation the statements of eye witnesses were recorded. The blood stained earth and the sample earth, nail clippings of the accused-appellants, the napkin belonging to appellant Ramia Gaudo and the blood stained wearing apparels of the deceased were sent to the Serologist for examination. After completion of investigation, the charge-sheet was placed against both the accused-appellants. The learned trial court basing on the evidence of eye witnesses, post-mortem report of the doctor, who conducted post-mortem examination over the dead body of the deceased and the report of the serologist convicted the accused-appellants u/s 302\34, I.P.C., but however acquitted them of the charges u/s 201\34. I.P.C. and sentenced each of them to undergo imprisonment for life, Therefore, the appellants being aggrieved by and affected with the orders of conviction and sentence preferred this appeal.

4. The learned State defence counsel has argued with strong intensity of conviction that although there are so many inconsistencies in the evidence of witnesses, but unfortunately the learned trial Court overlooked such inconsistencies and \or contradictions, and mechanically on the basis of the evidence of P.W.3 recorded the order of conviction against the appellants. It has been further argued that in evidence it has been stated by the Sarpanch of the village Neelambar Patra who has been examined as P.W.1, that the report was lodged on 5.9.93 at 4.00 P.M., but before that a constable was already deputed to guard the dead body. The wife of the deceased was also present at the police station. In that event why the names of the assailants of her husband were not disclosed. It has been strongly contended that the names of the assailants were also not disclosed in the F.I.R. The learned trial court has adopted two standards- one for appreciating the evidence of P.W.2 and the other for appreciating the evidence of P.W.3. Both the prosecution witnesses, namely, P.Ws. 2 and 3 have in the same breath slated about the involvement of these appellants. In case P.W.2 was found to be unreliable how P.W.3 will be believed so as to record an order of conviction against them. It has been further

argued that the report of the serologist cannot alone be a ground for holding the appellants guilty which at the best be used as a corroborative evidence. Therefore the trial court's judgment having suffered from several inconsistencies, legal as well as factual infirmities, the appellants should accordingly be acquitted of the charges.

5. However, learned defence counsel brought to our notice that the prosecution has equally failed to prove the motive of the accused to do away with the life of Lopinga. But Mr. Mohanty, learned Addl. Govt. Advocate has pointed out that motive has been attributed against the appellants that there was a land dispute between the appellants and the deceased as revealed from the evidence of P.W.11. Therefore, there is no force in the contention of the learned defence counsel.

6. Mr. Mohanty, learned Addl. Govt. Advocate has supported the judgment of the trial court by stating that P.W.3 is a most reliable and competent witness in whose presence the offence was committed. It has been further argued that there was no reason to discard the evidence of P.W.2, but the learned trial court on a trivial ground has rejected his ocular testimony. In a criminal case it is open to this Court to reappraise the evidence of the prosecution witnesses and come to an independent finding notwithstanding the reasons recorded by the learned trial court. Apart from the ocular evidence one of the most incriminating material found from the wearing apparel of appellant Ramia Gaudo was that his napkin contained human blood of "B" Group. There is absolutely no explanation as to how the wearing apparet of accused Ramia Gaudo contained human blood of "B" Group which was the blood group of the deceased. Therefore, in the aforesaid situation the learned trial court is justified in convicting and sentencing the appellants.

7. The F.I.R. was lodged by P.W.1 who does not claim to be an eye witness. He submitted the F.I.R. only on the basis of the information by the villagers that a dead body was lying near "Gumapada Patharabania". It is commented that the persons who informed P.W.1 have not been examined. We find there is no substance in the aforesaid submission in as much as the dead body of the deceased was lying in a jungle and the villagers reported the said fact to the local Sarpanch. There was no reason why others shall be examined in court. P.W.1's evidence is to the effect that he saw the dead body lying nearby a jungle. There is no incriminating material emerging from the said F.I.R., save and except, the selling the criminal law in motion on the basis of which a U.D. case was registered.

8. From his evidence it has again been established that a stone which was used as a weapon of offence, lay near the dead body which was identified and marked as M.O.I He noticed a track-mark of dragging of the dead body. P.W.1 also proved the seizure of wearing apparels of the deceased marked as M.Os. III and IV. Learned counsel appearing for the State defence has invited our attention as regards the timings of the first information report said to have been lodged by P.W.1 as well as the timing noted in the F.I.R. Since there is no dispute regarding the death of the deceased Lopinga Mallik, therefore, such minor discrepancy do not weigh much in

discarding the prosecution story. P.W.2 is another eye witness who presented a vivid picture of the prosecution story by implicating the appellants that he saw the appellants assaulting on the head as well as parietal region of the deceased with a stone. His statement was recorded on the following morning of the incident. From the cross-examination it has further appeared that he did not disclose the said fact to anybody in the village till his statement was recorded by the police. The learned trial court found substantial variation between the statement disclosed during 164 Cr.P.C. statement and that of the evidence in Court. Since the trial court found his statement to be unsafe, we do not therefore, find any reason to place credibility on his evidence. But P.W.3's evidence goes a long way in proving the prosecution story to the effect that he saw appellant Ramia caught hold of the deceased while appellant and Lundu assaulted the deceased with a stone. He also identified M.O.I to be that stone by which Lundu assaulted the deceased. Out of fear he did not resist the appellants at that point of time and, therefore, without any protest he went back to his village. From his evidence, at the first stage it was brought out that he saw the incident from a distance of 15 to 20 feet, but again said from a distance of 50 feet. It cannot be lost sight of the fact that P.W.3 belonged to rural area and presumably he had no knowledge about the calculation on of distance and therefore he could not say with mathematical precision about the actual distance. But fact remains that he had seen the assault by the appellants to the deceased. It is true that he had not disclosed the fact to any other person of the village. There are several factors contributing to the non-disclosure of the fact, such as, it may be out of fear, and also due to human behavioural pattern. But non-disclosure of such fact shall not be a ground to discard his evidence if his testimony is otherwise found to be credible. P.W.4 is also a post occurrence witness. His statement further strengthens the prosecution story that he found the accused-appellant Lundu having his hands stained with blood. To a query made by P.W.4 accused Lundu replied that he has killed the deceased, but being frightened he did not dare to speak to anybody other than the police. But this part of the statement that he had noticed accused Lundu with blood stained hands was not disclosed during investigation, but gave out in evidence. Therefore, such exaggeration and development during trial shall have to be excluded while considering the intrinsic value of the statement. However, the other part of the statement cannot be overlooked to the effect that he had seen the appellant Lundu immediately after the occurrence. P.W.5, who was the older brother of deceased, certified that on the date of occurrence he was moving with deceased Lopinga Mailik for purchase of rice. They all reached near the house of Rama Pradhan of village Barakhamma. The appellants suggested P.W.5 that he might go back to his village and the deceased would accompany them as they are proceeding towards that direction. Accordingly P.W.5 and his wife parted from the company of the deceased from the house of Rama Pradhan. This part of the evidence was also not shattered in cross-examination. This establishes that the deceased was found in the company of the appellants before the incident.

9. From the statement of P.W.6, the Surgeon of Baliguda Hospital, who conducted post-mortem examination of the deceased, it has been revealed that death was due to haemorrhage and shock resulting from injuries. He also opined that the injuries appeared on the body of the deceased could be possible by M.O.I. P.W. 11 was the I.O. who investigated into the case, examined the witnesses, seized the wearing apparels of the accused and the deceased as well, sent the incriminating materials for chemical examination and finally placed the charge-sheet. From the cross-examination we found no whittling circumstance can be brought out so as to impeach his testimony. P.W.12 was the O.I.C. who had also corroborated the evidence of P.W.11. Therefore, on a resume of the circumstantial and factual evidence appearing against the appellants the following circumstances have been proved.

(i) The deceased was found in the company of P.W.5 near the house of Rama Pradhan wherefrom the appellants suggested to take the deceased with them and P.W.5 and his wife returned to the village.

(ii) On the following morning the deceased was lying dead in a nearby jungle and the matter was reported at the police station by P.W.1.

(iii) P.W.3 has seen the assailants assaulting the deceased.

(iv) P.W.4 was a post-occurrence witness who noticed the appellants hurriedly going away immediately after the occurrence.

(v) The appellants failed to explain as to how the death of Lopinga Mailik took place after he was in their company.

(vi) The wearing apparel of the appellant Ramia Gauda was found to have contained with human blood of "B" Group.

Therefore, these circumstances unfailingly and unerringly point out the guilt of the appellants. Accordingly we do not find any illegality or factual infirmities so as to interfere with the order of conviction.

10. In the result, there is no merit in this appeal which is accordingly dismissed.