

A.F.R.

IN THE HIGH COURT OF ORISSA AT CUTTACK
CRLA NO. 571 of 2023

(An appeal U/S 374(2) of the Code of Criminal Procedure, 1973 against the judgment passed by Ms. Smruti Lekha Barik, Additional Sessions Judge-cum-Special Judge, Phulbani, Kandhamal, in S.T. Case No. 10 of 2016 arising out of Khajuripada P.S Case No.98 of 2015 corresponding to G.R. Case No. 622 of 2015 of the Court of learned S.D.J.M, Phulbani).

Heeradhar Chhreka @ ... **Appellant**
Mallick

State of Odisha **Respondent**

For Appellant : Mr. A. Tripathy, Advocate
For Respondent : Mr. G.N. Rout, ASC

CORAM:

HON'BLE MR. JUSTICE D. DASH
HON'BLE MR. JUSTICE G. SATAPATHY

DATE OF HEARING : 09.11.2023

DATE OF JUDGMENT: 08.01.2024

G. Satapathy, J.

1. The appellant herein impugns the judgment passed on 21.04.2023 by the learned Additional Sessions Judge-cum-Special Judge, Kandhamal at

Phulbani in Sessions Trial Case No. 10 of 2016 convicting the appellant for offences punishable U/Ss. 302/450 of Indian Penal Code, 1860 (In short the "IPC") and Sec.3(2)(v) of the Scheduled Caste & Scheduled Tribe (Prevention of Atrocities Act, 1989) (In short the "Act"), while acquitting him for offence U/S. 404 of IPC and co-accused for offence U/S. 411 of the IPC. By the impugned judgment, the appellant was, accordingly, sentenced to the following punishment:

i) The convict shall undergo sentence of imprisonment for life (which is always rigorous in nature) and to pay fine of Rs.25,000/- (Rupees Twenty Five Thousand) for commission of offence punishable U/s. 302 of IPC, in default of payment of fine to undergo sentence of rigorous imprisonment for a term of two (02) years.

(ii) The convict shall undergo sentence of imprisonment for life (which is always rigorous in nature) and to pay fine of Rs. 10,000/- (Rupees Ten Thousand) for commission of offence punishable U/s. 3 (2)(v) of SC & ST (POA) Act, in default of payment of fine to undergo sentence of

rigorous imprisonment for a term of one (01) year.

(iii) The convict shall undergo sentence of rigorous imprisonment for a term of five (05) years and to pay fine of Rs.1,000/- (Rupees One Thousand) for commission of offence punishable U/s. 450 of the IPC, in default of payment of fine to undergo rigorous imprisonment for a term of six (06) months.

2. The prosecution in brief is that one Urmila Deep (hereinafter referred to as "the deceased") was working in the hotel Suravi at Phulbani as a maid and on 09.09.2015, she was found dead in the said hotel which was reported by P.W.1-Rajesh Kumar Panigrahy and, accordingly, for such unnatural death Khajuripada UD Case No. 7 of 2015 was registered and the Police S.I. P.W.15 Indramani Nayak inquired the matter. In the course of inquiry, P.W.15 ascertained that the deceased was a married woman blessed with three sons and one daughter, but prior to 7-8 years back, she came to Phulbani town leaving

her husband and children due to quarrel and she was, accordingly, working in the hotel Suravi, but prior to one month of the occurrence, she left her rented house and was staying in the said hotel. While the deceased was staying at Sagadia Sahi in Phulbani, she fell in love with the convict-appellant, who was a cook in another hotel and they lived together in the rented house at Sagadia Sahi, Phulbani. On 19.02.2015, the deceased had lodged a case against the convict-appellant for offences punishable U/Ss. 341/323/294/506 of the IPC. It was also found in the inquiry that on 08.09.2015, the deceased had slept alone in the hotel, but in the dead hour of intervening night of 08/09.09.2015 at about 1.10 A.M., the convict trespassed into the hotel and killed the deceased by throttling, which was captured in the CC TV installed in the hotel. This was the sum and substance of the inquiry report submitted by PW15 on 11.09.2015.

3. Finding the aforesaid in inquiry report of P.W.15 to have disclosed commission of cognizable offence, the I.I.C., Khajuripada PS, Mr. A.K.Ghadei treated the same as FIR and registered Khajuripada P.S. Case No. 98 of 2015 and took up investigation of the case which was handed over to PW22, but P.W15 in the course of enquiry had earlier conducted inquest over the dead body of the deceased as well as sent the same for PM examination. After recovering the seized wearing apparels of the accused No.1 under Ext.5 and that of the victim along with her ornaments under Ext.8, PW22 recovered other ornaments of the deceased from the co-accused Manua @ Manoj Sahu of Titlagarh. P.W.22 also seized one video C.D. on production by Pradipta Kishore Nayak containing the visuals of the fateful night of the hotel dated 09.09.2015 along with a certificate under Ext.9. P.W.22 also seized the DVD machine, one monitor, five numbers of

cameras, one CP plus CC TV dome camera and 145 meter of cable wire under Ext.3 and left the aforesaid articles except the DVD machine in Zima of P.W.1 as well as sent the exhibits to SFSL Rasulgarh for chemical examination. P.W.22 then also seized four numbers of photos and certificate given by the photographer Arun Kumar Sahu under Ext.P.16 and sent the exhibits to CFSL, Kolkata. As usual on completion of investigation, P.W.22 submitted charge sheet against the convict and co-accused resulting in trial in the present case for offences punishable U/Ss.450/302/404 of the IPC r/w Section 3(2)(V) of the SC & ST (PoA) Act.

4. In support of the charge, the prosecution examined altogether 22 witnesses P.Ws.1 to 22 and proved certain documents under Exts.1 to P.32 as well as identified material objects under MO-I to III as against no evidence whatsoever by the defence. Of the witnesses, P.W.1 is the Hotel

owner, P.Ws.4, 5, 7 to 14 and 16 to 20 are the seizure witnesses, P.W.6 is the medical officer/doctor who had conducted PM examination over the dead body, P.W.15 is the informant-cum-Inquiring Officer in U.D. Case No.7 of 2015. P.W.21 is a witness to inquest, whereas P.W.12 is the Tahasildar, Komanna and lastly, P.W.22 is the I.O.

5. The plea of the convict in the course of trial was denial simplicitor and false implication.

6. After appreciating the evidence on record upon hearing the parties, the learned trial Court convicted the appellant by mainly relying upon the circumstantial evidence of last seen theory as contained in the digital evidence of CC TV footage.

7. In the course of argument, Mr. A. Tripathy, learned counsel for the appellant by mainly relying upon the Forensic Examination report of CFSL, Kolkata under Ext.P.28 has assailed the conviction of the appellant by contending *inter-*

alia that the report is suggestive of presence of not only that of accused No.1, but also two other persons, out of whom one was female and thereby, the report cannot be conclusively relied upon to convict the appellant and thus, the conviction of the appellant being not found to have successfully passed the test of proof beyond all reasonable doubt, the appellant is entitled to an acquittal since the sole evidence against him was the video footage which does not establish the guilt of the appellant. Accordingly, Mr. Tripathy has prayed to allow the appeal by acquitting the appellant of the charge. On the other hand, Mr. G.N. Rout, learned ASC by strongly relying upon Ext.P.28 has submitted that the appellant was found to have entered inside the hotel in the dead of the night as per the CC TV footage and thereby, he was the author of the crime. Mr. Rout has also submitted that the evidence on record has clearly established the

circumstances unerringly pointing towards the guilt of the accused No.1 and thereby, the conviction of the appellant cannot be questioned. Mr. Rout has accordingly, prayed to dismiss the appeal.

8. After having carefully bestowed an anxious consideration to the rival submissions keeping in view the impugned judgment of conviction and evidence on record to test the legality and sustainability of the conviction and sentence of the appellant, it is apparently clear that the learned trial Court has based conviction of the appellant primarily on the circumstantial evidence in the form of digital evidence and last seen theory, but before delving upon such evidence/theory, this Court by relying upon the unimpeached evidence of the doctor-P.W.6 Samal Singh, who conducted autopsy over the cadaver of the deceased, concurs with the finding of the learned trial Court with regard to the homicidal

death of the deceased which was not challenged by the appellant in this appeal. The prosecution is thus found to have established the death of the deceased to be homicidal in nature beyond all reasonable doubt with the available evidence on record. Once the prosecution is found to be successful in establishing the homicidal death of the deceased, the next question falls for consideration is as to who is responsible for the death of the deceased. In this case, there is absolutely no ambiguity that the learned trial Court had heavily relied upon the electronic evidence in the form of CC TV footage and the last seen theory culled out therefrom and this Court, therefore, embarks upon such digital evidence to re-evaluate it at the threshold. A careful perusal of the impugned judgment, curiously it appears that the learned trial Court by relying upon the digital evidence has based the conviction of the

appellant by assigning the following reason in paragraph-35 of the judgment.

"35. In the case in hand, it has already been proved that:-

(i). The accused No. 1 is the last seen person with the companion of the deceased;

(ii). There is no intervention of any third person in the time gap when the accused No. 1 found in companion with the deceased and dead body of the deceased was found;

(iii). The relation between the accused No. 1 and the deceased does not appear to be good and it is inimical in nature;

(iv). The video clipping i.e. MO.-I, established about the exchange of words, physical tussle and pressing of neck as reveals from body language and conduct of the accused No. 1 though voice is not audible.

All the above said prove facts complete the chain of circumstance and the chain so strong that it unerringly points towards only hypothesis that the accused No. 1 has caused death of the deceased at the relevant time."

- 9.** It is, however, considered appropriate to re-evaluate the digital evidence as tendered by the prosecution in the course of trial. Since the

video footage was captured in the camera installed in the hotel, the evidence of the owner of such hotel becomes important, but P.W.1 being the owner of the hotel Suravi has testified in the Court that his hotel has coverage of 24 close circuit camera (CCTV) and in the course of investigation, the I.O. (P.W.22) seized the digital video recorder and Hard Disk under seizure list under Ext.3. The evidence of P.W.14 in this regard is more or less similar since he has stated about seizure of some wires and cameras from the hotel of the PW1 in his present under seizure list Ext.3. This evidence about seizure of above articles was never seriously challenged by the defence except unsuccessfully suggesting to the witnesses for nothing being seized by the Police in their presence. However, the I.O.-P.W.22 in his evidence has stated that on 23.09.2015, he seized a video C.D. on production by Pradipta Kishore Nayak containing visuals of dated

09.09.2015 and one certificate issued by said Pradipta Kishore Nayak and thereafter, P.W.22 has exhibited such certificate in evidence under Ext.P.18/P.W.22 as a certificate issued U/S 65-B of the Indian Evidence Act. It is the further evidence of P.W.22 that on that day, he seized DVD machine, one monitor, five number of cameras, one CP plus CC TV dome camera and 145 meter of cable wire under Ext.3 and thereafter, released all the articles except the DVD machine in Zima of P.W.1. What strikes to the mind of the Court that is the non-examination of said Pradipta Kishore Nayak, on whose production the C.D. containing visuals of the occurrence date was seized as well as the certificate produced by him was also seized. It is obviously required that since the said Pradipta Kishore Nayak has issued the certificate stated to be U/S 65-B of the Indian Evidence Act and the Court has based the conviction mainly on the

report of the expert with regard to the visuals contained in the C.D, the prosecution should have examined the said Pradipta Kishore Nayak in the trial, but the said Pradipta Kishore Nayak neither was examined in evidence nor was any explanation offered as to why his evidence was withheld by the prosecution. On this point, this Court considers it apposite to refer to the decision in **Arjun Panditrao Khotkar Vs. Kailash Kushanrao Gorantyal and others; (2020) 7 SCC 1**, wherein a three Judge Bench of the Apex Court has held that "the required certificates U/S 65-B(4) of the Indian Evidence Act is unnecessary, if the original document itself is produced and this can be done by the owner of a laptop computer, computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where the

“computer” happens to be a part of computer system or computer network and it becomes impossible to physically bring such system or network to the Court, then the only means of providing information contained in such electronic record can be in accordance with Section 65-B(1) of the Indian Evidence Act together with the requisite certificate U/S 65(B)(1) of the Indian Evidence Act.” A cursory glance of the principle reiterated by the Apex Court has made it clear that when the system could be produced, it should be produced by the owner or person who operated such device by himself, but in this case what was the role of Pradipta Kishore Nayak was never revealed in evidence and how he was concerned to produce the device or video C.D was not revealed in the evidence. Further, how he was competent to issue certificate U/S 65-B(1) of the Indian Evidence Act has never been revealed in the evidence. It is also not forthcoming from the

evidence as to whether said Pradipta Kishore Nayak was the service provider so as to enable him to issue a certificate. It is also not understood as to how the said Pradipta Kishore Nayak was withheld to step into the witness box when his evidence was not only important, but also the basis of conviction of the appellant for a charge of murder which prescribes punishment for life and death.

10. Be that as it may, it appears from the record that the said video clip was stored in a pen drive and sent to Central Forensic Science Laboratory, Kolkata for examination and expert opinion and the expert opinion was furnished under Ext.P.28., but before proceeding further to analyze Ext.P.28, this Court now evaluate the findings of the learned trial Court on such expert opinion. Learned trial Court has recorded its finding in this regard in paragraph-21 by stating that from the footage of video clipping i.e.

CAM01, it is found that at 1:11:12 A.M., the accused No.1 entered to the premises of the said hotel through gate. From CAM07, it is found that at about 05:25:43 A.M., both the deceased and accused No.1 were moving at dining hall, at 05:34:05 A.M. both entered to the room and there was exchange of words and tussle between them and the accused No.1 pressed the neck of the deceased. At about 05:55:20 A.M., the accused No.1 came outside from the room and till 05:57:18 A.M. moving there and left the place. Till 06:00:00 A.M. no one entered the said premises or room. What is true is that the learned trial Court has stated in the aforesaid paragraph that both the accused No.1 and deceased entered into the room and there was tussle between them and the "accused No.1 pressed the neck of the deceased", but such observation appears to be without any evidence since there is absolutely no evidence in this regard and it is also not

forthcoming from the judgment as to whether the learned trial Court has played the video clip in the Court in presence of both the counsels and parties and recorded such observation at the time of recording of the evidence. Further, Ext.P.28 does not reveal these facts which have been discussed by the learned trial Court in paragraph-21. Duty of the Court is to assess the evidence to arrive at a finding, but not to jump into conclusion by its own notion or personal observation. It is also not understood as to how the learned trial Court came to observe that both accused No.1(appellant) and deceased entered into the room and there was exchange of words and tussle between them and the accused No.1 pressed the neck of the deceased, since there is no evidence at all to suggest that the room was covered by any CCTV camera. Normal situation in a hotel is not to install any camera inside any room used for occupation of the guest. Further, the learned trial

Court has also observed that the accused No.1 and deceased were found together in the hotel at about 05:34:05 A.M. and the suggestive time of death of the deceased was approximately 4-24 hours from the time of postmortem examination and thereby, such fact implies that the accused No.1 was found to be with the deceased within 4-24 hours from the suggestive time of the death of the deceased as revealed from the medical evidence, but there is hardly any evidence to indicate that the appellant (accused No.1) was solely found with the deceased within 4-24 hours just before the suggestive time as stated in the postmortem report.

11. Even on coming to Ext.P.28, it appears that one pen drive, one red & black color SanDisk Cruzer Blade 8 GB pen drive, four card size photographs of a person and four attested photographs of the appellant were sent to CFSL, Kolkata, but it was strange that although P.W.22

has seized such photographs with certificate given by the photographer Arun Kumar Sahoo under seizure list Ext.P/16, but the prosecution has neither examined the said Arun Kumar Sahoo as a witness nor were the photographs identified as material objects in the Court. It is also not forthcoming as to how and when the photographs of the accused No.1 (appellant) were taken by the photographer. In the digital age, it cannot be ruled out about manipulation in photographs by use of different Apps such as "Photoshop". It is, however, revealed from Ext.P.28 that video footage of camera CAM01 to CAM08 were analyzed, but no incidence could be read from CAM02 to CAM05, CAM07 and CAM08, whereas following facts were noticed by the Assistant Director, CFSL, Kolkata, Dr. P. Paul Ramesh in the report(Ext.P.28):-

*(i) The CAM01 consisted the view of a **front area** of the premises with three doors. Jeep parked in the premises. Person*

Marked **X** enters in to the premises at 01:11:12 AM and looks in to the doors and entered into one door. One lady comes out from the same door for natural call and goes back. At 04:47:46 AM she comes out and goes towards to jeep followed by the person marked **X**. After two minutes person marked **X** return to room followed by a lady.

(ii) The CAM02 consisted the view of a **kitchen**. It is dark, no incidence can be read.

(iii) The CAM03 consisted the view of a **kitchen**. It is dark, no incidence can be read.

(iv) The CAM04 consisted the view of a **dining hall**. It is dark, no incidence can be read.

(v) The CAM05 consisted the view of an **unknown**. It is dark, no incidence can be read.

(vi) The CAM06 consisted the view of the **kitchen/storage room** dated 2015-09-09(YYYY-MM-DD format) from 01:00:00 AM to 06:00:00 AM. One female can be seen wearing a dark pink coloured blouse and was using yellow printed saree as a blanket and she is observed to be sleeping. She was marked as **Y**. At 04:18:08 hours, the female wakes up and goes somewhere. At 04:19:31 hours, one person wearing purple t-shirt and black trousers can be partially seen in the available file footage angle. He was marked as **Z**. At 04:20:17,

person marked as **Y** can be partially seen in the available file footage angle. At 04:20:50, the person marked as **Y** can be observed interacting with someone but the other person is not seen in the available file footage angle. At 04:22:18, person marked as **Y** makes a bed and wears a saree (which she was using as a blanket) and goes somewhere. **A person** can be seen following her.

(vii) The CAM07 consisted view of a **dining hall** dated 2015-09-09(YYYY-MM-DD format) from 01:00:00 AM to 06:00:00 AM. Though some movement can be observed in the footage, due to darkness, no incidence can be read.

(viii) The CAM08 consisted the view of the **unknown**. Due to the darkness, no incidence can be read.

(ix) The morphological class and individual characteristics of the male person marked as **X** in the CCTV footages and frames of the exhibit '**BR**' and the morphological class and individual characteristics of the male person present in the photographs of the exhibits **A1 to A4** were compared and found to be consistent.

The Assistant Director of CFSL, Kolkata in the Forensic report vide Ext.P.28 has furnished the following opinion:-

(i) The exhibit BR consisted 40 files which consisted CCTV footage of dated 2015-09-09(YYYY-MM-DD format) from 01:00:00 AM to 06:00:00 AM of a CAM01, CAM02, CAM03, CAM04, CAM05, CAM06, CAM07 and CAM08. Person Marked **X** enters in to the premises at 01:11:12 AM. At 04:47:46 AM one lady comes out and goes towards to jeep followed by the person marked **X**. After two minutes, person marked **X** returned to room followed by a lady.

(ii) The CAM02 and CAM03 consisted a view of the kitchen of dated 2015-09-09(YYYY-MM-DD format) from 01:00:00 AM to 06:00:00 AM. Due to the darkness, no incidence can be read.

(iii) The CAM04 consisted the view dated 2015-09-09(YYYY-MM-DD format) from 01:00:00 AM to 06:00:00 AM of a dining hall. Due to the darkness, no incidence can be read. सत्यमेव जयते

(iv) The CAM05 and CAM08 consisted the view of an unknown. It is dark, no incidence can be read.

(v) The CAM06 consisted the view of the kitchen/storage room dated 2015-09-09(YYYY-MM-DD format) from 01:00:00 AM to 06:00:00 AM. One female marked as **Y** could be observed sleeping till 04:18:08 hours and later can be seen interacting with a partially seen person marked as **Z**. At 04:22:18 the female person marked as **Y** wears a saree and goes somewhere. She was followed by the person marked as **Z**.

(vi) The CAM07 consisted view of a dining hall dated 2015-09-09(YYYY-MM-DD format) from 01:00:00 AM to 06:00:00 AM. Though some movement can be observed in the footage, due to darkness, no incidence can be read.

(vii) The male person marked as **X** in the CCTV footages and frames of the exhibit '**BR**' and the male person present in the photographs of the exhibits **A1 to A4** are found to be same.

A careful glance of the opinion of the Assistant Director, there were presence of other persons in the CCTV footage which was marked in the opinion in the relevant portion of description in CAM01 and CAM06 which is reiterated again as follows:-

(i) The exhibit BR consisted 40 files which consisted CCTV footage of dated 2015-09-09(YYYY-MM-DD format) from 01:00:00 AM to 06:00:00 AM of a CAM01, CAM02, CAM03, CAM04, CAM05, CAM06, CAM07 and CAM08. Person Marked **X** enters in to the premises at 01:11:12 AM. At 04:47:46 AM one lady comes out and goes towards to jeep followed by the person marked **X**. After two minutes, person marked **X** returned to room followed by a lady.

(vi) The CAM06 consisted the view of the kitchen/storage room dated 2015-09-09(YYYY- MM-DD format) from 01:00:00 AM to 06:00:00 AM. One female marked as Y could be observed sleeping till 04:18:08 hours and later can be seen interacting with a partially seen person marked as Z. At 04:22:18 the female person marked as Y wears a saree and goes somewhere. She was followed by the person marked as Z.

In view of the facts as noticed in Ext.P.28 with regard to presence of persons marked as "Y and Z" and, therefore, the appellant cannot be forced to explain for being last seen with the deceased because Ext.P.28 never says that the appellant was alone present with the deceased, rather there was presence of other two persons which were in fact not explained/clarified by the prosecution nor it was found therefrom the observation of the learned trial Court as made in Paragraph-21.

12. On a conspectus of evidence on record together with the discussions made herein above,

it appears to the Court that the learned trial Court has ignored the non-examination of the material witness, who had issued the certificate U/S 65-B of the Evidence Act and the photographer from whose possession the photographs of the appellant were seized, but in a case of circumstantial evidence, these factors weigh heavily against the prosecution inasmuch as law is fairly well settled that the circumstance from which the conclusion of guilt is to be drawn should be fully and firmly established and should be consistent only with the hypothesis of guilt of the accused and they should be incapable of explaining the circumstance consistence with the hypothesis of innocence of the accused. In this case, the circumstance as found from Ext.P.28 is neither of such nature unerringly pointing towards the guilt of the appellant nor the doctrine of last seen theory can be invoked to hold the accused guilty of the offence for non-offering any

explanation, especially when it is not established beyond all reasonable doubt that the accused was only last seen with the deceased. It is, therefore, found that the learned trial Court has erred in appreciating the evidence to hold the appellant guilty of the offence U/S 302 of the IPC because the prosecution has not proved the guilt of appellant for such offence through admissible evidence beyond all reasonable doubt.

13. On coming to the conviction of the appellant for offence U/S 450 of the IPC, it appears that the conviction of the appellant for such offence rests on the basis of conviction of the appellant for offence U/S 302 of the IPC, but when such charge of murder having not been established by the prosecution beyond all reasonable doubt, the offence U/S 450 of the IPC which speaks for punishment for house trespass in order to commit the offence appears to be not established beyond all reasonable doubt.

Similarly, the offence U/S 3(2)(v) of the Act is concerned, it cannot be said to have been established against the offender merely because the offender is not a member of Scheduled Caste, whereas the victim is a member of Scheduled Caste. The essence of offence under the Act being the *mens rea* to commit offence against a person only because of his/her SC Caste, the commission of such offence by the appellant against the victim in this case cannot be considered to have been established, especially when the main charge of murder against the appellant is found not to have been established. Thus, in this case, the prosecution having not been able to establish the charge for offence U/S 302 of the IPC against the appellant, his conviction for offence U/S 3(2)(v) of the Act is unsustainable in the eye of law. In the wake of aforesaid, especially when the prosecution has not been able to establish the charge against the appellant for offence U/Ss.

450/302 of the IPC r/w Section 3(2)(v) of the Act, his conviction is liable to be set aside and the appellant is entitled to acquittal.

14. Resultantly, the appeal stands allowed on contest, but no order as to costs. As a logical sequitur, the judgment of conviction and order of sentence passed on 21.04.2023 by the learned Additional Sessions Judge-cum-Special Judge, Kandhamal at Phulbani in Sessions Trial Case No. 10 of 2016 are hereby set aside.

15. Since, the appellant is in custody, he will be set at liberty forthwith if his detention is not otherwise required in any other case.

(G. Satapathy)
Judge

I Agree

(D.Dash)
Judge

*Orissa High Court, Cuttack,
Dated the 8th day of January, 2024/S.Sasmal*