**IN THE HIGH COURT OF ORISSA AT CUTTACK**
**JCRLA No.52 OF 2021 : (A)**
**AND**
**CRLA No.625 OF 2023: (B)**

In the matter of Appeals under section 374 (2) of the Code of Criminal Procedure, 1973 and from the judgment of conviction and order of sentence dated 22.02.2021 passed by the learned Additional Sessions Judge, Rairangpur in Sessions Trial No.04 of 2017.

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Pagal @ Durga Beshra
(In JCRLA No. 52 of 2021) .... Appellants
Jitrai Soren @ Bale
(In CRLA No. 625 of 2023)

-versus-

State of Orissa .... Respondent
(In JCRLA No.52 of 2021 &
CRLA No. 625 of 2023)

Appeared in this case by Hybrid Arrangement
(Virtual/Physical Mode):

For Appellants - Mr.Sidhartha Swain,(Advocate)
(In JCRLA No.52 of 2021).
Mr.Jitendra Samantaray,
(Advocate)
(In CRLA No.625 of 2023).

For Respondent - Mr.S.K. Nayak,
Addl. Government Advocate,
(In both the JCRLA & CRLA)

***CORAM:***
**MR. JUSTICE D.DASH**
**DR.JUSTICE S.K. PANIGRAHI**

**Date of Hearing : 21.07.2023 : Date of Judgment: 24.07.2023**

***D.Dash,J.*** Since both these Appeals are directed against the judgment of conviction and order of sentence dated 22.02.2021 passed by the learned Additional Sessions Judge, Rairangpur in Sessions Trial No.04 of 2017

arising out of G.R. Case No.300 of 2016 corresponding to C.T. No.1189 of 2016 in connection with Bisoi P.S. Case No.54 of 2016 of the Court of the learned Sub-Divisional Judicial Magistrate (S.D.J.M.), Rairangpur; those had been heard together for their disposal by this common judgment.

The Appellants (accused persons) have been convicted for committing the offence under sections-302/201/34 of the Indian Penal Code, 1860 (for short, 'the IPC'). Accordingly, each has been sentenced to undergo imprisonment for life and pay fine of Rs.10,000/- (Rupees Ten Thousand) in default to undergo rigorous imprisonment for six months for the offence under sections 302 of the IPC and each of them has also been sentenced to undergo rigorous imprisonment for a period of five years and fine of Rs.2,000/- (Rupees Two Thousand) in default to undergo rigorous imprisonment for two months for the offence under sections 201 of the IPC with the stipulation that the substantive sentences would run concurrently.

**2**. On 04.07.2016 one Jogeswar Patra, a Gramrakshi discharging the duty as such under Bisoi Police Station in the District of Mayurbhanj received the information from some villagers of village Budhikhamari that a dead body was lying in the Judia Nala (rivulet). Having received such information, said Gramrakshi (P.W.21) with the villagers rushed to the spot and found one dead body lying on the ground with face being tied with a napkin facing downwards. It was also noticed that there were severe injuries on the neck. It having been learnt that some unknown culprit(s) having killed the deceased might have thrown the dead body inside that Judia Nala which is an isolated place; a written report to that effect being was lodged by the Gramarakhi (Informant-P.W.21) with the Officer-in-Charge (O.I.C.) of Bisoi Police Station. The same was treated

as F.I.R. (Ext.8) and after registration of the case, the O.I.C. (P.W.23) took up investigation.

In course of investigation, the Investigation Officer (P.W.23) examined the Informant (P.W.21)and then visited the spot. He prepared the spot map in presence of the witnesses and examined few other witnesses. After conducting the inquest over the dead body in presence of the witnesses, he prepared the report (Ext.1). He then sent the dead body for post mortem examination by issuing requisition. The waring apparels of the deceased and later on those of the accused Jitrai were seized under seizure lists, Ext.14 and Ext.13 respectively. The accused persons being arrested, it is said that they stated to have kept the Budia and blood stained Mosquito net (M.O.-I and M.O.-II) in a particular place (s) and expressed that they would give recovery of the same if taken to the place. The I.O. (P.W.23) states to have recorded their statements and it is said that pursuant to the statement, they led P.W.23 and others in giving recovery of the blood stained Mosquito Net and Budia from the place where they had kept and those were then seized under seizure list (Ext.7). On 09.10.2016, the Inspector-in-Charge (I.I.C.) of the Police Station (P.W.24) took up investigation from the first I.O. (P.W.23). After continuing with the investigation for few days and sending the incriminating articles for Chemical Examination through Court and on receiving the report, the second I.O. (P.W.24) submitted the Final Form on 31.10.2016 placing the accused persons to face the trial for committing the offence under section under sections 302/201/34 of the IPC.

**3.** On receipt of the Final Form as above, learned S.D.J.M., Rairangpur took cognizance of said offences and after observing the formalities, committed the case to the Court of Sessions. That is how the

trial commenced persons by framing the charges for the above mentioned offences against these accused persons.

**4.** The prosecution, during trial, in total has examined twenty-four (24) witnesses. As already stated, the Informant is P.W.21, who had lodged the F.I.R. (Ext.8). The independent witnesses are P.W.1, P.W.2, P.W.3, P.W.7, P.W.9, P.W.10, P.W.11, P.W.14, P.W.15 and P.W.19. Out of the other witnesses, the important are P.W.16 and P.W.17 as they are the witnesses to the seizure of the Budia and blood stained Mosquito net at the instance of the accused. The Doctor, who had conducted the autopsy over the dead body of the deceased has been examined as P.W.22 whereas the P.W.23 and P.W.24 are the two I.Os.

Besides leading the evidence by examining the witnesses, the prosecution has proved several documents which have been admitted in evidence and marked Ext.1 to Ext.16. The important of those are the F.I.R. (Ext.8), the inquest report (Ext.1), Post Mortem Examination Report (Ext.9). Further important documentary evidence is the so-called statement of the accused persons recorded by P.W.23 which has been admitted in evidence and marked Ext.4 and Ext.5 and the relevant seizure list showing seizure of the articles to produce. In the Trial, the Budia and blood stained Mosquito net seized in course of investigation were produced as Material Objects (M.O.-I and M.O.-II).

The plea of the defence is that of complete denial and false implication. However, no evidence, either oral or documentary, has been tendered from the side of the accused persons despite opportunity being provided in that regard.

**5.** The Trial Court on going through the evidence pilotted by the prosecution having first of all said that the death of Narayan was

homicidal in nature, has found the prosecution to have established the charge against the accused persons proving the incriminating circumstances through clear, cogent and acceptable evidence in making the chain complete in every respect leaving no other hypothesis other than the guilt of the accused persons. Accordingly, the accused persons have been convicted for having intentionally caused the death of Narayan and they have been sentenced as afore-stated.

**6.** Learned counsels for the Appellants (accused persons) did not dispute the nature of death of Narayan to be homicidal. He, however, submitted that the evidence relied as regards two circumstances which, according to the prosecution, are incriminating, on being joined is said to make the chain of events complete ruling out all the hypothesis other than the guilt of the accused persons have not been properly appreciated and when such evidence on their plain reading do not establish the circumstances in support of which those have been tendered, the finding of guilt against the accused persons as has been returned by the Trial Court is vulnerable. He further submitted that in so far as the last seen theory is concerned, the evidence of the witnesses are in variance with one another and the gap between the last seen and death being about three days, the evidence required for establishing the fact that deceased and the accused were last seen in coming over the time lag stands as the incriminating circumstance are highly wanting, He, therefore, submitted that the said circumstances having not been established by the prosecution beyond reasonable doubt and also when the so-called seizure of that Gudia and blood stained Mosquito Net at the instance of the accused having not been proved through clear, cogent and acceptable evidence, the accused persons are entitled to be acquitted.

**7.** Learned counsel for the Respondent-State supported the finding of guilt as has been returned by the Trial Court holding these accused persons liable for committing the offence under section 302/201/34 of the IPC. He submitted that series of witnesses when have consistently stated that the deceased after having gone with the accused-Durga when did not come back and his dead body was ultimately recovered after few days, as the accused persons are not providing any explanation as to what happened after the deceased went with them, the Trial Court has rightly taken that as one of the most important incriminating circumstance. He further submitted that said proven fact that the deceased and accused were seen last in the company of each other being taken with the evidence of recovery of the Budia (M.O.I) and Mosquito net (M.O.-II) at the instance of the accused persons and as it is the medical evidence that with that Buida (M.O.-I), the injuries noticed on the dead body of Narayan were possible, the Trial Court did commit no mistake in convicting the accused persons for having intentionally caused the death of Narayan.

**8.** Keeping in view the submissions made, we have carefully gone through the impugned judgment passed by the Trial Court. We have also extensively travelled through the depositions of all the prosecution witnesses (P.Ws.1 to 24) and have perused the documents admitted in evidence and marked exhibits (Exts.1 to Ext.16) from the side of the prosecution.

**9.** The term circumstantial evidence defined by Peter Murphyas evidence from which the desired conclusion may be drawn which requires the Tribunal of fact not only to accept the evidence presented but then to draw an inference from it. The term circumstantial evidence in India was used by Sri James Stephen for the first time stating that

these facts depend on other facts and exist if it is proved that the other fact existed. This means that the inference is drawn according to the reasonable prudent man based upon pre-exiting fact that has already been proved. Thus the circumstantial evidence does not establish complete guilt until every evidence is negating the innocence of the accused. The whole chain of fact and circumstance of the case should be so complete that from the same the existence of principal fact can legitimately be inferred or presumed and no suspicion or conjecture comes in the minds of the Court regarding the guilt of the accused when he can be convicted on the basis of circumstantial evidence.

The term 'circumstantial evidence' has not been sued directly in the Evidence Act. However, in section-3 of the act, the definition of the word 'proved' reads that if the existence of any fact is so probable which a prudent man will believe is to the exist than that is considered to be proved. This implies that the admissibility of circumstantial evidence that is based on logical inferences that direct evidence and circumstantial evidence are at par if the whole chain of events which happened collectively point unerringly at the guilt of accused. But if there is doubt that the accused is innocent and the chain of event is not complete then the benefit of the doubt has to go in favour of he accused.

**10.** In case of *Sudama Pandey V. State of Bihar*; (2002) 1 SCC 679, the following points have been stated to be kept in mind for holding the matter to have been proved with the aid of circumstantial evidence.

(a) Circumstances from which the inference had been drawn should be fully proved that they existed;

(b) All the facts that have been proved support the hypothesis of the guilt of accused;

(c) The chian of circumstances should be well connected and thus be completed so that it is conclusive; and

(d) The circumstances should toss out every possibility of the accused of being innocent.

**11**. Coming to the last seen in the theory doctrine, it be noted that this theory is found upon the principle of probability, cause and connection as no fact exists or takes place in isolation. Basically, it means that if an event happens that other event also occurs which are the probable consequences of the major event or is related to it either retrospectively or prospectively. These inferences or presumptions are drawn logically, according to how a reasonably prudent man will connect the dots is the prevailing scenario. It has its root with section -7 of the Indian Evidence Act called the 'Doctrine of Inductive Logic'. That states that if any fact related to the occasion cause or effect lead to the circumstance in which that thing occurred or it provided an opportunity in the occurrence of that thing then those facts will be relevant and in the last seen theory also a person who was last present with the victim would have a reasonable opportunity to commit the crime.

**12**. This presumption of fact taken under section 114 of the Evidence Act under which the Court can presume that certain facts exist, if some other facts are proved to be in cases of natural events, human conduct and public and private business. As for example if a person was the last person seen with another just before his murder, then it can be presumed, that such a person murdered the other under this theory since that person had adequate scope and opportunity to commit the crime. Be that as it may, the presumption is not considered as conclusive proof of the guilt of the person and those are rebuttable. It only shifts the onus

upon the person to prove that he is innocent which is an exception in the criminal law as the burden of the proving the guilt of the accused always lies upon the prosecution. Though the last seen theory relieves the prosecution of the onus of proving the guilt yet it is weak evidence and it needs to be corroborated with other factors like if there is motive with the person who was last seen with the deceased or he could have even inflicted the kind of injury that caused the death.

In cases of *Jaswant Gir V. State of Punjab*; (2005) 12 SCC 438, it has been held by the Apex Court that if other links are not present to corroborates the theory, then it is not safe to solely base the finding on this theory. The fact of last seen should also be supported by other facts in such a way that the circumstances are unerringly determinative in nature and conclusively prove the guilt of the person. The Court thus has to be on guard when deciding these kind of matters as even minute details can change the whole scenario of the case.

**13**. The settled law for a case to be held proven entirely based on circumstantial evidence, as has been detailed out in catena of decision are that:-

(a) every circumstances that leads to the guilt of the accused should be proved beyond reasonable doubt by the prosecution; and

(b) all the circumstances should cogently depict the guilt of the accused leaving no incongruities, suspicions so as to lead to the establishment of the guilt beyond reasonable ground and to in a half-backed situation.

**14**. In case of *Digambar Vaishnab V.State of Chhattisgarh*: (2019) 4 SCC, it has been held that there should be reasonable proximity between the time of seeing the person and recovery of the body to point the needle towards the person last seen with the deceased. However simply that they were last seen together cannot be the sole criteria to convict the accused. Last seen theory with other obtained circumstances negating the innocence of the accused can lead to base the conviction banking upon the doctrine of last seen. In some cases though there are huge time gap between the occurrence of the event and the time when last seen together still if the prosecution establishes the fact that no other person could have interfered or intervened as there was exclusive possession of the accused to the place where the incident occurred, then based on this, also the last seen theory can be established and presumption can be taken despite a huge time gap. (Ref:-Satpal Singh V. State of Haryan: (2010) 8 SCC 714.

**15**. Keeping in mind the above said legal position, in order to address the rival submission in judging the sustainability of the Trial Court's finding holding the accused guilty of the charges, let us now have a look at the evidence to see that the same if pass through the tests as aforesaid.

**16.** As per the prosecution case, one evening accused-Durga when called the deceased Narayan to his house, they went together and three days thereafter the dead body of Narayan was recovered from the rivulet. This, according to the prosecution, is the first most important circumstance. Therefore, we are now called up to examine the evidence in support of the last seen theory. P.W.1 is a friend of the deceased. He states that on one evening Narayan had gone to his house and there accused-Durga came and called him to his house. So, both of them went together.

It be stated here that the deceased Narayan is a resident of village Pokharia whereas the accused Durga is a resident of village Judia. It is his further evidence that thereafter Narayan did not return to his house. This P.W.1 is a resident of village Jamiradiha and when deceased is a resident of village Pokhari, he was not supposed to return to the house of P.W.1 and therefore, the evidence of this P.W.1 that the deceased did not return back to his house is of absolutely no significance when he does not say that the deceased had told that he would return to the house of P.W.1 after attending some events in the house of accused-Durga. When he too does not state to have gone to the house of the accused; his evidence if taken that the deceased did not return to his own house is not acceptable. This P.W.1 is also not stating as to when he saw the dead body. The fact remains that the dead body was found on 04.07.2016, which is said to be three days after the deceased Narayan and accused Durga were together seen last.

P.W.2 is none other than the wife of P.W.1. He has stated in the same line as that of P.W.1. She states to have no knowledge as to which place the accused-Durga and deceased-Narayan went from their house. When P.W.2 has stated that accused Durga came and called Naryan to go to his house to see his daughter who was suffering from fever, that is, however, not the evidence of P.W.1. So the very purpose of accused proceeding to the house of accused Durga is only being stated by P.W.1 and his wife (P.W.2) is not supporting that which ordinarily she was supposed to. That being so, a doubt arises in mind as regards the presence of both P.W1 and P.W.2 at the relevant time in their house. P.W.3 is the daughter of P.W.1 and P.W.2. She does not state as to citing what reason, the accused Durga called deceased Narayan to go with him.

It be stated here that deceased-Narayan is the maternal uncle of P.W.3 and thus the brother of P.W.2 and brother-in-law of P.W.1. None of these three witnesses have stated that after deceased Narayan left their house and did not return to their house whether they had inquired anything about the deceased Narayan as to what happened to him which was quite natural and obvious. They do not state to have gone to the house accused-Durga to ask him regarding the whereabouts of Narayan nor even to the house of Narayan to ask the family members. It is also not stated by them as to whether they had seen the dead body of Narayan after having been informed about the recovery of the same by Narayan and there to have immediately disclosed before others to that might's happening when they say deceased Narayan left their house with accused Durga. Therefore, the evidence of these three witnesses, in our considered view, are of no use to the prosecution in support of the projected theory of last seen.

P.W.7 is another witness, who only knew deceased-Narayan being her nephew (husband's elder brother's son). It is her evidence that on one Saturday Narayan had left the house by saying that he was going to village Jamirdiha and thereafter did not return and next Tuesday Police called her and the daughter of Narayan to identify the dead body in the Sub-Divisional Hospital, Rairangpur. This evidence of P.W.7 does not run at all stand in support of the last seen theory. He does not say even to have seen accused with Narayan. She simply says that Narayan having told that he was going to village Jamirdiha, had left the house. The evidence of the daughter of the deceased (P.W.8) is only in respect of identification of the dead body and nothing else. The nephew of Narayan (P.W.9) has stated that few days before the death (it means before the recovery of the dead body) Narayan had left the house to

attend the weekly market at Bisoi. This again goes completely different from what has been stated by P.W.7 and that has also been stated by P.W.11 who is another nephew of Narayan. This P.W.11 has however stated that Narayan was known as a Gunia (Witch Doctor) From this judicial notice of the situations prevalent in the rural areas populated by mostly members of Scheduled Tribe that such persons known as Gunia (/witch Doctor) face very rough weather in their life with so many friends and equal number of foes too. With the above evidence on record, we find that the last seen theory does not at all stand in support of the prosecution case.

**17**. Coming to the other circumstance with regard to the recovery of Budia and Mosquito net, the prosecution is relying upon the evidence of P.W.16 and P.W.17 as also the I.O. (P.W.23). It has been stated by P.w.16 that when both the accused persons were present at the Police Station, they confessed their guilt. This part of the evidence of P.W.16 which has also been stated by P.W.17 is inadmissible in the eye of law in view of the provision contained in section 25 of the Evidence Act. Furthermore, none of these witnesses is stating as to why and for what purpose they had been to the Police Station on that day and were present right at the relevant time. It is not stated by them that at what time they saw the accused persons at the Police Station. P.W.16 then straightway says that he went with the Police and the accused where the accused persons showed the place of concealment of Buida and Mosquito net. He again states that accused Jitrai gave recovery of that Gudia from a straw heap and accused Durga gave recovery of Mosquito net from house. Having not stated as to where the statements of the accused persons were recorded, he has directly proved the statements of accused Jitrai and that of accused Durga. The evidence of P.W.17 is almost the

replica of the evidence of P.W.16. These two persons are of another village and how they knew the accused persons is also not stated by them.

With the above evidence, let us now turn to the evidence of P.W.23 (the I.O.). He says that on 06.07.2016, he arrested accused Durga from his father-in-law's house situated at village Masinabila under the jurisdiction of Bangiriposi Police Station (which adjoins the jurisdiction of Bisoi Police Station). The arrest is said to have been made at 11.15 p.m., He has stated that after arrest accused Durga confessed to have committed the crime with accused Jitrai and therefore, accused Jitrai was arrested from his house. So, the only material against the accused Jitrai is the statement of accused Durga before the police and thereafter, the so-called statement of accused Jitrai himself in confessing his guilt after being arrested and leading P.W.23 in giving recovery of the incriminating articles. It is then stated by P.W.23 that during interrogation both of them agreed for discovery of weapon of offence and so the place of occurrence. We putting a full stop here just think that this P.W.2 thereby meant to say that on being asked or proposed they agreed. Having said this, we do not think it proper to proceed further as such evidence of this witness (P.W.23) who is the I.O. of the case is enough to discard the circumstance projected by the prosecution as to the recovery of the Buida and Mosquito net at the instance of the accused persons. The evidence on this score are wholly unsatisfactory. We find that the Trial Court has committed grave error in admitting and accepting the evidence of P.Ws.16, 17 and 23 being read together within the ambit under section-27 of the Evidence Act.

Thus, in view of the discussion of evidence as above, we find ourselves in disagreement with the finding of the Trial

Court that the prosecution has established the charges against the accused persons beyond reasonable doubt. Therefore, we are constrained to hold that the judgment of conviction and order of sentence passed by the Trial Court cannot be sustained and are liable to be set aside.

**18.** In the result, the Appeals are allowed. The impugned judgment of conviction and order of sentence dated 22.02.2021 passed by the learned Additional Sessions Judge, Rairangpur in Sessions Trial No.04 of 2017 are hereby set aside.

Since both the Appellants (Pagla @ Durga Beshra and Jitrai Soren @ Bale and are in jail custody, they be set at liberty forthwith, if their detention is not required in connection with any other case.

***(D. Dash)***
***Judge.***

***Dr. S.K. Panigrahi,J*** I agree.

***( Dr. S.K. Panigrahi)***
***Judge.***

*Himansu*