IN THE HIGH COURT OF ORISSA AT CUTTACK

JCRLA No.81 of 2006

AFR

Kasinath Mallick .... ***Appellant***

-versus-

State of Odisha .... ***Respondent***

Advocates appeared in this case:

For the Appellant : Mr. Debasis Sarangi, Amicus Curiae

For the Respondent : Mr. Janmejaya Katikia, Addl. Government Advocate

CORAM:
THE CHIEF JUSTICE
JUSTICE G. SATAPATHY

JUDGMENT
14.07.2023

Dr. S. Muralidhar, CJ.

1. This appeal is directed against a judgment dated 13th April 2006 passed by the Additional Sessions Judge, Boudh in S.T. Case No.22 of 2005 convicting the Appellant for the offence punishable under Section 302 of IPC and sentencing him to undergo imprisonment for life.

2. By an order dated 19th January 2012, this Court directed that the Appellant be enlarged on bail during the pendency of the appeal.

3. The case of the prosecution is that on 24th October 2004 at around 9.30 am, while the Appellant was returning from the village Baragochha with his wife Bhagyaseni Mallick @ Keta (hereafter, 'the deceased'), on the way at Lungurujena near Kenjari jungle, he brutally assaulted the deceased by means of a stone and she died on the spot. On the report of Balakrushna Mahamallik (P.W.1), the local police commenced investigation. Surendra Baghsingh (P.W.11), who was the Officer-in-Charge, Manamunda Police Station (PS), received a written report of P.W.1 and in the course of investigation he visited the spot and examined witnesses. On 25th October 2004, he held an inquest over the dead body of the deceased. He seized the bloodstained earth, sample earth, the piece of stone stained with blood in the presence of witnesses and prepared a seizure list. He then sent the dead body for autopsy. He seized the wearing pant and shirt of the Appellant, the ornaments of the deceased and arrested the Appellant on 26th October, 2004. The statements of two of the witnesses were recorded under Section 164 Cr PC on 8th November, 2004. After receipt of the postmortem report and chemical examination report, P.W.11 submitted a charge sheet on 11th January, 2005.

4. The Appellant pleaded not guilty and claimed trial. 11 witnesses were examined for the prosecution. Of these, the statements of Bishnu Prasad Sahu (P.W.6) and Bhikari Charan Meher (P.W.3) were, in the course of investigation recorded also under Section 164 Cr PC. No witness was examined for the Appellant.

5. On an analysis of the entire evidence, the trial court came to the conclusion that the prosecution had proved its case against the Appellant beyond all reasonable doubt. As regards the delay in registering the FIR, it was noted that no question had been put to the I.O. regarding its cause and further, no prejudice was shown to have been caused to the Appellant on that score. The Appellant was accordingly convicted of the offence punishable under Section 302 IPC and sentenced in the manner indicated.

6. This Court has heard the submissions of Mr. Debasis Sarangi, learned Amicus Curiae for the Appellant and Mr. Janmejaya Katikia, learned Additional Government Advocate for the State.

7. There are two eye-witnesses to the occurrence i.e., P.Ws.3 and 6. Both of their statements under Section 164 Cr PC were recorded. P.W.4 was a post occurrence witness, whereas P.Ws.5, 7 and 10 were witnesses to the seizure. Dr. Sk. Maniruddin (P.W.9) conducted the postmortem.

8. The following injuries on the body of the deceased were noticed by P.W.9:

> "(iii) There was a laceration of tongue of right side by the fractured ends of the lower jaw of right side. There was compound fracture of the right lower jaw which was broken into three pieces each of size 1 and ½ cm. x 2cm x 1cm. with a loss of two teeth, one premolar and one canine. There was dislocation of the right lower jaw from the joint tamper mandible joint."

9. As regards the cause of death, the opinion was as under:

> "Fracture and dislocation of the lower jaw of the right side leading to profuse haemorrhage, shock and suffocation."

10. The seized stone was shown to P.W.9 and he confirmed that the injuries over the body of the deceased could have been caused by it. P.W.9 was subjected to cross-examination and he was categorical that the injuries that he had detected were not possible by the impact of a medha or stick. He also ruled out the injury as a result of a woman suffering from epilepsy falling on a stony surface. He stated in his cross-examination that "in fact disfiguration is quite obvious in the present case, but I have not specifically so mentioned in my report".

11. P.W.3 very clearly stated that while he was proceeding to the Gundulia hat on the way at Kenjari jungle near a turning, he found a young girl child weeping near a bicycle on the road. Soon thereafter, P.W.3 saw the Appellant brutally assaulting the deceased with a stone on the chest, face and neck. When P.W.3 raised a protest, the Appellant threatened him and out of fear, P.W.3 receded from the spot. He noticed one Bishnu Sahu (P.W.6) arriving at the spot. In his cross-examination, P.W.3 stated that when he asked the Appellant what he was doing there, the Appellant stood up holding a stone stained with blood and threatened to kill P.W.3. The cross-examination of this witness does not seem to have yielded much for the defence.

12. Likewise, P.W.6 stated that he too noticed a female child crying near a cycle parked on the road and he too saw the Appellant assaulting the deceased on her face and chest with a

stone. He too noticed P.W.3 coming from Gundulia side. On the material aspects, both P.Ws.3 and 6 completely corroborated each other. In their respective statements under Section 164 Cr PC they were consistent in their version naming the present Appellant as being the assailant and his attacking the deceased with a stone on her neck and head.

13. The medical evidence has fully corroborated the eye-witness testimonies of P.Ws.3 and 6. Both these witnesses are the independent witnesses unrelated to the deceased or the Appellant. Recently in ***Shahaja @ Shahjahan Ismail Mohd. Shaikh v. State of Maharashtra*** (judgment dated 14th July, 2022 in Crl. A. No. 739 of 2017), the Supreme Court of India has summarized the legal principles governing the appreciation by courts of eye-witness testimony as under:

> "27. The appreciation of ocular evidence is a hard task. There is no fixed or straight-jacket formula for appreciation of the ocular evidence. The judicially evolved principles for appreciation of ocular evidence in a criminal case can be enumerated as under:
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> I. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.
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> II. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor

of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details.

III. When eye-witness is examined at length it is quite possible for him to make some discrepancies. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence.

IV. Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

V. Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.

VI. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

VII. Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

VIII. The powers of observation differ from person to person. What one may notice, another may not. An object or

movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

IX. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

X. In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

XI. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

XII. A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross examination by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.

XIII. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to contradict that witness. [See *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, 1983 Cri LJ 1096 : AIR 1983 SC 753, Leela Ram v. State of Haryana, AIR 1999 SC 3717, and Tahsildar Singh v. State of UP, AIR 1959 SC 1012*]

28. To put it simply, in assessing the value of the evidence of the eye-witnesses, two principal considerations are whether, in the circumstances of the case, it is possible to believe their presence at the scene of occurrence or in such situations as would make it possible for them to witness the facts deposed to by them and secondly, whether there is anything inherently improbable or unreliable in their evidence. In respect of both these considerations, the circumstances either elicited from those witnesses themselves or established by other evidence tending to improbabilise their presence or to discredit the veracity of their statements, will have a bearing upon the value which a Court would attach to their evidence. Although in cases where the plea of the accused is a mere denial, yet the evidence of the prosecution witnesses has to be examined on its own merits, where the accused raise a definite plea or puts forward a positive case which is inconsistent with that of the prosecution, the nature of such plea or case and the probabilities in respect of it will also have to be taken into account while assessing the value of the prosecution evidence."

14. Tested on the anvil of the above principles, this Court finds that the testimonies of the eye witnesses P.Ws.3 and 6 to be credible and reliable. Further they have received independent corroboration by the medical evidence. Therefore, it is safe to convict the Appellants on the basis of such evidence.

15. Although, learned Amicus Curiae for the Appellant sought to argue that there was an unexplained delay in the lodging of the FIR and some inconsistencies in the depositions of P.Ws.3 and 6 and in particular, the statement of the I.O., this Court finds that these really do not help the defence very much. There is some admission made by the I.O. about P.W.6 not telling him about the Appellant uttering certain words to the deceased and chasing her.

However, on the material aspects of the statements of P.Ws.3 and 6 not much has been elicited from even P.W.11 to discredit their testimonies. As rightly pointed out by the trial court, even on the aspect of delay in lodging the FIR, no question was put to this witness to explain it. Therefore, this cannot be said to have weakened the case of the prosecution. Added to all of this is the chemical examination report which clearly showed that the clothes of the deceased contained stains of human blood. The stone had human blood of AB grouping. All of this strengthened the case of the prosecution against the Appellant.

16. Viewed from any angle therefore there is absolutely no case made out by the Appellant for interference with the impugned judgment of the trial court. The present appeal is accordingly dismissed.

17. The bail bonds of the Appellant are hereby cancelled. He is directed to surrender forthwith and, in any event, not later than 14th August 2023 failing which the IIC of the concerned Police Station will take steps to apprehend him to serve out the remaining sentence. A copy of this judgment be sent forthwith to the IIC of concerned Police Station for necessary action.

(S. Muralidhar)
Chief Justice

(G. Satapathy)
Judge

S.K. Guin/PA