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JAHARLAL DAS

v.

STATE OF ORISSA

APRIL 12, 1991

B [S. RATNAVEL PANDIAN AND K. JAYACHANDRA REDDY, JJ.]

Indian Penal Code, 1860: Sections 302 and 376—Rape and murder—Criminal trial—Death penalty—Circumstantial evidence—Sufficiency of evidence for conviction—Gravity of offence cannot over-
C *weigh legal proof—Caution against basing conviction on suspicion—Court should ensure that conjectures and suspicions do not take the place of legal proof—Necessary conditions for circumstantial evidence as a basis for conviction explained—Inquest Report—Purpose of.*

The appellant was tried for rape and murder of a girl aged five
D **years. The entire evidence against him was circumstantial: (a) the accused and the deceased were last seen toghether; (b) false explanation given by the accused regarding the whereabouts of the deceased; (c) alleged recovery of the dead body of the deceased at the instance of the accused and (d) presence of abrasions on the genital of the accused as well as blood stains on his wearing apparells and nail clippings. Relying**
E **on the circumstantial evidence the Trial Court convicted him under Sections 302 and 376 and sentenced him to death for the offence of murder and seven years rigorous imprisonment for the offence of rape. The High Court confirmed the conviction and the sentence awarded by the Trial Court. In appeal to this court it was contended on behalf of the appellant that the circumstantial evidence is wholly insuf-**
F **ficient to bring home the guilt of the accused.**

Allowing the appeal, this Court,

HELD: 1. The circumstantial evidence in order to sustain the conviction must satisfy three conditions; (1) the circumstances from which
G **an inference of guilt is sought to be drawn, must be cogently and firmly established; (ii) those circumstances should be of a definite tendency nerringly pointing towards the guilt of the accused; (iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, and it should also be**
H **incapable of explanation on any other hypothesis than that of the guilt of the accused. [303E-F]**

Hanumant and Anr. v. *The State of Madhya Pradesh,* [1952] SCR 1090; *Reg* v. *Hodge,* [1838] 2 Lew. 227; *Dharam Das Wadhwani* v. *State of Uttar Pradesh,* [1974[3 S.C.R. 607 and *Jagta* v. *State of Haryana,* [1975] 1 SCR 165, referred to. A

2. In cases depending largely upon circumstantial evidence there is always a danger that the conjecture or suspicion may take the place of legal proof and such suspicion however so strong cannot be allowed to take the place of proof. The Court has to be watchful and ensure that conjectures and suspicions do not take the place of legal proof for sometimes unconsciously it may happen to be a short step between moral certainty and the legal proof. At times it can be a case of 'may be true'. But there is a long mental distance between 'may be true' and 'must be true' and the same divides conjectures from sure conclusions. The Court must satisfy itself that the various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. [304F-G, 309E-F] B C

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3. In the instant case the circumstance that the deceased was last seen in the company of the accused is not established beyond reasonable doubt. This circumstance was not mentioned in the Inquest Report prepared by the Investigating Officer. Further the statement of the parents of the deceased that the accused took the deceased girl by itself is not enough to conclude that the deceased was last seen in the company of accused because even according to them on being enquired the accused told them that he had sent the girl back in a truck. [308C, 305F] E

3.1 The prosecution has not conclusively proved the crucial circumstance of the recovery of the dead body of the deceased girl at the instance of the accused. No Panchnama was prepared for such a discovery under Section 27 of the Evidence Act and there is no mention in the Inquest Report as to how the body was discovered. On the other hand there is any amount of doubt and suspicion about the accused having shown the place of occurrence. Once it is held that the crucial circumstance namely the discovery of the body at the instance of the accused is not established, than the other circumstances are hardly sufficient to establish the guilt of the accused. [308B-C-D, 306B, 307C] F G

3..2 The explanation given by the accused that he sent the girl back to the village in a truck cannot be held to be not plausible and therefore false because it is not uncommon in villages for children to go about the fields and walk short distances while coming back to the village. [308E] H

3.3 The prosecution has also not established that the accused had an intercourse on the day of the occurrence. When the docotor who examined the accused stated that he could not find any sign of sexual intercourse atleast within one hour of his examination then it is only a matter of conjectures as to when the accused had any intercourse. The presence of blood in the nail clippings and on the underpant does not also incriminate and do not connect the accused in any manner with the alleged offences. The accused also had given an explanation namely that his gums were bleeding and in wiping out the same he got these blood stains. Even otherwise this circumstance coupled with the circumstance of last seen in the company of the accused would not amount to legal proof of the guilt particularly when the crucial circumstance namely that the accused showed the dead body is held to be not established. When such a main link goes, the chain gets snapped and the other circumstances cannot in any manner establish the guilt of the accused beyond all reasonable doubts. Therefore there is a reasonable doubt about the guilt of the accused and the benefit of the same should go to him. Accordingly the conviction and sentence of the accused is set aside. [309B-C, F-G]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 276 of 1991.

From the Judgment and Order dated 16.7.1990 of the Orissa High Court in Criminal Appeal No. 117 of 1990 And Death Reference No. 1 of 1990.

H.K. Puri (Amicus Curiae) for the Appellant.

A.D. Giri, Solicitor General and A.K. Panda for the Respondent.

The Judgment of the Court was delivered by

K. JAYACHANDRA REDDY, J. Leave granted.

This is a case of death sentence. The fact that such a sentence is awarded even in the year 1990 would immediately suggest that the offence involved should be of a grave nature. Yes, the offence is not only grave but heinous and inhuman.

A girl aged five years was a victim of rape and thereafter murder. The sole appellant before us was tried, convicted and sentenced to death by the Sessions Court and confirmed by the High Court. It is a

case depending entirely on circumstantial evidence and the obvious contention is that the circumstantial evidence is wholly insufficient to bring home the guilt to the accused. A

No doubt the offence is a shocking one but the gravity of the offence cannot by itself overweigh as far as legal proof is concerned. Invariably in such cases a person last seen with the victim, unless otherwise there are circumstances prima facie exonerating him, would be the prime suspect but in the ultimate judicial adjudiciation suspicion, howsoever strong, cannot be allowed to take the place of proof. With that caution in mind we shall now proceed to examine the facts and circumstances as put forward and the various arguments advanced. B

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The deceased Disco alias Sukumari, a girl aged 5 years was the daughter of P. Ws 1 and 6, the father and the mother who were drummers by castes. They belong to village Badachatra, an interior part of Mayurbhanj District. They had three children and the deceased was the eldest. In the year 1988 during Kalipuja time the accused who was the resident of Tulsibani village about one kilometre away, came to the house of P. Ws 1 and 6. He named their newly born daughter. He took his meals in their house and went away saying that he would come with the new dressses for the newly born daughter. Next day i.e. on 9.11.88 he came to their house in the morning with new dressses. He told the parents that he would take the deceased with him to Bombay Chhak to get new dresses for the other two children. He took his lunch and went with the deceased towards Bombay Chhak. Sometime after his departure P. W. 6 told her husband P. W. 1 to proceed to Bombay Chhak as the deceased might be crying. Accordingly P.W. 1 accompanied by one Sambhu proceeded towards that Chhak. On the way they met one Babuli and asked him whether he had seen the accused and the deceased to which he replied in the negative. P.W. 1 came back to the village and sat in the shop of P.W. 2 who informed that he had seen the accused going towards village Tulsibani alongwith the deceased. P.W. 1 and Sambhu then went to that village but could not find them there. Thereafter they went to Jharpokharia Police Station and gave a report to the Officer-in-charge P.W. 11 stating that the deceased and the accused have not returned. He made an entry in the station diary. From there P.W. 1 again went to the Tulsibani Village where a person informed him that he has seen the accused going towards his house. P.W. 1 went there and enquired the accused. He told P.W. 1 that the deceased had gone back home but P.W. 1 caught hold of him but the accused squirmed away from his grip. P.W. 1, however, again caught him and took him to his Village and according to P.W. 1 D E F G H

A on being questioned the accused confessed to have raped and committed murder of the deceased. The accused is alleged to have pointed the place where he had thrown the dead body, whereafter P.W. 1 and others proceeded in that direction. P.W. 11 the Police Officer also came in a jeep and took the accused into custody, drew up an F.I.R. and sent the same to the Police Station for registration of a case. The accused is alleged to have led the Police party to the spot where the dead body was lying. P.W. 11 found the deceased lying with injuries on her vagina and other parts. He held the inquest in the presence of P.W. 4 and others and sent the dead body for post-mortem. P.W. 7 conducted the post-mortem. He noticed abrasions all over the body. He also found one bruise on the left side of the forehead and a lacerated wound of 2.5 cm × 1 cm × muscle deep starting from the posterior angle of vagina along the perinium upto the anus. On inrternal examination he found the following injuries:

> "(1) Soft tissues and muscles below the external injuries to the neck were contused with extra-vassation of blood into the soft tissues.
>
> (2) Heamatoma under the scalp corresponding to external injury No. 11.
>
> (3) The hymen was torn and the floor of the vagina i.e., vaginal channel was lacerated. This injury corresponds to external injury No. 15."

The Doctor opined that all the injuries were antemortem and homicidal in nature and cause of death was due to asphyxia and shock as a result of strangulation and also due to injuries to the vagina. He also opined that the injuries on the neck suggest that the deceased was strangulated by pressure of hands. So far injury to the vagina is concerned, he was of the opinion that the same could have been caused by forcible penetration of a male organ. The accused also was examined on 10.11.88 itself by another Doctor P.W 8 for some abrasions on his genital. P.W. 8, however, categorically stated that on examining the accused he could not find any recent sign of sexual intercourse. The prosecution relied on some blood stains which were found on his dhoti but the accused explained away by saying that they were caused by the bleeding of his gums. The accused when examined under Section 313 pleaded not guilty. He, however, admitted that he went to the house of P.W. 1 but denied the rest of the case.

The trial court did not accept the P.W. 1, s evidence regarding the extra-judicial confession alleged to have been made by the accused. It held that nobody else has mentioned about this extra-judicial confession and at any rate it was supposed to have been made in the presence of the police. We have also examined the evidence of P.W. 1 as well as the evidence of the other witnesses. The trial court has rightly rejected this part of the prosecution case regarding the alleged extra-judicial confession. As a matter of fact we do not find anywhere mentioned that such a confession was made by the accused to P.W. 1 neither in the F.I.R. nor in the evidence of other witnesses who were also said to have been present when the accused was brought to the Village by P.W. 1. P.W. 6, who is no other than the wife of P.W. 1, did not even mention about it.

The trial court, however, relying on the other circumstances convicted the accused under Sections 302 and 376 I.P.C. and sentenced him to death subject to confirmation by the High Court and for seven years' rigorous imprisonment for the offence of rape. The sentences are directed to run concurrently. The High Court confirmed the conviction and sentence awarded by the trial court.

As already mentioned this case rests purely on circumstantial evidence. It is well-settled that the circumstantial evidence in order to sustain the conviction must satisfy three conditions; 1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused. In the leading case *Hanumant and Another* v. *The State of Madhya Pradesh,* [1952] SCR 1090 it is also cautioned thus:

> "In dealing with circumstantial evidence there is always the danger that conjecture or suspicion may take the palce of legal proof. It is therefore right to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the

A circumstances should be of a conclusive nature and tendency, and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such
B as to show that within all human probability the act must have been done by the accused."

Mahajan, J., as he then was, has also aptly referred to a passage containing the warning addressed by Baron Alderson to the *Jury in Reg* v. *Hodge*, [1838] 2 Lew 227 which is stated as under:

C "The mind was apt to take a pleasure in adapting circumstances to one another and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to over-
D reach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

In *Dharam Das Wadhwani* v. *State of Uttar Pradesh*, [1974] 3 SCR 607 it was held that "unlike direct evidence the indirect light circumstances
E may throw may vary from suspicion to certitude and care must be taken to avoid subjective pitfalls of exaggerating a conjecture into a conviction." In *Jagta* v. *State of Haryana*, [1975] 1 SCR 165 it was held that "The circumstances that the accused could not give trustworthy explanation about the injuries on his person and about his being present on the scene of occurrence are hardly sufficient to warrant conviction."

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It may not be necessary to refer to other decisions of this Court except to bear in mind a caution that in cases depending largely upon circumstantial evidence there is always a danger that the conjecture or suspicion may take the place of legal proof and such suspicion however so strong cannot be allowed to take the place of proof. The Court has
G to be watchful and ensure that conjectures and suspicions do not take the place of legal proof. The Court must satisfy that the various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. Bearing these principles in mind we shall now consider the reasoning of the courts below in com-
H ing to the conclusion that the accused along has committed the offence.

The trial court relied on the following circumstances:

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"(a) 'Last seen' theory—that the accused and the deceased were last seen together.

(b) Conduct of the accused—that the accused attempted to flee away when he could be seen at his village by P.W. 1; B

(c) False explanation—the accused when questioned gave false explanation regarding the whereabout of the deceased;

(d) Recovery of the dead body of the deceased on the showing of the accused—That the accused pointed out the place where the dead body of the deceased was lying inside a paddy field; C

(e) Presence of injury on the genital as well as stains of blood on the wearing apperel and nailclippings of the accused." D

The evidence of P.Ws 1, 2 and 6 are relied upon in support of the first circumstance namely that the deceased was last seen in the company of the accused. P.W. 1 the father and P.W. 6 the mother deposed that on the day of occurrence the accused came to their house and took the deceased towards Bombay Chhak to purchase new clothes. The E accused only admitted to the extent namely that he had been to their house and denied the rest of the prosecution case. However, we shall accept the evidence of P.Ws 1 and 6 to the effect that the accused took the deceased on that day to Bombay Chhak. But that by itself is not enough to conclude that the deceased was last seen in the company of the accused because even according to them on being enquired, the F accused told them that he sent the girl back in a truck. Even otherwise the distance between the two villages is not much. P.W. 2's evidence, however, is relied upon that the deceased was going in the company of accused. P.W. 2 is also a native of the same village to which P.Ws 1 and 6 belong. He deposed that on a Wednesday he had been to village pond to take his bath at about 12 noon and while returning he saw the G accused going towards east with a minor girl aged about 5 years but P.W. 2 does not say that the deceased was in his company. He, however, proceeded to depose that he found P.W. 1 searching for some one and thereupon P.W. 2 told him that he has seen the accused with a minor girl going towards the paddy field. He admitted that he did not konw whose daughter was in the company of the accused. In the cross- H

A examination he further admitted that he did not talk to the accused. No doubt P.W. 2's evidence, to some extent, corroborates the evidence of P.Ws 1 and 6 but unfortunately even at the stage of inquest this circumstance namely that the deceased was last seen in the company of the accused, was not noted. We will advert to this aspect at a
B later stage. The important and crucial circumstance heavily relied upon by the prosecution is the alleged recovery of the dead body of the deceased on showing of the accused and the accused pointed the place where the body of the deceased was lying. For this again the prosecution relied on the evidence of P.Ws 1 and 11. Having carefully gone through the evidence of P.W. 1 we find that he has improved his version from stage to stage. As already noted both the courts below
C were not prepared to place any reliance on his evidence regarding the extra-judicial confession about which he made no mention at any earlier stage. As far as the recovery of the body is concerned, P.W. 1 however deposed that he managed to catch hold of the accused and brought him to the village and that the police came in a jeep and took
D the accused into custody. Then all of them went towards paddy field which had been pointed by the accused and on search they found the dead body. P.W. 11 the Investigating Officer deposed at he went to the village and found the accused to have been detained. He therefore prepared the F.I.R. and sent the same for registration of the crime. Then he arrested the accused and his evidence thereafter to put in his
E own words reads as under:

> "The accused pointed out the place where the dead body of the deceased was lying and thereafter led me to the paddy field wherefrom I could recover the dead body of the deceased Disco. As there were good number of persons
F present apprehending danger to the accused I sent him to the police station. During course of investigation, I examined witnesses, seized the dhoti (M.O. III), Shirt (M.O. IV) and this chadi marked M.O. VIII from the accused under the seizure list already marked Ext. 3. The dead body of the deceased was lying in the paddy field
G where there were paddy plants which had been damaged and scattered. I held inquest over the dead body of the deceased Disco in presence of witnesses under the inquest report already marked Ext. 1. I noticed injuries on the vagina and other parts of the body of the deceased. After inquest I sent the dead body for P.M. examination through
H constables."

According to this evidence the accused is alleged to have taken P.W. 11 and others to the open paddy field where the dead body was lying. It is only therafter that the inquest report was drawn up. However, P.W. 11 stated in his evidence that before going to the paddy field the F.I.R. Ex. P. 10 was drawn up by him. Surprisingly we find a mention about the discovery of the body in the F.I.R. itself. But the same is not found in the inquest. There is not even a reference to the accused in the Column No. 9 of the inquest report where the information of witness as to the cause of death has to be noticed. We are aware that the purpose of inquest report is only to ascertain the cause of death but in a case of this nature there should have been atleast a mention in the inquest report as to how the body was discovered. Apart from that usually a panchnama is prepared for such a discovery made under Section 27 of the Evidence Act but strangely in this case there is no such panchnama nor there is any other evidence apart from the evidence of P.Ws 1 and 11. P.W. 6 does not say anything about this aspect. As a matter of fact the trial court has noted the discrepancies in the evidence of P.Ws 1 and 11 and it is observed as under:

> "The Investigating Officer, P.W. 11 has stated something more about the find of the dead body. He speaks that the accused pointed out the place where the dead body of the deceased was lying and thereafter led him to the paddy field wherefrom the dead body of the deceased could be recovered. Though this part of his evidence has not been supported by P.W. 1, but from the evidence of both P.Ws 1 and 11 coupled with the evidence of P.W. 4, I am pursuaded to hold that on the showing of the accused, the dead body of the deceased was recovered from a paddy field."

We have perused the evidence of P.W. 4. His evidence does not in any manner incriminate the accused. P.W. 4 deposed that the dead body of the deceased was found lying in paddy field and that the police held inquest over the dead body in his presence and that the inquest report is P. 1 in which he put his signature as a witness. Nothing more is stated by him. He does not even refer to the presence of the accused at the place where the dead body was found or at the time of inquest, which was held also there. P.W. 4 does not in any manner help the prosecution case so far as this circumstance is concerned. If really the body has been discovered at the instance of the accused there should have been a panchnama and a mention about the same in the inquest report. P.W. 11 categorically in his evidence has stated that after sending the F.I.R. the accused was questioned and the body was discovered there-

after at the instance of the accused and the inquest was held over the dead body and P.W. 4 was a panch witness to the inquest and he also affixed his signature in the inquest report. But as mentioned above P.W. 4 does not say anything about the accused being present anywhere near the place where the dead body was found nor there is a reference to the accused in the inquest report. The only two remaining witnesses P.Ws 1 and 11 namely the father of the girl and the Investigating Officer respectively have contradicted each other. That is the type of evidence regarding this crucial circumstance. It is highly dangerous to accept the same and hold that the dead body was discovered at the instance of the accused. Having given our careful consideration we are of the firm opinion that the prosecution has not established this circumstance conclusively. On the other hand there is any amount of doubt and suspicion about the accused having shown the place of occurrence. We may also point out at this stage that the circumstance that the deceased was last seen in the company of the accused was not mentioned in the inquest report. Therefore the first circumstance also namely that the deceased was last seen in the company of the accused is not established beyond reasonable doubt. However, when once it is held that the crucial circumstance namely the discovery of the body at the instance of the accused is not established, then the other circumstances are hardly sufficient to establish the guilt of the accused. The courts below have also observed that the accused gave a false explanation. According to the prosecution case the accused is supposed to have stated to P.Ws 1 and 6 that he sent away the deceased in a truck. The courts below held that this explanation is false mainly on the surmise that a minor girl could not have come back on her own in a truck. We are not convinced that on this surmise alone we can hold that the accused has given a false explanation. It is not uncommon in villages for children to go about the fields and walk short distances while coming back to the village. In any event the accused had given an explanation that he sent the girl back to the village in a truck and the same cannot be held to be not plausible and therefore false.

Then the last circumstance relied upon by the courts below is the presence of some abrasions on the genital of the accused and presence of stains blood on the wearing apparels and nail clippings. The prosecution wanted to show that because of the penetration the accused sustained the abrasions on his penis. The Doctor, P.W. 8 who examined the accused has stated that he found only two pin-head abrasions on the genital of the accused and on examination he opined that he could not find any recent sign of sexual intercourse and he also

added that there was no such sign of having intercourse within one hour of his examination. However to a court question, P.W. 8 stated that as a result of forcible sexual intercourse those abrasions can be possible. We are unable to see as to how this evidence, in any manner, is helpful to the prosecution. When P.W. 8 stated that he could not find any sign of sexual intercourse atleast within one hour of his examination then it is only a matter of conjectures as to when the accused had any intercourse. The accused is a man aged 57 years and it is not as if he was not used to sexual intercourse. In any event the prosecution has not established that the accused had an intercourse on the day of the occurrence. Then the presence of blood in the nail clippings and on the underpant does not also incriminate and do not connect the accused in any manner with the alleged offences. The accused also had given an explanation namely that his gums were bleeding and in wiping out the same he got these blood stains. Even otherwise having given our earnest consideration, we are not able to say that this last circumstance coupled with the circumstance of last seen in the company of the accused amount to legal proof of the guilt particularly when the crucial circumstance namely that the accused showed the dead body is held to be not established. When such a main link goes, the chain gets snapped and the other circumstances cannot in any manner establish the guilt of the accused beyond all reasonable doubts. It is at this juncture the Court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes unconsciously it may happen to be a short step between moral certainty and the legal proof. At times it can be a case of 'may be true'. But there is a long mental distance between 'may be true' and 'must be true' and the same divides conjectures from sure conclusions. The least that can be said in this case is that atleast there is a reasonable doubt about the guilt of the accused and the benefit of the same should go to him.

We are conscious that a grave and heinous crime has been committed but when there is no satisfactory proof of the guilt we have no other option but to give the benefit of doubt to the accused and we are constrained to do so in this case. Accordingly, the appeal is allowed. The conviction and sentence of the accused is set aside and he shall be set at liberty forthwith if not required in any other case.

T.N.A. Appeal allowed.