

IN THE HIGH COURT OF ORISSA, CUTTACK

JCRLA No.45 of 2008

An appeal from the judgment and order dated 19.04.2008 passed by the Sessions Judge, Puri in S.T. Case No.399 of 2006.

Prasanta Kumar
Moharana Appellant

-Versus-

State of Odisha Respondent

For Appellant: - Mr. Sougat Das
Amicus Curiae
For Respondent: - Mr. Arupananda Das
Addl. Govt. Advocate

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO
AND

THE HONOURABLE MR. JUSTICE CHITTARANJAN DASH

Date of Hearing and Judgment: 07.12.2023

By the Bench: The appellant Prasanta Kumar Moharana faced trial in the Court of learned Sessions Judge, Puri in S.T. Case No.399 of 2006 for commission of offence punishable under section 302 of the Indian Penal Code (hereinafter 'I.P.C.') on the accusation

that on 26.05.2006 at about 5.00 p.m. in village Brahmana Alandia, he committed murder of Dhaneswar Moharana (hereinafter, 'the deceased').

The learned trial Court vide impugned judgment and order dated 19.04.2008 has been pleased to hold the appellant guilty of the offence charged and sentenced him to undergo imprisonment for life and to pay a fine of Rs.5,000/- (rupees five thousand), in default, to undergo rigorous imprisonment for a further period of six months.

Prosecution Case:

2. The prosecution case, as per the first information report (hereinafter 'F.I.R.') (Ext.2) presented by Pranakrushna Moharana (P.W.1), the father of the deceased before the Officer in-charge of Chandanpur police station on 31.05.2006 is that on 26.05.2006 at about 5.00 p.m., the deceased had been to the house of his maternal uncle, which is situated in the same village, where he took a sip of milk and as it tasted bitter, he informed the same to his grandmother (P.W.2). After some time, the deceased returned back home and while ironing his shirt, he disclosed before his mother (P.W.10) about the taking of milk and fell down on the ground. Immediately, the deceased was shifted in an auto rickshaw to Chandanpur hospital where the

doctor Rakesh Kumar Sahu (C.W.1) administered an injection to him and referred him to District Headquarters Hospital, Puri, but on the way to the D.H.H., the deceased died which was declared by the doctor upon reaching at the hospital. Communication was made to Kumbharapada police station so also Chandanpur police station and on 27.05.2006, post mortem over the dead body was conducted in connection with Chandanpur P.S. U.D. Case No.11 of 2006. It is further stated that on 30.05.2006 at about 9.00 p.m., in the presence of villagers, the appellant confessed his guilt and stated that he had mixed poison in the milk which was consumed by the deceased as a result of which he died. This fact of confession was communicated by the appellant to his father Pabani Moharana and also to the younger brother of the informant, namely, Manidhar Moharana.

On the basis of the F.I.R. presented by P.W.1, Chandanpur P.S. Case No. 57 dated 31.05.2006 was registered under section 302 of the I.P.C. against the appellant.

It appears that prior to the registration of F.I.R., on receipt of casualty memo from Medical Officer, District Headquarters Hospital, Puri, the Officer in-charge of Chandanpur police station had registered Chandanpur P.S. U.D. Case No.11 dated 27.05.2006 and directed A.S.I. Bhagabatia Kandha (P.W.11) to enquire into the matter and during course of the

enquiry, P.W.11 proceeded to District Headquarters Hospital, Puri along with constable and examined the doctor, held inquest over the dead body of the deceased and prepared the inquest report (Ext.1) and he also examined other witnesses, prepared the dead body challan (Ext.8) and sent the dead body for post mortem examination.

Dr. Tirthabasi Mohapatra (P.W.5), who was the Asst. Surgeon attached to District Headquarters Hospital, Puri, conducted the post mortem examination over the dead body of the deceased on 27.05.2006 but he could not give any definite opinion as to the cause of death of the deceased. However, he preserved the internal organs of the deceased like spleen, liver, stomach with its contents, a loop of the intestine and one kidney and kept the same in a sealed bottle and handed over the same to the police constable for sending the same for chemical examination. He prepared the post mortem report (Ext.3).

P.W.11, the enquiring police officer received the post mortem report (Ext.3) of the deceased and he also sent the viscera of the deceased for chemical examination to the Director, State Forensic Science Laboratory, Bhubaneswar and then submitted the final form in the U.D. case.

P.W.12 Deba Prasad Dash, the officer in-charge of Chandanpur police station after registration of the case, took up

the investigation and during the course of investigation, he collected the case records of U.D. case, visited the spot, prepared the spot map vide Ext.10, examined the witnesses, arrested the appellant on 01.06.2006. On the basis of the statement of the appellant recorded under section 27 of the Evidence Act, a Hildan pesticide poison container kept in a blue polythene jari was seized, as per seizure list Ext.6, from near a pond which is situated near the temple of Gopinath Deb. An aluminum dekchi as well as small glass was seized from the house of P.W.2 in presence of the witnesses as per seizure list Ext.7 and the same was sent for chemical examination to S.F.S.L., Rasulgarh and the chemical examination report vide Ext.13 was obtained. On completion of investigation, finding prima facie materials against the appellant, charge sheet was submitted against the appellant under section 302 of the I.P.C.

Framing of Charges:

3. After submission of charge sheet, the case was committed to the Court of Session after complying due formalities. The learned trial Court framed charge against the appellant as aforesaid and since the appellant refuted the charge, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

Prosecution Witnesses, Exhibits and Material Objects:

4. During the course of trial, in order to prove its case, the prosecution has examined as many as twelve witnesses.

P.W.1 Pranakrushna Moharana is the father of the deceased and the informant in this case. He is also a witness to the inquest over the dead body of the deceased and he proved the inquest report vide Ext.1.

P.W.2 Sodari Moharana is the grandmother of the deceased as well as the appellant and she stated about the extra judicial confession of the appellant before her and P.W.10.

P.W.3 Laxmidhar Mohanty is an independent witness and has a pesticide shop at Damodarpur Bazar under Chandanpur P.S. who did not support the prosecution case, for which he was declared hostile by the prosecution.

P.W.4 Ramesh Chandra Moharana is a co-villager of the deceased and an independent witness who did not support the prosecution case, for which he was also declared hostile by the prosecution.

P.W.5 Dr. Tirthabasi Mohapatra was the Asst. Surgeon attached to District Headquarters Hospital, Puri who conducted the post mortem over the dead body of the deceased and proved his report vide Ext.3. He opined that that the

probable cause of death was due to consumption of endosulfan insecticidal poison and proved his opinion vide Ext.4/1.

P.W.6 Giridhari Moharana is a co-villager of the appellant as well as of the deceased who is a witness to the inquest over the dead body of the deceased.

P.W.7 Dr. Kumudini Mishra was the Assistant Surgeon attached to District Headquarters Hospital, Puri who examined the deceased in the casualty ward on the date of occurrence and found him to be dead and thereafter she informed the I.I.C. of Khumbharpada police station about the same by writing a letter which she proved vide Ext.5.

P.W.8 Bauribandhu Moharana is a co-villager of the appellant as well as of the deceased. He pleaded his ignorance about the occurrence, except seizure of some articles and proved the seizure lists vide Ext.6 and Ext.7, for which he was declared hostile by the prosecution.

P.W.9 Umakanta Moharana did not support the prosecution story for which he was declared hostile by the prosecution.

P.W.10 Mani Moharana is the mother of the deceased and aunt of the appellant and she stated about the extra judicial confession of the appellant before her and P.W.2.

P.W.11 Bhagabatia Kandha was the A.S.I. of police attached to Chandanpur police station who was directed by P.W.12 to enquire into the matter. He held inquest over the dead body of the deceased and he proved the inquest report vide Ext.1. He also examined other witnesses, prepared dead body challan (Ext.8) and sent the dead body for post mortem examination. He also sent the viscera of the deceased for chemical examination to the Director, S.F.S.L., Bhubaneswar and submitted the final form in the U.D. case vide Ext.9.

P.W.12 Deba Prasad Dash is the Investigating Officer of the case.

The prosecution exhibited fourteen documents. Ext.1 is the inquest report, Ext.2 is the written F.I.R., Ext.3 is the post mortem report, Ext.4 is the letter of query of P.W.12, Ext.5 is the casualty letter written by P.W.7 to P.W.12, Ext.6 is the seizure list in respect of red colour tin daba, Ext.7 is the seizure list in respect of aluminum dekchi and steel glass, Ext.8 is the dead body challan, Ext.9 is the final form, Ext.10 is the spot map, Ext.11 is the disclosure statement of the appellant, Ext.12 is the carbon copy of forwarding letter of S.D.J.M., Puri, Ext.13 is the chemical examination report and Ext.14 is the letter of P.W.12 to the Director of S.F.S.L., Rasulgarh, Bhubaneswar.

The prosecution also proved three material objects. M.O.I is the aluminium dekchi, M.O.II is the steel tumbler and M.O. III is the tin daba.

Court Witness & Exhibits:

5. During the course of trial, the Court has examined one witness.

C.W.1 Dr. Rakesh Kumar Sahu was the Medical Officer attached to Chandanpur C.H.C. and stated that he referred the deceased to the District Headquarters Hospital, Puri as he was having convulsion, however, he could not say what treatment was given to the deceased by him when he had attended the deceased on 26.05.2006.

The trial Court has proved two exhibits. Ext.C-1 is the entry no.4122 dated 26.05.2006 made in outpatient department register and Ext.C-1/1 is the O.P.D. register of the year 2006 of Chandanpur C.H.C.

Defence Plea:

6. The defence plea of the appellant is one of denial and it was pleaded that a false case has been foisted upon him. Defence has neither examined any witness nor exhibited any document.

Findings of the Trial Court:

7. After assessing the oral as well as documentary evidence on record, the learned trial Court came to a finding that from the evidence of P.Ws.2 and 10, it can very well be concluded that the deceased consumed the milk and after consuming, he became serious and while being shifted to hospital, he succumbed. It has been further held from the evidence of P.Ws.2 and 10, it reveals that the appellant was present in the village and in the house of his grandmother (P.W.2). It has been further held that the poison container (M.O.III) recovered in pursuance to the disclosure statement has been established as the deceased died of the similar poison and it would further show that the appellant had kept the poison container in the place from where the same was recovered pursuant to his disclosure statement. The learned trial Court also relied upon the extra judicial confession stated to have been made by the appellant in the presence of P.W.2 and P.W.10 and held that the confession is a voluntary one and there was no threat, coercion or compulsion on the appellant before making such confession and thus, the confession of the appellant with regard to mixing the poison with milk, consuming which the deceased died, is acceptable one. It has been further held that the appellant had a motive to do harm to P.W.2 as well as the

deceased as the appellant was jealous of her (P.W.2) relationship with the deceased. The learned trial Court summed up the circumstances appearing in the case and held that the deceased died of poisoning, such death of the deceased occurred soon after consuming milk in the house of P.W.2, the appellant was present in the said house where the milk was kept on the date of occurrence, pursuant to the disclosure statement of the appellant, poison container was recovered from a place and nexus of the poison container with the death of the deceased has been established and the poison found in the viscera of the deceased was matching with the poison in the container and that the appellant made extra judicial confession regarding mixing poison with milk and that the appellant had a motive to cause harm to P.W.2. It has been further held that from circumstances were established by clear, cogent and unimpeachable evidence by the prosecution and there is no hindrance to hold that it was the appellant who had mixed poison to the milk, consuming which the deceased died and as such he contributed to the death of the deceased and accordingly, the trial Court found the appellant guilty under section 302 of the I.P.C.

Contentions of the Parties:

8. Mr. Sougat Das, who is appointed as the counsel for the appellant vide order dated 21.11.2023, contended that

admittedly there is no direct evidence in the case and the case is based on circumstantial evidence and when it is the prosecution case that the death of the deceased was on account of poisoning, it was required to prove such aspect beyond all reasonable doubt. The doctor, who conducted post mortem examination, has not given any definite opinion relating to the cause of death and reserved the opinion awaiting the viscera report. When the internal organs were sent to S.F.S.L., Rasulgarh, Bhubaneswar for chemical examination, the prosecution should have taken steps to procure the viscera report and ought to have proved it in accordance with law, which has not been done. In a case of this nature, it was also the duty of the Investigating Officer not only to bring the viscera report but also to place it before the doctor who conducted the post mortem examination to obtain the final opinion relating to the cause of death. Learned counsel further argued that no poison could be traced from the aluminium dekchi (M.O.I) as well as the steel glass (M.O.II) which were sent for chemical examination. Learned counsel also argued that the prosecution has also not established the motive on the part of the appellant to commit the crime and though it is the case of the prosecution that the appellant procured the poison and mixed it with the milk which was kept by P.W.2 but P.W.3, being a vital witness to that aspect, has not supported

the prosecution case. Learned counsel further argued that the extra judicial confession stated to have been made by the appellant before P.W.2 and P.W.10 cannot be accepted inasmuch as there are material contradictions between the evidence in Court vis-à-vis the statement recorded under section 161 of Cr.P.C. which has been duly proved in the case. Learned counsel further argued that extra judicial confession being a weak piece of evidence and there being no material corroboration to the same by way of proving the death to have occurred on account of poisoning, it is very risk to rely on such circumstance and therefore, it cannot be said that the circumstances have been proved by clinching evidence and that the circumstances form a complete chain which unerringly points towards the guilt of the appellant and therefore, it is a fit case where the appellant should be given the benefit of doubt.

Mr. Arupananda Das, learned Additional Govt. Advocate appearing for the State of Odisha, on the other hand, supported the impugned judgment and contended that the reaction of the deceased after consuming the milk and his disclosure before P.W.2 is very relevant and the extra judicial confession being made by the appellant before the close relatives, i.e. P.W.2 and P.W.10, the same should not be disbelieved as there was no reason for them to tell falsehood

against the appellant and there is also motive behind commission of crime and therefore, the learned trial Court has rightly found the appellant guilty under section 302 of the I.P.C. and therefore, the appeal should be dismissed.

Absence of viscera report and effect thereof:

9. Adverting to the contentions raised by the learned counsel for the respective parties, since it is the prosecution case that the deceased died on account of poisoning, we have to first delve into such aspect. The relevant witnesses are the doctors i.e. P.W.5 and C.W.1. C.W.1, was the Medical Officer attached to Chandanpur C.H.C. and he stated that the deceased came to the C.H.C. on 26.05.2006 and he was having convulsion and he referred the deceased to District Headquarters Hospital, Puri. He further stated that since there was no referral slip, he could not say what treatment was given to the deceased when he attended the deceased on 26.05.2006. His evidence is completely silent that he even suspected the case to be poisoning for which there was convulsion and accordingly he referred the patient to the D.H.H. The doctor (P.W.5), who conducted the post mortem examination over the dead body of the deceased, stated that he could not detect any external injury on the person of the deceased and since no definite opinion could be given, he

preserved internal organs of the deceased like spleen, liver, stomach with their contents and a loop of the intestine and one kidney and kept the same in a sealed bottle and handed over the sealed bottles to the police constable for sending the same for chemical examination. He further stated that the I.O. (P.W.12) made a query to opine as to the cause of the death and he opined that the 'probable cause' of death is due to consumption of endosulfan insecticidal poison. Admittedly, the evidence has come on record that the viscera was sent by P.W.11 to S.F.S.L., Rasulgarh, Bhubaneswar for chemical analysis but no viscera report has been proved in this case. P.W.12, the I.O. stated that P.W.11 after discussing with him sent the viscera of the deceased to S.F.S.L. and it was the C.D.M.O. who used to send the viscera to the Director, S.F.S.L. for chemical examination. P.W.12 admitted that there is no forwarding report for sending the viscera to S.F.S.L. for examination and that no documentary evidence is available on record to show that C.D.M.O., Puri sent the viscera of the deceased to S.F.S.L., Bhubaneswar. Neither the I.O. has stated that he collected the viscera report and sent it to P.W.5 nor P.W.5 has received the viscera report and given his opinion as to the definite cause of the death. When the doctor (P.W.5) could not give any definite opinion regarding cause of the death, awaiting the viscera report and as the same

was not produced before him, it is surprising how the doctor (P.W.5) gave such opinion and how the learned trial Court came to a definite conclusion that the death of the deceased was due to endosulfan insecticidal poison. The finding of the learned trial Court that it is a case of poisoning is not at all acceptable to us.

The importance of production of 'viscera report' in alleged cases of death due to poisoning cannot be understated, which has also been duly recognised by the Hon'ble Supreme Court in a number of cases including the one in **Chhotan Sao -Vrs.- State of Bihar reported in (2014) 4 Supreme Court Cases 54**. While expressing anguish over the conduct of the Investigating Officer, Public Prosecutor as well as the trial Court Judge in letting the trial continue despite of non-availability of the viscera report, the Hon'ble Court held:

"16. Before parting with the appeal, we wish to place on record our anguish regarding the inadequacy of investigation, the failure to discharge the responsibility on the part of the Public Prosecutor and the Magistrate who took cognizance of the offence under Section 304-B. The investigating officer who submitted the charge-sheet ought not to have done it without securing the viscera report from the forensic lab and placing it before the Court. Having regard to the nature of the crime, it is

a very vital document more particularly in the absence of any direct evidence regarding the consumption of poison by the deceased Babita Devi. Equally the Public Prosecutor failed in his responsibility to guide the investigating officer in that regard. Coming to the Magistrate who committed the matter to the Sessions Court, he failed to apply his mind and mechanically committed the matter for trial. The Public Prosecutors and judicial officers owe a greater responsibility to ensure compliance with law in a criminal case. Any lapse on their part such as the one which occurred in the instant case is bound to jeopardise the prosecution case resulting in avoidable acquittals. Inefficiency and callousness on their part is bound to shake the faith of the society in the system of administration of criminal justice in this country which, in our opinion, has reached a considerably lower level than desirable."

[Emphasis supplied]

It is apposite to note that it is not the only instance when the Hon'ble Supreme Court reminded the concerned authorities about the importance of viscera report in suspected cases of poisoning. Upon noticing the frequent recalcitrance of the investigating agencies in obtaining the viscera report in such cases, the Hon'ble Court in **Joshinder Yadav -Vrs.- State of**

Bihar reported in (2014) 4 Supreme Court Cases 42 was constrained to issue certain directions for mandatory procurement of such report in all alleged/suspected cases of poisoning. We deem it pertinent to reproduce below the observations made by the Hon'ble Apex Court in the aforesaid case.

"25. We must note that this is the third case which this Court has noticed in a short span of two months where, in a case of suspected poisoning, viscera report is not brought on record. We express our extreme displeasure about the way in which such serious cases are dealt with. We wonder whether these lapses are the result of inadvertence or they are a calculated move to frustrate the prosecution. Though the FSL report is not mandatory in all cases, in cases where poisoning is suspected, it would be advisable and in the interest of justice to ensure that the viscera is sent to the FSL and the FSL report is obtained. This is because not in all cases there is adequate strong other evidence on record to prove that the deceased was administered poison by the accused. In a criminal trial, the investigating officer, the prosecutor and the court play a very important role. The court's prime duty is to find out the truth. The investigating officer, the prosecutor and the courts must work in

sync and ensure that the guilty are punished by bringing on record adequate credible legal evidence. If the investigating officer stumbles, the prosecutor must pull him up and take necessary steps to rectify the lacunae. The criminal court must be alert, it must oversee their actions and, in case it suspects foul play, it must use its vast powers and frustrate any attempt to set at naught a genuine prosecution. Perhaps, the instant case would have been further strengthened had the viscera been sent to the FSL and the FSL report was on record. These scientific tests are of vital importance to a criminal case, particularly when the witnesses are increasingly showing a tendency to turn hostile. In the instant case, all those witnesses who spoke about poisoning turned hostile. Had the viscera report been on record and the case of poisoning was true, the prosecution would have been on still firmer grounds.

26. Having noticed that in several cases where poisoning is suspected, the prosecuting agencies are not taking steps to obtain viscera report, we feel it necessary to issue certain directions in that behalf. We direct that in cases where poisoning is suspected, immediately after the post-mortem, the viscera should be sent to the FSL. The

prosecuting agencies should ensure that the viscera is, in fact, sent to the FSL for examination and the FSL should ensure that the viscera is examined immediately and report is sent to the investigating agencies/courts post-haste. If the viscera report is not received, the court concerned must ask for an explanation and must summon the officer concerned of the FSL to give an explanation as to why the viscera report is not forwarded to the investigating agency/court. The criminal court must ensure that it is brought on record.”

Therefore, in view of the directions of the Hon'ble Supreme Court, omission on the part of the investigating agency in sending the viscera for examination and collecting the viscera report after the same is prepared by the Forensic Science Laboratory tantamounts to dereliction in obeying the order of the Hon'ble Highest Court, which is nothing less than a misconduct. Similarly, the concerned Scientific Officer is also accountable if he fails to provide the viscera report in time even after the viscera is provided to him for necessary chemical examination. In the present case, failure on the part of the investigating officer to procure the viscera report from the S.F.S.L. is a serious lapse in the investigation.

Analysis of the evidence of witnesses:

10. In the recent case of **Hariprasad alias Kishan Sahu -Vrs.- State of Chhattisgarh reported in (2023) SCC OnLine SC 1454**, the Hon'ble Supreme Court reiterated the conditions which are needed to be met by the prosecution in an alleged case of murder by poison. While reaffirming the need to prove certain circumstances in such cases, the Hon'ble Court held:

"20. Before delving into the evidence adduced by the prosecution, it may be noted that this Court way back in 1984, in **Sharad Birdhi Chand Sarda v. State of Maharashtra** (supra), which has been followed in catena of decisions, had observed that in the case of murder by poison, the prosecution must prove following four circumstances:—

"(1) there is a clear motive for an accused to administer poison to the deceased,

(2) that the deceased died of poison said to have been administered,

(3) that the accused had the poison in his possession,

(4) that he had an opportunity to administer the poison to the deceased."

The material witnesses in this case i.e. P.W.2 and P.W.10 are next to be discussed. P.W.2 is none else than the grandmother of the appellant and she has stated that the appellant is the son of her adopted son Pabani and the informant (P.W.1) is her son-in-law. She further stated that she had a tremendous liking for the deceased as he was good in academics and whenever the deceased used to come to her house, she used to take care of him and for that the appellant was jealous of the deceased and sometimes the appellant also misbehaved with her. P.W.2 further stated that the deceased had come to her house on the day of 'Sabitri Amabasya' and the appellant had also come on that day and the parents of the appellant had gone to the temple. When the deceased arrived at her house, she enquired from the deceased whether he had taken any food and he stated that he had not taken anything. She gave him milk by bringing the same from the pot. She further stated that the deceased after taking a sip of milk, complained that it was bitter and enquired from her whether kerosene or petrol was mixed in it and after washing his mouth, the deceased returned back to his house. She further stated that when the deceased took the milk, the appellant was present in the house and after the deceased left the house, the appellant followed him. She further stated that she also tasted the milk and found the same emitting

bitter smell and she also gave a little milk to her daughter-in-law, who also complained that the milk tasted bitter. She further stated that the milk was procured from one Apari, who informed her that he had supplied the same milk in two to three houses and he also gave milk to P.W.2 which did not taste bitter. P.W.2 further stated that while returning to the house, he poured rest of the milk which she had kept in the container (dekchi) in the waters of Linga Pokhari and the fishes of the said pond after consuming the said milk died. She further stated that on the next day of the death of the deceased, the appellant returned back to Puri to join his service and again returned back five days thereafter and in that night at about 9.00 p.m., in her presence so also in presence of others, the appellant confessed to have mixed poison in the milk which she had kept in the container (dekchi) to kill the deceased as the deceased was studying well and P.W.2 had tremendous liking for the deceased. She further stated that she washed the container in which she had kept the milk so also the glass. In her cross-examination, P.W.2 has stated that she had given a little than half a glass of milk to the appellant to drink and the appellant drank half of the milk given to him and after taking a sip, complained of bitter taste and did not drink anymore and after keeping the glass with rest of the milk, complained smell of petrol and kerosene in the milk and

left her house. The evidence of P.W.2 reveals that after the deceased complained taking a sip of the milk, not only she but also her daughter-in-law tasted milk and they also found that it was bitter but there was no evidence that there was any reaction after taking the milk by either P.W.2 or by her daughter-in-law. The daughter-in-law of P.W.2 has not been examined in this case. If the same milk was taken by not only the deceased but also by P.W.2 and her daughter-in-law and nothing happened to them and no viscera report was produced, on the basis of the opinion of the doctor (P.W.5) without perusing the viscera report, the learned trial Court should not have come to the conclusion that the probable cause of death was due to poison as it creates doubt as to whether poison was mixed with the milk in question or not.

In a case of this nature, not only the source of procurement of poisoning was required to be established by the prosecution beyond all reasonable doubt but it was the requirement to prove the viscera report. The case of prosecution would have got fortified had it been established that the poison which was detected from the viscera examination is the same which was found from the container (M.O.III). In the absence of such link, a cogent doubt is created that poison was mixed with

the milk which was given by P.W.2 to the deceased as a result of which there was reaction to the deceased and ultimately he died.

Whether extra-judicial confession of the appellant can be acted upon?:

11. Coming to the extra judicial confession, though P.W.1 has stated in that respect but in the cross-examination, he has stated that after five days of the death of the deceased, the confession was made by the appellant which he learnt from his brother-in-law Pabani Moharana. The said Pabani Moharana has not been examined in this case and therefore, it appears that P.W.1 has no direct knowledge about the extra judicial confession and at best, it is a hearsay evidence.

Coming to the evidence of P.W.2, though she stated that five days after the occurrence, the appellant confessed before her as well as others that he had mixed poison in the milk to kill the deceased, but the previous statement of P.W.2 recorded by the I.O. has been confronted to her and it has been proved through the I.O. (P.W.12) that she did not said before him that the appellant had confessed before her and others to have mixed poison in the milk and that she did not state before the I.O. that the appellant had confessed before them that he had mixed insecticidal poison to kill her (P.W.2) and the

deceased and that she had also not stated before the I.O. that the deceased complained of the smell and taste of kerosene and petrol in the milk and after washing his mouth, he left for his house and that the appellant followed him. In view of the material contradictions in the evidence of P.W.2, it is very difficult to accept her evidence so far as extra judicial confession of the appellant is concerned.

The other material witness on this aspect examined on behalf of the prosecution is none else than P.W.10, who is the mother of the deceased. She has stated that the appellant is her nephew (brother's son) and her mother had adopted the father of the appellant. She further stated that on Savitri Amabasya i.e. on 26.05.2006, in the evening hours, the deceased proceeded to the house of P.W.2 and half an hour thereafter, the deceased returned to the house and while ironing his pant, he complained reeling of his head and called her. She enquired from the deceased about the cause of head reeling to which the deceased disclosed that he drank milk in the house of P.W.2 from which smell of petrol and kerosene was coming and that tasted bitter. Then the deceased vomited and lost his sense and she rushed to the house of P.W.2 to know as to what milk her mother had given to the deceased to drink and she found the appellant was present there and was very much perturbed. P.W.2 disclosed

before P.W.10 that the deceased was complaining taste of bitterness while drinking milk and he had hardly taken two sips and refused to drink rest of the milk. This witness has also stated that in the evening of 30.05.2006, the appellant arrived in the house and in presence of others, he confessed that he had mixed Hildan pesticide in the milk to kill the deceased and P.W.2 and that he had purchased the poison from Chandanpur bazar twenty days prior to the occurrence. The previous statement of the witness (P.W.10) recorded under section 161 of the Cr.P.C. has also been confronted to her and it has been proved through the I.O. (P.W.12) that she has not stated that on the evening of 30.05.2006, the father of the appellant came to their house and called her to his house and thereafter she along with her brother-in-law proceeded to the house of the appellant and she has also not stated that in the evening of 30.05.2006, they arrived at the house of P.W.2 and found P.W.2 and Bhaskar Muduli along with the appellant. P.W.10 has also not stated that in their presence, the appellant confessed to have mixed poison in the milk to kill the deceased and P.W.2. She has also not stated in her statement under section 161 of the Cr.P.C. that the appellant confessed before them that he had purchased Hildan poison twenty days prior to the date of occurrence to kill the deceased from Chandanpur bazaar. Therefore, there are material

contradictions in the evidence of P.W.10 so far as extra judicial confession of the appellant is concerned and since such statement is made for the first time in Court, it is very difficult to accept such statement and return a finding basing upon such statement. Above all, it is an admitted fact that in the statement made by the deceased before P.W.10, nothing has been stated against the appellant. It is only stated that after drinking milk in the house of P.W.2, it tasted bitter for which the deceased vomitted.

Law is well settled that extra judicial confession is a weak piece of evidence. The Court must scrutinize all the relevant factors, such as, the person to whom the confession is made, the time and place of making it, the circumstances in which it is made and finally the actual words used. The Court should also be satisfied that it is voluntary one and it does not appear to be the result of inducement, threat or promise as contemplated by Section 24 of the Indian Evidence Act.

In the case in hand, though both the witnesses who have stated about extra judicial confession are closely related to the appellant so also to the deceased but when it is the prosecution case that the appellant had planned for committing the murder of the deceased as well as P.W.2 and accordingly, he

procured poison and secretly mixed the same in the milk which was kept by P.W.2 and nobody was aware about the same then it is suspicious as well as strange as to why after four to five days of the occurrence, he suddenly came forward and disclosed before others to have mixed the poison in the milk when no one was aware that it was a case of poisoning and there was any kind of suspicion against the conduct of the appellant. Admittedly, as already stated, there is no evidence on record that poison was mixed in the milk. The inquest was conducted on the next day of occurrence and in the inquest report (Ext.1), which was prepared in presence of P.W.1, the father of the deceased and others, it was mentioned that the probable cause of death was on account of epileptic fits. If on the day of occurrence, it was the deceased who has stated before P.W.10 that he took milk in the house of P.W.2, it tasted bitter and smell of kerosene and petrol was coming from the same and there was any reaction to him for which he died, the same should have been reflected, in short, at least in the inquest report, particularly when the father of the deceased (P.W.1) was a signatory to the inquest report (Ext.1).

The Inquiry Officer (P.W.11), who conducted the inquiry from 26.05.2006 till 01.06.2006 and examined a number of witnesses, has stated that he did not get any information till

he submitted the final form regarding the involvement of the appellant in causing death of the deceased. Rather P.W.1, the and others disclosed before him that the deceased died of epileptic fits and that is what P.W.11 has mentioned in column no.9 of the inquest report.

The learned trial Court, while summarising the circumstances, has made an observation that the poison found in the viscera of the deceased matched with the poison in the container. It is strange that when the viscera report was not obtained from F.S.L. and not proved in the case and not placed before the doctor for opinion, how the learned trial Court came to such a finding.

Law is well settled that when a case is based on circumstantial evidence, the prosecution is required to prove the chain of circumstances by clear, cogent and reliable evidence. The circumstances, when taken together, must form a complete and unbreakable chain from which there cannot be any escape from the conclusion that it is the appellant and the appellant alone who committed the crime. [**Ref: Sharad Birdhichand Sarda -Vrs.- State of Maharashtra reported in (1984) 4 Supreme Court Cases 116]**]

In the case in hand, the prosecution case that it is a case of poisoning has not been established by adducing cogent and trustworthy evidence. In the so-called oral dying declaration stated to have been made before P.W.10, the deceased has not whispered anything against the appellant. The source of procurement of the poison has also not been established. The extra judicial confession is not believable on account of material contradictions in the evidence of P.Ws.2 and 10 and therefore, upon a collective assessment of prosecution evidence, it is very difficult for us to come to a finding that it is the appellant who has committed the murder of the deceased.

Conclusion:

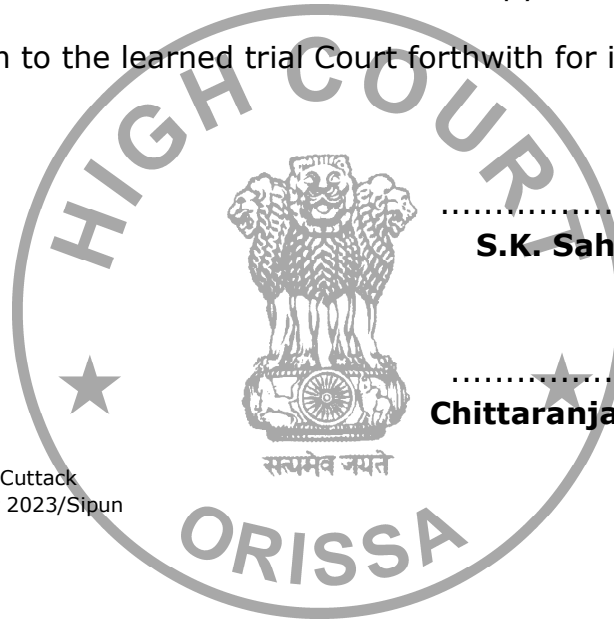
12. In view of the foregoing discussions, we are of the humble view that the finding arrived at by the learned trial Court is not sustainable in the eye of law and accordingly, the impugned judgment and order of conviction of the appellant under section 302 of the I.P.C. is hereby set aside.

In the result, the JCRLA is allowed.

The appellant, who is on bail by virtue of the order of this Court dated 27.07.2012 passed in Misc. Case No.85 of 2010, is discharged from liability of his bail bonds. The personal bonds and the surety bonds hereby stand cancelled.

Before parting with the case, we would like to put on record my appreciation to Mr. Sougat Das, learned Amicus Curiae for rendering his valuable help and assistance towards arriving at the decision above mentioned. The learned Amicus Curiae shall be entitled to his professional fees which is fixed at Rs.7,500/-(rupees seven thousand five hundred only). This Court also appreciates the valuable help and assistance provided by Mr. Arupananda Das, learned Additional Government Advocate.

The lower Court records with a copy of this judgment be sent down to the learned trial Court forthwith for information.



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S.K. Sahoo, J.

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Chittaranjan Dash, J.

Orissa High Court, Cuttack
The 07th December 2023/Sipun