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IN THE HIGH COURT OF ORISSA AT CUTTACK

JCRLA No. 97 of 2010

(Arising out of the Judgment of conviction on dated 25th of September, 2010 passed by Shri G. K. Mishra, Addl. Sessions Judge, Nabarangpur in C.T. No. 13/2008, for the offence under section 302 of the Indian Penal Code, 1860)

Rupadhar Jani .... ***Appellant***

Mr. Prem Kumar Mohanty, Advocate

-versus-

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

Mr. Rajesh Tripathy, Addl. Standing Counsel

P R E S E N T:

HONOURABLE SHRI JUSTICE S. K. SAHOO

AND

HONOURABLE SHRI JUSTICE CHITTARANJAN DASH

Date of Judgment: 11.07.2024

Chittaranjan Dash, J.

1. The Appellant, namely Rupadhar Jani faced the trial on the charge under Section 302 of the Indian Penal Code (in short, herein after referred to "IPC") before the learned Addl. Session Judge, Nabarangpur for committing murder of his

mother Ratani Jani and 18 (eighteen) days old brother by giving them blows on the neck by means of a "*Katari*" locally called "*Ghaghada"* wherein, the learned court found him guilty in the offence charged as above, convicted and sentenced the Appellant to undergo Rigorous Imprisonment for life and to pay a fine of ₹20,000/- (Rupees twenty thousand), in default, to undergo further Rigorous Imprisonment for two years more.

2. The prosecution case, in brief, is that on 19.07.2007 at 10 a.m. while the mother of the Appellant was at home, the Appellant demanded rice from her. When she refused, a quarrel ensued. Later, while his mother and his 18-day-old infant brother were sleeping, the Appellant returned and attacked them with a Ghaghada on their necks, resulting in their instantaneous deaths. After the murder, the Appellant fled away from the scene, taking some rice and an axe with him. An independent villager, noticing the absence of any family members, went to the police station and lodged FIR. Upon receiving the FIR, the OIC registered the case vide Papadahandi P.S. Case No. 73/2007 dated 19.07.2007 and commenced investigation.

3. In course of investigation, the I.O. examined the complainant and the other witness Padman Nayak, and then proceeded to the scene of occurrence in village Khajuri, prepared the spot map and took photographs of the deceased Ratani and her infant son. He held inquests over the dead bodies and sent the bodies for post mortem examination. He also collected blood-stained earth from the scene and arrested the Appellant at 9 p.m. on the same day. While in police custody, the Appellant volunteered his statement as to concealment of weapon of offence recovery thereof which the I.O. recorded as required under Section 27 of the Evidence Act in presence of the witnesses. Subsequently, the Appellant led the police and the witnesses to the location where he had concealed the weapon, which having given recovery by the Appellant was seized in presence of witnesses. The I.O. seized other incriminating articles and prepared the seizure list proved vide Ext. 16. Upon completion of the investigation, the I.O submitted the charge sheet leading to the trial.

4. The case of the defence is one of complete denial and false implication. Further case of the defence is that the Appellant was not of sound mind at the time of occurrence.

5. To bring home the charges, the Prosecution examined 8 witnesses in all. P.W.1 being the medical officer; P.W.2 is the Sarpanch who accompanied the informant; P.W.3 being the sister of the Appellant is a child witness and is also the sole eye-witness to the occurrence; P.W.4 is a post occurrence witness to the scene of occurrence; P.W.5 is the father of the Appellant; P.Ws.6 and 7 are seizure witnesses and P.W.8 is the I.O.

6. The learned trial court having believed the evidence of the prosecution witnesses found the prosecution to have proved its case beyond all reasonable doubt and held the Appellant guilty and convicted him awarding sentence as described above.

7. The learned counsel for the Appellant advanced his arguments and took the plea of insanity. Elaborating his argument, it is submitted that the Appellant was not of sound mind at the time of the incident. He contends that the Appellant, known in the village as "Baya," exhibited signs of mental disorder from an early age, as confirmed by P.W.5, the father of the Appellant. This mental instability was not addressed through medical treatment, and it is asserted that the

Appellant's erratic behavior and lack of comprehension of his actions stem from this untreated condition. He emphasizes that the burden of proving insanity rests on a balance of probabilities, and submitted that the evidence presented sufficiently indicates the Appellant's long-standing mental issues. The learned counsel further questions the admissibility and reliability of the testimony provided by P.W.3, the sister of the Appellant, a five-year-old child at the time of the incident. He submits that given her young age and limited cognitive abilities, her capacity to accurately perceive, recall, and recount events is highly questionable. The inherent susceptibility of young children to suggestion and influence casts doubts on the veracity of her statements. He highlights that the child's testimony may be unreliable and insufficient to form the basis of confirming a conviction.

8. Mr. Tripathy, the learned ASC for the State, on the other hand submitted that the learned trial court has perspicaciously appreciated the evidence laid by the parties before it, more so the prosecution and believing the testimonies of the witnesses to be truthful and natural besides the circumstances appearing in the case to be consistent and coherent that links the chain

unerringly pointing guilt on the Appellant, found him to be the perpetrator of the murder and convicted him and as such the impugned judgment requires no interference. As regards the plea of insanity, it is argued by Mr. Tripathy that the evidence overwhelmingly demonstrates the Appellant's full awareness and intentionality in committing the crime. According to Mr. Tripathy, merely because the Appellant was addressed as "Baya' in early days cannot by itself establish him to be insane in absence of a cogent evidence. He also submitted that the prosecution has otherwise very well emphasized the reliability and truthfulness of the child witness, P.W.3, whose testimony was consistent, robust and detailed. He further submits that to ensure the credibility of P.W.3, preliminary questions were asked to establish her consciousness and understanding of the events, confirming her capacity to provide reliable and rational testimony. It is also argued that P.W.3 clearly described how the Appellant demanded tobacco and rice from their mother and, upon being refused, attacked both the mother and the infant brother with a Ghaghada. Her narration was further corroborated by P.W.4 and P.W.5, who arrived at the scene of occurrence shortly after the incident. Moreover, the

Appellant's disclosure statement while in police custody and the recovery of the weapon of offence based on his statement further substantiate his culpability. Mr. Tripathy, contends that the Appellant's actions were deliberate and conscious, negating the defence's claim of insanity and that the Appellant did have the mental capacity to understand the nature of his actions, as evidenced by his behavior before and after the crime, and therefore, should be held fully accountable for his actions under the law.

9. Having regard to the arguments advanced by the learned counsels for the parties, the issues raised for primary consideration is with respect to the reliability of the child witness, the recovery of the weapon of offence at the instance of the Appellant and the plea of insanity taken by the Appellant.

10. Needless to say that the credibility and reliability of a child witness often require careful examination due to their unique position and vulnerability. The essential legal principles governing the admissibility and reliability of child witness testimony are enshrined in Section 118 of the Indian Evidence Act, 1872 which postulates that the testimony of a

child witness is admissible, provided that the child is found competent to testify and understands the obligation to speak the truth. The competence of a child witness is evaluated through a preliminary examination called a test of *voir dire*, through which the court ascertains whether a child witness possesses the intellectual capacity to understand and answer questions relevant to the case. This examination helps the court to determine the child's ability to perceive, recall, and narrate facts truthfully.

11. P.W.3, who was aged about 5 years at the time of occurrence, is the sibling of the Appellant and the sole eyewitness to the incident. She provided a detailed account of the events leading up to the murder of her mother and infant brother. Her testimony is crucial to the prosecution's case, as she is the only direct witness to the occurrence. Her competency, in the instant case, has been assessed through the test of *voir dire*, where she was asked some preliminary questions, that confirmed her capacity to understand the nature of questions and the importance of speaking the truth. The learned trial court found her competent to provide evidence as she narrated the sequence of events consistently, stating that

the Appellant first demanded tobacco and then rice from their mother and, upon refusal, attacked her and the infant with a Ghaghada. She vividly described how she managed to escape and alert the villagers. Her account remained consistent during cross-examination, reinforcing her credibility. There is absolutely no inkling or an indication that P.W.3 was tutored or influenced in her testimony by any extraneous element or circumstance. Her spontaneous and detailed description of the incident, coupled with the emotional distress evident in her narration, suggests the authenticity of her account.

12. Moreover, P.W.3's narration can be corroborated by the testimonies of other witnesses. P.W.2 corroborated the aftermath of the incident as described by P.W.3, confirming that he found the victims in a pool of blood upon arriving at the scene. P.W.4 corroborated P.W.3's testimony by confirming that he saw P.W.3 running and crying, and the Appellant fleeing the scene. His statement reinforces the sequence of events described by P.W.3 and adds credibility to her narrative by placing the Appellant at the scene immediately after the crime, P.W.4 supported P.W.3's account by stating that he saw the Appellant fleeing with the weapon.

13. The Apex Court in its recent decision in the matter of ***Pradeep vs. The State of Haryana*** **(Criminal Appeal no. 553 of 2012)** reported in **2023 LiveLaw (SC) 501** has held that –

> "8. It is a well-settled principle that corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. A child witness of tender age is easily susceptible to tutoring. However, that by itself is no ground to reject the evidence of a child witness. The Court must make careful scrutiny of the evidence of a child witness. The Court must apply its mind to the question whether there is a possibility of the child witness being tutored. Therefore, scrutiny of the evidence of a child witness is required to be made by the Court with care and caution.
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> 9. Before recording evidence of a minor, it is the duty of a Judicial Officer to ask preliminary questions to him with a view to ascertain whether the minor can understand the questions put to him and is in a position to give rational answers. The Judge must be satisfied that the minor is able to understand the questions and respond to them and understands the importance of speaking the truth. Therefore, the role of the Judge who records the evidence is very crucial. He has to make a proper preliminary examination of the minor by putting appropriate questions to ascertain whether the minor is capable of understanding the questions put to him and is able to give rational answers. It is advisable to record the preliminary questions and answers so that the Appellate Court can go into the correctness of the opinion of the Trial Court."

14. In ***Dattu Ramrao Sakhare v. State of Maharashtra*** reported in **(1997) 5 SCC 341** it was held as follows –

> "5. A child witness if found competent to depose to the facts and reliable one, such evidence could be the basis of conviction. In other words, even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions

and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

15. Following the principles established in the above decisions, the testimony of P.W.3, despite being that of a child, is reliable and credible. The *voir dire* examination confirmed her competence, and her consistent and spontaneous narration of the events indicates truthfulness. The absence of evidence suggesting tutoring or influence further strengthens the reliability of her testimony. As discussed above, P.W.3's account is corroborated by the testimonies of P.W.2, P.W.4, and P.W.5. The consistency across these witnesses regarding the immediate aftermath of the incident and the behavior of the Appellant before and after the crime supports the prosecution's case. The detailed and coherent testimony of P.W.3 provides a crucial link in the prosecution's case, directly implicating the Appellant in the crime. Her first-hand account, corroborated by other evidence and witnesses, fulfills the requirements set out by legal precedents for accepting child witness testimony. Furthermore, the

comprehensive examination of the witness's statement does not indicate any coaching of the child witness. Therefore, considering the witness's consistency and the corroboration provided by other witnesses, the testimony is deemed reliable and corroborated.

16. Subsequently, the Appellant has taken the plea of insanity and the critical aspect of section 84 of Indian Evidence Act is the requirement for an accused to be suffering from an unsoundness of mind at the time of committing the act, rendering them incapable of understanding the nature and quality of the act or knowing that what they are doing is wrong or illegal. The burden of proof lies on the defence to establish the presence of legal insanity, as distinct from medical insanity. The defence failed to produce any medical records or expert testimony to substantiate the claim of the Appellant's insanity. In the absence of medical evidence, it is challenging to establish the Appellant's mental condition at the time of the crime.

17. In the matter of ***Prakash Nayi @ Sen vs. State of Goa*** **(Criminal Appeal No. 2010 of 2010)**, reported in **2023 LiveLaw (SC) 71**, the Supreme Court has held that –

"4. Section 84 of the IPC recognizes only an act which could not be termed as an offence. It starts with the words "nothing is an offence". The said words are a clear indication of the intendment behind this laudable provision. Such an act shall emanate from an unsound mind. Therefore, the existence of an unsound mind is a sine qua non to the applicability of the provision. A mere unsound mind per se would not suffice, and it should be to the extent of not knowing the nature of the act. Such a person is incapable of knowing the nature of the said act. Similarly, he does not stand to reason as to whether an act committed is either wrong or contrary to law. Needless to state, the element of incapacity emerging from an unsound mind shall be present at the time of commission.

5. The provision speaks about the act of a person of unsound mind. It is a very broad provision relatable to the incapacity, as aforesaid. The test is from the point of view of a prudent man. Therefore, a mere medical insanity cannot be said to mean unsoundness of mind. There may be a case where a person suffering from medical insanity would have committed an act, however, the test is one of legal insanity to attract the mandate of Section 84 of the IPC. There must be an inability of a person in knowing the nature of the act or to understand it to be either wrong or contrary to the law.

6. The aforesaid provision is founded on the maxim, actus non reum facit nisi mens sit rea, i.e., an act does not constitute guilt unless done with a guilty intention. It is a fundamental principle of criminal law that there has to be an element of mens rea in forming guilt with intention. A person of an unsound mind, who is incapable of knowing the consequence of an act, does not know that such an act is right or wrong. He may not even know that he has committed that act. When such is the position, he cannot be made to suffer punishment. This act cannot be termed as a mental rebellion constituting a deviant behaviour leading to a crime against society. He stands as a victim in need of help, and therefore, cannot be charged and tried for an offence. His position is that of a child not knowing either his action or the consequence of it."

18. In the instant case, P.W.2, the Sarpanch of the village, in his sworn testimony states that the Appellant was known as "Baya" in the village, however, he has also explicitly stated during cross-examination that it was not a fact that the Appellant was an insane person suffering from a mental disorder. P.W.3 mentioned that the Appellant used to roam hither and thither in the house as if he had a mental disorder. P.W.5, the father of the Appellant, stated that the Appellant had shown signs of mental disorder since childhood and was referred to as "Baya" due to his behavior. However, he also mentioned that the Appellant had not received any medical treatment for his alleged mental disorder. However, the father and all the other witness testimonies lacked the medical or expert evidence necessary to establish the Appellant's legal insanity.

19. The Appellant's actions before and after the crime, including demanding food, attacking the victims, fleeing the scene, and leading the police to the weapon's recovery, indicate that he was aware of his actions. The witnesses' statements indicate that the Appellant exhibited irrational behavior. However, that does not conclude that he had

homicidal tendencies. The evidence presented only shows behavior deviating from normalcy. This evidence is insufficient to prove that the Appellant's sense of reasoning was impaired to the extent necessary to establish legal insanity.

20. The final point of issue in this appeal is the recovery of the weapon which plays a crucial role in establishing the guilt of the Appellant. P.W.4, who witnessed the seizure of the weapon, provides significant testimony regarding its discovery. According to his deposition, he and the other villagers rushed to the scene upon hearing P.W.3's cries and found the Appellant fleeing with the alleged weapon and a bag of rice. This statement not only corroborates the immediate aftermath of the crime but also underscores the critical nature of the weapon as evidence. As a seizure witness, P.W.4's testimony is pivotal in establishing the chain of custody and authenticity of the recovered weapon, a Ghaghada, which was allegedly used in the commission of the crime.

21. In ***Pakala Narayan Swami vs. King Emperor*****, (1939) 41 BOMLR 428,** the Apex Court observed that **-**

"Some confusion appears to have been caused by the definition of confession in Article 22 of Stephen's "Digest of the Law of Evidence" which defines a confession as an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime. If the surrounding articles are examined, it will be apparent that the learned author after dealing with admissions generally is applying himself to admissions in criminal cases, and for this purpose defines confessions so as to cover all such admissions in order to have a general term for use in the three following articles, confession secured by inducement, made upon oath, made under a promise of secrecy. The definition is not contained in the Indian Evidence Act, 1872: and in that Act it would not be consistent with the natural use of language to construe confession as a statement by an accused "suggesting the inference that he committed" the crime."

22. As well put in the matter of State of Maharashtra vs. Suresh **2000 (1) ACR 266 (SC)** it is held by the Apex Court as follows -

"there are three possibilities when an accused point out the place where a dead body or an incriminating material was concealed without stating that it was conceded by himself. One is that he himself would have concealed it. Second is that, he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities the criminal court can presume that it was concealed by the accused himself. This is because accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well justified course to be adopted by the criminal court that the concealment was made by himself. Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act."

23. From the above decisions, it can be inferred that the principle regarding the recovery of weapons hinges on proving that the place where the weapon was found, in the goat shed of the Appellant's house, was accessible only to the Appellant and known solely by him. This is crucial in demonstrating that the Appellant was in possession of the weapon and could have used it to inflict the fatal injuries observed on the victims. Furthermore, the medical officer's opinion is pivotal in establishing the weapon's capability to cause the injuries observed on the victims. In this case, the medical officer (P.W.1) confirmed that the injuries sustained by the mother and the infant were consistent with those that could be inflicted by the recovered Ghaghada. This expert-correlation strengthens the prosecution's argument that the Appellant had both the means and the opportunity to commit the crime using the recovered weapon.

24. The application of the principles set forth in the above decisions support the trial court's decision to admit and consider the recovery of the weapon as incriminating evidence against the Appellant. The recovery, based on the Appellant's direction, serves as a crucial link in establishing his guilt,

affirming the validity of the inference drawn by the learned trial Court regarding the Appellant's direct involvement in the offence.

25. In conclusion, after a thorough review of the facts, testimonies, and legal principles involved in this case, it is evident that the trial court's judgment convicting the Appellant stands on firm ground and the prosecution has successfully established beyond reasonable doubt that the Appellant committed the heinous act of murdering his mother and infant brother. Key pieces of evidence, including the consistent testimonies of witnesses, the recovery of the weapon at the Appellant's instance, and the medical evidence aligning with the injuries sustained by the victims, collectively point to the Appellant's culpability. Moreover, the plea of insanity was carefully examined and found insufficient to undermine the Appellant's criminal liability.

26. From the discussions as above, we are of the opinion that the findings recorded by the learned trial court is found to be legal and justified and therefore we do not hesitate to declare the conviction of the Appellant as held confirmed. Since the

sentence awarded is absolutely in accordance with law, there is nothing to interfere therewith.

As a result, the Appeal stands dismissed being devoid of merit.

Before parting, we place on record our appreciation to Mr. Prem Kumar Mohanty, the learned counsel engaged to represent the Appellant and that of Mr. Rajesh Tripathy, the learned ASC for their valuable services rendered by them to the Court.

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Chittaranjan Dash, J.

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S. K. Sahoo, J.

A.K.Pradhan/Bijay