CASE NO.:
Appeal (crl.) 697 of 2003

PETITIONER:
Sashi Jena & Ors.

RESPONDENT:
Khadal Swain & Anr.

DATE OF JUDGMENT: 10/02/2004

BENCH:
Y.K. SABHARWAL & B.N. AGRAWAL.

JUDGMENT:
JUDGMENT

B.N.AGRAWAL,J.

The appellants were convicted by trial court under Section 302 read with Section 34 of the Penal Code and sentenced to undergo imprisonment for life. On appeal being preferred, their conviction and sentence have been upheld by the High Court.

The short facts are that on 4.5.1986 at 5.30 p.m. one Trinath Behera, who was Gramrakhi of Village Golabandha, submitted a report at Buguda Police Station disclosing therein that on the same day at 12.30 p.m. one Sarasu Jena @ Salu, wife of appellant no. 2 - Prasana Kumar Jena, committed suicide by hanging herself in her house. On the basis of this written report, Unnatural Death Case No. 3 dated 4.5.1986 was instituted, but subsequently, after a few days, on receipt of postmortem report of the dead body of Salu, a case under Section 302 of the Penal Code was registered against unknown persons. The police, after registration of the case, took up investigation, examined witnesses and upon completion thereof, having found the instant case to be one of suicide and not homicide, submitted final report in favour of the accused persons on 27.10.1986 whereafter on 29.4.1987 Khadal Swain [PW.2], father of deceased Salu, filed a complaint in the Court of learned Sub-Divisional Magistrate for prosecution of the appellants.

Case of the prosecution, as unfolded in the complaint petition, in short, is that appellant no. 1 \026 Sashi Jena, is the mother-in-law of Salu, appellant no. 2 \026 Prasana Kumar Jena, her husband and other two appellants, namely, Sarat Kumar Jena and Rabindranath Jena, are full brothers of appellant no. 2. Salu was given in marriage by PW.2 to appellant no. 2 in the month of Baisakh in the year 1985 and at the time of marriage PW.2 gave dowry worth Rs. 20,000/-, but in spite of that the accused persons were not satisfied and demanded a further sum of Rs. 5000/- and on its non-fulfillment, Salu was ill-treated by her husband and also subjected to torture by all the accused persons. On 4.5.1986 in the morning Salu met Madan Swain (PW.1) and requested him to inform her parents about demand of further amount of Rs. 5000/- by her in-laws and she had expressed before him that in case the said amount was not paid, she would be done to death. PW.1 assured Salu that he would convey the news to her parents, but before he could do so, the same day in the afternoon at 12.30 p.m., when PW.1 was in the house of his in-laws, who were next door neighbour of the appellants, on hearing cries coming from the house of the appellants, he went there and found that Salu was lying on the floor and appellant nos. 1 and 2 were pressing a crowbar on her neck till her death while appellant nos. 3 and 4 were holding her legs. PW.1 thereafter immediately rushed to the village of PW.2 and narrated him the entire incident whereupon PW.2 along with his wife-Rohini Swain (PW.4), PW.1 and Narayan Swain [PW.5], co-villager of PWs 2 and 4, went to the house of the appellants, but appellant no. 1 stopped them from entering the house by holding out a Kati (Sword). PW.1 was said to have also narrated the incident to PW.4, Kirtan Nayak (PW.3), a co-villager of the accused persons, and PW.5.

Upon filing of the complaint, learned Magistrate examined the complainant on solemn affirmation and postponed issuance of processes against the accused

persons by deciding to hold inquiry under Section 202 of the Criminal Procedure Code ('the Code' for short), during the course of which, apart from other witnesses, the prosecution examined PW.1, who supported the prosecution case, as disclosed in the complaint petition. Upon conclusion of inquiry, the Magistrate issued processes against the appellants and they were committed to the Court of Sessions to face trial.

Defence of the accused persons was that they were innocent and had no complicity with the crime as it was not a case of homicide because Salu had committed suicide by hanging herself, she being unhappy with her husband as one of his legs was swollen, which was incurable.

During trial, the prosecution examined 7 witnesses out of whom PW.1, who, according to the prosecution case was an eye-witness to the alleged occurrence, did not at all support the prosecution case, as such declared hostile. PWs. 2 and 4 are father and mother respectively of deceased Salu. PW.3 was a resident of the village of occurrence and PW.5 co-villager of the complainant. PW.6 was the Doctor who held post-mortem examination on the dead body of Salu and PW.7 was the Investigating Officer. Upon conclusion of the trial, the learned Additonal Sessions Judge convicted and sentenced the appellants, as stated above, and their appeal to the High Court having been dismissed, the present appeal by special leave.

According to the prosecution case, PW.1 was the solitary eyewitness to the alleged occurrence, but, in his evidence before the trial court, he did not at all support the prosecution case though he supported the same in all material particulars in his statement made before the learned Magistrate during the course of inquiry under Section 202 of the Code. The crucial question to be examined in this case is as to whether the statement of PW.1 recorded during the course of inquiry under Section 202 of the Code is relevant and admissible in the case on hand so as to form basis of conviction of the accused persons. It has been submitted on behalf of the appellants that such a statement is not admissible under Section 33 of the Evidence Act, 1872 ('the Act' for short) as the accused had neither any right nor opportunity to cross-examine PW.1 during the course of inquiry. It may be useful to refer to Section 33 of the Act which runs thus:-

"S.33.- Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated.- Evidence given by a witness in a judicial proceeding or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable :

Provided \026

that the proceeding was between the same parties or their representatives in interest;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.- A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section."

[Emphasis Added]

From a bare perusal of the aforesaid provision, it would appear that evidence given by a witness in a judicial proceeding or before any person authorized to take it is admissible for the purpose of proving in a subsequent judicial proceeding or in a later stage of the same judicial proceeding, the truth of the facts which it states in its evidence given in earlier judicial proceeding or earlier stage of the same judicial proceeding, but under proviso there are three pre-requisites for making the said evidence admissible in subsequent proceeding or later stage of the same proceeding and they are (i) that the earlier proceeding was between the same parties; (ii) that the adverse party in the first proceeding

had the right and opportunity to cross examine; and (iii) that the questions in issue in both the proceedings were substantially the same, and in the absence of any of the three pre-requisites afore-stated, Section 33 of the Act would not be attracted. This Court had occasion to consider this question in the case of V.M. Mathew vs. V.S. Sharma & Ors., AIR 1996 Supreme Court 109, in which it was laid down that in view of the second proviso, evidence of a witness in a previous proceeding would be admissible under Section 33 of the Act only if the adverse party in the first proceeding had the right and opportunity to cross examine the

witness. The Court observed thus at pages 110 and 111 :-

"The adverse party referred in the proviso is the party in the previous proceeding against whom the evidence adduced therein was given against his interest. He had the right and opportunity to cross-examine the witness in the previous proceeding\005\005the proviso lays down the acid test that statement of a particular witness should have been tested by both parties by examination and cross-examination in order to make it admissible in the later proceeding."

[Emphasis added]

Thus, the question to be considered is as to whether accused has any right to cross examine a prosecution witness examined during the course of inquiry under Section 202 of the Code. It is well settled that the scope of inquiry under Section 202 of the Code is very limited one and that is to find out whether there are sufficient grounds for proceeding against the accused who has no right to participate therein much less a right to cross examine any witness examined by the prosecution, but he may remain present only with a view to be informed of what is going on. This question is no longer res integra having been specifically answered by a 4-Judge bench decision of this Court in the case of Chandra Deo Singh vs. Prokash Chandra Bose @ Chabi Bose & Anr., AIR 1963 SC 1430, wherein this Court categorically laid down that an accused during the course of inquiry under Section 202 of the Code of Criminal Procedure, 1898, has no right at all to cross examine any witness examined on behalf of the prosecution. It was observed thus at page 1432:

"Taking the first ground, it seems to us clear from the entire scheme of Ch. XVI of the Code of Criminal Procedure that an accused person does not come into the picture at all till process is issued. This does not mean that he is precluded from being present when an enquiry is held by a Magistrate. He may remain present either in person or through a counsel or agent with a view to be informed of what is going on. But since the very question for consideration being whether he should be called upon to face an accusation, he has no right to take part in the proceedings nor has the Magistrate any jurisdiction to permit him to do so. It would follow from this, therefore, that it would not be open to the Magistrate to put any question to witnesses at the instance of the person named as accused but against whom process has not been issued; nor can he examine any witnesses at the instance of such a person\005.".

[Emphasis Added]

Thus, we have no difficulty in holding that as during the course of inquiry under Section 202 of the Code an accused has no right much less opportunity to cross examine a prosecution witness, statement of such a witness recorded during the course of the inquiry is not admissible in evidence under Section 33 of the Act and, consequently, the same cannot form the basis of conviction of an accused.

Next question that arises in the case on hand is as to whether the statement of PW.1 recorded during the course of inquiry under Section 202 of the Code can be proved under Section 157 of the Act to corroborate evidence of other witnesses viz. PWs 2,3,4 and 5 examined during trial. Language of Section

157 of the Act is very clear and the same lays down that "in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact may be proved". A plain reading of the Section would show that previous statement of a particular witness can be used to corroborate only his own evidence during trial and not evidence of other witnesses. In the case of Moti Singh & Anr., vs. The State of Uttar Pradesh, AIR 1964 SC 900, similar question had arisen before a 4-Judge bench of this Court wherein though the evidence in court of two witnesses, namely, Ram Shankar and Jageshwar, during trial was disbelieved in relation to the manner of occurrence by the trial court as well as the High Court, their statements made before a Magistrate under Section 164 of the Code were relied upon to corroborate the other evidence adduced by the prosecution during trial. The aforesaid procedure was deprecated by this Court and it was laid down that such previous statement could be used to corroborate the evidence of that very witness examined during the course of trial and not evidence of other witnesses examined before the trial court. In that case, this Court set aside the conviction of the accused persons observing thus at page 901:-

"\005.Those statements could have been used only in either corroborating or contradicting the statements of these witnesses in Court. If those witnesses were not to be believed, their previous statements could not be used as independent evidence in support of the other prosecution evidence."

In view of the foregoing discussion, we are of the opinion that the statement of PW.1 recorded during the course of enquiry under Section 202 of the Code cannot be used against the accused for any purpose as the same is not admissible either under Section 33 or Section 157 of the Act. This being the position, in the absence of any direct evidence, it has to be considered as to whether conviction of the appellants can be upheld on the basis of circumstantial evidence enumerated hereunder and the prosecution has succeeded in proving the same :

1. The deceased was ill-treated by her husband and subjected to torture by other accused persons for non-fulfillment of demand of dowry of Rs. 5,000/- in spite of the fact that at the time of marriage articles worth Rs. 20000/- were given by way of dowry, which led to her death.
2. PWs. 2, 3, 4 and 5 made statements in court that PW. 1 narrated the incident to them showing complicity of the accused with the crime.
3. Prosecution witnesses were prevented by appellant no. 1 \026 Sashi Jena from entering her house when they arrived there by holding out a Kati.
4. Medical evidence showing that it was a case of homicide and not suicide.

So far as the first circumstance is concerned, the prosecution has adduced evidence of PWs. 2 and 4, who are father and mother respectively of Salu. These two witnesses, as it would appear from the evidence of PW.7, the Investigating Officer, were examined before the police but they did not disclose, in their statements made before the police, demand of dowry at any point of time and torture of the victim for non-fulfillment of such a demand by the accused persons. For the first time, such a case was made out by the prosecution in the Petition of Complaint which was filed after 11 months of the alleged occurrence. In view of these facts, it is not possible to place reliance upon the evidence of PWs. 2 and 4 to prove this circumstance.

This brings us to the second circumstance that PW.1 disclosed about the incident showing complicity of the accused persons with the crime before the prosecution witnesses. PWs. 2, 3, 4 and 5 stated in their evidence that when they arrived at the place of occurrence PW. 1 narrated the incident to them. As stated above, PW 1 did not at all support the prosecution case during trial and his statement before the committing court having been already held by us to be inadmissible, it cannot be used for corroborating the evidence of PWs 2,3,4 and 5 made during trial. That apart, so far as PWs. 2 and 4 are concerned, from the evidence of PW.7, it would appear that these witnesses had, in their statements made before the police, no where stated that PW.1 narrated the incident to them showing complicity of the accused persons with the crime and for the first time such a case was made out in the complaint petition after 11 months of the alleged occurrence. So far as PWs. 3 and 5 are concerned, they were not

examined before the police, but were examined, for the first time, during the course of inquiry under Section 202 of the Code after several months of the alleged occurrence, viz., PW.3 after 22 months in March 1988 and PW. 4 after 12 months in May, 1987 of the incident. This being the position, it is not safe to rely upon the evidence of these witnesses to prove this circumstance.

The third circumstance that the prosecution witnesses were prevented by appellant no. 1 \026 Sashi Jena from entering her house by holding out a Kati has been proved by PWs. 2,3,4 and 5 as all of them so stated in their examination-in-chief. PW.3 stated during the course of cross examination that he had neither seen any Kati in the hands of accused Sashi Jena nor seen her obstructing the witnesses from entering the house. In view of this statement of PW.3, the veracity of the prosecution case that accused Sashi Jena obstructed the members of the prosecution party from entering the house by holding out a Kati becomes highly doubtful and, accordingly, we have no option but to hold that the prosecution has failed to prove this circumstance.

We now come to the fourth and the last circumstance that according to the medical evidence it was a case of homicidal death and not suicide. From the evidence of PW.6 \026 the Doctor who held postmortem examination, it would appear that it was a case of homicidal death. It appears that during the course of investigation, PW.7 \026 the Investigating Officer \026 sent the postmortem report to Professor, FMT Department, MKCG Medical College, Berhampur, for his opinion, who requested PW.7 to send hyoid bone, as according to him, it was essential for formation of opinion as to whether it was a case of suicide or homicide, but PW. 7 reported vide his letter dated 15.10.1986 (Ext. 16/1) that the said bone was not available in the Sub-Divisional Hospital where postmortem examination was conducted. Upon receipt of the said letter, the said Professor submitted his report under letter dated 15.10.1986 (Ext. 16), which was based on the post-mortem report, to the effect that, in the absence of any mention in the postmortem report as to whether the fracture was antemortem or not and what was the type of the fracture, it could not be said with reasonable amount of certainty that it was a case of homicide. In this view of the matter, it would not be safe to place reliance upon the report (Ext. 16) Thus, in view of opinion of the doctor, PW 6, we have no option but to hold that it was a case of homicide and the prosecution has succeeded in proving this circumstance against the accused persons which, being the solitary circumstance against them, cannot form basis of their conviction as it is well settled that in a case of circumstantial evidence, there should be chain of circumstances showing complicity of the accused persons with the crime and the chain should be complete. In view of the foregoing discussion, we are of the view that prosecution has failed to prove its case beyond reasonable doubt and the High Court was not justified in upholding conviction of the appellants.

In the result, the appeal is allowed, the conviction and sentence of the appellants are set aside and they are acquitted of the charge. The appellants, who are in custody, are directed to be released forthwith if not required in connection with any other case.