

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.354 of 1992

Arising out of PS. Case No.-41 Year-1980 Thana-Forbesganj, District Purnia

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1. Rajendra Mandal, Son of Late Soti Mandal.
2. Vishwanath Kuwar, Son of Late Ramchandra Kuwar.
3. Harnandan Sah, Son of Jagdish Sah.
All residents of village Saifganj, P.O. Parwaha, P.S. Forbesganj, District Araria.
.... Appellants

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellants : Smt. Rina Sinha, Amicus Curiae
For the Informant : Sri Dinu Kumar, Advocate
Sri Shiw Kumar Prabhakar, Advocate
For the State : Sri Abhimanyu Sharma, APP

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CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA

and

HONOURABLE SHRI JUSTICE AMARESH KUMAR LAL

ORAL JUDGMENT

(Per: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA)

Date: 23-01-2015

The three appellants along with acquitted accused Shilanand Kuwar were charged under Section 411 of the Indian Penal Code while appellant Rajendra Mandal was charged under Sections 302/34, 460 and 394 of the Indian Penal Code by the learned Sessions Judge, Purnia for being tried in Sessions Trial No. 185 of 1982. The judgment in the case was delivered by the learned 1st Additional Sessions Judge, Purnia on 28.08.1992. While accused Shilanand Kuwar was acquitted of all the charges, appellant Rajendra Mandal was held guilty of committing offences under Sections 302/34, 460 and 394 of the Indian Penal Code. The other



two appellants were held guilty of committing offence under Section 411 of the Indian Penal Code. The appellants were heard on sentence on the same day. Appellant Rajendra Mandal was directed to suffer rigorous imprisonment for life on each of the three counts of his conviction with further direction that the sentences imposed upon him were to run concurrently. The remaining two appellants Vishwanath Kuwar and Harnandan Sah were directed to suffer rigorous imprisonment for three years under Section 411 of the Indian Penal Code. The three appellants jointly preferred the present appeal to this Court against the judgment of conviction and order of sentence passed upon each of them.

2. Undisputedly, Omkar Mall Agrawal (P.W.7) was running a cloth shop on the Sadar Road, Ward No. 4 of Forbesganj. Another undisputed fact was that deceased Sukhdeo Mishra and appellant Rajendra Mandal were under employment of P.W.7 as workers in the said cloth shop. It is also not disputed that P.W.7 Omkar Mall Agrawal had left Forbesganj for going to Kolkata and had asked deceased Sukhdeo Mishra to sleep inside the shop.

3. What is stated is that at about 7 A.M. on 17.02.1980, Batuk Rai (P.W.1) with Yugeshwar Ram (P.W.3), who had also their shops by the side of the shop of P.W.7, finding that the deceased, an early riser, had not come out of the shop, firstly,



called him by his name to come out but getting no response, knocked at the doors of the shop as a result of which the doors were opened. Peeping inside, P.Ws. 1 and 3 found that the deceased was lying dead and he had bled from his eyes and nostrils and further that there was an injury on his neck and a *Gamchha* was also tied around it. He went to the house of Ratan Lal Agrawal (P.W.4), who happened to be the nephew of the deceased, to inform about the death of Sukhdeo Mishra. P.W.4 came to the shop and found Sukhdeo Mishra dead. He went to the police station to file Ext.2, the written report, on the basis of which Ext.9, the First Information Report of the case, was drawn up.

4. The investigation was taken up by P.W.12 S.I. Khelanand Mishra who went to the place of occurrence and prepared the inquest report (Ext.3). He, thereafter, prepared the dead body *Chalan* and sent the dead body for post-mortem examination. He inspected the place of occurrence. On 18.02.1980, Omkar Mall Agrawal (P.W.7) handed over a written application to P.W.12 containing the list of stolen articles. That list of stolen articles has been marked Ext.4. P.W.12 put some informers on alert and after examining Harsh Bahadur (P.W.2) who had been hired as a night watchman by the shopkeepers of the market place, he arrested appellant Rajendra Mandal on 19.02.1980. He, thereafter,



came to the house of appellant Harnandan Sah who produced Rs. 350/- in cash and he seized the money after preparing Ext.6, the production-cum-seizure memo. He thereafter went with appellant Harnandan Sah to a pond. It is stated by P.W.12 that appellant Harnandan Sah had produced an old box from inside the pond that was seized by preparing seizure memo. Likewise, he arrested appellant Vishwanath Kuwar also and as may appear from paragraph-12 of P.W.12, on the joint statement of the three appellants, he proceeded to the house of appellant Vishwanath Kuwar where he was handed over three different *Jholas* containing ornaments of silver and gold both which were unearthed by appellant Vishwanath Kuwar from under a jackfruit tree in an orchard and other two *Jholas* from a potato field. The ornaments were identified by P.Ws. 4 and 7, i.e., the informant and his uncle. After recording the statements of witnesses and collecting other materials, P.W. 12 sent up the four accused for trial and accordingly, they were tried which ended in the impugned judgment.

5. Smt. Rina Sinha, the learned Amicus Curiae has taken us through the evidence of witnesses and has submitted that the evidence does not raise any inference better than mere suspicion against the accused persons. It was also submitted that there was no

clinching admissible evidence so as to holding that the charges were established to the hilt.

6. Sri Abhimanyu Sharma, the learned Additional Public Prosecutor also submitted that the evidence appears only creating suspicion and there was virtually no clinching material available on record.

7. We have already noted down that Sukhdeo Mishra was murdered while he was sleeping inside the shop of Omkar Mall Agarawal (P.W.7) but the evidence of P.W.4 the informant itself indicates that appellant Rajendra Mandal had been asked to sleep at the residence of P.W.7 Omkar Mall Agrawal and in fact appellant Rajendra Mandal had slept there. The Investigating Officer has stated that he had gone to the house of P.W.7 Omkar Mall Agrawal and had arrested Rajendra Mandal from that very house and in presence of P.W.7. The circumstance which appears in favour of appellant Rajendra Mandal is that if he had committed the offence, he could not remain present in the house of P.W.7. P.W.4, the informant of the case, did appear stating that he did not find appellant Rajendra Mandal anywhere and had informed the police also, but his own evidence also indicated as if there was a probability that Rajendra Mandal was still very much available to the police not only on the date when the case was registered, but



subsequently also and that was the reason that he was arrested by the police very easily. The evidence of Harsh Bahadur (P.W.2) was that he had seen Rajendra Mandal going towards south and he was coming with a box from the side of the shop of P.W.7. The attention of the witness was drawn to the above fact and P.W.12 S.I. Khelanand Mishra has stated in paragraph-22 that P.W.2 Harsh Bahadur had not made that statement to him. The conduct of P.W.2 also appears suspicious. He was cross-examined on the fact of having seen Rajendra Mandal going with the box and he stated that he could not say as to what was the colour of the box and rather stated that it was rapped under a cloth but he could not say as to what was the colour of the cloth. As regards disclosing the fact of Rajendra Mandal going with the box, P.W.2 stated that he did not question Rajendra Mandal, firstly, as to where he was going with the box and further that he did not divulge this fact to anyone for the whole day of the occurrence and he could know about the murder of Sukhdeo Mishra only when he had returned back to his duty in the evening and still the incident of murder making round in the market place, he was not stating the fact of having seen Rajendra Mandal with a box to anyone. This conduct of P.W.2 also makes it unsafe to accept that he could have seen Rajendra Mandal going with the box. We have already noted that Rajendra Mandal was very much

available at the house of P.W.7. Thus, the charge under Sections 302, 460 or 324, in our opinion, does not appear established as regards appellant Rajendra Mandal.

8. So far as other evidence in the case is concerned, it is based on the seizure of a box on account of the same being recovered and produced by Harinandan Sah and three *Jholas* of ornaments being recovered and handed over by appellant Vishwanath Kuwar to the Investigating Officer. Paragraph-12 of P.W.12 points out that the three accused persons had pointed out to P.W.12 as to what was the place from where the police could get the ornaments recovered. However, while going to recover the ornaments, as per the same paragraph-12, P.W.12 stated that he took only Vishwanath Kuwar with him who first went to an orchard to recover the first *Jhola* of silver ornaments then came to a potato field with appellant Vishwanath Kuwar to recover the other two *Jholas*. We do not find any statement which was made to P.W.12 by the three appellants available to us nor there is evidence of P.W.12 that he had recorded the statement of the three appellants in presence of any witness and had then proceeded to make the recoveries. If the three appellants had given the information regarding the place where the ornaments had been concealed, then in our opinion, the three appellants should have been taken to the



places from where the recoveries were allegedly made. But, we do not find anything available to us on record. The first recovery of an old box was made on account of the same being produced by appellant Harinandan Sah but the curious aspect of the recovery is that it was recovered from the pond belonging to appellant Vishwanath Kuwar. The second recovery of three *Jholas* from three different places and was on account of the information given by the three appellants but, what we find is that the recovery memos which were prepared in respect of either a box or the three *Jholas*, the copies of the same were not given to either of the three appellants. The law on recovery and seizure of any theft property appears in Section 100 Cr.P.C. and it mandates that a copy of the seizure memo must be given to the accused person. This mandatory provision of the Code of Criminal Procedure also does not appear complied with and that further raises our doubt that the recoveries were really genuine.

9. Both P.Ws. 4 and 7 have stated that they had accompanied the Collector, the Superintendent of Police and the Investigating Officer to Saifganj for recovery of the properties and the properties were shown to them at the police station where they had identified them but P.W.12 was stating that as soon as the properties were recovered, the two witnesses saw and identified



them. We do not doubt that the properties belonged to P.W.7 but the nature of evidence which was produced, creates a serious doubt regarding the claim of the police that there was some information given to it either by the three appellants or by any of them and that they had gone to recover the properties in the manner they claimed. The witnesses who had been associated with the seizure, like, P.Ws. 10 and 11 also did not support that anything was produced by any of the appellants before P.W.12 who had seized it and had prepared the seizure memo. This, all the more, compounds the weak nature of the evidence which was adduced by the prosecution in support of the charges.

10. What we find on analysis of the evidence of witnesses is that in spite of Sukhdeo Mishra having been murdered inside the shop and in spite of the fact that some ornaments might have been taken away from there which were indeed belonging to P.Ws. 4 and 7, the prosecution still failed to establish that it were the three appellants who had committed the murder or had taken away the properties to conceal it somewhere which were subsequently recovered. What we further find is that the prosecution had not satisfactorily established the charges against the appellants as well who deserve to be acquitted on account of disproof of the charges.

11. In the result, The appeal is allowed by setting aside the judgment of conviction and order of sentence dated 28.08.1992, passed by the learned 1st Additional Sessions Judge, Purnia in Sessions Trial No. 185 of 1982. The three appellants are acquitted of the charges, they had been found guilty of. The appellants are on bail. They shall stand discharged from the liabilities of their respective bonds.

(Dharnidhar Jha, J.)

(Amaresh Kumar Lal, J.)

Sanjay/N.A.F.R.

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