

Criminal Appeal (DB) No 389 of 1992

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Against the judgment of conviction dated 13.08.1992 and order of sentence dated 14.08.1992 passed by Shri B N P Singh, Additional Sessions Judge II, Bhagalpur in Sessions Trial No 246 of 1990.

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Md Qaiyum, son of Budhan Mian, resident of Village – Javey, PS – Bhawanipur, District - Purnea

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.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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For the Appellant/s : Mr Ravindra Kumar, Amicus Curiae

For the State : Mr Ajay Mishra, APP

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CORAM: HON'BLE MR JUSTICE NAVANITI PRASAD SINGH
And
HON'BLE JUSTICE SMT ANJANA MISHRA

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ORAL JUDGMENT

(Per: HON'BLE MR JUSTICE NAVANITI PRASAD SINGH)

The sole appellant has preferred this appeal from the judgment of conviction and order of sentence dated 13.08.1992 and 14.08.1992 respectively passed in Sessions Trial No 246 of 1990 by the Additional Sessions Judge II, Bhagalpur convicting the sole appellant for an offence punishable under Section 302 of Indian Penal Code (IPC) and sentencing him to rigorous imprisonment for life for murdering Shine, three years old daughter of informant Zainul Abidi

(PW 1) and Section 201 of IPC for which he was sentenced to five years rigorous imprisonment. Sentences to run concurrently. It may be noted that the appellant has already remained in custody for about six years.

2 The prosecution case starts with the Fardbayan of PW 1 Zainul Abidi given at about 8.45 am on 19.11.1988 to the Officer-in-charge of Naugachia Police Station Shri Arun Kumar Singh who has not been examined. It, inter alia, alleges that on the previous day that is 18.11.1988 at about 5 pm, there was some quarrel amongst ladies in the neighbourhood. The wife of informant PW 1 Begum Tara Khatoon (PW 7) took the infant and went there. The appellant, who is the son-in-law of the brother-in-law of the informant, came there and took the infant in his lap. He returned to informant's house with the infant and in way, he met the informant's mother Sadiqa Khatoon (PW 8) who asked for the custody of the infant but appellant is said to have refused. From home of the informant where the appellant went with the child is not known. When the mother of the infant returned home and did not find the appellant or the child, she started making enquiries. Neighbours collected. The appellant also came there. The neighbours questioned the appellant. On receiving this message, the informant (PW 1), who had gone to Naugachia Town to sell eggs, returned. Everyone questioned the appellant. He maintained silence.

At about 9 pm, the appellant is said to have disclosed that if Rs 3,000/- is given, he would release the child. When the villagers agreed to pay the amount, the appellant is alleged to have said that the child would be released in the morning. The villagers kept him in custody. In the morning at about 5 am, he led the villagers to some distance and then allegedly disclosed that he had killed the infant and thrown her in the river. The villagers then searched and they allegedly found the body floating in the river. They took out the body of the infant from the river and took it to the house of the informant. People were sent to inform the police and, accordingly, the Officer-in-charge came and recorded the statement. In the meantime, the appellant was beaten up by the villagers. The appellant was already in custody of the villagers. He was handed over to the police. The case was investigated. The body of the infant was sent for post mortem which was performed at about 2 pm on 19.11.1988 itself by Dr D N Mehta (PW 11). Chargesheet having been submitted and cognizance having been taken, the case was committed to the Court of Session where charges under Sections 302 and 201 of IPC were framed to which the appellants pleaded not guilty and tried and convicted. Hence, the appeal.

3 Learned Amicus Curiae, arguing for the appellant, submits that the prosecution story is wholly incongruous and cannot be

accepted. He submits that if appellant had kidnapped and then murdered the child why would he had appeared before the villagers immediately without even being called. He would then submit that having been in custody of the villages, how can even it be imagined that he would demand Rs 3,000/- for the return of the child. He would further submit that if what is alleged that the appellant confessed to the villagers in the morning that he had killed and thrown the child in the river then why, in the first place, he would have said that if Rs 3,000/- would be paid, he would return the child. Lastly, he would submit that if we look to the post mortem report, it belies the prosecution case.

4 Starting from the last point, the post mortem report is on record to the doctor (PW 11). In the post mortem report, the cause of death is asphyxia. The doctor specifically said that some cloth was put over the mouth of the infant because of which she suffocated and died. He, thus, finds some small injuries in the posterior wall of the vagina. He does not give any opinion about rape and the cause of death is asphyxia. He does not find that either the body was bloated or had died because of drowning. This is important because if we believe the prosecution story then the appellant was in custody of the villagers for at least 17 hours before the post mortem was conducted. The post mortem report clearly states that death had taken place

within 15 hours of the post mortem. Two things arise from this. Either the appellant was not responsible for the death because for at least 17 hours, he was clearly in the custody of villagers or the infant was killed by someone else and thrown in the river or lastly, the body was found somewhere and alleged wrongly that it was found floating in the river because if the body had been thrown in the river, in normal course, it would have sunk to rise and float after quite some time. In that case, the post mortem report would have shown that the body was bloated full of water which was not the case. Then the whole prosecution story about recovery of the body from the river becomes highly doubtful. Learned counsel further submits that keeping this in mind, it stands explained why police was not immediately informed. Police help was not taken to recover the body from the river rather police was called home and handed over the body. Thus, the recovery of the body from the river itself becomes doubtful.

5 Thus, what is the evidence against the appellant? There is statement of the mother of the infant (PW 7) that he had taken the child. In the first information report, it is stated that PW 8 had seen appellant bringing the child but in the Court, PW 8 is merely tendered and as Supreme Court would say, if prosecution tenders a witness, it is to be assumed that the prosecution has given up the witness.

Witness would, if allowed to speak, speak against the prosecution **(Sukhwant Singh –Versus- State of Punjab, AIR 1995 Supreme Court 1601)**. Then the evidence is alleged confessions made by the appellant before other witnesses. The other witnesses are close relations. The independent witnesses are tendered.

6 Thus, in our view, on this evidence, it cannot conclusively be said or held that the appellant is guilty. Admittedly, PW 1, the informant and the father of the infant was nowhere in the scene till he comes later in the night when allegedly the villagers already had the appellant in custody. When he is examined in Court, he changes or improves the story a bit. First, he states that his wife had gone to see the quarrel amongst the ladies in the neighbourhood and the daughter followed her later. Then he admits in his cross-examination that it was disclosed that one Binod had carried away the daughter and was demanding Rs 3,000/-. If this is taken into account then the appellant had hardly any role to play.

7 In such a situation where the prosecution is unable to prove its story to the full then relying upon the theory of last seen and other such assumption is not valid. We would, accordingly, hold that the prosecution has failed to prove the case beyond reasonable doubt. The appellant is, thus, acquitted and freed from his liabilities of bail bonds. The judgment and order under appeal are set aside.

8 For the assistance given to us by Shri Ravindra Kumar, Amicus Curiae, we would direct the Patna High Court Legal Aid Committee to pay him Rs 5000/-.

(Navaniti Prasad Singh, J)

Patna High Court,
The 29th of January, 2015,
NAFR, M E Haque/-

(Anjana Mishra, J)

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