

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.551 of 1993

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(AGAINST THE JUDGMENT OF CONVICTION AND ORDER OF SENTENCE, DATED 19TH OCTOBER, 1993, PASSED BY SHRI AWADHESH KUMAR OJHA, IInd. ADDITIONAL SESSIONS JUDGE, KATIHAR, IN SESSIONS TRIAL NO.198 OF 1993, ARISING OUT OF PRANPUR POLICE STATION NO. 65 OF 1992, CORRESPONDING TO G.R. CASE NO. 2345 OF 1992).

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Md. Mozamil Haque, son of Sajjad Ali, resident of village Bharat Kol, P.S. Paranpur, District Katihar

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant : Mr. N.A. Shamsi, Advocate
Mr. S. Ehteshamuddin, Advocate

For the State : Mr. Ajay Mishra, APP

Mrs. Soni Shrivastava, Advocate, as Amicus Curiae

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CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI

AND

HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE I. A. ANSARI)

Date: 12-03-2015

Under the judgment, dated 19.10.1993, passed, in Sessions Trial No. 198 of 1993, by learned 2nd Additional Sessions Judge, Katihar, the appellant, Md. Mozamil Haque, stands convicted under Sections 302 and 201 of the Indian Penal Code. Following his conviction under Section 302 of the Indian Penal Code, while the accused-appellant has been sentenced to undergo imprisonment for life, he has been sentenced to undergo, for his conviction under Section 201 of the Indian Penal Code, rigorous imprisonment for two years.

2. The case of the prosecution, as unfolded at the trial, may, in brief, be described as under:

(i) On 23.12.1992, at about 9.00 PM, two-and-a-half years old male baby of the informant, Md. Ayub Ali, while playing in a cradle at the veranda of his house, when none from the family was present there, disappeared. The parents and the members of the family looked for the baby, but found no trace of the baby. Apprehending that the baby might have fallen in the pond situated by the side of the house of the informant, they started making search on the following day with the help of fishing net and found the dead body of the informant's son with a rope tied around his neck. There was also a lace tied around the neck of the said baby indicating thereby that someone was trying to play black magic as was prevalent in the village of the informant.

(ii) On being informed about recovery of the said baby's dead body from the said pond, the police arrived at the house of the informant, where the informant (PW 14) gave an oral statement to the police, which was reduced into writing as the informant's *fardbeyan*.

(iii) Treating the informant's said *fardbeyan* as the First Information Report, Prampur Police Station Case No.65 of 1992, under Sections 302 and 201 of the Indian Penal Code, was registered, on 25.12.1992, against accused Md. Mozamil Haque.

(iv) During investigation, inquest was held over the said dead body, which was also subjected to *post mortem* examination, and , on completion of investigation, *charge sheet* was laid, under Sections 302/201 of the Indian Penal Code, against accused Md. Mozamil Haque.

3. To the charge framed at the trial under Sections 302 and 201 of the Indian Penal Code, the accused pleaded not guilty.

4. In support of their case, prosecution examined altogether 15 (fifteen) witnesses including the doctor, who had conducted the *post mortem* examination. The accused was, then, examined under Section 313 (1)(b) of the Code of Criminal Procedure, 1973, wherein the accused denied that he had committed the offences, which were alleged to have been committed by him, the case of the defence being that of denial. The defence also adduced evidence by examining three witnesses.

5. Heard Mr. N. A. Shamsi, learned counsel for the appellant, and Mr. Ajay Mishra, learned Additional Public Prosecutor, appearing for the State. We have also heard Ms. Soni Shrivastava, learned Counsel, appearing as *Amicus Curiae*.

6. In the fact situation of the present case, it is, in our view, appropriate to take into account the medical evidence on record. We may point out in this regard that on conducting

post mortem examination on the said dead body on 25.12.1992, the doctor (P.W.12) found as follows:

i) *Rigour motis was absent.*

External finding: -

A jute rope ligature was tied around neck with a thin thread at lower portion of neck with a piece of wood. on removal of rope ligature mark was found on and around upper portion of neck.

On dissection extravagation of blood underneath the skin 2/3rd of pinna of right side with ragged margin was missing. 1/3 of Pinna of upper portion of left side was missing with ragged margin. 2"x 2" lacerated injury on left scrotom with left testicle comes out of it.

7. In the opinion of the doctor, the death was caused by *asphyxia* as a result of *strangulation*, time elapsed since death being approximately 48 hours.

8. Neither the finding of the doctor nor his opinion with regard to the cause of death of the said baby was disputed either by the prosecution or by the defence. This apart, we, too, do not notice any thing inherently incorrect or improbable in the evidence given by the doctor.

9. We are, therefore, clearly of the view that the said baby met with homicidal death, the death having been

caused due to *asphyxia by strangulation*.

10. The question, which, now, arises for consideration, is: whether the present accused-appellant was the one, who had caused the death of the said baby?

11. Bearing in mind the question posed above, when we revert to the evidence on record, we notice that there is no eye witness to the alleged occurrence of strangulation of the said baby boy. We find that no one has claimed that he or she had seen the accused-appellant either taking away the baby or putting him to death by strangulation. There is also no direct evidence to show that the said son of the informant was drowned in the pond aforementioned by the accused-appellant. The prosecution's case is, thus, entirely based on circumstantial evidence.

12. The relevant incriminating circumstances, which appear from the evidence on record against the appellant, are follows: -

1. That there was enmity between the family of the accused and the first informant;
2. That the accused is said to have been seen touching the cradle and the baby on the date of occurrence;
3. That the accused was allegedly absconding after the occurrence;
4. That the dead body of the boy was recovered from the pond;
5. That P.W.1 (Saifuddin) saw the accused

carrying a *patali* (i.e., a bundle) around the time of occurrence;

6. That the accused had threatened the mother of the baby that he would remove the baby; and
7. That the accused was learning *tantra mantra* prior to the occurrence.

13. The first circumstance against accused-appellant, namely, Md. Mozamil Haque, is that his relation was inimical with the family of the deceased baby. It may be noted, as has been rightly pointed out on behalf of the appellant, that enmity cuts both the ways. While enmity may become the cause for committing an offence, enmity may be the cause for falsely implicating a person as accused or fastening him with an offence on suspicion. However, it is trite that suspicion cannot be made basis of conviction.

14. Keeping in view what has been indicated above, when we turn to the evidence of P.W 1 (Saifuddin), we notice that according to his evidence, he claims to have met the accused about six months' ago, while he was returning from the market, and, at that time, (P.W.1) he (Md. Saifuddin) noticed that the accused was carrying a bundle under his left arm-pit and though he (P.W 1) enquired from the accused as to what he (accused) was carrying, the accused did not respond and, on the following day, he (PW 1) left home for work and came back to his village after three days and, then, learnt

about the recovery of the dead body of the son of the informant from the pond.

15. In his cross examination, P.W.1 (Saifuddin) has deposed that his statement was recorded after 18 days of his seeing the accused-appellant carrying a bundle under his arm-pit as has been described hereinbefore. The Investigation Officer, has, however, confirmed that the statement of PW 1 was recorded on 14.03.1993.

16. What is, now, important to note is that the occurrence had taken place on 24.12.1992 and according to I.O. (P.W 15), the statement of PW 1 was recorded after almost three months of the occurrence. Why such a belated statement was made to the police and how the police came to know that PW 1 had seen the accused-appellant going in the manner as has been described by PW 1, remained shrouded in mystery.

17. There is neither any direct nor any indirect explanation discernable, in this regard, from the evidence on record.

18. Situated thus, it becomes clear that apart from the fact that the evidence, given by the PW1, cannot be readily relied upon, his evidence, even if it is true, cannot make the Court hold, boldly and confidently, that the accused-appellant was seen carrying a bundle, which had the said baby

son of the informant.

19. The third incriminating circumstance against the accused-appellant is that the accused-appellant is claimed to have been seen by PW 6 (Sabera Khatoon) touching the baby, while the baby was playing in the cradle, and, on being questioned, the accused-appellant had replied that he was arranging the clothes and dress of the baby.

20. While considering the above evidence of PW 6, it needs to be pointed out that PW 6 has claimed that she had told her son, who is the informant, that on the day of occurrence, the accused was seen by her touching the cradle and, on being questioned, he responded by saying that he was arranging the clothes and dress of the baby. This fact has, however, not been mentioned in the First Information Report and this fact was also omitted by PW 6, while her statement was being recorded by police. The omission to mention the fact that the accused- appellant had been seen touching the cradle on the day of the occurrence is an important and vital circumstance, particularly, when the informant has claimed in the First Information Report itself, that there was a black lace tied around the neck of his son's dead body indicating that someone was trying to play black magic and the informant (PW 14) asserts, in his evidence, that the accused was known to be involved in practicing black magic. This apart, in the First

Information Report, it is alleged that some unknown person had taken away the baby.

21. In the circumstances indicated above, we find it wholly unsafe to rely upon the evidence of PW 6 that the accused-appellant had been seen touching the cradle and on being questioned by PW 6, he (accused) responded by saying that he was arranging the clothes of the baby. The said assertion of PW 6, even if believed, cannot, in the absence of anything else, make the Court hold that the accused-appellant was the one, who had taken away the said baby or strangled to death the said baby and/or also threw the dead body into the pond.

22. Another circumstance against the accused-appellant, as we have indicated above, is that he is alleged to have absconded after the occurrence. The mere fact that the accused was not seen after the occurrence cannot be made a ground for holding the accused responsible for the disappearance of the said child and/or his disappearance and/or his death inasmuch as the name of the accused did not surface on the day, when the First Information Report was lodged on recovery of the said dead body.

23. In fact, as the materials on record reveals, his name surfaced, for the first time, on 14.03.1993, when PW 1 gave a statement to the police claiming to have seen the

accused-appellant carrying a bundle under his arm-pit in the manner as indicated above.

24. We are, therefore, not satisfied that merely on the ground that the accused was not seen after the occurrence, he can be confidently held to have been involved in the disappearance of the said baby and/or involved in causing the said baby's death and/or causing the disappearance of the said baby's dead body.

25. Yet another circumstance, which was surfaced from the evidence on record, is the assertion of P.W 8 (Bibi Sabera Khatoon), mother of the said baby that the accused had threatened to remove the baby. This fact, too, did not find mention in the First Information Report and/or immediately after the occurrence. If these facts were true, the name of accused would have appeared in the First Information Report as the one, who was being suspected to be behind the disappearance of the said child.

26. Moreover, no suspicion was even expressed against the accused-appellant in the First Information Report was lodged. If the accused had been seen with the said baby and/or he had threatened that he would remove the baby, such facts would have naturally appeared at the earliest point of time, when the police arrived at the house of the informant. Surprisingly, however, the name of the accused-appellant



surfaced as a person suspected to be involved in the occurrence only on belated examination of PW 1 by the police and, in this regard, we have already indicated above that there is no explanation given or discernable from the evidence on record as to how the police came to know that P.W.1 had seen the accused carrying a bundle of his arm-pit. We, therefore, find it unsafe to hold that the accused-appellant had threatened PW 8 that he would remove the baby.

29. We may, now, point out that when a case rests on circumstantial evidence, each of the circumstances shall be independently and convincingly proved, and the circumstances, when joined together, must make a complete and unbroken chain leading to the lone and only conclusion that it is none other than that the accused, who was involved in the commission of the offence, in question. The incriminating circumstances, adduced against the accused, must not only be consistent with the hypothesis of the guilt of accused, but must also be inconsistent with the hypothesis of his innocence.

30. In the case at hand, the various incriminating circumstances ought to have been convincingly proved, but, as we have already held above, the various incriminating circumstances have not been convincingly proved beyond reasonable doubt. This apart, even if the incriminating circumstances, surfacing from the evidence on record, are

considered together, the cumulative effect thereof cannot be such that one can confidently hold that it was none, but the accused-appellant, who had caused disappearance of the baby, and/or killed the baby and/or threw the baby into the pond.

31. Far from the above, even if the various circumstances, which have been brought on record against the accused-appellant, were held to be true, these circumstances, when combined together, merely raise suspicion against the accused-appellant as a person, who might have been involved behind the disappearance and killing of the said baby. The suspicion, which was so raised, cannot, however, be said to have taken place of proof.

32. Because of what have been discussed and pointed out above, we do not find that the evidence, adduced by the prosecution, was sufficient to hold that the accused-appellant was guilty of the offence, which he had been charged with. At any rate, the accused-appellant deserved to be accorded, at least, benefit of doubt.

33. In the result and for the foregoing reasons, we allow this appeal. The impugned conviction of the accused-appellant and the sentence passed against him by the judgment and order, under appeal, are hereby set aside. The accused-appellant is held not guilty of the offences, which he stands convicted of, and he is accordingly acquitted of the

same under benefit of doubt.

34. Since the accused-appellant is on bail, his bail bonds are hereby cancelled and his sureties shall stand accordingly discharged.

35. Let the *Amicus Curiae* be paid a fee of Rs.5,000/-.

36. Registry shall, forthwith, send a copy of this judgment and order to the learned trial Court along with the Lower Court Records.

(I. A. Ansari, J.)

(Gopal Prasad, J.)

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