

IN THE HIGH COURT OF JUDICATURE AT PATNA

Against the judgment of conviction dated 08.06.2010 and order of sentence dated 14.06. 2010 passed by Sri Krishna Mohan Srivastava, the learned 2nd Additional Sessions Judge, Bagaha, West Champaran in Sessions Trial No. 394 of 2003/Serial No. 422 of 2009 arising out of Goberdhana (Gobrahiya) P.S. Case No. 20 of 2002.

Criminal Appeal (DB) No.825 of 2010

Chandan Mahto, son of Kanhai Mahto, Village- Pipa Done, P.S. Gobrahia, District- West Champaran.

.... Appellant.

Versus

The State of Bihar

.... Respondent.

Appearance :

For the Appellant : Smt. Fauzia Shakil, Amicus Curiae.

For the State : Susri Shashi Bala Verma, A.P.P.

CORAM: HONOURABLE SHRI JUSTICE GOPAL PRASAD

and

HONOURABLE SHRI JUSTICE DHARNIDHAR JHA

CAV JUDGMENT

(Per: HONOURABLE SHRI JUSTICE GOPAL PRASAD)

Date: 26-8- 2015

This appeal arises out of the judgment dated 14th June, 2010 passed by the learned 2nd Additional Sessions Judge, Bagaha, in Sessions Trial No. 394 of 2003/Serial No. 422 of 2009 arising out of Goberdhana (Gobrahiya) P.S. Case No. 20 of 2002, by which the appellant has been convicted for offences under Sections 376, 302 and 201 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life for the offence under Section 302 of Indian Penal Code and rigorous imprisonment for ten years for offence under Section 376 of Indian Penal Code. He was further sentenced to undergo rigorous imprisonment for five years for committing offence

under Section 201 of Indian Penal Code. Sentences were directed to run concurrently.

2. The prosecution case that victim Sabitri Kumari (deceased) aged about 12 years was the daughter of the informant Ramjee Sharma(P.W.8) had, on 08.11.2002 gone to village Belatari to collect the dues of Garasa from one Saral Bot, son of Cheda Bot, but she did not return home till evening on 08.11.2002. The informant, Ramjee Sharma started searching for her. During search along with other villagers learnt from Ghanshyam Choudhary(P.W.2) and Nemraj Mahto (P.W.4) that they had seen the appellant Chandan chewing sugarcane in the evening at about 5.00 P.M. on the ridge i.e. path way passed in between sugarcane field of Bhrahmdeo and Suraj Bot. Thereafter, villagers and Gumasta (P.W.10) apprehended Chandan in the mid night at about 2.30 AM. from his house and Chandan Mahto on enquiry confessed that he had caught the victim and took her in the sugarcane field and had raped her and thereafter, killed her and concealed the dead body in Sargatha forest. The informant along with others P.W. 1 Sheetal Mahto, P.W.10 Budhai Mahto, the Gumasta, produced the appellant, Chandan Mahto in the police station and gave written report written by Sheetal Mahto and signed by informant Ramjee Sharma (P.W.8) Laxman Mahto (P.W.9) and Budhai Mahto (P.W.10) at 9.45 P.M.on 09.11.2002 and on the basis thereof the F.I.R.



was lodged on 10.11.2002 at 10.00 A.M. After lodging of the First Information Report, investigation proceeded, the statements of witnesses were recorded and during investigation broken bangles was recovered from the sugarcane field for which seizure list was prepared. The dead body was recovered from Sargatha forest. Thereafter, inquest report was prepared (Exhibit 1 and Exhibit 1/1) and subsequently post mortem examination was conducted and post mortem examination report was marked as Exhibit-3. The police after investigation submitted charge sheet, but the I.O. was not examined in the case. After submission of the charge sheet, cognizance was taken and case was committed to the Court of Sessions and subsequently, charges were framed under Sections 376, 302 and 201 of Indian Penal Code.

3. During the trial, fourteen witnesses were examined on behalf of the prosecution. P.W.1 Sheetal Mahto, P.W.9 Laxman Mahto and P.W. 14 Manib Mian were declared hostile and they did not support the prosecution case. P.Ws. 2 and 4 were the witnesses who stated that they saw the appellant Chandan Mahto on the path way passing through the ridge of the sugarcane field of Brahmdeo and Suraj Bot. P.Ws. 3, 5 and 13 were witnesses of seizure list regarding recovery of broken bangles. P.Ws. 5 and 6 are the hearsay witnesses and stated that they had learnt from others that Chandan Mahto

confessed that he has raped the victim and killed. P.W. 10 has stated that he followed the informant while he was searching for his daughter. P.Ws. 11 and 12 are the doctors. P.W. 11 has stated in his evidence that he conducted post mortem examination on the deceased. However, I.O. has not been examined in this case.

4. The defence of the accused person was that he has falsely been implicated in this case and no occurrence as alleged was committed by Chandan and that the witnesses have falsely deposed against him.

5. The trial court convicted the appellant taking into consideration the fact that when the dead body of the deceased was recovered as per statement of the that amounted to fact leading to discovery of a fact that it was as for the appellant to give explanation as to how he came to know that the dead body of the deceased Sabitri Kumari was kept in the bush in the jungle. Hence, it was held that the extra judicial confession given by the accused before the witnesses and police leading to discovery of dead body is admissible under Section 27 of the Evidence Act and flat denial of the accused without giving any explanation is additional link in the chain of circumstances to held that prosecution had succeeded prove the charges under Sections 376, 302 and 201 of the Indian Penal Code.

6. Learned counsel for the appellant however challenged the



order of conviction and it has been submitted that prosecution has not been successful in establishing the charges beyond reasonable doubt. It has further been submitted that there is no direct evidence about the occurrence and the case hinges on circumstantial evidence but circumstance upon which the inference of guilt has been drawn has neither been fully established nor the fact alleged to have been proved from a chain of circumstance consistent with the hypothesis of the guilt leaving no room for innocence of the appellant. There is neither cogent and reliable evidence regarding confession of the appellant nor prove of fact leading to discovery. It has further been contended that non-examination of the I.O. has caused prejudice to the appellant to establish the place of occurrence and the recovery of dead body of the deceased on confession and the chain of circumstances is not complete to arrive at any reasonable conclusion of the guilt of the appellant.

7. Learned counsel for the State however contends that the prosecution has been able to establish the charges as recovery of dead body itself is said to be indicative of the fact that the accused had the knowledge about the murder and concealment of the dead body and recovery was made at his instance.

8. However, taking into consideration the respective submissions the question for consideration is as to whether the prosecution has been able to prove the charges beyond reasonable

doubt.

9. The prosecution case as alleged in the written report filed by the informant in writing of Sheetal Mahto (P.W. 1) and signed by Ramjee Sharma, alleged that his daughter Sabitri Kumari aged about 12 years had gone to Belatandi to collect dues of Garasa from Saral Bot and while she was returning at about 5 P.M. through the path way passing by the ridge of the sugarcane field Chandan Mahto who was chewing sugarcane while sitting on the ridge caught his daughter and took her to sugarcane field and raped her by force and thereafter, did her to death and concealed the dead body in Sargatha forest. Further case is that he learnt this fact from Chandan Mahto who was questioned by the Gumasta P.W.10 and other villagers before whom the appellant disclosed this fact and then informant P.W.8 along with Sheetal Mahto (P.W. 1) Laxman Mahto (P.W.9) and Budhai Mahto (P.W.10) took the appellant to the police station to file the written report and to hand the appellant over to the police.

10. Hence from the allegation itself it is apparent that neither the informant nor the witnesses P.Ws. 1, 9 and 10 were eye witnesses to the occurrence. The occurrence was alleged to have taken place on 08.11.2002 at 5.00 P.M. The written report had been given on 09.11.2002 at 9.45 P.M. The F.I.R. was drawn on 10.11.2002 at 10.00 A.M.

11. The informant, P.W. 8, in his evidence has stated that when his daughter did not return then he started making search for her and he learnt from Brahamdeo Pandit (P.W. 5), Ghanshyam Chaudhary (P.W. 2) and Nemraj Mahto (P.W. 4) that Chandan Mahto was chewing sugarcane on the ridge, i.e. single path way (Ekparia Rasta) at about 4-5 P.M. on the date of occurrence. Then they apprehended Chandan from his house in the night at 2.30 A.M in between the night intervening 8th-9th November, 2002, then Chandan disclosed in the police station that he had committed rape and murder of the deceased. However, this evidence is quite contrary and contradictory to the written report. The case of prosecution in written report that Chandan was apprehended and he admitted before Gumasta, P.W.10 and other villagers that he had raped and murdered the victim and then they produced Chandan at the Police Station with help of Gumasta P.W.10 and other villagers. But the informant in his evidence has not supported the prosecution case as disclosed in the written report that the appellant, Chandan apprehended and made extra judicial confession confessed before the informant or Gumasta or other villagers in village and not in the police station. This gives the fatal blow to the evidence of P.W. 8 as well as to prosecution case which is based on extra judicial confession. The confession in Police Station before the police is not admissible in evidence under Section 25 of the Evidence Act.



12. The evidence of this witness P.W.8, the informant is quite contrary to the statement made in the first information report. Whereas in the written report, on the basis of which First Information Report has been lodged, it has not been mentioned that P.W.8 learnt from Nemraj Mahto, P.W.4 and Ghanshyam Chaudhary, P.W.2-- but that may be a omission. But the fact mentioned in the F.I.R.-- that on being apprehending, Chandan disclosed before Gumasta and other villagers in the village is quite contradictory to the evidence of P.W.8 that Chandan Mahto confessed the guilt at the police station when he produced Chandan with the help of Gumasta in the police station. Hence the admission on confession by the appellant before police in police station is hit by Section 25 of the Evidence Act and is an extra judicial confession nor this evidence lead to admission regarding fact leading to discovery under Section 27 of the Evidence Act.

13. Moreover, Chandan was apprehended in between the night of 8th-9th November, 2002 at 2.30 A.M. but was produced in police station with a written report on 9th November, 2002 at 9.45 P.M. after long delay for which there is no explanation.

14. Though, P.W.8 has stated that he learnt from P.Ws. 2 and 4 about chewing of sugarcane by Chandan has also not been mentioned in written report, may only be an omission but a vital omission to conceal the fact may amounts to contradiction.

15. P.Ws. 2 and 4, though, have stated that they disclosed about Chandan chewing sugarcane in the field in between the field of Brahmadeo and Suraj Bot. P.W. 4 has also stated that he saw Chandan Mahto chewing Sugarcane and thereafter, he went to his house and learnt that Sabitri Kumari was missing.

16. However from the evidence of P.Ws. 2 and 4, it is apparent that they saw the appellant chewing sugarcane which itself is not an incriminating circumstance as there is no evidence that the victim was seen along with the deceased and that circumstance is not a circumstance pointing to the guilt of the accused as it is not a case of last seen together.

17. P.W. 1 Sheetal Mahto has also not supported the prosecution case as he has been declared hostile and in his evidence he stated that he did not know anything about of the occurrence. P.W.9 Laxman Mahto, though, has proved signature on the First Information Report marked Exhibit 2/1, but has stated that he did not know anything about the occurrence.

18. P.W.10, Budhai Mahto, the Gumasta of the village has stated that while searching for the victim, they learnt about Chandan having been seen chewing sugarcane and they as such went to the house of Chandan Mahto but Chandan was not in his house. However this evidence is contrary to evidence of P.W. 8 the informant who

deposed that he met with Chandan at his house. Though, has further deposed in paragraph 3 that he met Chandan in the night then on enquiry Chandan refused to admit anything about the occurrence and thereafter, police was informed, which police came but Chandan did not disclose anything before the police.

19. Hence his evidence is quite contrary to the prosecution story in written report that Chandan accepted his guilt before P.W.10, the Gumasta of village and other villagers.

20. However, he has further stated in paragraph 4, that on making further enquiry from Chandan, he accepted and confessed to his guilt. Hence, evidence of P.W.10 is again contrary to the prosecution case as disclosed in the First Information Report. This witness has further stated that he did not see the victim girl along with Chandan. He has stated that they made a search for the girl in the night and reported to the police in the morning, but as per record police was informed in night at 9.45 P.M. on the basis of which F.I.R. was lodged. This evidence is again contrary to the evidence of the witness, P.W.10 Budhai Mahto who is named in the First Information Report and who had also signed the First Information Report. However, his deposition is quite contrary to the prosecution case as disclosed in the First Information Report.

21. The First Information Report discloses about the extra

judicial confession of Chandan before P.W.10 and other villagers and then he was produced before the police. But the evidence of P.W.10 that Chandan was apprehended and first he refused, then the police was informed then police came. But the appellant did not disclose anything to the police as per evidence in paragraph 3 of his deposition, but subsequently on further enquiry confessed and hence the prosecution case of extra judicial confession by Chandan before police falls to ground. Further in paragraph 9, he has stated that the police was informed in the morning at the police station which is against contrary to prosecution case. Hence his evidence does not inspire confidence regarding confession or fact leading to discovery of the dead body. Further this witness has stated that on re-enquiry Chandan accept his guilt then Officer-in-Charge of the Police Station took Chandan with him and as per disclosure made by Chandan, the police recovered the dead body of Sabitri Kumari. However, I.O. has not been examined in this case and he has not come to depose from where he had recovered the dead body and as to whether the appellant had confessed before the police or whether the dead body was recovered on the confession of the appellant.

22. Hence evidence of P.W.10 is quite contrary to prosecution case as alleged in the First Information Report regarding confession of Chandan and it does not inspire confidence as the story

of extra judicial confession by Chandan has not specifically been supported either by P.W.8 the informant or by P.W.10, the Gumasta and P.W.1.

23. P.W.7, claims that he also was amongst persons for search for the victim along with the informant, During search, on disclosure of Ghanshyam Chaudhary and Nemraj Mahto that they have seen Chandan Mahto chewing sugarcane, but Chandan could not be found in the night and he met Chandan on the next day. On enquiry Chandan first refused but subsequently confessed the commission of the offences. This evidence is again making out a third story of meeting Chandan in next day morning whereas P.W.8 and P.W.10 in their evidences have deposed that they met Chandan in the night of the occurrence itself. The evidence of P.W.8 informant is that he learnt from Nemraj Mahto and Ghanshyam Chaudhary in the night then Chandan Mahto was apprehended at his house itself in the night at 2.30 A.M., but as per the evidence of P.W. 7 he met Chandan in the next morning when he claims he was following the informant in the night with P.Ws. 8 and 10. However, this witness has further stated that police had come in the village in the night of the date of occurrence itself is again a contradiction or contrary to the prosecution case. He has further stated that police had also searched for Chandan, but did not find him in the night, as per his evidence in paragraph 14 and he

has stated that Chandan disclosed on the next day about rape and murder which evidence are quite contrary to basic prosecution story. He has further disclosed this fact on the Rasta at about 10.00 A.M. in the day and at that time police was also present there. However, this part of evidence is quite contrary to the evidence of P.W.8 and P.W.10 and against the prosecution case.

24. Hence P.Ws. 8, 7 and 10, the most important witnesses, for the prosecution have in their evidence deposed that Chandan confessed committing rape and murder of the victim. But their evidence is totally contradictory to each other about time and place of confession and specifically contradictory and contrary to prosecution case in F.I.R. P.W.8 in the written report has stated that Chandan was apprehended in the night at about 2.30 A.M. at his home and confessed his guilt before Gumasta, P.W.10 and other co-villagers then he was brought to the police station on 09.11.2002 at about 9.45 P.M. and there he had given written report whereas evidence of P.W.10 that Chandan was not at his home, but could be found in the night of the occurrence, when the police was informed and police came, whereas the statement of the informant in the First Information Report that appellant was produced in the police station on 09.11.2002 at 9.45 A.M. whereas evidence of P.W. 7 was that the appellant confessed at 10.00 A.M. on the next day of the occurrence in presence of the police.

Hence evidence regarding confession is neither reliable nor trustworthy. Moreover, evidence of P.Ws. 2 and 4 are more particularly about the fact that they had disclosed about the presence of Chandan on the date of occurrence at the ridge of the field chewing sugarcane. Evidence of P.Ws. 5 and 6 is only hearsay as they had learnt from the villagers that Chandan had confessed to his guilt.

25. So far as P.W.3 is concerned, he has come to depose that appellant Chandan confessed his guilt in the Panchayat. However, there is no evidence that any Panchayati was convened in which Chandan was produced and he has made the confession.

26. P.W.11 is the doctor who did not say anything. P. W.12 is also doctor who examined the dead body of victim and found some injuries on it. He found Asphyxia caused due to fracture of Cervical, Vertebral and laceration of spinal cord which had caused the death of the deceased. He found the following antemortem injuries :-

- (i) cervical veribra 3rd and 4th fractured and spinal cord completely lacerated.*
- (ii) brain matter congested.*
- (iii) both lungs found congested.*
- (iv) heart empty in its left chamber.*
- (v) liver congested.*
- (vi) stomach congested and found containing undigested food materials.*
- (vii) Vaginal wall was completely lacerated of*

labia minora was congested and lacerated. Hymen was ruptured and filled with semen discharge and vaginal wall was found ruptured and blood was found in the pelvic region. Injuries externally on thigh and nose were found present.

27. However, taking into account the entire evidence, the only evidence against the appellant was that he was seen chewing sugarcane on the common ridge of sugarcane fields of Brahmdeo and Suraj Bot. However, there is evidence that Chandan confessed his guilt before Gumasta and villagers. So far as the evidence regarding confession of the appellant regarding rape and murder is concerned, that evidence of witnesses is neither consistent nor reliable but appears contradictory to each other. Further taking into consideration the entire evidence, there is no eye witness to the occurrence and there is no evidence that victim was seen along with the appellant. However, only material is that appellant was seen near sugarcane field on the Rasta passing through the sugarcane fields at about 5 P.M. on the date of occurrence i.e. on 08.11.2002. The other evidence against him is, confession of guilt and the recovery of the dead body, but there I.O. not examined to say whether dead body recovered from the place disclosed by the appellant. The evidence is contradictory to the evidence of witnesses from one other and varies from witness to witness and hence is neither safe nor acceptable to rely upon the

witness. Moreover, I.O. has not been examined in this case and has not come to depose whether the appellant confessed before the police or whether his confession was made for the first time and which confession had lead to discovery of dead body to prove fact leading to discovery. Neither any individual circumstance has been proved to indicate that circumstances were pointing to the guilt nor any chain of circumstance establish the guilt of the accused leaving the inconsistency with the innocence.

28. Having regard to the fact that there is no direct evidence and before this Court convict the appellant on the basis of evidence based on circumstantial evidence, the circumstances must lead to irresistible conclusion of guilt must be fully established. It is well settled that “ the circumstance from which conclusion of guilt is to be drawn should be fully established. The circumstances concerned ‘must’ or ‘should’ and not ‘may be established. The circumstance so established should be consistent only with the hypothesis of the guilt and should not be explainable on any other hypothesis except that of the guilt of the accused leaving no room or inconsistency with the innocence and moreover, the circumstances should be of a conclusive nature and further chain of circumstance must be so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused showing in all human probability the act

must have been done by the accused.

29. However, the prosecution is based on the circumstance that appellant has confessed his guilt and that confession really led to discovery of the dead body of the deceased but neither the prosecution has been able to establish the confession of the appellant by cogent, reliable or unimpeachable evidence to establish the fact conclusively nor has been able to show that his confession led to the recovery of dead body when the circumstances to be taken into consideration or proposed to be considered does not fully establish the guilt of the accused, it cannot be taken into consideration to conclude that the prosecution has proved the case beyond doubt. However, evidence adduced suffers from various infirmities as evidences of witnesses are not trustworthy and reliable and worthy of credence. The trial court misdirected itself in taking into account the circumstances that appellant has confessed his guilt and the said confession led to the discovery of the dead body. Moreover, in absence of evidence of I.O. serious prejudice appears caused to the prosecution and prosecution has also not succeeded in establishing that the confession by the appellant leading to discovery nor the circumstance leading to the irresistible conclusion of the guilt of the appellant.

30. Hence, I find and hold that prosecution has not been able to prove the charges beyond all reasonable doubt. Hence, conviction

and sentence recorded by the trial court is hereby set aside and appeal is allowed.

31. The appellant, namely, Chandan Mahto, who is in custody, be set at liberty forthwith, if not required to be detained in any other case.

(Gopal Prasad, J)

Dharnidhar Jha, J. I agree.

(Dharnidhar Jha, J)

m.p.
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