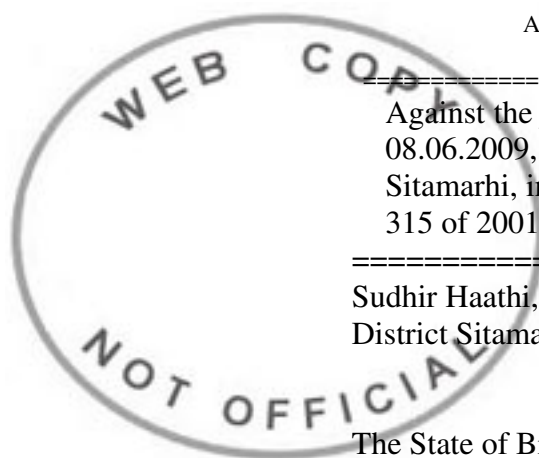




IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.713 of 2009

Arising Out of PS.Case No. -315 Year-2001 Thana - Sitamarhi District- SITAMARHI

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Against the judgment of conviction dated, 05.06.2009 and order of sentence, dated 08.06.2009, passed by the Additional Sessions Judge, Fast Track Court, III, Sitamarhi, in Sessions Trial No. 153 of 2002/168 of 2008 (Sitamarhi P.S. Case No. 315 of 2001, G.R. No. 1417 of 2001)

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Sudhir Haathi, son of Baidyanath Hathi, resident of village Punaura, P.S. Sitamarhi, District Sitamarhi

.... Appellant

Versus

The State of Bihar

.... Respondent

With

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Criminal Appeal (DB) No. 512 of 2009

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Arising Out of PS.Case No. -315 Year-2001 Thana - Sitamarhi District- SITAMARHI

- =====
1. Madan Rai, son of late Palat Rai
 2. Baidyanath Hathi, son of late Hiralal Hathi
 3. Raghunath Hathi, son of late Hiralal Hathi
 4. Mahendra Mahto, son of late Jindlal Mahto alias Teain Mahto,
All residents of village Punaura, P.S. Sitamarhi, District Sitamarhi
- =====

.... Appellants

Versus

The State of Bihar

.... Respondent

With

=====

Criminal Appeal (DB) No. 791 of 2009

=====

Arising Out of PS.Case No. -315 Year-2001 Thana - Sitamarhi District- SITAMARHI

Kailash Pradhan, son of Bhuta Pradhan, resident of village Punaura, P.S. Sitamarhi, District Sitamarhi

.... Appellant

Versus

The State of Bihar

.... Respondents

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Appearance :
(In CR. APP (DB) No. 713 of 2009)

For the Appellant : Mr. Kanhaiya Pd. Singh, Sr. Advocate
Mrs. Jyotsna Kumari,
Mr. Alok Kumar Alok
Mr. Man Mohan Kumar, Advocates

For the Respondent : Mr. Suraj Narayan Pd. Sinha, Sr. Advocate
Mrs. Madhubala Verma, Advocate
Dr. Mayanand Jha, APP

(In CR. APP (DB) No. 512 of 2009)

For the Appellants : Mr. Rama Kant Sharma, Sr. Advocate
Mr. Lakshmi Kant Sharma, Advocate
For the Respondent : Mr. Suraj Narayan Pd. Sinha, Sr. Advocate
Mrs. Madhubala Verma, Advocate
Dr. Mayanand Jha, APP

(In CR. APP (DB) No. 791 of 2009)

For the Appellant : Mr. Kanhaiya Pd. Singh, Sr. Advocate
Mrs. Jyotsna Kumari,
Mr. Alok Kumar Alok
Mr. Man Mohan Kumar, Advocates
For the Respondent : Mr. Suraj Narayan Pd. Sinha, Sr. Advocate
Mrs. Madhubala Verma, Advocate
Dr. Mayanand Jha, APP

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CORAM: HONOURABLE THE CHIEF JUSTICE

And

HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date: 26-02-2015

These three criminal appeals are filed against the judgment dated 5.06.2009 rendered by the Court of Additional Sessions Judge, Fast Track Court III, Sitamarhi in Sessions Trial No.153 of 2002/168 of 2008. Six persons were put on trial and the trial court convicted all of them for the offences punishable under Section 364, 302 read with Section 34 and 201 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for life. Fine of Rs.5000/- was also imposed on each of them and in default of payment thereof, to undergo rigorous imprisonment for six months.

2. Criminal Appeal (DB) No.512 of 2009 is filed by Madan Rai, Baidyanath Hathi, Raghunath Hathi, and Mahendra Mahto, who figured as accused nos.2 to 5 before the trial court. Criminal Appeal (DB) No. 713 of 2009 is filed by Sudhir Haathi, the

first accused, whereas Criminal Appeal (DB) No. 791 of 2009 is filed by Kailash Pradhan accused no.6.

3. The case of the prosecution, as presented before the trial court, was as under :-

P.W.6 Kameshwar Prasad Singh submitted a complaint on 14.02.2001 before the Police Station Sitamarhi stating that Sudhir Haathi, A -1, Kailash Pradhan, A-6, Manoj Kumar, (who was declared as juvenile and tried separately) and Ratnesh Pradhan (since dead) came to his house in village Punaura at about 2.30 P.M in Tata Sumo vehicle and asked his son Sudhir Singh to accompany them to a Mela at Athkoni. He stated that Sudhir Singh declined to accompany them stating that it is too cold; but the four persons mentioned above have convinced him stating that they can shut the windscreens of the vehicle and return by evening and ultimately Sudhir Singh accompanied the four persons. It was further stated by P.W.6 that even by midnight on 12.12.2001, his son did not return and in the morning when he made an attempt to meet the four persons named above, they were not available. Search is said to have been made at various places and when A-1 was asked the whereabouts of Sudhir Singh, he did not give any proper reply. He mentioned that his son Sudhir Singh had business dealings in the trade of Coal with A-1 wherein he invested huge money and that there was some dispute

between those persons. It was also stated that the two persons by name Murari Prasad, P.W.1 and Sanjay Singh P.W.7 were aware of these matters. First information report was registered on the same day and it has reached the concerned court on 20.12.2001.

4. The Investigating Officer P.W.13 Krishna Kumar is said to have visited the place where Sudhir Singh joined the four persons; and examined various individuals. On 21.12.2001, he received information about the dead body in another village and on information being given to P.W.6, he came to the place together with some persons and identified the dead body, to be of his son Sudhir Singh. Thereafter the body was sent for post mortem.

5. The trial was initially undertaken against A-1, A-6 and Ratnesh. Thereafter four persons i.e. Madan Rai, Baidyanath Hathi, Raghunath Hathi and Mahendra Mahto, A-2 to A-5 were added by the trial court, in exercise of power under Section 319 of the Code of Criminal Procedure and charges were framed against them.

6. Before the trial court P.Ws. 1 to 15 were examined and various exhibits, including the inquest report and postmortem report were filed. Statements of as many as five witnesses including that of P.W.3 were recorded in the context of adding the names of others, as accused. On behalf of the defence, D.Ws.1 to 12 were examined.

7. The trial court convicted all the accused, for the offences under Sections 364, 302/34 and 201 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for life, apart from other punishment, of lesser description.

8. During the pendency of these appeals, Madan Rai, A-2, the Appellant No.1 of Cr. Appeal (DB) No. 512 of 2009 died and the appeal abated.

9. On behalf of the appellants, Mr. Kanhaiya Prasad Singh, and Mr. Rama Kant Sharma learned senior counsel advanced arguments. They submit that except stating that the son of P.W.6 accompanied A-1, A-6 and two others for attending a Mela, P.W. 6 did not mention that he had any doubt about the other accused for disappearance of his son. They contend that the evidence of P.W.13, the Investigating Officer, is totally incomplete and he did not even indicate the basis for examining P.Ws. 2 to 5 and though he is said to have examined some more persons such as Jhulan Mishra, Nawal Mishra, Hemlata Singh Mahanth Hathi and Giridhari Sharan in the investigation, they were not examined in the court. They submit that P.W.6 did not mention the names of A-2 to A-5 in his complaint, but named them for the first time, in his examination-in-chief and, according to him, those four persons were seen near the village while A-1, A-6 and his sons Sudhir Singh left in Tata Sumo vehicle. They

contend that once A-2 to A-5 were found in the village itself, the basis for implicating them in this case for the alleged offence said to have occurred in the evening, is totally absent. It is pleaded that the evidence of P.W.6 is completely at variance with that of P.W.3.

10. Learned counsel further submit that P.W. 3 was not named in the fardbeyan or in the first information report and the circumstances under which he came to be examined, was not mentioned by the Investigating Officer. They pleaded that P.W.6 did not make any mention about P.W.3, whereas latter stated that he was very much present at the house of P.W.6 when the investigation was taking place. Learned counsel submit that the evidence of P.W.3 is totally untrustworthy and even if any part of it can be believed, it is totally at variance with the other evidence.

11. Dr. Mayanand Jha, learned Additional Public Prosecutor, submits that P.W. 6 was consistent throughout, in his version that the deceased was taken by A-1 and A-6 and two others and in the course of investigation, involvement of A-2 to A-5 has also come to light. He submits that the inclusion of names of A-2 to A-5 became necessary due to the developments in course of trial, and the prescribed procedure was followed in this behalf. He submitted that on receipt of the complaint, the prosecution tried its level best, firstly to trace the missing person and thereafter it was able to identify the

culprits, once the dead body was recovered. Learned counsel further submitted that the trial court furnished cogent reasons in support of its conclusion, convicted and sentenced the accused persons.

12. The entire case rests upon the theory of 'last seen together'. The deceased Sudhir Singh was said to be in the house, on 12.12.2001 and in the afternoon A-1 and A-6 and two others, namely, Manoj Kumar and Ratnesh Mandal came in Tata Sumo vehicle and asked him to accompany to a Mela. P.W.6 stated that though his son Sudhir Singh was not ready to accompany those persons, he was persuaded but his son did not return even by midnight. On the next morning P.W.6 tried to know the whereabouts of his son, and to identify four persons. The answer given by A-1 was said to be evasive. The exact time at which P.W. 6 asked A-1 about the whereabouts of his son Sudhir Singh is not clear. The complaint of this witness about missing of his son is submitted only on 15.02.2001 i.e. three days after Sudhir Singh is said to have left for Mela.

13. The delay in submitting the complaint can be ignored since P.W.6 himself was not sure as to what happened to his son. However, the prosecution failed to explain as to why the complaint reached the nearby court on 20.12.2001.

14. In the matter of such nature, the evidence of the Investigating Officer assumes significance and he was expected to

provide the links, one after the other, between the incident and the accused. In this case, however, except mentioning the factum of receiving the complaint, and visiting the place from where Sudhir Singh left and recording the statements of some persons such as P.Ws. 2 to 5; P.W.13 did not elaborate the matter.

15. The prosecution witness cannot be picked up from somewhere and made to speak about the occurrence, unless they are named in the first information report or noted during investigation. The prosecution has to explain the description of such witness and the manner in which he has become relevant in the case. Hardly there was any explanation as to the circumstances under which P.Ws. 2 to 5 were examined. Another peculiar aspect is that the trial court examined as many as five persons including P.W. 3 separately without giving any witness number to them, and added the names of A-2 to A-5. Let us, for a while ignore the reservation expressed by the appellants as to procedure adopted in this behalf.

16. The theory of 'last seen together' leading to an offence punishable under Section 302 IPC, is required to be examined with a bit of caution. In such cases many a time imagination takes the place of proof and it is too well recognized that once mind is let free to stitch imaginary events, it is difficult to control it. It is mainly against a person who has grudge against the



victim, that the theory of last seen together can be straightway invoked. If the meeting of the victim and the accused was otherwise in congenial atmosphere, and they were accompanied by many other friends, much more is needed to establish that the accused took advantage of his company with the victim and committed the crime. Further when the intention of an accused is to kill a person against whom he has enmity; he is prone to make sure of the absence of others, lest the event is witnessed.

17. Reverting to the facts of the case, P.W.6 did not entertain even an inkling of doubt about the safety of his son in the hands of A-1 and others. Any person in his place would have straightaway accosted A-1 when his son did not return. One after other witnesses of the prosecution stated that though four persons came back to the village, Sudhir Singh did not return. Nobody would wait for three days to submit complaint in this behalf. The information about the appearance of the dead body of Sudhir Singh is said to have been noticed only on 21.12.2001 and the same is said to have been identified as that of Sudhir Singh. No effort was made to visit the place from where the dead body was recovered nor to verify from anyone, about the incident leading to death of Sudhir Singh. The body was in such a mutilated condition, that post mortem report is also not helpful to know about the cause of death. Though law

provides for drawing inference to provide some missing links in the prosecution, there must be some well-known basis to start with. Important requirements such as date and time of death, the cause of death, probability of the deceased being put to death under different set of situations; cannot be pushed under the carpet of the theory of last seen together.

18. P.W.1 is another important witness for the prosecution. He is said to be running a Telephone Booth nearby the house of P.W. 6. His evidence is also to the effect that he had last seen Sudhir Singh in the company of A-1 and A-6 and two others. The unreliability of the evidence of this witness is clear from the fact that he admitted in his cross-examination that he is figuring as an accused in three criminal cases and P.W.6 is his pairvikar.

19. P.W.2 was declared hostile at the trial on being insisted by the prosecution.

20. P.W. 3 stated in his evidence that A-1 is of the same village as that of P.W.6 and one day earlier, he went to Athkoni Mela for selling the Malas and there he met the deceased in the company of A-1 and A-6 and other two persons. This is totally at variance with the evidence of P.W.6 who has stated that A-2 to A-5 were present in the village even after Sudhir Singh, A-1, A-6 and two others left for the Mela. It is also important to note that P.W. 3 stated



that he did not remember as to from which place he had purchased the material, i.e. malas and that he came to know about the death of his mother, only after he came to the village. He has also deposed that it is after paying obeisance to his mother, that he came to know about the missing of Sudhir Singh. Though he is said to have been present near the entrance of P.W.6 when the investigation was going on, none, including P.W.6, spoke to his presence. He admitted in his cross-examination that on 16.12.2001 he went to the house of P.W.6 but he did not inform anybody that he met Sudhir Singh in the Mela. He has also admitted that he has not given any information to the police about his meeting Sudhir Singh in the Mela, even after he came to know about missing of the person. Obviously, he is a planted witness.

21. P.W.4 is the brother of the deceased. In the cross-examination, it was elicited from him that Sudhir Singh was facing trial in a criminal case at Darbhanga. He stated that he did not go to Athkoni Mela to search his brother even after he came to know that he was missing. He stated that he went to Samastipur on 14.12.2001 in search of his brother. However, that was not mentioned in the complaint by P.W.3.

22. The evidence of P.W.5 is on the same lines as that of P.Ws.1 and 3. Other witnesses spoke about the steps in the

investigation, such as post mortem report and the inquest report.

23. There are certain important aspects, to be noticed in this case. The trial court framed uniform charges against all the accused. It has already been mentioned that names of A-2 to A-5 are not mentioned in the first information report at all. They came to be included in exercise of power under section 319 of the Code of Criminal Procedure. It appears that the trial court recorded the statements of some persons in the context of including the names of A-2 to A-5 as construing the ultimate evidence. It did not realise that the statements that are referable to Section 319 of the Code of Criminal Procedure are comparable to those under Sections 161 and 164, Cr.P.C. and that independent evidence must be adduced, as to the role of the accused so included. Not a word of deposition is contained in the record, after A-2 to A-5 were added.

24. The motive, alleged against the accused is that there was some business transaction between Sudhir Singh and A-1 and in that connection he might have been killed. Almost all the witnesses, namely, P.Ws.1 to 6 spoke about the same fact, namely, existence of business rivals between those two persons. However, everyone has admitted in his cross-examination that he is not aware of the actual nature of business or dispute between them. There was not even a reference to any demand against each other between the

deceased and A-1. At least P.Ws.4 and 6, i.e. brother and father of the deceased were supposed to know details. However, nothing of that sort was forthcoming.

25. Under these circumstances, we are of the view that it would not at all be safe to convict the accused i.e. appellants herein for the offence of causing death of Sudhir Singh.

26. In the result, these appeals are allowed and judgment of conviction dated 05.06.2009 and order of sentence dated 08.06.2009 rendered by the Court of Additional Sessions Judge, Fast Track Court III, Sitamarhi in Sessions Trial No.153 of 2002/168 of 2008 is set aside. The appellants are acquitted of the offence as alleged against them. The bail bonds furnished by the appellants, except appellant Sudhir Haathi, shall stand cancelled since they are on bail. Appellant Sudhir Haathi, shall be released forthwith from the jail in which he is serving the sentence, if not wanted in any other case.

AFR

(L. Narasimha Reddy, CJ)

B.T/-

(Vikash Jain, J)

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