

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.475 of 1993

Arising Out of PS.Case No. -122 Year- 1991 Thana –Muffasil, District- BHOJPUR

- =====
1. Satyendra Singh son of Sri Sheo Kumar Singh
 2. Sanjay Singh son of Kavi Raj Singh
 3. Kanjee Singh son of Ashok Singh

All residents of village- Dariyapur, Police Station-Arrah
Muffasil, District-Bhojpur

.... Appellants

Versus

The State of Bihar

.... Respondent

=====

Appearance :

For the Appellant/s : Mr. Ram Suhawan Singh, Adv.
Mr. Chandra Moleshwar, Adv.
Mr. Ramesh Kumar Srivastava, Adv.

For the Respondent/s : Mr. Ajay Mishra, A.P.P.

=====

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

and

HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date: 12-07-2017

Three appellants have preferred the present appeal under Section 374(2) of the Code of Criminal Procedure against the Judgment of their conviction and order of sentence dated 26.08.1993 passed by Shri Ashok Kumar Verma, 6th Addl. District & Sessions Judge, Arrah in Sessions Trial No.471 of 1991. By the said Judgment, the learned trial Judge has convicted three appellants for the offence under Section 302/34 of the Indian Penal Code and sentenced to undergo R.I. for life under Section 302/34 of the



Indian Penal Code.

2. The prosecution case, in short, is that on 04.06.1991 deceased Umesh Singh had gone to ease at about 6.00 P.M. along with accused Satyendra Singh, Sanjay Singh and Kanjee Singh. Kiran, sister of deceased Umesh Singh and informant Ramesh Singh had also gone with Umesh Singh and in the way Umesh Singh had purchased ground nut from the shop of Ganesh Singh and given some ground nuts to Kiran and she returned back to her house. Deceased Umesh Singh proceeded with three accused persons with ground nut and four cigarettes. When deceased Umesh Singh, brother of the informant Ramesh Singh did not return to the house in the night, the sister of the informant narrated the facts. The informant thought that Umesh Singh might had gone to the house of accused persons and slept there. Even then the informant searched for the deceased Umesh Singh at about 10 to 11 O'clock in the night in the village and at the house of three accused persons but nothing could be traced out. The informant also could not meet the three accused persons. On the next day at about 5.00 A.M. one Bhuteli Singh of the village told the informant that a dead body was lying in the western *badhar* of the village and people were going to see it. The informant also went to see the dead body and found that his brother Umesh Kumar Singh was murdered by cutting his throat. The informant also



found some ground nuts, one butt of cigarette, *Lota* and a torch of five cells near the dead body. There was sufficient blood on the ground. According to prosecution, the deceased had Rs.2000/- with him about which, accused persons had knowledge from before and for the money the accused persons had killed the deceased.

3. On the basis of aforesaid fardbeyan of the informant Ramesh Singh (P.W.11), a formal F.I.R. was lodged vide Arrah Muffasil P.S. Case No.122/91 under Section 302/34 of the Indian Penal Code. The F.I.R. was lodged against unknown. After investigation, the police submitted chargesheet against aforesaid three appellants on 03.09.1991. Thereafter, on 06.09.1991, the learned Chief Judicial Magistrate took cognizance of offence under Section 302/34 of the Indian Penal Code and on 20.09.1999 after cognizance was taken, the case was committed to the court of Sessions and, thereafter, the case was numbered as Sessions Trial No.471 of 1991. On 24.04.1992, charges were framed against all the three appellants under Section 302/34 of the Indian Penal Code. Since the appellants denied charges, they were tried.

4. The prosecution, to prove the charges, examined altogether 13 witnesses. Out of 13 witnesses, P.Ws 2, 3 & 7, namely, Surendra Singh, Bachcha Jee Singh and Murat Ram were examined as formal witness since they had proved their signatures on the



seizure list as well as inquest report. The signature of Surendra Singh (P.W.2) on seizure list was marked as Ext.1 and on inquest report; his signature was marked as Ext.1/1. Similarly, signature of Bachcha Jee Singh (P.W.3) on seizure list was marked as Ext.1/2 and on inquest report, his signature was marked as Ext. 1/3. Murat Ram (P.W.7) has proved writing and signature of Sri Indrasan Chaudhary, Investigating Officer (P.W.13) over formal F.I.R., which was marked Ext.2. Tarkeshwar Singh @ Bhutali Singh (P.W.8) has proved his signature on the fardbeyan, which was marked as Ext.3. Barhu Thakur (P.W.1) has been declared hostile, whereas Deo Kumar Singh (P.W.10) has been tendered and, as such, the evidence of P.W.10 Deo Kumar Singh has got no relevance. P.Ws. 4 and 5, namely, Kiran Devi and Hewanti Devi are own sisters of the informant and the deceased Umesh Singh, whereas Lalti Kuer (P.W.6) is the mother of the deceased. P.W.9 Shakaldeo Narayan has identified writing and signature of the Sub-Inspector of Police Indrasan Chaudhary (P.W. 13) on the fardbeyan and fardbeyan was marked as Ext.4. Ramesh Singh is the informant and was examined as P.W.11, whereas Dr. Gurusharan Prasad, who conducted autopsy on the dead body of the deceased, was examined as P.W.12 and has proved Postmortem Examination Report, which was marked as Ext.5. P.W.13 Indrasan Chaudhary is the Investigating Officer of the



case and he has proved inquest report, which was marked as Ext.6 and he has also proved the seizure list relating to seizure of blood stained soil, torch of the deceased, ground nuts, one match box, one butt of cigarette as well as steel *Lota* of the deceased from the place, where the dead body was found. The dead body of the deceased was found in *badhar* of village Dariyapur. It is not in dispute that the case was initiated against the appellants on the ground of last seen of the deceased with the appellants.

5. Sri Ram Suhawan Singh, learned counsel for the appellants has argued that though the prosecution has made out a case of last seen of the deceased with the appellants, but none of the independent witnesses had come forward to corroborate the fact that the deceased was last seen with the appellants. He submits that though there is complete inconsistency in the evidence of witnesses on the point of last seen, all witnesses, who tried to prove the case of last seen, are none else, but close relation of the deceased. He submits that the informant in the case was own brother of the deceased, whereas Kiran Devi (P.W.4) and Hewanti Devi (P.W.5) were own sisters of the deceased. Lalti Kuer (P.W.6) is mother of the deceased. He highlights that in his fardbeyan, the informant had disclosed that he got information from his younger sister Kiran Devi (P.W.4) that she had seen her brother going with three appellants



towards a shop in the village, where the deceased had purchased some ground-nuts and gave some ground-nuts to Kiran Devi(P.W.4) and, thereafter, she had returned back. According to learned counsel for the appellants, Hewanti Devi (P.W.5) sister of the deceased and Lalti Kuer(P.W.6) mother of the deceased in their examination-in-chief had given a different story. According to learned counsel for the appellants, the aforesaid two witnesses i.e. P.W.5 and P.W.6 had stated that on the date of occurrence i.e. on 04.06.1991 in the evening at about 7 O'Clock , P.W.6 (mother of the deceased) had served a cup of tea to Umesh Sing(deceased) as well as the informant Ramesh Singh. In the examination-in-chief, P.W.6 Lalti Kuer has developed a story and stated that three appellants had arrived at her house and the deceased after taking tea had gone with three accused persons saying that he was going to attend call of nature, whereas P.W.4 Kiran Devi , on whose information F.I.R. was lodged by the informant, had stated that about 6 O' Clock in the evening on 04.06.1991, she had gone to purchase salt in a shop of the village, where his brother deceased Umesh Singh met, who was purchasing ground nuts and cigarette from the shop and he also gave some ground nuts to Kiran Devi and, thereafter, had returned. According to learned counsel for the appellants, there is complete inconsistency in relation to time of last seen as well as manner of last seen. Learned



counsel for the appellants has highlighted the evidence of the Investigating Officer (P.W.13) Indrasan Chaudhary to show that witnesses, who had deposed in court, had not stated the same thing before the Investigating Officer in their statement recorded under Section 161 of the Code of Criminal Procedure. It has also been argued, by way of referring to evidence of Kiran Devi (P.W.4), that the deceased was habitual drunker. He further submits that during investigation, materials were collected to suggest that the deceased was having some illicit relation with a widow of Late Shyam Kishore Singh. Learned counsel for the appellants has drawn our attention to paragraph-9 of the cross-examination of the Investigating Officer (P.W.13) to show that in the case diary, the Investigating Officer had recorded statement of one of the witnesses, in which it was stated that with wife of late Shyam Kishore Singh, deceased Umesh Singh as well as appellant no.3 Kanjee Singh were having illicit relation. This statement, according to the Investigating Officer, was made by one Deo Nath. He further submits that the Investigating Officer in the same paragraph had stated that the Dy. Superintendent of Police had given instruction to record statement of wife of Late Shyam Kishore Singh, but the same could not be recorded since she was regularly residing in Delhi. It has also been argued that save and except inconsistent evidence regarding last seen of the deceased with



the appellants, there is no other corroborative material to show complicity of the appellants. He submits that no further material was collected to show participation of the appellants in the murder of deceased Umesh Singh. Learned counsel for the appellants, by way of referring to cross-examination of the witnesses, has argued that about one year back, there was some dispute in between appellants side and the informant side and, as such, appellants were implicated in the case without any corroborative evidence. According to learned counsel for the appellants, in absence of any further material, the learned trial Judge was required to grant benefit of doubt to the appellants instead of convicting and sentencing them and, as such, according to learned counsel for the appellants, the impugned Judgment of conviction and order of sentence is liable to be set aside.

6. Sri Ajay Mishra, learned Addl. Public Prosecutor has vehemently opposed the appeal and he has argued that in a case of last seen, there is no need to produce any corroborative evidence. He tried to persuade the Court that witnesses had categorically stated that the deceased one day prior to recovery of dead body was seen with the appellants and, as such, there will be only conclusion that the appellants in a clandestine manner had killed the deceased.

7. Besides hearing learned counsel for the parties, We have also perused the entire materials and evidence on record. Kiran Devi



(P.W.4) in paragraph-1 of her examination-in-chief has stated that the day, on which her brother was done to death, in the evening while she had gone to purchase salt in the shop of one Hakim Sah, she noticed that her deceased brother Umesh Singh was purchasing nuts and he gave some nuts to her and, thereafter, he went towards western side with some remaining nuts. She further stated that deceased Umesh had also purchased four cigarettes and he was having torch as well as one *Lota*. At that very time, three appellants were standing near a well. In paragraph-2, she (P.W.4) had further stated that all the three appellants along with her brother, thereafter, went towards western side of *badhar*. In paragraph-7 of her cross-examination, she accepted that her brother was in the habit of drinking wine and Ganja. Subsequently, she stated that on the said date, accused persons forced her brother to drink. She further stated that near the dead body , there were three bottles, but she was not sure as to whether any seizure list was prepared in respect of seizure of bottles or not, whereas the seizure list, which has been marked as Ext.7, does not indicate regarding recovery of bottles. After evidence of P.W.5, it is evident that P.Ws.5 and 7, namely, Hewanti Devi and Lalti Kuer (sister and mother respectively of the deceased) had given a different story. In paragraph-1 of examination-in-chief of Hewanti Devi, she had stated that on 04.06.1991 at about 7 O'Clock in the



evening, her brothers Ramesh (the informant) and Umesh (deceased) were sitting near the door and they were served tea by her mother. She stated that at that very time, all the three appellants arrived there and asked Umesh (deceased) to move towards the field. Thereafter, the deceased demanded water and torch and her mother provided steel *Lota* with full of water and torch and, thereafter, the deceased went along with all the appellants. She had stated that all four persons had gone. She further stated that in the same night at about 9.O'Clock, her mother went to the house of appellant no.3 to inquire about her son Umesh (deceased). She stated that she also had gone with her mother to the residence of appellant no.3. She stated that appellant no.3 was lying on a cot in half-naked condition and he was shivering. On being asked, he told her mother “जाइए चाची सोइए वह सबेरे आएगा”. Thereafter, this witness (P.W.5) with her mother went to the house of other two appellants, but they were not found there. In the next morning, at 5.00 A.M, Bhuteli Singh (P.W.8) informed that dead body of a boy was thrown after cutting neck, which was lying in the field. Thereafter, P.W.4 and others went to the place, where the dead body was lying. Similarly, mother of the deceased, namely, Lalti Kuer (P.W.6) had stated that accused persons had come to her house and the deceased went with accused persons. In paragraph-3 , she stated that when till 10.00 P.M. her son did not return , she went



to the house of appellant no.3, where she saw that appellant no.3 was lying on a cot and on being asked about deceased Umesh, he informed that he will return back in the morning. She reiterated that appellant no.3 was shivering at that very time. In cross-examination, in paragraph-8, she stated that when she asked from appellant no.3 regarding the deceased, appellant no.3 informed that she was told “चाची क्यों हड़बड़ाई हो वह कहीं पीता खाता होगा, सुबह आएगा”, whereas on attention being drawn to her statement recorded under Section 161 of the Code of Criminal Procedure that in paragraph-11 she had stated that it is incorrect that she has not said to the police officer that appellant no.3 had said that Umesh will come back in the morning.

8. Ramesh Singh (P.W.11) in paragraph-1 of his examination-in-chief had categorically stated that his brother Umesh Singh (deceased) did not return up to 10-11 O' Clock in the night, his sister (P.W.4) told that Umesh Singh (deceased) after purchasing nuts and cigarettes had gone with the accused persons. He with a view to develop a motive stated that his deceased brother was keeping Rs.2200/- cash and stated that this fact was known to accused persons and this was the reason for committing such occurrence. In paragraph-6 of his cross-examination, while his attention was drawn towards his statement recorded under Section 161 of the Code of Criminal Procedure, he stated that he had not



stated before the police that Umesh was addict of Ganja, wine and cigarette. In paragraph-7 of his cross-examination, he had stated that in northern side of his house, there was house of Shyam Kishore Singh, where his widow was residing and the deceased was a regularly visitor to the house of widow. In paragraph-8 of his cross-examination, he has stated that he had advised his deceased brother Umesh Singh to give Rs.2200/- to his mother and he has stated that Umesh Singh had never given any money to him. He further stated that he had informed that Umesh Singh (deceased) had gone with three accused persons towards the field. He has denied in paragraph-10 of his cross-examination that his brother Umesh Singh was characterless.

9. Tarkeshwar Singh @ Bhuteli Singh (P.W.8) has stated in paragraph-1 of his deposition that on 04.06.1991 in the evening he had seen appellant nos.1 and 2 with deceased Umesh Singh and in paragraph-4 of his cross-examination, he had accepted that he was cousin of the deceased. At this juncture, it is appropriate to mention that other witnesses, who had stated on the point of last seen of the deceased with appellants, had stated that in the next morning , this witness had informed regarding a dead body lying in the field. Had it been a case of last seen of the deceased with the appellants, such fact would have disclosed by this witness to other witnesses.



Accordingly, the evidence of P.W.8 is not beyond suspicion since those facts were never stated by other witnesses, who are none else, but relation of P.W.8.

10. Gurusharan Prasad (P.W.12) had conducted postmortem examination on the dead body of the deceased. He has also proved Postmortem Examination Report and in the Postmortem Examination Report, following injuries were found. It is apt to reproduce entire evidence, which is as follows:

“1. On 5.6.91 I was posted at Arrah Sadar Hospital as Civil Asst. Surgeon. On that day at 3.00 P.M. I had conducted post-mortem examination on the dead body of Sri Umesh Singh S/O Sri Bishwanath Singh of vill-Dariyapur , P.S. Arrah Mofasil, Dist- Bhojpur and found the following antemortem injuries on the dead body:-

(i) One incised wound in front of neck deep up to the cervical bone with cutting of major vessels (artery and views of both sided nerves of both sides including trachea and oesophagus)

(ii) One incised wound on the back of neck 3” x 2” x 1 ½”

(iii) One incised wound on the left side of back on the upper part 1” x ½”x ½”.

2. On dissection on opening cranial cavity, no blood matter seen. Brain matter intact pale chest cavity. Heart lungs pale.

Abdominal Cavity –liver, Kidney soft and pale.

Stomach pale containing semi digested food matter



about 4 ounces in weight.

Urinary bladder- empty.

3. In my opinion, death was caused by shock and haemorrhage due to above mentioned injuries. Weapon used –sharp cutting weapon.

Time elapsed since death within 24 hours at the time of examination.

4. The dead body was identified by constable no.272 Ramnik Singh and Choukidar Sarma Paswan and Ram Dular.

5. In ordinary course, the injuries were sufficient to cause death.

6. This post-mortem examination report is in my pen and signature. It is marked as Ext.5.

Cross-examination:

7. Rigor mortis was absent. It had disappeared. It was summer season. In summer season rigor mortis sets earlier and disappears earlier. Normally, in summer season rigor mortis starts earlier and is completed within 10 to 12 hours. Then it takes 10-12 hours to disappear from the entire body. After 10-12 hours rigor mortis starts disappearing. After disappearance of rigor mortis decomposition starts. Formation of urine is a continuous process. Food leaves stomach in two and four hours. The deceased might have taken meal before 2-3 hours before his death. The deceased was not known to me from before. I had received inquest report also with the dead body.”

11. In the case, evidence of the Investigating Officer has got much relevance since the Investigating Officer has categorically



stated in his cross-examination regarding the fact, which were never stated by the witnesses before him, but the witnesses had developed those facts at the time of examination before the trial court. This fact has already been noticed and discussed above. Even after closing of prosecution evidence, at the time of recording statement of accused persons under Section 313 of the Code of Criminal Procedure, the appellants were not informed regarding exact evidences collected against them. In a vague manner, the question was put to the accused on the point that with one object all the three appellants had killed Umesh Singh (deceased). Once the appellants were put on trial on the evidence of last seen, it was mandatorily required, at the time of recording statement under Section 313 of the Code of Criminal Procedure, to put certain questions on the point of last seen. However, on perusal of statement recorded under Section 313 of the Code of Criminal Procedure, it appears that it was farce. Statement of all the three appellants recorded under Section 313 of the Code of Criminal Procedure is as follows:

(i) The statement of **Satyendra Singh (appellant no.1)** recorded under Section 313 Cr.P.C.:

प्रश्न – क्या आप अन्य अभियुक्तों के साथ एकमत होकर उमेश कुमार सिंह की हत्या किये ?

उत्तर – जी नहीं ।

प्रश्न – आप को इस सम्बन्ध में और क्या कहना है ।

उत्तर – कुछ नहीं ।



(ii) The statement of **Sanjay Singh (Appellant no.2)** recorded under Section 313 Cr.P.C.

प्रश्न – क्या आप अन्य अभियुक्तों के साथ एकमत होकर उमेश कुमार सिंह की हत्या किये ?

उत्तर – जी नहीं।

प्रश्न – आप को इस सम्बन्ध में और क्या कहना है ।

उत्तर – कुछ नहीं।

(iii) The statement of **Kanjee Singh (Appellant no.3)** recorded under Section 313 Cr.P.C.

प्रश्न – क्या आप अन्य अभियुक्तों के साथ एकमत होकर उमेश कुमार सिंह की हत्या किये ?

उत्तर – जी नहीं।

प्रश्न – आप को इस सम्बन्ध में और क्या कहना है ।

उत्तर – कुछ नहीं।

At this juncture, it would be appropriate to quote paragraphs 142, 143 and 144 of the Judgment of the Hon'ble Apex Court, reported in **AIR 1984 SC 1622 (Sharad Birdhichand Sarda Vs. State of Maharashtra)**.

“142. Apart from the aforesaid comments there is one vital defect in some of the circumstances mentioned above and relied upon by the High Court, viz., circumstances Nos. 4, 5, 6, 8, 9, 11, 12, 13, 16 and 17. As these circumstances were not put to the appellant in his statement under Section 313 of the Criminal Procedure Code they must be completely excluded from consideration because the appellant did not have any chance to explain them. This has been consistently held by this



Court as far back as 1953 where in the case of Hate Singh Bhagat Singh v. State of Madhya Bharat: AIR 1953 SC468 this Court held that any circumstance in respect of which an accused was not examined under Section 342 of the Criminal Procedure Code cannot be used against him. Ever since this decision, there is a catena of authorities of this Court uniformly taking the view that unless the circumstance appearing against an accused is put to him in his examination under Section 342 or Section 313 of the Criminal Procedure Code, the same cannot be used against him. In Shamu Balu Chaugule v. State of Maharashtra, (1976)1 SCC 438: AIR 1976 SC 557)this Court held thus:

“The fact that the appellant was said to be absconding, not having been put to him under Section 342, Criminal Procedure Code, could not be used against him”.

143. To the same effect is another decision of this Court in Harijan Megha Jesha Vs. State of Gujarat, AIR 1979 SC 1566 where the following observation were made:

“In the first place, he stated that on the personal search of the appellant, a Chadi was found which was bloodstained and according to the report of the serologist, it contained human blood. Unfortunately, however, as this circumstance was not put to the accused in his statement under Section 342, the prosecution cannot be permitted to rely on this



statement in order of convict the appellant”

144. It is not necessary for us to multiply authorities on this point as this question now stands concluded by several decisions of this Court. In this view of the matter, the circumstances, which were not put to the appellant in his examination under Section 313 of the Criminal Procedure Code, have to be completely excluded from consideration.”

12. Considering the fact that there was inconsistency in the prosecution evidence as well as the fact that save and except fractured deposition on the point of last seen, no other corroborative material were brought on record and, as such, the Court is of the opinion that on the evidence on record, there was possibility of two views; one suggesting innocence of the appellants and second pointing out to their guilt. The possibilities, which goes in favour of accused is required to be taken note of. Though during trial, the prosecution tried to develop a case of motive to suggest that the deceased was having Rs.2200/- and this was the reason for committing murder, it appears that such motive, which was suggestive, has got no evidentiary value. Moreover, in the case, the provision contained in Section 313 of the Code of Criminal Procedure has also been violated.

13. Accordingly, considering inconsistency in the evidence that, too, on the point of even last seen and not putting any



circumstances regarding last seen, certainly the appellants deserve to be extended the benefit of doubt and, as such, the appeal is allowed and the Judgment of conviction and order of sentence 26.08. 1993 passed in Sessions Trial No.471 of 1991 is hereby set aside.

14. All the appellants by order dated 02.12.1993 were granted bail. Since the Judgment of conviction and order of sentence has been set aside, they are discharged from the liability of their bail bonds.

(Rakesh Kumar, J)

(Mohit Kumar Shah, J)

NKS/-

AFR/NAFR	
CAV DATE	
Uploading Date	19.07.2017
Transmission Date	19.07.2017

