

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.166 of 1994

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Surender Yadav, son of Triloki Yadav, resident of Village- Zohoor Bigha, P.S.
Asthawan, District- Nalanda

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. N.A. Samshi, Advocate

For the Respondent/s : Mr. Sujit Kumar Singh, A.P.P.

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 12-12-2017

Challenging his conviction ordered by the Sessions Judge, Nalanda at Biharsharif on 11.03.1994 in Sessions Trial No. 565 of 1992 convicting him for offence under Sections 302/34 and 201/34 I.P.C. and sentencing him to undergo rigorous imprisonment for life and R.I. for 7 years respectively, this appeal has been filed by the appellant under Section 374(2) read with Section 389 of the Code of Criminal Procedure.

It is the case of the prosecution that P.W. 7 Baleshwar Yadav recorded a fardbeyan on 12.05.1992 before the Sub Inspector of Police Asthama on 12.05.1992 based on which the F.I.R. was registered and it was the grievance of the informant that his younger brother, namely, Binda Yadav had come to his village from his Sasural and on 11.05.1992 his



friend and the present appellant Surender Yadav came to their house at 8:00 P.M. asked Binda Yadav to go and stay with him in his house in the night. After taking meal, Binda Yadav went along with Surender Yadav to his house and in the morning, it is stated that the informant was informed about the dead body of his younger brother Binda Yadav found in a ditch near the area. It was said that Binda Yadav was killed by the accused appellant Surender Yadav along with Ramdeo Yadav, Triloki Yadav, Suresh Yadav, Bindeshwar Yadav, Gopal Yadav and Lalan Yadav. All were prosecuted for the aforesaid offence. Surender Yadav having been convicted, this appeal, the other accused persons have been acquitted of the charges.

It is the case of the appellant before us that the entire conviction is based on circumstantial evidence i.e. the evidence to the effect that Binda Yadav was requested by the appellant to go to his house. He went to his house and certain witnesses like P.W. 2 Lakhan Yadav, P.W. 5 Yadu Yadav had seen the deceased Binda Yadav along with the appellant Surender Yadav and other co-accused person. It is emphasized by taking us through the evidence and statement on record that the last seen evidence in the matter is not sufficient enough to record the conviction and, therefore, the conviction is bad in



law.

On the contrary, learned counsel for the prosecution took us through the statement of witnesses particularly P.W. 2 Lakhan Yadav, P.W. 5 Yadu Yadav, the circumstances that have come on record and argued that it is a case where the chain of circumstances are complete and the entire case of the prosecution stands established.

We have heard learned counsel for the parties and we find that in the case in question on behalf of the prosecution 9 witnesses were examined. They were P.W. 1 Ram Pravesh Yadav, P.W. 2 Lakhan Yadav, P.W. 3 Yogendra Yadav, P.W. 4 Latika Devi, P.W. 5 Yadu Yadav @ Yadunandan Yadav, P.W. 6 Rajiya Devi, P.W. 7 Baleshwar Yadav, P.W. 8 Kalyan Kumar and P.W. 9 Dr. Ram Partap Singh.

On behalf of the defence only one witness Mohan Prasad was examined.

Dr. Ram Partap Singh P.W. 9 is the doctor who conducted the post mortem and submitted the post mortem report (Exhibit-4) which clearly goes to show that the deceased suffered gun-shot injuries and died because of the same. The doctor found five injuries on the person of the deceased of which all the five were caused by use of a firearm.



P.W. 7 is the informant and he has testified to the effect that on 11.05.1992 in the evening at about 8:00 P.M. the appellant came to his house and requested the deceased Binda Yadav to go with him to his house. After having his meal, the deceased Binda Yadav accompanied Surender Yadav to his house and thereafter he did not come, but his dead body was recovered in the morning. On inquiry, the informant P.W. 7 was informed that his brother Binda Yadav was killed by the appellant and his friends on account of some dispute with regard to stealing of a buffalo or a cow. P.W. 1 Ram Pravesh Yadav and P.W. 5 Yadu Yadav in their statement have stated about their seeing the appellant Surender Yadav along with the deceased in the terrace of Surender Yadav where the deceased Binda Yadav was singing a flock song. It was also stated by these witnesses that the other accused persons were also seen in the terrace enjoying the song and they were also armed with gun, rifles and lathis. P.W. 2 thereafter speaks about his going to the field in the night at about 11.30 and his seeing all the accused persons going away along with the deceased Binda Yadav and immediately thereafter hearing of gun short sound. P.W. 2 and P.W. 5 Yadu Yadav in their statement have been consistent and both of them speak about the deceased being seen in the company of



Surendra Yadav and others in the night. In Paragraph 2 of his statement P.W. 5 clearly states that when he was going to his agriculture field in the night with a torch and in the torch light he found Surendra Yadav armed with a rifle and other co-accused armed with rifles, guns and lathis going towards the northern side of the village and Binda Yadav was also accompanying them. Thereafter he speaks about hearing sound of firing from the area where they had gone and the dead body of Binda Yadav being recovered from that vicinity in the morning. This is in sum and substance the evidence that has come on record and the learned Writ Court has convicted the appellant on these grounds. However, learned counsel tried to emphasize that even though all the other six accused persons were also seen to be present along with the appellant but they have been acquitted and, therefore, the appellant is also entitled to similar treatment. Merely because the other co-accused have been acquitted in an incorrect manner or illegally by the trial court and if the State Government has not filed an appeal challenging their acquittal, the benefit cannot be granted to the appellant and on going through the order passed by the learned trial court we find that only because in the fardbeyan it is not mentioned that P.W. 2 and P.W. 5 had seen the accused taking



the deceased in the night, the benefit has been granted to them but in the case of the present appellant, the overwhelming evidence that has come on record clearly goes to show that the appellant came to the house of the deceased, Latika Devi P.W. 4, Rajia Devi P.W. 6 are witness to the same and P.W. 7 the informant has also testified that the appellant came to their house and took Binda Yadav with him to stay in his house. P.W. 5 further says in his evidence that the motive for committing the offence is that the appellant had an apprehension that the deceased was having illicit and illegal relation with his wife and, therefore, he had committed the offence.

Except for contending that there is false implication and further saying that the appellant and the deceased were friends and known to each other, nothing is brought to our notice on the basis of which the statement of witnesses recorded by the prosecution, particularly the statement of P.W. 1 Ram Pravesh Yadav P.W. 2, Lakhani Yadav and P.W. 5 Yadu Yadav should be disbelieved. The fact about the appellant coming to the house of the deceased, taking him to his house is established from the statement of P.W. 4 Latika Devi P.W. 6, Rajiya Devi and P.W. 7 the informant Baleshwar Yadav. The deceased being seen in the company of the appellant along with other co-



accused in the terrace of his house on the date of the incident is also confirmed from the statement of P.W. 1 Ram Pravesh Yadav, P.W. 2 Lakhan Yadav and P.W. 5 Yadu Yadav. Thereafter, P.W. 2 Lakhan Yadav and P.W. 5 Yadu Yadav seeing the deceased in the company of the appellant who was carrying a rifle going towards the northern side of the village from where his dead body is recovered in the morning. These are the circumstances that have come on record and if we analyze the aforesaid circumstances in the backdrop of the law laid down by the Supreme Court which lays down the principles for conviction in a criminal case based on circumstantial evidence, we find that the chain of circumstances and each link to complete the chain of circumstances are complete. In the case of **Raja @ Rajinder Vs. State of Haryana- (2015) 11 SCC 43** Hon'ble Supreme Court deals with the question of when can a case be said to fulfil all the requirements of circumstantial evidence for its conviction. In Paragraph 10 the principle has been laid down in the following manner:-

“As the factual matrix would show, the case of the prosecution entirely hinges on circumstantial evidence. When a case rests on circumstantial evidence, the Court has to be satisfied that:

“(I) the circumstances from



which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.”

And thereafter in Paragraphs 12 and 13 after considering earlier judgments of the Supreme Court in the case of **Balwinder Singh Vs. State of Punjab- 1995 Supp (4) SCC 259** and **Ujjagar Singh Vs. State of Punjab-(2007) 13 SCC 90** the Hon’be Supreme Court lays down the principle in the following manner:-

“11. In **Balwinder Singh v. State of Punjab- 1995 Supp (4) SCC 259** it has been laid



down that: (SCC p. 262, para 4)

“4. ... the circumstances from which the conclusion of guilt is to be drawn should be fully proved and those circumstances must be conclusive in nature to connect the accused with the crime. All the links in the chain of events must be established beyond a reasonable doubt and the established circumstances should be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In a case based on circumstantial evidence, the court has to be on its guard to avoid the danger of allowing suspicion to take the place of legal proof and has to be watchful to avoid the danger of being swayed by emotional considerations, howsoever strong they may be, to take the place of proof.”

12.From the aforesaid it is clear as day that the court is required to evaluate the circumstantial evidence to see that the chain of events has been established clearly and completely to rule out any reasonable likelihood of the innocence of the accused. Needless to say whether the chain is complete or not would depend on the facts of each case emanating from the evidence and no universal yardstick should ever be attempted



(see Ujjagar Singh V. State of Punjab- (2007) 13 SCC 90, SCC p. 98. para 14)

13. In the instant case, the circumstances that have been established by the prosecution are that the deceased had accompanied the appellant-accused, being called by him, from his house in the early part of the evening on the date of occurrence. The mother of the deceased, Kalawati P.W. 11 has deposed in that regard. Thereafter, from the material brought on record, it is clearly revealed that the appellant was seen at the tea stall with the deceased. The said fact has been deposed by Mahender P.W. 10. Thus, from the aforesaid evidence, two facts are established, namely, the accused and the deceased had left the house of the deceased and were seen taking tea together at the tea stall. It is submitted by the learned counsel for the appellant that the last seen theory as advanced by the prosecution is not acceptable inasmuch as the owner of the tea stall has not been examined. When the testimony of the aforesaid two witnesses deserve acceptance and receive corroboration from the other evidence on the record, no adverse inference should be drawn because of non-examination of the tea-stall owner, who, as has been submitted by the learned counsel for the appellant, is a material witness. It is well settled in law that non-examination of a material witness is not a mathematical formula for discarding the weight of the testimony available on



record, if the same is natural, trustworthy and convincing (see State of H.P. V. Gian Chand-(2001) 6 SCC 71. That apart, he was not such a witness who alone was the competent witness to depose about a fact and his non-examination would really destroy the version of the prosecution.”

If the evidence in the present case is analyzed in the backdrop of the aforesaid principle, we find that the circumstances in the present case are complete and it is a case where this Court can rely upon the deposition of the witnesses to hold that the chain of circumstances are complete. Thereafter in Paragraphs 21 and 22 in the same judgment the learned Court lays down the principle with regard to motive being assumed as a significant factor for presumption of the offence being committed and the fact about proximity of the time between which the offence is committed and the evidence of last seen are to be co-related. In the case of **Kiriti Pal Vs. State of West Bengal-(2015) 11 SCC 178** the theory of last seen has been discussed in detail and the principle laid down is that if within the proximity of the death having occurred, ample evidence of the victim last seen with the accused are available, the same is sufficient enough to record a conviction on the basis of the circumstantial evidence. If the evidence in the present case, as is discussed hereinabove, is analyzed in the backdrop of the



aforesaid legal principle, as laid down by the Supreme Court, we have no hesitation in holding that the chain of circumstances are complete. The evidence available on record indicate that the appellant went to the house of the deceased at about 8:30 in the night and took him to his house. The evidence further shows that the deceased was seen in the company of the appellant in his house singing a song in the night. Thereafter, the appellant is seen to be going towards a particular place in the village along with a rifle in his hand and the deceased is also seen to be accompanying him. Thereafter, the statement of witnesses show that they did hear sound of gun-shots being made and in the early morning, the dead body of the deceased is recovered. The Medical evidence indicates death due to use of firearm. These, in our view, are circumstantial evidence, good enough to hold the appellant guilty of the charges levelled against him, and we see no reason to make any indulgence into the matter.

The learned trial court has analyzed the evidence in detail and has held that the appellant is responsible for commission of the offence and we see no error in the same warranting taking a different view. Accordingly, finding no merit in the appeal filed, the same stands dismissed. The appellant is on bail. His bail bonds be cancelled and he be taken



into custody forthwith to serve out his remaining sentence.

(Rajendra Menon, CJ)

(Anil Kumar Upadhyay, J)

P.K.P.

AFR/NAFR	N.A.F.R.
CAV DATE	N.A.
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