

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.194 of 1994

(Against the judgment of conviction and order of sentence dated 05.04.1994 passed by Shri Anil Kumar Verma, learned 2nd Additional Sessions Judge, Sitamarhi in Sessions Trial No. 186 of 1993/ 26 of 1993 + 188 of 1993/ 27 of 1993, arising out of Nanpur P.S. Case No. 09 of 1993)

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Birendra Mahto, son of Acchelal Mahto, resident of Village- Mohamadpur, P.S.-
Nanpur, District- Sitamarhi.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Prasson Sinha, Advocate

For the Respondent/s : Mr. Dilip Kumar Sinha, APP

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY)

Date: 14-10-2017

The instant appeal has been filed by the sole appellant Birendra Mahto against the judgment of conviction and order of sentenced dated 05.04.1994 passed by learned 2nd Additional Sessions Judge, Sitamarhi in Sessions Trial No. 186 of 1993 / 26 of 1993 + 188 of 1993 / 27 of 1993, arising out of Nanpur P.S. Case No. 09 of 1993, whereby the appellant has been convicted under Sections 302 of the Indian Penal Code on the basis of broad probability of the case and sentenced to undergo R.I. for life although the trial court disbelieving the claim of P.W. 5 and P.W.7 that they have seen the accused person fleeing away from the direction of the sound of firing



and acquitted three accused, but convicted the sole appellant on the ground that blood like stains in abandon on thigh and underwear of accused Birendra Mahto was found and such blood stain might have been caused while dragging the body of the deceased Shyam Mahto.

2. The prosecution case as per statement of Prahlad Mahto is as follows:

The informant Prahlad Mahto, who is the father of the deceased Shyam Mahto, was in need of some wood for housing purpose. For this purpose on 09.02.1993 at about 1.30 P.M. informant's son Shyam Mahto proceeded on cycle from his village Mohammadpur for Pupri Bazar to consult a co-villager Yogendra Mahto, who was working as a salesman in the wood shop of Manoj Chaudhary. It is alleged that Yogendra Mahto after returning back from Pupri came to the house of informant and enquired about the whereabouts of Shyam Mahto upon which informant stated that Shyam had gone to Pupri to meet him. Then the informant enquired from Yogendra Mahto whether Shyam met with him or not upon which Yogendra stated that Shyam did not meet him at Pupri. It is alleged that then after half an hour Yogendra Mahto again came to the house of informant and stated that Ganesh Mahto had gone to the northern "Sareh" to watch his potato field and at about 7.30 P.M. he



had heard the sound of firing and also the sound of crying “Babu ho Babu”. Yogendra stated that Ganesh Mahto was spreading news of this incident in the village. It is alleged that then informant went to the house of Ganesh Mahto and enquired from him and he corroborated the facts stated by Yogendra Mahto. It is alleged that then Prahlad Mahto, Ganesh Mahto, Yogendra Mahto and a large number of villagers proceeded towards northern “Sareh” in search and when they reached near the way going to village Bahera in a field adjoining to the Pagdandi in a Masur field they found signs of some crushed plants and some blood was also found fallen there. When they proceeded ahead they found an old cycle fallen on the ground and then they sent a man to call the Chowkidar. Then they proceeded towards the orchard in the western side and started search and all of a sudden the informant saw the cycle of his son and his son was also fallen there dead in a pool of blood. They found that there was fire arm injury below right ear. That blood in abundance was scattered at that place. Then the informant came to his house weeping and crying. In the fardbeyan the informant suspected Achhelal Mahto and his sons Birendra and Arun, who are accused in this case on the ground of suspicion as there was a land dispute taken place a few months back and at that time these accused had threatened to kill the informant. The fardbeyan of first informant is said to have been recorded on



09.02.1993 at 22.00 hours by S.I. Chandeshwar Singh of Nanpur P.S. at village Mohammadpur at the house of the informant.

3. On the basis of the fardbeyan Nanpur P.S. case no. 09 of 1993 was registered for the offence under Section 302 of the Indian Penal Code and Section 25 (a)/26 of the Arms Act against unknown.

4. The police after investigation submitted charge-sheet under Sections 302/34 of the Indian Penal Code against four accused persons. Thereafter the learned Magistrate took cognizance of the offence and the case was committed to the Court of Sessions for trial. On framing of charges, the appellant along with others pleaded not guilty and as such they were subjected to the Sessions Trial.

5. On behalf of the prosecution, altogether 14 witnesses were examined. P.W. 1 is Yogendra Mahto, P.W.2 is Ganesh Mahto, P.W. 3 is Jagdish Mahto, P.W. 4 is Prahlad Mahto. P.W.5 is Ramashish Mahto, P.W.6 is Ram Nandan Singh, P.W. 7 is Ram Hirday Mahto, P.W. 8 is Dr. S. K. Chandra Singh, P.W. 9 is Ram Kumar Mahto, P.W. 10 is Sudhir Mahto, P.W.11 is Ram Babu Mahto, P.W. 12 is Chandeshwar Singh, P.W. 13 is Srikant Singh and P.W. 14 is Badri Ram.

6. Mr. Prasoon Sinha, learned counsel appearing on



behalf of the appellant submitted that in the instant case there is no eye witness to the occurrence. Out of four accused charge-sheeted in the instant case, three have been acquitted on the ground of broad probability and this appellant has been convicted on the basis of probability. He referred to paragraph 25 and 26 of the judgment of the trial court where in the trial court recorded finding merely on the basis of probability. He submitted that the basic principle of criminal jurisprudence is to establish the guilty beyond all reasonable doubt. He submitted that the standard of proof in criminal case is not like departmental proceeding where preponderance of probability is the standard of proof.

7. Before adverting to the discussion of the trial court on the finding, he submitted that it is well settled principles of law that in a case based on circumstantial evidence like the instant case, the chain of events must lead to only one conclusion of commission of crime by the accused alone. The circumstance must be unambiguous and conclusive leading to only one conclusion that the accused alone has committed crime and if there is any possibility or hypothesis that other than the accused could have committed the crime or if there is any scope of possibility of innocence of the accused then the court is suppose to accept that proposition, which goes in favour of the accused. He submitted that in cases of circumstantial evidence the



scientific investigation is crucial and failure of the investigation to complete the investigation on scientific line being non-examination of crime material or materials collected at the alleged crime scene by the Forensic Science Laboratory goes to the root of the case and in such a situation when two views are possible in the absence of scientific test or lab report, which is clinching in such matter, the accused persons are entitled to the benefit of doubt. He submitted that in cases where the accused are suspected to have committed crime on the basis of previous enmity particularly in a case of no eye witness, the standard of proof to convict a person cannot be probability as adopted by the trial court in the instant case and as such he submitted that the entire finding of the trial court is perverse. Referring to the prosecution case, he submitted that from the fardbeyan, it appears that on 09.02.1993 informant's son Shyam Mahto, aged about 25 years, had gone to Pupri Bazar on bicycle to select the wood and its rate in the shop of Manoj Chaudhary where the villager Yogendra Mahto works as salesman. The informant has stated in the fardbeyan that after sun set the said Yogendra, salesman in the shop of Manoj Chaudhary came to his place and enquired where is Shyam, son of the informant, then the informant told that he has gone to Pupri Bazar to meet you then Yogendra replied that he has not met Shyam and Yogendra returned back to him and within half an hour returned back and stated that he



has learnt from Ganesh Mahto, who was watching the potato field that at around 7.30 P.M., he heard sound of firing and the crying sound of 'Babu Ho Babu' and Ganesh Mahto thereafter spread news of this incident in the village. It is the case of the informant that thereafter he along with Yogendra visited Ganesh Mahto and thereafter he along with many other villagers rushed towards north from where Ganesh Mahto heard the sound of firing and after vigorous search they found blood stains and the crops trampled there and after some distance they saw the old bicycle, which arose suspicion, thereafter he sent for Chaukidar and thereafter he saw the bicycle and dead body of his son in the pool of blood stains. He suspected the involvement of Achhelal Lal, son of Ram Gulam Mahto and his son Birendra Mahto and Arun on account of land dispute. Referring to fardbeyan Mr. Prasoon Sinha submitted that the foundation of this case is based on suspicion and the informant suspected involvement of the appellant and other family members of Achhelal Lal on account of land dispute.

8. Mr. Prasoon Sinha submitted that there is no explanation from the prosecution that how Yogendra Mahto suo motu visited the house of the informant to enquire about the son of the informant. There is no explanation as to how within half an hour Yogendra Mahto again reached the residence of the informant and there is absolutely no explanation as to how Yogendra Mahto reached



the residence of the informant when there was no clue from Ganesh Mahto that the son of the informant was done to death by firing. There is no explanation that how the informant has suspected that his son was killed and therefore he along with other villagers i.e. Ganesh Mahto and Yogendra went to the direction from where Ganesh Mahto heard the sound of firing. Mr. Prasoon Sinha has submitted that from the deposition of the informant, it appears that the informant has purchased certain land from the brother of the accused Achhelal Lal Mahto and there was tension on account of purchase of such land. In para 3 of his deposition he has stated that he along with his son has gone to the place of Yogendra Mahto and talked about the purchase of wood in the morning of 09.02.1993. In para 3 of his deposition he has stated that after the dead body of his son was recovered from village Bahera and after discovery of the dead body he has not sent any person for information to the police.

9. Mr. Prasoon Sinha has submitted that in the instant case P.W.5 and P.W. 7 have claimed that they have seen the accused persons fleeing away from the place of firing. The trial court has disbelieved the statement of P.W.5 and P.W. 7 and has categorically held out in para 26 of the judgment that P.W.5 and P.W.7 lies in their claim that they have seen the accused persons fleeing away from the direction of firing. In such a situation when other accused persons



were acquitted by the trial court on the basis of broad probabilities of the case. Broad probabilities according to the trial court is presumably false implication due to previous enmity. If that is accepted then the natural corollary of the aforesaid broad probability is to disbelieve the prosecution case based on suspicion and on account of previous enmity as false.

10. Adverting to the finding of the trial court that the informant has stated that from the place when they proceeded found lacerated Masoori crops and laceration continued till the orchard where the dead body of the deceased was found. The trial court proceeded that these shows that probably the assailant fired fatal shot by the side of Pagdnandi where blood was found and the deceased was dragged towards orchard probable to keep the matter unknown to as long as possible and he submitted that probability has no place to record a finding of guilt. The finding has to be unambiguous and clear and not based on probability. He submitted that in the instant case the earth containing blood stained was not sent for FSL report. He also referred to the failure of investigation in sending the seized clothes bearing stains like blood for FSL for chemical examination. He referred to the deposition of investigating officer where he has stated that he did not find any trail in the mustard or Tori field. The failure of the prosecution to send the seized articles including the Sweater,



Lungi, underwear and other materials apart from blood stained soil, which goes to show that the prosecution has not made any effort to ascertain the truth and in absence of scientific examination by the FSL connecting this appellant with this crime is fallacious. He has submitted that the so-called cartridges recovered from Akshar Mahto has not been sent for expert examination. There is no TIP conducted with respect to the ownership of the cycle, which was allegedly the cycle of the deceased, which was recovered from the place of occurrence. Mr. Prasoon Sinha has submitted that considering the totality of the facts situation where the prosecution has not explained many suspicious circumstance and in a case when there is no material to safely conclude that that appellant and appellant alone has committed the crime, the appellant is entitled to the benefit of doubt.

11. Mr. Dilip Kumar Sinha, counsel appearing on behalf of the State submitted that recovery was made from the house of the appellant and blood stained underwear and other clothes were recovered and as such the trial court has committed no error in holding the appellant guilty. However, he has not disputed the proposition that probability and suspicion howsoever strong cannot partake the character of proof and in case of no eye witness, the chain has to be complete and unambiguous.



12. We have heard the parties and on analysing materials on record, we are in agreement that the submission of Mr. Sinha that in a case based on circumstantial evidence there is a complete chain of circumstance, which is conclusive on the point of not only commission of crime, but commission of the crime by the accused person alone. The law on circumstantial evidence is well settled. The Apex Court has reiterated the principle in the judgment reported in (2017) 8 SCC 497 in para 29 to 31, which is reproduced here for ready reference:

“29. It is now well established, by a catena of judgments of this court, that circumstantial evidence of the following character needs to be fully established:

- (i) Circumstances should be fully proved.
- (ii) Circumstances should be conclusive in nature.
- (iii) All the facts established should be consistent only with the hypothesis of guilt.
- (iv) The circumstances should, to a moral certainty, exclude the possibility of guilt of any person other than the accused (see *State of U.P. v. Ravindra Prakash Mittal, Chandrakant Chimanlal Desai v. State of Gujarat*). It also needs to be emphasised that what is required is not the quantitative, but qualitative, reliable and probable circumstances to complete the claim connecting



the accused with the crime. Suspicion, however grave, cannot take place of legal proof. In the case of circumstantial evidence, the influence of guilt can be justified only when all the incriminating facts and circumstances are found to be not compatible with the innocence of the accused or the guilt of any other persons.

30. The following test laid down in *Pudala Veera Reddy v. State of A.P.* also needs to be kept in mind: (SCC pp.710,para 10)

“10. (1) 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.”

31. Sir Alfred Wills in his book *Wills'*



Circumstantial Evidence (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence:

“(1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum;

(2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability;

(3) in all cases, whether of direct or circumstantial evidence, the best evidence must be adduced which the nature of the case admits;

(4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt; and

(5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.”

13. Considering the principle laid down by the Apex Court in the judgment reported in (2017) 8 SCC 497 and analyzing the present case, we are in agreement with the counsel for the appellant that in the matter of circumstantial evidence, the prosecution is required to take utmost care to ensure that the accused alone has



committed the crime and there is no possibility of any other person has committed the crime. This could have been ensured had the prosecution sent the clothe seized by the investigating officer or blood stained earth for FSL report. In view of the fact that the trial court has disbelieved the story of P.W. 5 and 7 to have seen the accused persons fleeing away from the direction of sound of firing. It was all the more necessary for the prosecution to establish that the accused (appellant) alone has committed the crime. Enmity cuts both ways, it may be the motive of committing crime or it may be the reason for false implication in a case where the informant or prosecution has no definite proof about the real culprit, the accused deserves benefit of doubt.

14. In the instant case from the materials available on the record, we are of the considered view that the informant was clueless as to who has committed the crime and that is the reason he has suspected the accused persons for commission of the crime, in such a situation, we cannot ruled out the possibility of false implication.

15. Now advertng to the seizure of blood stained clothe, it was incumbent upon the investigating officer to send the same for FSL report and also sent the blood stained earth from the



alleged place of occurrence for FSL examination, as the scientific report could have led to a finding by matching the bloods collected at the place of occurrence with the bloods found on the clothe of the appellant. The prosecution has thus proceeded only on the basis of suspicion and the failure on the part of the prosecution to send the cartridge/pistol recovered from the house of the appellant for its examination has rendered the prosecution case under shadow of doubts.

16. We find that in such a situation, conviction of the appellant by the trial court is not justified, accordingly, we set aside the judgment of conviction of the trial court and acquit the appellant. As the appellant is on bail, he is discharged from the liabilities of his bail bonds.

(Rajendra Menon, CJ)

(Anil Kumar Upadhyay, J)

Uday/-

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