

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.136 of 2012

Arising Out of PS. Case No.-231 Year-2010 Thana- BIDUPUR District- Vaishali

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1. Biswanath Chaudhary , son of Late Lakhan Chaudhary
 2. Arun Chaudhary , son of Bishwanath Chaudhary
- Both Resident Of Village- Panapur Dharampur, P.S.- Bidupur,
District- Vaishali (Bihar)

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Sri Satish Kumar , Advocate
		Sri Arun Kumar, Advocate
For the Respondent/s	:	Sri 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 : 12-09-2017

Two appellants, who are father and son respectively, have filed the present appeal under Section 374(2) read with Section 389 (1) of the Code of Criminal Procedure, 1973 (hereinafter referred to as “Cr.P.C.”) against the judgment of their conviction and sentence dated 14th December , 2011 & 19.12.2011 respectively passed in Sessions Trial No. 469 of 2010 by Sri Ajit Kumar Pandey, learned Additional Sessions Judge – cum- FTC 1st , Vaishali at Hajipur . By judgment dated 14th December, 2011 both the appellants were held guilty and convicted for offence under section 302 / 34 of the Indian Penal Code, 1860 (hereinafter referred to as “IPC”) and by order dated 19.12.2011



both were sentenced to undergo rigorous imprisonment for life under section 302 /34 of the IPC and they have further been imposed a fine of Rs. 5,000/- .

Short fact of the case is that on 29.8.2010 at about 16.00 Hrs. (4 P.M.) fardbyan of one Smt. Seema Devi, wife of Dilip Das was recorded by Sub Inspector of Police Sri Arjun Yadav of Bidupur Police Station near the well of Biswanath Chaudhary/ the appellant no. 1 of village - Panapur Dharampur, P.S.- Bidupur in the district of Vaishali. The informant /P.W. 5 gave her fardbyan near the dead body of her son -Abhishek Kumar (aged about 11 years) that on the same day i.e. on 29.8.2010 at about 10.00 A.M. she along with her deceased son -Abhishek Kumar was in the field for grazing of her goat . Along with her son 2-3 boys were also there. The informant who was at some distance from the well was cutting woods for fire. After some time she heard the cry of her son, who was crying and calling her as “ मॉ मॉ ”. After hearing the cry of her son, she ran towards the well and saw that appellant no. 1/ Bishwanath Chaudhary and his son- appellant no. 2 /Arun Chaudhary had thrown her son into the well and accused persons said that your son was regularly plucking lemon and on the that day also he was doing the same thing. Thereafter, the informant raised alarm and said that both accused had thrown



her son into the well. In the meanwhile , both the appellants started fleeing away. However, on the alarm raised by the informant number of villagers assembled there and they apprehended both the appellants and also assaulted them. After being informed police arrived there and she gave her fardbyan and with the help of villagers Police took out the body of her son -Abhishek, who had already died. The informant claimed that they (both the appellants) due to plucking of lemon by her son -Abhishek Kumar had thrown him into well and killed him.

After recording fardbyan on the same date a formal FIR was lodged at 21.00 Hrs. (i.e. 9 P.M.) vide Bidupur P.S. Case No. 231 of 2010 for offence under section 302/ 34 of the IPC against both the appellants. During investigation accusation was found true and thereafter, on 27.11.2010 charge- sheet was submitted against both the accused persons and on 1.12.2010 learned Chief Judicial Magistrate took cognizance of offence. After compliance of provision under section 207 of the Cr.P.C., on 14.12.2010 the case was committed to the court of Sessions , and as such , the case was numbered as Sessions Trial No. 469 of 2010. In the case on 6.6.2011 charges were framed against both the appellants for offence under section 302/ 34 of the IPC . Since the appellants denied charges the prosecution to prove the case examined



altogether ten witnesses. Out of ten witnesses, P.W. 1/ Dharmendra Kumar (a child witness aged about nine years) had deposed as independent eye witness. Similarly, P.W. 2 /Mukesh Kumar (who was also aged about ten years) was examined as an eye witness. P.W. 5 / Seema Devi -informant is also an eye witness whereas, P.W. 3/ Rameshwar Das and P.W. 4 / Bijendra Paswan besides witness to the inquest report are hearsay witnesses. P.W. 6 / Bhavna Kumari (sister of the deceased), P.W. 7 / Kanchan Kumari (aged about thirteen years), another sister of the deceased and P.W. 8/ Dilip Das (father of the deceased and husband of informant) are hear say witnesses whereas, P.W. 9 /Dr. Vijay Kumar had conducted post -mortem examination on the dead body of the deceased and P.W. 10 /Binay Kumar Sharma was the Investigating Officer of the case. After completion of prosecution evidence , statement of accused under section 313 of the Cr.P.C. was recorded and thereafter the defence also examined one witness namely, Umesh Kumar, who is a formal witness and proved a copy of FIR which was allegedly filed on behalf of the appellant no. 1 regarding assault given on him by the informant's side. The prosecution case in sum and substance was that deceased with his two friends were playing and in the meanwhile, occurrence had taken place. Accordingly,



before proceeding with other evidences it is necessary to examine the evidence of two friends of deceased, who have been examined as P.W. 1 and P.W. 2.

P.W. 1 /Dharmendra Kumar is a minor witness aged about nine years and he at the time of deposition was a class -IV student. The learned trial Judge at the very outset after noticing the demeanor of this witness has recorded that “though witness is not major, but he understands everything” . This witness has stated in paragraph no. 1 that on the date of occurrence he along with one Mukesh / PW. 2 and deceased were playing. They were playing on the tree of Biswanath Chaudhary . In the meanwhile, Biswanath Chaudhary /appellant no. 1 arrived and told that you people were in the habit of committing theft of lemon. Thereafter, Biswanath Chaudhary chased them and after chase to some extent Abhishek was apprehended . Both Biswanath Chaudhry and Arun Chaudhary caught him and started pressing neck and they threw him into the well. He stated that police had inquired from him and he has disclosed all the facts to ‘Darogaji’. He also identified both the accused in the dock. In paragraph no. 4 of his cross- examination he stated that he explained everything to the mother of deceased (Abhishek) . He further stated that the mother of deceased was about twenty hands from well. In paragraph no.



15 he reiterated that he had seen both Biswanath and Arun immediately after they caught Abhishek. In paragraph no. 16 of his cross- examination he further stated that firstly Abhishek was caught by Biswanath/ appellant no. 1 and he caught his hand and immediately thereafter Arun /appellant no. 2 caught his neck. Though this witness , a child witness, was cross -examined at length but nothing could be extracted to create any doubt on his evidence.

P.W. 2 /Mukesh Kumar who was also playing with the deceased and P.W. 1 was a child witness and aged about 11 years and he was a student of class -VII . He in paragraph no. 1 stated that on the date of occurrence he was playing in the orchard of Biswanath Chaudhary. Along with him Dharmendra /P.W. 1 and Abhishek(deceased) were also playing. He stated that Biswanath Chaudhary caught hand of Abhishek with whom Arun / appellant no. 2 was also there. After pressing neck of Abhishek he was thrown into well. In paragraph no. 2 of his examination -in- chief he stated that Biswanath Chaudhary said that every day they were plucking lemon. He also identified both the accused in the dock. In paragraph no. 7 of his cross -examination he disclosed that 'Darogaji' had inquired from him in the night of occurrence at about 8-9 Hours. He further stated that he had informed 'Darogaji'



that he was playing in the orchard of Biswanath Chaudhary . Biswanath Chaudhary had caught hand of Abhishek and along with Arun /appellant no. 2 was also there and after pressing neck of Abhishek he was thrown into the well and Biswanath Chaudhary had said that regularly he was plucking lemon. In paragraph no. 16 of his cross- examination he has stated that after hearing sound of water as Chapak (छपाक) he proceeded towards the well. His mother and mother of Abhishek also arrived. Besides them 2-3 persons also arrived there and thereafter on hulla many of the villagers arrived there . They were about fifty in number and on suggestion he denied that he had not stated as per diktat.

P.W. 5 /Seema Devi is the mother of the deceased and informant of the case. In paragraph no. 1 of her examination -in-chief she stated that day of occurrence was Sunday and about 10.00 A.M. she was in the field for grazing her goat. Along with her son -Abhishek and Mukesh/ P.W. 2 also arrived . She went to cut the fire wood and her son near the tree of lemon, started playing with Mukesh/ P.W. 2 and Dharmendra /P.W. 1 and started plucking lemon. After some time she heard the sound of Abhishek as मों मों. Thereafter, she noticed that Biswanath Choudhary/ appellant no. 1 and Arun Choudhary/ appellant no. 2



had caught hand of her son and pressing his neck threw him into well and Biswanath said that “रोज रोज नीबू तोड़ने आता है आज भी तोड़ने आया है”. In paragraph no. 3 she stated that Biswanath Chaudhary and Arun Chaudhary both were apprehended at the place of occurrence itself and after arrival of Police fardbyan was recorded and she proved her signature on fardbyan, which was marked as Exhibit -2 . She further stated that Nagendra Das had come into influence of the accused persons and as such, she will prefer not to examine him. At this juncture it is necessary to indicate that Nagendra Das was also a witness to the fardbyan and he has put his signature on the fardbyan. She also identified both the accused in dock. In cross- examination in paragraph no. 9 she stated that Biswanath Chadudhary (appellant no. 1) was the land owner and she reiterated that he was the owner of the land but she denied as to whether she had seen any paper or not. In paragraph no. 16 she has stated that prior to the date of occurrence there was no dispute with the accused. She further stated in paragraph no. 21 that Biswanath Chaudhary had never filed any case against her . This witness too was cross- examined at length but nothing could be extracted to create doubt on her evidences .

P.W. 3 /Rameshwar Das in paragraph no. 1 has stated that dead body of Abhishek was taken out from well by the Police



and in his presence inquest report was prepared and he put his signature on the inquest report. His signature was got marked as Exhibit -1 . In paragraph no. 2 he stated that he heard that Biswanath Chaudhary/ appellant no. 1 and Arun Choudhry /appellant no. 2 after pressing neck of Abhishek had thrown him into well .

P.W. 4 /Bijendra Paswan has stated that in his presence dead body of Abhishek was taken out from well and inquest report was prepared and he put his signature on the inquest report. His signature was got marked as Exhibit -1/1. In paragraph no. 3 of his examination- in- chief he stated that he heard that due to lemon Biswanath Chaudhary and Arun Chaudhary had killed and thrown Abhishek into well . In paragraph no. 6 of his cross -examination he further stated that he had seen the dead body lying in the well.

P.W. 6 / Bhavna Kumari is the daughter of the informant and sister of the deceased. She stated that on the date of occurrence she got information that Biswanath Chaudhary/ appellant no. 1 and Arun Chaudhary / appellant no. 2 have killed her brother and thrown him into well and reason for the occurrence was plucking of lemon . After getting information she went to the place of occurrence and her statement was also got recorded by the Police. She also identified both the accused in the dock . In paragraph no.



12 of her cross -examination she disclosed that Mukesh / PW. 2 and Dharmendra / P.W. 1 had explained about the occurrence.

P.W. 7 / Kanchan Kumari who was aged about 13 years on the date of her cross- examination and a class -VIII student has also stated that she was informed by Dharmendra / P.W. 1 Mukesh/ P.W. 2 regarding the occurrence.

P.W. 8/ Dilip Das [father of the deceased] and husband of the informant has stated that on the date of occurrence i.e. on 29.8.2010 he was in Delhi. He received telephonic call from his house that Biswanath Chaudhary /appellant no. 1 and Arun Chaudhary /appellant no. 2 had killed his son and thrown him into well. He stated that he was informed by his wife through phone and after getting information he came to his village by train and found dead body of Abhishek, which was kept on his door. In paragraph no. 3 he stated that his wife informed him that Biswanath Chaudhary and Arun Chaudhary due to the dispute regarding lemon had killed his son and thrown him into well. He further stated that his wife had told that the occurrence had taken place at 10.00 . This witness is also a hearsay witnesses .

P.W. 9/ Dr. Vijay Kumar, who was posted as medical officer in Sadar Hospital Hajipur had conducted post -mortem examination on 29.8.2010 in the evening as per the order of the



District Magistrate. He had conducted post-mortem examination on the dead body of deceased- Abhishek and found no ante-mortem injuries . He stated that on dissection lungs contained water bubbles and regarding cause of death he stated that in his opinion death was due to *asphyxia* following drowning. He proved the post-mortem examination report , which was marked as Exhibit -3. It is necessary to incorporate post-mortem examination report, which is as follows:-

“No any ante-mortem injuries was found at the time of P.M. Examination. Eye semi open- Black hair.

On dissection - Skull- bones intact and brain and mages intact and congested. Neck -muscles intact. Trachea and ocsophagus contain water.

Thorax -Both placenta ruptured. Lung contain water bubbles. Pericardium and heart intact and contain blood (all chambers)

Abdomen- All abdomen viscera intact and congested. Stomach contain 100 ml of water. Small and large intestine, contain water and faecal matter.

Time elapsed since death -within 24 hours.

Cause of death - In my opinion death is due to asphyxia following drowning”.

P.W. 10 /Binay Kumar Sharma is the investigating officer and he stated that on 29.8.2010 he was posted as officer -in-charge of Bidupur Police Station . He stated that on the same day he received fardbyan of Seema Devi /wife of Dilip Das . He stated that fardbyan was in the writing and signature of Sub Inspector of Police Arjun Yadav and he proved the fardbyan, which was marked as Exhibit -4. On the fardbyan he made an



endorsement and he proved the same, which was marked as Exhibit- 5. He also proved formal FIR of Bidupur P.S. Case no. 231 of 2010, which was marked as Exhibit -6. He further stated that on 29.8.2010 at 15.40 Hrs. (3.40 P.M.) he got an information regarding lying of dead body in well in village -Panapur Dharampur, regarding which he recorded station diary entry and thereafter, he along with Sub Inspector Of Police Sri Arjun Yadav and other police officials proceeded to the place of occurrence and dead body was taken out from well in presence of villagers . He proved the inquest report, which was marked as Exhibit -7 . He in paragraph no. 5 has made categorical statement that on inquest report police station case no. was not mentioned. At this juncture it is necessary to indicate that since inquest report was prepared immediately after dead body was taken out from well and formal FIR in the case was lodged in the night, rightly on inquest report case no. was not mentioned. He further stated that dead body was sent for post- mortem examination by preparing dead body challan and he proved dead body challan, which was marked as Exhibit- 8. He also inspected the place of occurrence and found that well was having no boundary and it was almost covered by long grasses around the well. In paragraph no. 8 of his cross- examination he stated that he



had recorded statement of Nagendra Das (not examined) and he remained at the place of occurrence up to 21.00 Hours (9.00 P.M.) . He stated that during investigation he had recorded the statement of Dharmendra Kumar /P.W. 1 and Mukesh Kumar / P.W. 2 . In paragraph no. 18 he stated that on the dead body there was no external injury . In paragraph no. 25 of his cross-examination he reiterated that Mukesh during investigation had stated that he was playing in the orchard of Biswanath Chaudhary. Biswanath Chaudhary had caught hand of Abhishek and he was with Arun. After pressing neck they threw Abhishek into well. After examination of prosecution witnesses, all the circumstances which were collected during trial were placed to both the appellants while recording their statement under section 313 of the Cr.P.C.

Sri Satish Singh , learned counsel, assisted by Sri Arun Kumar , learned counsel for the appellants after placing entire evidence has argued that death has not occurred in the manner as alleged by the prosecution. He submits that number of witnesses as well as investigating officer have categorically stated that the well in which it was alleged that deceased was thrown was having no boundary and it was almost covered by long grasses . He submits that there was possibility that after noticing arrival of



the appellants , the children, who were regularly indulging in theft of lemon from the orchard of the appellants, had tried to flee away and while fleeing away the deceased might have slipped into well, and as such , according to learned counsel for the appellants there was possibility of death of the deceased due to slip, not in the manner as has been alleged by the prosecution i.e. by throwing him into well by the appellants' side. To substantiate his submission, learned counsel for the appellants has referred to evidence of P.W. 2 . He submits that this witness i.e. P.W. 2 in paragraph no. 16 of his cross- examination has stated that after hearing the sound of water from inside well as Chapak (छपाक) he went there. This witness further has stated in the same paragraph that his mother and mother of Abhishek also arrived there. Taking clue from the statement of this P.W. 2 in paragraph no. 16 of his cross- examination he tried to persuade the court that this statement suggests that P.W. 2 had not witnessed the occurrence and after hearing the sound he went there and he had not seen any occurrence, as has been alleged by him. Similarly, by way of referring to deposition of P.W. 1 in paragraph no. 4, learned counsel for the appellants has stated that this witness has stated that he had stated about the entire occurrence to to mother of the deceased, who has been examined



as P.W. 5. Learned counsel for the appellants further tried to persuade the court by way of referring to the statement made in paragraph no. 5 of the cross-examination of P.W. 1 that this witness has stated that mother of deceased (Abhishek) was about 20 hands (30 feet) away from the well and as such, there was no possibility of witnessing the occurrence by the mother of the deceased i.e. P.W. 5. Accordingly, learned counsel for the appellants tried to persuade the court regarding absence of the informant at the place of occurrence . On aforesaid grounds it has been argued that it was not a conclusive case of prosecution that either of the witnesses had seen exact occurrence, rather according to learned counsel for the appellants, the deceased died while he was fleeing away after noticing the appellants and he slipped into well. According to learned counsel for the appellants if on the basis of evidences there are two possibilities one suggesting guilt and another about innocence, certainly the court may proceed to act upon the possibility of innocence and benefit of doubt can be extended to the appellants . On aforesaid grounds it has been argued to set aside the judgment of conviction. The Court proposes to record that save and except arguing on the point of clean acquittal on the basis of alleged contradiction in the



evidences and plea for grant of benefit of doubt, no other argument has been advanced by learned counsel for the appellants.

Sri Ajay Mishra, learned Additional Public Prosecutor opposing the appeal has argued that if for the time being all other evidence is ignored, the evidence of P.W. 1, who was minor and playing with the deceased is itself sufficient to come to the conclusion that prosecution has proved the case beyond all reasonable doubt. He submits that it is consistent case of the prosecution that deceased was playing with P.W. 1 and P.W. 2 and they had accepted that they were playing on the tree of appellant no. 1 / Biswanath Chaudhary and P.W. 1 has made categorical statement that both the appellants arrived and chased them and while fleeing away deceased (Abhishek) was apprehended by the appellants and thereafter they threw the deceased into well and accused had said that regularly accused persons were plucking lemon from his orchard. Besides evidence of P.W. 1, Sri Mishra has also placed reliance on the evidence of P.W. 2 i.e. one of the friends of the deceased and mother / P.W. 5. According to him on examination of over all evidences it is conclusive case of the prosecution that both the appellants due to plucking of lemon from their orchard had caught the deceased and threw him into well in presence of P.W. 1, P.W. 2 and P.W.



5. Even the statement which were made by the witnesses during trial was not disputed by defence as to whether the witnesses had developed a story other than their statement recorded under section 161 of the Cr.P.C. He submits that witnesses have stated during trial as they have stated during investigation before the Police and those facts have been noticed in the evidence of investigating officer /P.W. 10 .

We have perused the statement of accused recorded under section 313 of the Cr.P.C. and are of the considered opinion that whatever evidences were collected were explained to them. Thereafter, the defence also examined one witness namely Umesh Kumar as D.W. 1, who proved FIR No. 245 of 2010 , which was marked as Exhibit -X dated 4.9.2010. Learned counsel for the appellants has argued that from the appellants' side also FIR vide FIR No. 245 of 2010 was lodged regarding assault given on them. However, on perusal of the same it is evident that in the present case occurrence had taken place on 29.8.2010 but from the appellants' side FIR was lodged on 4.9.2010 much after lodging of the present case. Moreover, the court is of the opinion that examination of evidence of D.W. 1 appears to be completely formal and requires no detail examination. On minute examination of the aforesaid evidences which have been brought on record, the



court is of the considered opinion that the evidence of prosecution witnesses, particularly evidence of two eye witnesses i.e. P.W. 1 and P.W. 2 is consistent and no doubt can be created on their evidences particularly in view of the fact that both the witnesses were minor and were friends of the deceased, who were playing with the deceased at the time of occurrence and in their presence accused persons had chased them and after chase deceased was apprehended in their presence. The deceased was thrown into well. So far evidence of mother /P.W. 5 is concerned, her evidence may also not be doubted. It was categorical case of the informant that the informant with her son had gone for grazing of her goat. At the time of occurrence she was near the well and cutting fire wood. Immediately after hearing cry, she had seen the occurrence and as such, evidence of P.W. 5 may not be brushed aside. So far other witnesses are concerned most of them are hearsay witnesses, who arrived after the occurrence.

Entire evidence of P.W. 1, P.W. 2 and P.W. 5 were examined by this court and the court is of the considered opinion that the prosecution has proved the case beyond all reasonable doubt and considering all those facts the learned trial judge has passed the judgment of conviction and sentence, which requires no interference.



In view of the fact and circumstances, we do not find any ground for interference with the judgment of conviction dated 14.12.2011 and sentence dated 19.12.2011 passed by Sri Ajit Kumar Pandey, learned Additional Sessions Judge – cum- FTC -1st, Vaishali at Hajipur in S. Tr. No. 469 of 2010 . Accordingly , the appeal stands dismissed.

(Rakesh Kumar, J)

(Mohit Kumar Shah, J)

praful/-

AFR/NAFR	AFR
CAV DATE	N/A
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