

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Criminal Appeal (DB) No.228 of 1994**

Arising Out of PS.Case No. -155 Year- 1988 Thana –K. Nagar District- PURNIA

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Moti Singh, Son of Balkan Singh, resident of village Gangoli, Police Station –  
Kuwahagan, District-Purnia.

.... .... Appellant/s

Versus

State of Bihar

.... .... Respondent/s

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**Appearance:**

For the Appellant/s : Mr. Rakesh Kumar Sinha, Advocate.

For the Respondent/s : Mr. S. N. Prasad, Advocate.

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**CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL**

**And**

**HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL**

**ORAL JUDGMENT**

**(Per: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL)**

**Date: 14-10-2017**

Heard learned counsel for the appellant as well as  
learned APP for the State on this appeal and perused the record.

2. This criminal appeal has been preferred against the  
Judgment and Order of conviction dated 19.04.1994 and order of  
sentence dated 22.04.1994 passed by 2<sup>nd</sup> Additional Sessions Judge,  
Purnia in Sessions Trial No. 212 of 1988 / 169 of 1992 arising out of  
K. Nagar P.S. Case No. 155 of 1985, whereby the learned trial court  
acquitted accused, namely, Bulkan Singh, Dholan Devi, Mohan



Singh, Harihar Singh and Dip Naraian Singh of the charges levelled against them and convicted the accused Moti Singh for the offence punishable under Sections 302 and 201 of the Indian Penal Code and sentenced him to undergo R.I. for life imprisonment for the offence punishable under Section 302 of the Indian Penal Code and further sentenced to undergo R.I. for two years for the offence punishable under Section 201 of the Indian penal Code. Both the sentences were directed to run concurrently.

**3.** The factual matrix of the case is that K. Nagar P.S. Case no. 155 of 1988 was instituted initially under Section 364 of the Indian Penal Code and subsequently added with Sections 302 and 201 of the Indian Penal Code against the accused persons, namely, Bulkan Singh, Moti Singh, Dholan Devi, Mohan Singh, Harihar Singh and Dip Narain Singh on the basis of the fardbeyan of the informant Ram Kripal Singh, Son of Deo Singh, Resident of Village-Taranagar, P.S.-Kasba, District- Purnia recorded by S.I. F. Ahmad, incharge Maranga O.P. District Purnia on 09.09.1985 at 15:30 hours at Maranga O.P. with the allegation in succinct that marriage of his daughter, namely, Kanti Devi was performed with Moti Singh. After marriage, she was living in her marital house. Earlier to her marriage with Moti Singh, she was married with the son of Ram Chandra Singh in Nepal five years back, who had died in motorcycle accident.



Then second marriage of his daughter was performed with Moti Singh. She was pregnant of five months. Further allegation is that on 08.09.1985 at round 2 PM, Ramuchit Singh arrived at his house and informed him that the accused persons named in the F.I.R. have eliminated her daughter and disposed of her dead body. On the said information, he along with his relative Ram Babu Singh arrived at the marital house of his daughter on 09.09.1985 at 10 AM and on quizzing, Moti Singh and his mother divulged that Knati Devi had died on the past Friday night. They further divulged that after her death, they have dumped her dead body in Bochaha Dhar. On making complain about disposing of the dead body without giving any information to him, Moti Singh caught hold his feet and prayed to save his life. On quizzing about his grand daughter Krishna Kumari, he handed her over to him. His grand-daughter divulged him that all the accused persons have eliminated her mother. On making enquiry from the locals, he learnt that Moti Singh and other accused persons after eliminating his daughter had disposed of her dead body. It is claimed by the informant that all the accused persons after committing murder of his daughter have disposed of her dead body.

**4.** Aforesaid case was investigated by the police and on conclusion of the investigation, I.O. submitted chargesheet against the aforesaid accused persons.



5. On receiving the chargesheet and the case diary and perusing the same, the learned Magistrate took cognizance of the offence against the accused persons and committed the case to the court of sessions and on transfer finally the case came in the *seisin* of 2<sup>nd</sup> Additional Sessions Judge, Purnia for trial.

6. Charge against the accused, namely, Bulkan Singh, Moti Singh, Dholan Devi, Mohan Singh, Dip Naraian Singh and Harihar Singh was framed under Section 201 of the Indian Penal Code and further charge against the accused, namely, Bulkan Singh, Moti Singh and Dholan Devi was framed under Section 302 of the Indian Penal Code. Charges were read over and explained to them to which they pleaded not guilty and claimed to be tried.

7. To substantiate its case, in ocular evidence, the prosecution has examined altogether eight prosecution witnesses namely, informant Ram Kripal Singh as PW-1, Ram Babu Singh as PW-2, Madhusudan Singh as PW-3, Ramuchit Singh as PW-4, Dr. Krishna Nand Singh who has conducted the autopsy of the dead body of the deceased as PW-5, Ram Sewak Singh as PW-6, Upendra Poddar as PW-7 and Kripa Nath Das as PW-8. Out of the aforesaid witnesses, PW-4 and PW-8 are tendered witnesses. PW-6 is the witness of inquest report while PW-7 is the witness of seizure list. The prosecution has filed and proved several documents by way of



documentary evidence.

**8.** Statement of the accused persons was recorded under Section 313 of the Code of Criminal procedure. The case of the defence is complete denial of the occurrence claiming themselves to be innocent. The accused persons have neither adduced any ocular nor documentary evidence in buttress of their case.

**9.** After hearing the parties and perusing the record, the learned trial court passed the impugned Judgment and Order of conviction and sentence as detailed in the earlier paragraph.

**10.** Being aggrieved and dissatisfied with the aforesaid Judgment and Order of conviction and sentence, the convict Moti Singh has preferred this Criminal Appeal.

**11.** The point for consideration in this case is, as to whether the prosecution has been able to bring home the charges levelled against the appellant beyond all reasonable doubts or not.

**12.** It is submitted by learned counsel for the appellant that though out of the eight witnesses examined by the prosecution, PW-1, PW-2 and PW-3 happen to be the material witnesses, but they are not the eye witnesses of the occurrence. The only competent eye witness of the occurrence, namely, Krishna Kumari (grand-daughter of the informant) who has allegedly witnessed the occurrence of assaulting her mother (deceased) by the accused persons has not been



examined by the prosecution rather withheld by it and no explanation has been assigned by the prosecution for her non-examination. It is further submitted that the dead body recovered was of the deceased has not been established by the prosecution as the occurrence is said to be of 06.09.1985 and the doctor has conducted the autopsy on 10.09.1985, but the doctor has found rigor mortis on the person of the deceased which is not possible as per medical jurisprudence and the most important fact is that as per the prosecution case, the deceased was pregnant of five months, but the doctor has not found any foetus in the womb of the deceased. Aforesaid aspect of the case creates serious doubt about the identity of the deceased. As a matter of fact, it was not the dead body of Kanti Devi rather of some other lady. Kanti Devi has not been murdered by him rather she is living with her first husband in Nepal. It is further submitted that the informant has given statement in quite contradiction to the prosecution case, hence his testimony is not reliable and worth credence. It is further submitted that the defence has drawn attention of PW-1, PW-2 and PW-3 regarding contradiction between their statements given before the court and that given before the I.O. under Section 161 of the Code of Criminal Procedure, but the I.O. has not been examined by the prosecution to confirm or corroborate the said contradiction(s). Hence, due to non-examination of the I.O., great



prejudice has been caused to the defence. Thus, the prosecution has utterly and miserably failed to substantiate the prosecution case and bring home the charges levelled against the appellant beyond all reasonable doubt. Hence, the appellant is entitled to get benefit of doubt.

**13.** On the other hand, learned APP advocating the correctness and validity of the impugned judgment and order of conviction and sentence submitted that the material witnesses examined by the prosecution have fully supported the prosecution case and the ocular evidence also stands corroborated by the medical evidence. Learned Lower Court correctly appreciating the facts and evidence available on record has rightly passed the impugned judgment and order of conviction and sentence which is liable to be upheld and this criminal appeal has no substance in it and is liable to be dismissed.

**14.** From perusal of the record, it appears that it is the case of the prosecution as alleged by the informant in the fardbeyan and in his deposition that his daughter, namely, Kanti Devi (deceased) was pregnant of five months, but on perusal of the post mortem report of the deceased marked as Exhibit-5, it appears that the doctor has not found any foetus in the womb of the deceased rather has candidly reported that no pregnant uterus was found.



Moreover as per prosecution case, the occurrence is said to be of 06.09.1985 and on the said date the deceased is said to have been dumped in Bochaha Dhar by the accused persons after committing her murder and the autopsy of the dead body was conducted by the doctor after four days on 10.09.1985 but the doctor has found rigor mortis present on the person of the deceased. As the occurrence is said to be of four days earlier to that of the post mortem, rigor mortis must not be present on the dead body of the deceased, because rigor mortis starts appearing after 4-6 hours and completely disappears after 32-36 hours. Thus, the aforesaid two aspects of the case create serious doubt about the identity of the dead body of the deceased. As per the prosecution case, there was cut mark on the left index finger of Kanti Devi and the informant in his statement has stated that he had seen the left index finger of the deceased cut. But from perusal of the inquest report marked as Exhibit-2, it appears that I.O. has not reported any such identification of the dead body of the deceased in his report. From perusal of the statement of the informant as recorded in Para-12 of his cross-examination, it appears that on fishing out the dead body from the water, he had not touched the dead body rather witnessed it from a distance of 4-6 feet. The defence has taken the case by giving suggestion to the informant in Para-16 of his cross-examination that the dead body was not of Kanti Devi rather Kanti



Devi is living in Nepal along with her previous husband. The aforesaid aspect of the case goes to strengthen the aforesaid case of the defence and indicates that the prosecution has failed to establish that the dead body was actually of Kanti Devi (the daughter of the informant).

**15.** From perusal of the statement of the informant as given in the fardbeyan and in Para-3 of his examination-in-chief that his grand daughter, namely Krishna Kumari who happens to be the daughter of the deceased divulged him on grilling that Moti Singh has committed murder of her mother by assaulting her by means of lathi. Hence, the said Krishna Kumari happens to be the competent witness of the occurrence but she has not been examined by the prosecution rather withheld and prosecution has also not assigned any plausible reason for her non-examination. Hence adverse inference is drawn against the prosecution.

**16.** From perusal of the fardbeyan of the informant, it appears that as per fardbeyan the first husband of Kanti Devi had died in motor vehicle accident, but in quite contradiction to the aforesaid statement, informant has stated that in Para-1 of his examination-in-chief that his aforesaid son-in-law has been murdered in Punjab. Likewise, in his examination-in-chief, he has stated that his grand-daughter, namely, Kirshna Kumari has divulged him the



factum of committing murder of the deceased by the accused Moti Singh by assaulting her by means of lathi but in Para-15 of his cross-examination he has not divulged to the I.O. about the revelation of the murder of the deceased by Moti Singh by means of lathi to him by Krishna Kumari. Hence in view of the aforesaid contradiction between fardbeyan and statement of the informant and statement of the informant *inter se*, the informant does not appear to be reliable and worth credence.

17. The informant and rest two other witnesses, namely, Ram Babu Singh (PW-2) and Madhusudan Singh (PW-3) happen to be the hearsay witnesses of the occurrence. From perusal of the testimonies of the aforesaid witnesses, it appears that the defence has drawn attention of the aforesaid witnesses regarding contradiction between their statements given before the court and that given before the I.O. under section 161 of the Code of Criminal Procedure regarding the material aspect of the case. But I.O. has not been examined by the prosecution to confirm or corroborate the aforesaid contradiction. From perusal of the statements of aforesaid witnesses recorded by the I.O. in the case diary, it appears that the aforesaid witnesses have taken quite a different stand in the court than what taken before the I.O.. In view of the aforesaid contradiction(s), the testimonies of the aforesaid three witnesses do



not appear to be reliable and trustworthy and do not inspire our confidence to conclusively hold the guilt of the appellant.

**18.** When the I.O. of the case is not examined by the prosecution and the attention of the witnesses has already been drawn towards their earlier statements and the Investigating Officer could not be brought to give his evidence, then in my considered opinion, the Court can peruse the case diary and find out as to whether or not the attention of the witnesses towards their previous statements were correctly drawn and to satisfy itself as to whether or not they had given similar statement before police. There are two parts of the case diary. First part contains such portion of the diary in which the Police Officer has recorded statement of the witnesses about the incident or about other relevant facts. The Second part of the case diary contains that portion in which the Police Officer has himself seen or heard a particular fact and has recorded a fact out of his own perception. To this category would come recording about the inspection of place of occurrence making of seizure of certain incriminating articles or in some cases, when the Police Officer reaches the place of occurrence where the occurrence has not finished and he sees himself whole or part of the occurrence, recording of that. The latter part of the case diary cannot be used by the Court unless the Investigating Officer is examined because that would amount to using that portion of the



case diary as evidence. Only the Investigating Officer can tell the Court in witness box as to what were his findings out of his own perception, so that he can be put to cross-examination over that. However the first part of the case diary consists, as already noted, the statement recorded by the witnesses. If the Investigating Officer comes to the Court for evidence and if he is asked to confirm those portion of the statement of the witnesses to which the attention of the witnesses was drawn, the Investigating Officer will say only what he has recorded as his statement in the case diary and cannot go beyond that. Now, the question is, whether that portion of the case diary can be looked into by the Court and used in the trial to assist the Court in reaching at a correct decision when the Investigating Officer is not brought before the Court. Sub-Section (2) of Section 172 of Cr.P.C. provides that the Court cannot only call for the case diary but may also use such diary to take aid in such trial. If the Court only has the power to look into the case diary and whatever it peruses to keep it only in mind and then to proceed to record the judgment keeping such impression only in mind that, in my opinion, cannot be the intention of the legislation. In my considered opinion, if the Court peruses any such things and uses it to its aid in trial, this must go in black and white as part of the judgment. The only limitation is that the court cannot use any portion of the case diary as evidence. In



view of the aforesaid proposition of law and in view of the contradiction between the statements of the witnesses, as recorded before the court and that given before the I.O. under Section 161 Cr.P.C., the testimonies of the witnesses given before the court do not inspire my confidence to uphold the conviction of the appellants relying upon the same.

**19.** From perusal of the record, it appears that the informant has got information of the murder of his daughter on 08.09.1985 at around 2 PM, but he had rushed to the marital house of his daughter on the following day i.e. on 09.09.1985 at 10 AM. The said act of the informant appears to be against the natural course of conduct and creates serious doubt about the prosecution case. Moreover, from perusal of the record, it appears that the fardbeyan of the informant was recorded on 09.09.1985 at 02:30 PM and F.I.R. was lodge on 09.09.1985 at 7 PM, but F.I.R. was sent to the Court on 12.09.1985 i.e. after an abnormal delay of three days and prosecution has not assigned any reason for the said delay in sending the F.I.R. to the court, giving sufficient hiatus and time to the prosecution for manipulation of the case against the appellant. Hence the aforesaid aspect of the case also creates serious doubt about the prosecution case.

**20.** Considering the facts and circumstances of the



case, we find and hold that the prosecution has failed to substantiate the prosecution case and bring home the charges levelled against the appellant beyond all reasonable doubts by adducing consistent, trustworthy, worth credence and reliable ocular and documentary evidence. Hence, the appellant is entitled to get the benefit of doubt. So, the impugned judgment and order of conviction and sentence passed by the learned lower court is set aside and the appellant is acquitted from the charges levelled against him. As the appellant is on bail, he is discharged from the liability of his bail bonds. Accordingly, this appeal is allowed.

**(Prakash Chandra Jaiswal, J.)**

**Kishore Kumar Mandal, J.:** I agree.

Mishra/-

**(Kishore Kumar Mandal, J.)**

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