

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.637 of 2011

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Binay Das, son of late Lakhan Das, resident of village- Bhatoria, P.S.- Nathnagar
(Madhusudanpur), District- Bhagalpur.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Neeraj Kumar @ Sanidh (*Amicus Curiae*)

For the State : Mr. A.K.Sinha, P.P.

For the Informant : Mr. Indeshwari Prasad Mandal, Advocate.

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CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH

and

HONOURABLE MR. JUSTICE ARUN KUMAR

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH)

Date: 18-04-2017

This appeal is preferred against the judgment of conviction dated 04.05.2011 and order of sentence, dated 07.05.2011, passed by the learned Additional Sessions Judge-cum-F.T.C.-I, Bhagalpur in Sessions Trial No. 585 of 2008, whereby the sole appellant has been convicted under Section 302/34 of the Indian Penal Code and sentenced to undergo life imprisonment along with a fine of Rs. 5,000/-.

2. The prosecution case, in brief, as made out in the *fardbeyan* of Babu Lal Das (PW-5) of village- Bhatauria, P.S.- Madhusudanpur, District- Bhagalpur recorded by Sub Inspector,



P.N.Tiwari of Madhusudanpur Police Station on 31.10.2007 at village Bhatauria near Tunia Pokhar at 3:30 P.M, is as follows:

(i) The informant stated that on 31.10.2007 in the day time, his co-brother Binay Das (husband of wife's sister) , aged about 20 years, also resident of the same village- Bhatauria, came to his house and enticed his 06 years old grandson to accompany. The accused Binay Das took his grand son to Tunia Pokhar, where he along with his friend/associate Amit Kumar Das killed him near the small mango and *Tar* trees in the eastern-southern corner of the Pokhar by slitting his neck with the branch (*Daffi*) of a *Tar* tree which has sharp edges. His grandson cried in pain, whereupon villagers rushed towards him and saw Binay Das and Amit Das fleeing from the place of occurrence. On *hulla* of the villagers, the informant along with his second wife Gango Devi (PW-1) and daughter-in-law Bisokha Devi (PW-4) and other villagers ran towards Pokhar, and found his grandson dead, his neck slitted by some sharp cutting weapon. Blood in large quantity was found on the ground. They also found blood on the *Daffi* (*Dali*) of the *Tar* tree, located near the body.

(ii) The occurrence took place as Binay Das had suspicion that his wife Shabnam Devi had lodged a criminal case against him with Madhusudanpur Police Station at the behest of



informant and his family members. Appellant's wife Shabnam Devi happens to be the Mausi of the deceased Makhan Kumar.

3. On the basis of the *fardbeyan*, the police registered Madhusudanpur P.S.Case No. 260 of 2007 dated 31.10.2007 under Section 302/34 of the Indian Penal Code against the appellant and one Amit Das.

4. The Investigating Officer, during the investigation, inspected the place of occurrence and also seized the *Tar* branch (*Daffi*) with blood, after severing it from the stem of the tree. The I.O. took statement of witnesses and obtained the post-mortem report and finding the case to be true submitted charge sheet under Section 302/34 of the Indian Penal Code against the appellant and Amit Das showing the latter as absconder. On receipt of the charge sheet, the learned Magistrate took cognizance of the offence and committed the case to the court of sessions for trial. Charge was framed against the sole appellant under Section 302/34 of the Indian Penal Code to which he pleaded not guilty and claimed to be tried.

5. The case of the defence, as per the statement recorded under Section 313 of the Cr.P.C. as well as from the mode of cross-examination, is one of false implication on account of admitted enmity with the prosecution side. However, the defence neither examined any witness nor produced any documentary evidence in



support of his case.

6. The trial court, relying upon the evidence of informant and other eye witnesses, convicted the sole appellant under Section 302/34 of the Indian Penal Code.

7. The prosecution, in order to substantiate its case, examined 12 witnesses, namely, PW-1 Gango Devi is the second wife of the informant, PW-2 Janardan Mandal, who was declared hostile during the trial, PW-3 Ram Deo Das is the hearsay witness, PW-4, Bisokha Devi is the mother of the deceased Makhan Kumar, PW-5 Babu Lal Das is the informant and the grandfather of the deceased, PW-6 Janardan Das is the cousin of the informant, PW-7 Paras Nath Tiwari is the I.O. of the case, PW-8 Jhalo Devi is the first wife of the informant, PW-9 Chunchun Das is an independent witness, PW-10 Dinesh Kumar is the hearsay witness, PW-11 Sushil Das is also a hearsay witness and also witness to the inquest alongwith the informant Babu Lal Das, and PW-12 Dr. Arun Kumar Singh who held postmortem on the dead body of the deceased.

8. Out of these 12 witnesses, PW-1 Gango Devi (second wife of the informant), PW- 4 Bisokha Devi (mother of the deceased) and PW-5 Babulal Das (informant) and PW-8 Jhalo Devi (first wife of the informant) all stated that on the day of occurrence on 31.10.2007 at about 2:00 to 2:30 P.M., the appellant Binay Das



along with one Amit Das came to their house and enticed 06 years old Makhan Kumar (grandson of the informant) to go along with them for purchasing biscuits from a nearby shop. PW-4 stated that after some time, she heard *hulla* that her son has been killed, whereupon she rushed towards *Tunia Pokhar* and on the way, she saw Binay Das and Amit Das fleeing. When she reached *Tunia Pokhar*, she found her son dead, lying on the ground having cut injury on his neck. Lots of blood had fallen on the ground and there was blood stains on the nearby branch (*daffi*) of a small *Tar* tree.

9. PW-5 (the informant) also stated that Shabnam Devi had filed a criminal case under Section 498A of the Indian Penal Code against the appellant. In his statement, he has stated that Binay Das committed the murder of Makhan Das suspecting that his mother Bisokha Devi has instigated her sister (Shabnam Devi) to lodge a case against him. PW-6 Janardan Das stated that on 31.10.2007 between 2:00 to 2:30 P.M., he was in his house. He saw Binay Das taking away Makhan Kumar along with him and Amit Das was also following him. PW-9 Chunchun Das stated that on the relevant date and time at about 2:00 P.M., he too saw Binay Das carrying Makhan Kumar towards Bahiar and one Amit Das was also coming behind them.

10. PW-12 Dr. Arun Kumar Singh, who held post-



mortem on the dead body of the deceased, found cut injuries on the neck of the deceased caused by sharp cutting weapon.

11. PW-7 Paras Nath Tiwari, Investigating Officer of the case, stated that he found large quantity of blood near the place of occurrence, where the deceased was found dead. He also found blood on the branch of one of the small *Tar* trees, located near body, which he severed from the main root and prepared seizure of the same in presence of the witnesses. On these premises, the prosecution has tried to establish its case and bring home the charge against the appellant under Section 302/34 of the Indian Penal code.

12. Mr. Neeraj Kumar @ Sanidh, learned *amicus curiae*, appearing on behalf of the appellant, has assailed the impugned judgment of conviction and order of sentence on more than one ground. He submits that there is no eye witness to the occurrence and the case is based on circumstantial evidence. The prosecution has not been able to establish a complete chain of circumstances to establish that the appellant has alone committed murder. The informant (PW-5) and his second wife (PW-1) have given a go-bye to the prosecution case contained in the FIR.

13. Elaborating his submissions, learned *amicus curiae* submits that the informant (PW- 5) in the FIR stated that the appellant Binay Das came to the house in the day time and took his



grand son towards *Tunia Pokhar*. After some time, on hearing the cry of the boy, the villagers raised *hulla* and informed him of the incident, whereupon he along with his second wife PW-1 and PW-4 (the mother of the deceased) rushed to the place of occurrence. But, both, PW-5, the informant and his second wife, PW-1 in their evidence stated otherwise. They stated that the appellant came and took their grand son on the plea of providing him biscuit from the nearby shop and when the grand son did not return for an hour, they made hectic search of him and went to the *Tunia Pokhar*, along with the mother of the deceased (PW-4), where they found the child lying dead having sustained sharp cutting injury on his neck. They also saw some grass cutters around the place of occurrence. PW-1 even went to the extent of stating that she saw accused slitting neck of the deceased with branch of a *Tar* tree, which is not even the prosecution case in the FIR. Learned counsel thus submits that the evidence of PW-1 and PW-5 are not reliable as they have given go-bye to the prosecution case.

14. The defence would further submit that the Investigating Officer, in his evidence, stated that on receipt of information that a boy has been killed, he made a Station Diary Entry and proceeded towards the place of occurrence. However, the Station Diary Entry has not been produced by the prosecution. The



police did not find any severed *Tar* branch or stem, lying on the ground with which the neck of the boy is alleged to have been slitted.

15. He next submits that the prosecution story that Binay Das came to the informant's house and took with him the 06 years old son of PW-4 in her presence and in presence of the informant, does not seem probable, as admittedly Binay Das was aggrieved with the mother of the deceased Makhan Kumar and the informant, as he had suspicion that she was instrumental in having the case lodged against him, by his wife. In such hostile situation, one would not allow Binay Das to take away Makhan along with him.

16. Conversely, Mr. Ashwini Kumar Sinha, learned counsel appearing on behalf of the State, has supported the prosecution case. He submits that as many as six prosecution witnesses i.e., PWs. 1, 4, 5, 6, 8 and 9 have seen the appellant taking away the deceased boy on the fateful day in the noon at about 2:30 P.M. PWs 4, 5 and 8 have seen the accused persons fleeing from the place of occurrence after the crime. The witnesses and the I.O. found blood near the place of occurrence as well as on the branch of small *Tar* tree, with the aid of which the neck of the boy was cut as the edges are sharp.

17. Learned counsel appearing on behalf of the



informant, while adopting the argument advanced on behalf of the State, submits that the appellant Binay Das was a *Mausa* of the deceased Makhan Kumar and none thought that he would kill him as there was no direct conflict between the prosecution side and the appellant.

18. We have heard learned counsel for the parties. We find that there is consistent evidence of PW-1, 4, 5 and 8 that on the relevant time between 2:00 to 2:30 PM on 31.10.2007, the appellant Binay Das along with Amit Das came in their house and enticed 06 years old boy Makhan Kumar to go along with them. PW-6 Janardan Das and PW-9 Chunchun Das also stated that on 31.10.2007 at about 2:00 P.M., while they were returning from *Bahiar*, they saw Binay Das taking away Makhan towards *Bahiar* and one Amit Kumar was also following them. PW-4, in her evidence, stated that only some time after Binay Das had taken away her son, the villagers raised *hulla* and informed her and others that Makhan Kumar has been killed. Upon hearing the news, PW-4 rushed towards the pond and found her son lying dead near a small *Tar* tree. Lots of blood had fallen near the place of occurrence and there was blood on the branch (*daffi*) of the small *Tar* tree near the place where the boy was lying dead. She further stated that she saw the appellant and others fleeing from the place of occurrence. PW-1



Gango Devi, PW-5 Babulal Das (informant) and PW-8 Jhalo Devi, in their evidence stated that they also saw the appellant fleeing away from the *Bahiar* after committing murder of Makhan Kumar. The police, on receipt of information that a boy has been killed in the village, recorded a Station Diary entry and straight away proceeded to the place of occurrence, where he took *fardbeyan* of PW-5 at 3:30 P.M.

19. It thus appears from the evidence of the witnesses and the *fardbeyan* and the evidence of the Investigating Officer that the boy was done to death within a short span of time being last seen alive with the appellant Binay Das.

20. It is true that there are some minor discrepancies in the statement of the PW-1 Gango Devi and the informant Babulal Das (PW-5) wherein they stated that when the boy did not return for some time, they began to make a search and in course of which, they found the boy dead near a *Tar* tree and also saw the two accused persons fleeing away. However, the discrepancies are not of such nature which would affect the root of the prosecution case, as the witnesses are consistent in their version that they saw the appellant taking away Makhan Kumar around 2.30 P.M. and seen him fleeing with his associate after the commission of crime. Even we discard the evidence of PWs from considerations, still there is nothing in the



statements of PWs-1, 4, 5 and 8 to doubt the veracity of the statement that Binay Das took Makhan Kumar from the house on the pretext of providing him some biscuit from the nearby shop. PW-6 also saw the appellant and Amit Das taking along with them Makhan Kumar at 2:00 P.M. on fateful day.

21. Furthermore, the appellant argued that no one would leave his small child to go with a person with whom there is enmity. We would broadly and generally agree with the submissions advanced by learned counsel for the appellant. However, in the instant case, situation is different. The appellant is the own *Mausa* of the deceased Makhan Kumar. There was no litigation between the prosecution side and the appellant. As such in such circumstances, one may not apprehend that the appellant, who is the own *Mausa*, would kill the deceased on mere suspicion that his mother may have been instrumental in getting the case filed by the appellant's wife.

22. Thus, from the scrutiny of the evidence adduced on behalf of the prosecution side, the following circumstances emerge against the appellant: (a) he was last seen with the deceased on 31.10.2007 between 2:00 to 2:30 PM by as many as five witnesses, PW-4, PW-5, PW-6, PW-8 and PW-9, (b) soon thereafter, within a short span of time, the boy was found dead at the pond near a small *Tar* tree, (c) blood was found at the place of occurrence and on the



branch of *Tar* tree by which the neck of the deceased is alleged to have been slitted, (d) the appellant was found fleeing away by PW-4, PW-5 and PW-8 from the place of occurrence soon after the murder of the child (e) the police having received information immediately came to the place of occurrence and recorded the *fardbeyan* of the informant at 3:30 P.M. at the place of occurrence.

23. It thus appears that the boy was killed within a very short time of being taken by the appellant Binay Das. It is true that no conviction can be sustained on the theory of last seen alone. In the instant case, as noticed above, there are other circumstances other than one of “last seen”. Furthermore, it is well settled that the theory of last seen would have no application, where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small, that possibility of any person other than the accused being the author of the crime becomes impossible. The Hon’ble Apex Court in the case of ***Bodhraj @ Bodha and Others vs. State of Jammu and Kashmir*** reported in ***(2002) 8 SCC 45***, observed:

“31. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen



with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases.....”

24. In the instant case, there is very small time-lag much less than an hour between the points of time, the accused took the deceased Makhan Kumar along with him and his death. The appellant has not made any suggestion to the prosecution witnesses much less produced any evidence that the deceased was taken by someone else and he was murdered after he had left the deceased mid-way. Besides this, the police has found blood near the place of occurrence and also on the branch of the *Tar* tree, which corroborates the place of occurrence and manner of occurrence.

25. The case of the appellant that the police did not find any *Tar* branch severed from its roots near the place of occurrence would be of no help to him, as it is not the prosecution case that any branch, which was severed from its root, was used in cutting the neck of the deceased.

26. Situated thus and in view of foregoing discussions, we otherwise also find that the prosecution has been able to establish chain of circumstances consistent with the guilt of the appellant. We accordingly affirm the judgment of conviction, dated 04.05.2011



and order of sentence, dated 07.05.2011, passed by the trial court convicting the appellant under Section 302/34 of the Indian Penal Code and sentencing him to life imprisonment. However, the fine amount is reduced to Rs. 2500/- and in default of payment, he would undergo S.I. for one month. The appellant who is in custody would remain so to serve the balance period of sentence.

27. Accordingly, the appeal is dismissed.

(Samarendra Pratap Singh, J)

(Arun Kumar, J)

Sujit/-

AFR/NAFR	AFR
CAV DATE	24.03.2017
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