

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.1108 of 2012

Arising Out of judgment of conviction dated 27.9.2012, and order of sentence dated 5.10.2010, passed by the learned Additional Sessions Judge (Fast Track Court No. 1), Siwan in Sessions Trial No. 286 of 1989.

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Pundi Awadhiya S/O Late Banshi Awadhiya R/O Village - Narharpur Nama, Badahariya, District - Siwan			Appellant
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Versus

The State Of Bihar			Respondent
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Appearance :

For the Appellant : Mr. Raghav Prasad, Advocate

For the Respondent : Mr. S.N.Prasad, Additional Public Prosecutor

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CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL

and

HONOURABLE MR. JUSTICE MADHURESH PRASAD

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL)

Date: 29-08-2017

The sole appellant has been convicted under sections 302/34 of the Indian Penal Code (herein after referred to as 'the IPC') by the judgment of conviction dated 27.9.2012, passed by the learned Additional Sessions Judge (Fast Track Court No. 1), Siwan in Sessions Trial No. 286 of 1989. By an order of sentence the appellant was directed to suffer rigorous imprisonment for life and also to pay a fine of Rs.5000/- with default clause.

2. Prosecution case hinges on the theory of last seen. PW 6 (Gyatri Devi), wife of the deceased Ramashray Singh, lodged a fard beyan on 10.10.1998 at 10 AM alleging that on the previous



evening, at about 4.30 PM the appellant had come to her house and asked her husband (the deceased) to accompany him for taking toddy who readily agreed and accompanied him on a cycle. He did not return thereafter. On the following morning, at about 8 O'clock the dead body of the victim was found lying near the bridge over the canal just north of village Naharpur. The informant suspected hands of the appellant and ten others in the commission of the crime citing that her husband had recently disclosed her that other co-accuseds (not the appellant) were planning to kill him. Police arrived at the place where the dead body was lying and prepared the inquest report. He recorded the fard beyan of the informant (exhibit 3) witnessed by PW 2 (Ramdeo Sah). The dead body was dispatched for post mortem. Dr. R. N. Singh, who was then posted as Civil Assistant Surgeon, Siwan Hospital (not examined) held autopsy and found several incised injuries caused by sharp cutting weapon, being cause of death, which had occurred within 24 hours. On conclusion of the investigation, charge sheet was laid against the eleven accused persons. Cognizance of the offence was taken thereon and the case was committed to the court of sessions. On transfer the case came on the file of the learned trial judge for disposal. Charges were framed and read over to the appellant which, like others, was denied. Defence of the appellant is complete denial of the prosecution case



and his false implication merely on suspicion.

3. To prove the case, the prosecution examined several witnesses. PWs 1 (Lallan Prasad), PW 4 (Kedar Prasad), PW 5 (Sharda Devi, first wife of the deceased) and PW 6 (Gyanti Devi, second wife of the deceased); the informant having stated that These witnesses have also stated about the utterances made by the deceased immediately prior to the incident about his apprehension of an attempt made by other co-accuseds put on trial (not the appellant) to do away with his life. The reason was that one Dasai Singh had sold a piece of land to the deceased on which Indrasan Singh, local Mukhia had an eye. The son of Indrasan Singh was killed and those accused persons were suspected the hands of the deceased in the murder of son of Indrasan Singh. The evidence of PW 2 (Ramdeo Sah) does not throw much light on the prosecution case. He is the hearsay witness who has said about the discovery of the dead body of the deceased and that he heard that the deceased had accompanied the appellant in the preceding evening. PW 3 (Shiv Shankar Chaudhary) is a formal witness who proved the endorsement of the Station House Officer on the formal First Information Report. PW 7 (Sheonath Mahto) has deposed that on 9.10.1988 at about 6 PM the deceased along with one unknown person had come to his door to consume toddy. This witness has however admitted that his



submission was not previously recorded by any authority. We have perused his evidence. He is not stated the appellant as one who accompanied the deceased when he visited his place to consume toddy. PW 8 (Sukat Mahto) has not been relied upon by the prosecution. He has been declared hostile. The Investigating officer as well as the doctor, who held autopsy on the deceased, have however not been produced by the prosecution.

4. The learned trial court, on appraisal of the evidence, convicted the appellant, relying solely on the evidence of PW 1 (Lallan Prasad), PW 4 (Kedar Prasad), PW 5 (Sharda Devi) and PW 6 (Gyanti Devi) who had stated about the deceased going with the appellant on the preceding evening at about 4.30 PM. Other accused persons facing the trial, were, however acquitted.

5. We have heard Mr. Raghav Prasad, learned counsel for the appellant and Mr. S. N. Prasad, learned Additional Public Prosecutor for the State.

6. The counsel for the appellant has argued that the learned trial court committed serious error in concluding that it was the appellant who was only responsible for the killing of the husband of the informant relying on the evidence of the family members, i.e., PW 1 (Lallan Prasad), PW 4 (Kedar Prasad), PW 5 (Sharda Devi) and PW 6 (Gyanti Devi) as they had seen the



deceased going with the appellant on the preceding evening. He submits that apart from the aforesaid evidence, there is no other incriminating evidence against him. The motive that surfaced in the evidence of the family members, particularly PW 5 (Sharda Devi) and PW 6 (Gyatri Devi) was attributed to other co-accuseds of this case, who have been acquitted by the trial court for want of cogent evidence. Although PW 7 (Sheonath Mahto), who used to draw toddy, has not named the appellant as one who had accompanied the deceased to his place for taking toddy at 7 PM, but his evidence, even otherwise, does not implicate the appellant inasmuch as he was not testified by any earlier statement made during the investigation. Our attention has also been drawn to the question, put to him, by the court while recording his statement under section 313 of the Code of Criminal Procedure (herein after referred to as 'the Cr.P.C.'), wherein no such incriminating material, if any, proving the motive against the appellant, was put to the accused appellant. If the prosecution wanted to rely on the evidence of the prosecution witnesses on the point of motive against the appellant, it was incumbent upon the prosecution to bring to his notice and solicit his response/reply while recording his statement under section 313 of the Cr.P.C.

7. There is no cleavage between the parties that the



present case rests on the circumstantial evidence. The family members of the deceased, who took the dock, have narrated that the appellant had come to the house of the deceased at 4.30 PM on 9.10.1988 and the deceased accompanied him on a cycle. The following morning his dead body was found lying near the bridge over the canal, north of village Naharpur. Whether the evidence of the prosecution that the deceased was last seen with the appellant, would be sufficient to hold him guilty beyond shade of reasonable doubt, is the contention made on behalf of the appellant. It has been urged that the solitary evidence of the appellant, last seen with the deceased at 4.30 PM in the evening of the preceding day, would not even remotely complete the chain of circumstance to prove his guilt conclusively. In order to sustain conviction based on circumstantial evidence, the proof must be consistent with the guilt to the exclusion of any other hypothesis consistent with the innocence of the accused. A circumstantial evidence will not support the conviction if it is merely consistent with guilt or creates merely suspicion of guilt. If the circumstantial evidence proof can be reconciled either with the theory of innocence or with the theory of guilt, the theory of innocence must be adopted. The aforesaid proposition of law is consistent with the well recognized principle that however strong suspicion may be, it will not take the place of



prove. Coming to the facts of the case, the prosecution has argued that there is evidence to prove motive against the appellant to commit the crime. We have carefully gone through the evidence of PW 1 (Lallan Prasad), PW 2 Ramdeo Sah), PW 5 (Sharda Devi) and PW 6 (Gyatri Devi) and PW 7 (Sheonath Mahto). Almost all of them have enlisted names of several accuseds (many of whom faced the present trial and acquitted). The name of the appellant does not, however, figure in the said list of suspected accuseds. That apart, on going through the statement of the appellant, recorded under section 313 of the Cr.P.C. it is more than explicit that the prosecution did not rely on their evidence on motive against the appellant. The same being not an incriminating circumstance, was not put to him to seek his explanation. There is no other evidence on record suggesting motive on the part of the appellant to commit the offence. The prosecution on this case has failed to prove the motive on the part of the appellant for commission of the crime. On the contrary, the relationship between the deceased and the appellant seemed to be very cordial as on his mere askance to accompany him for taking toddy, the deceased readily agreed and sat on his bicycle. The family members also did not prevent the deceased as he was not considered as a suspect.

8. In case of Kanhaiya Lal Vs. State of Rajasthan,



reported in **(2014) 4 Supreme Court Cases 715**, the fact situation bears great similarity. The trial court had convicted the appellant accepting the theory of last seen which was affirmed by the High Court in appeal. On marshalling the facts, the Hon'ble Apex Court found that there was solitary evidence of the appellant, last seen with the deceased which was not considered conclusive prove of his guilt. The Supreme Court, while acquitting the appellant, in paragraphs 12 and 15 observed as under:-

“2. The circumstances of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.

15. The theory of last seen- the appellant having gone with the deceased in the manner noticed hereinbefore, is the singular piece of circumstantial evidence available against him. The conviction of the appellant cannot be maintained merely on suspicion, however strong it may be or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that there was cordial relationship between the accused and the deceased for a long time. The fact situation bears great similarity to that in Madho Singh Vs. State of Rajasthan.”

9. We have already noted that the evidence of PW 7 does not implicate the appellant as one who was seen with the deceased at his place at 7 PM. Learned trial court has misread his evidence. The last seen theory comes into play where the time gap between



point of time when appellant was last seen with the deceased and when the dead body of the deceased was found, is so small that possibility of any person, other than any accused being author of the crime, becomes impossible. In absence of any other positive evidence except the deceased having last seen with the accused, in the preceding evening it would be hazardous to come to a definite conclusion of his guilt. We may also reiterate here that PW 7 was not examined by the I.O. during the investigation.

10. For the reasons and discussions made hereinabove, we unhesitatingly exonerate the appellant of the charges. In the result, the appeal is allowed. Conviction and sentence, dated 27.9.2012, and 5.10.2010, passed by the learned Additional Sessions Judge (Fast Track Court No.1), Siwan in Sessions Trial No. 286 of 1989, arising out of Barhariya Police station Case No. 101 of 1998, against the appellant Pundi Awadhiya, is set aside. Appellant is stated to be in jail. He shall be set at liberty forthwith, if not wanted in any other case.

(Kishore Kumar Mandal, J)

(Madhuresh Prasad, J)

Shashi.

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