

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.128 of 2013

Arising Out of PS.Case No. -104 Year- 2011 Thana -GOVINDPUR District- -

Vijay Mistry Son Of Late Prayag Mistry Resident Of Village - Rustampur, P.S. - Roh, District - Nawada.

..... Appellant
Versus
The State Of Bihar.
..... Respondent
With

Criminal Appeal (DB) No. 193 of 2013

Arising Out of PS.Case No. -104 Year- 2011 Thana -GOVINDPUR District- -

1. Upendra Mistri S/O Sadhu Mistri R/O Village- Dumari, P.S.- Govindpur, District- Nawada
2. Pappu Sharma S/O Late Yadu Mistri R/O Village- Bhanai, P.S.- Akbarpur, District- Nawada

..... Appellants
Versus
The State Of Bihar
..... Respondent
With

Criminal Appeal (DB) No. 304 of 2013

Arising Out of PS.Case No. -104 Year- 2011 Thana -GOVINDPUR District- NAWADA

Dular Yadav S/O Kamal Yadav Resident Of Village- Maheshpur Baksoti, P.S.- Govindpur, Dist.- Nawada

..... Appellant
Versus
The State Of Bihar
..... Respondent
With

Criminal Appeal (DB) No. 869 of 2013

Arising Out of PS.Case No. -104 Year- 2011 Thana -GOVINDPUR District- NAWADA

Diamond Kumar S/O Late Anil Kumar Singh Resident Of Dumari, P.S.- Govindpur, District- Nawada

..... Appellant



Versus

The State Of Bihar

.... Respondent

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Appearance:

(In Cr. Appeal (DB) No.128 of 2013)

For the Appellant/s : Mr. Rabi Bhushan Prasad No.1
Mr. Vijay Prakash Bhargava
Ms. Binita Singh

For the State : Mr. Satya Narayan Prasad, APP
Mr. Abhimanyu Sharma

(In Cr. Appeal (DB) No.193 of 2013)

For the Appellant/s : Mrs. Rina Sinha
Miss. N.K. Lata

For the State : Mr. Satya Narayan Prasad, APP
Mr. Abhimanyu Sharma

(In Cr. Appeal (DB) No.304 of 2013)

For the Appellant/s : Mr. Gauri Shankar Prasad

For the State : Mr. Satya Narayan Prasad, APP
Mr. Abhimanyu Sharma

(In Cr. Appeal (DB) No.869 of 2013)

For the Appellant/s : Mr. Rajendra Narayan, Sr. Advocate
Mr. Jagdhar Prasad

For the State : Mr. Satya Narayan Prasad, APP
Mr. Abhimanyu Sharma

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CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL

And

HONOURABLE MR. JUSTICE SANJAY KUMAR

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE SANJAY KUMAR)

Date: 04-02-2017

In all, five appellants in these four connected appeals have assailed the judgment of conviction and order of sentence dated 10th January, 2013 passed by the learned Addl. Sessions Judge (Ad hoc)-III, Nawada in Sessions Trial No. 96 of 2012/31 of 2012, whereby



all the appellants have been held guilty under sections 364/34, 302/34 and 201/34 IPC and sentenced to undergo R.I. for 10 years with fine having default clause, R.I. for life with fine having default clause and R.I. for 10 years with fine having default clause respectively. All the sentences so imposed on them were directed to run concurrently.

2. P.W.1, being the wife of the deceased, who was working as village Choukidar, lodged the Fardbayan (Ext. 3) on 17.12.2011 at about 12.30 P.M alleging that, as usual, her husband after taking meal in the morning went to attend the duty. He used to come back from the duty by 7-8 P.M. in the evening. On 16.12.2011, he went on his duty but till late evening did not return. The informant did not take it seriously as she thought that the husband must have stayed at the police station itself. Till the following morning when the deceased did not return home, then she started searching for him. An information was also given about his missing by her to the police station. She started verifying from her relatives and known persons in the village but could not find him. In course of such enquiry/verification, she met Mithilesh Singh (P.W.4), Ashok Singh (P.W.2), Manoj Singh, Pradip Sao and Satyendra Kumar (all not examined) who disclosed to her that on the evening of 16.12.2011 while they were coming to village they had seen all the appellants herein except the appellant Diamond Kumar assembled at the house



of the appellant Upendra Mistry and were hastily proceeding towards Sakri river which is close to the village. The informant suspected that the appellant Upendra Mistry and Dular Yadav bore animosity against her husband as he was instrumental in getting them arrested in connection with some criminal cases. They had also held out threats to the husband of the deceased. The informant thus alleged that the accused appellants with a view to commit murder of the deceased had kidnapped him. A formal FIR (Ext. 6) was drawn up on the same day by the Station House Officer (P.W.5) and he took over investigation of the case. He visited the village in question and recorded the statement. However, we find from the record that the investigation of the case was assigned to another Police Officer (P.W.6) on the following day. It further appears that the appellant Pappu Sharma was arrested by the I.O. on 18.12.2011 from his house and thereafter on 19.12.2011 the appellant Diamond Kumar was taken into police custody. The investigation was, however, assigned to another Police Officer namely Roop Narayan Ram (P.W.6) who took over the same on 20.12.2011. Soon after taking over the investigation on the basis of the confidential information he arrested the appellant Dular Yadav on 20.12.2011. Be it noted that the appellant Diamond Kumar is stated to have made confessional statement before the police at the police station in which while inculcating himself the manner of occurrence and the



participation of the appellants were disclosed. The confessional statement so made by him has been produced as Ext. 4 which is signed by P.W.2, P.W. 4, Lalan Singh and Rabindra Kebet (both not examined). Pursuant to such disclosures, the dead body of the deceased was recovered near Budhwala Tilha in the bed of Sakri river and inquest report (Ext. 5) was prepared by the Investigating Officer. The dead body was thereafter dispatched to the hospital for post mortem/autopsy. As noticed, the investigation, at this stage, was taken over by Roop Narayan Ram (P.W. 6). Soon after taking over the investigation, he apprehended the appellant Dular Yadav and brought to the police station where he is stated to have made confessional statement which was not got signed by any independent witness. On his such disclosure on 21.12.2011, the police is said to have searched and recovered a rope around 100 yards away from the place where the dead body was found buried. The seizure memo of the plastic rope is Ext. 8. Upon recording the statement of the witnesses and after obtaining the post mortem report (Ext. 2), the investigation was concluded and the charge-sheet was laid. On 31.01.2012 another accused Hira Rajbar was declared absconder and cognizance of the offence was taken on 10.04.2012 and on the same day it was committed to the court of sessions for trial. Charges under sections 364/34, 302/34 and 201/34 were framed against all the appellants and contents thereof were read over



and explained to the appellants to which they denied their guilt and claimed to be tried. From the trend of the cross examination, it appears that they took the plea of false implication owing to animosity.

3. The prosecution, in order to prove the charges, produced 07 prosecution witnesses, besides exhibiting the documents. The statements of the appellant were recorded under section 313 Cr. P.C. From their statements, it is found that the appellant Diamond Kumar and Dular Yadav have retracted from their alleged confession made before the police. Although the relevant exhibits were not shown to them but specific questions were put with respect to their alleged confession made before the police which was denied by each of them.

4. The learned trial court, on appraisal of the evidence(s) produced in support of the prosecution case, found the charges proved beyond all reasonable doubts against the appellants. The learned trial court found that the chain of the circumstances conclusively proved the guilt of the appellants. Having found so, the sentences were imposed upon them, as noted above.

5. Heard Mr. Rajendra Narayan, Sr. Counsel in support of Cr. Appeal No. 869 of 2013, Mr. Rabi Bhushan Prasad in Cr. Appeal No. 128 of 2013, Mr. Gauri Shankar Prasad in Cr. Appeal No. 304 of 2013 and Mrs. Rina Sinha appearing in Cr. Appeal No. 193 of



2013 as well as Mr. Satya Narayan Prasad, APP for the State.

6. From the narration made above, it appears it has been found by the learned trial court that the present case is based on circumstantial evidence. Nobody had seen the assault perpetrated on the deceased resulting in his death. From the inquest report (Ext. 5) and the objective finding of the doctor (P.W.3) who held the post mortem examination on the cadaver of the deceased, we find that the death of the deceased was homicidal in nature. The doctor in his report (Ext. 2) found the following anti mortem injuries:-

“External appearance

- 1. Body swollen. Foul smelling in early decomposition.
- Sands all over the body and clothes most marked on face.
- Tongue protruded
- Skin- peeled at placed over chest and back.
- Hair-loosing
- Teeth-fixed

External Antemortem injuries:-

- 1. Ecchymoses in front of neck and upper part of chest and also on left side of chest.
- 2. Abrasion over left scapular area
- 3. Bruises at back of both wrists.

On Dissection:-

- 1. Skull- Brain matter liquefied.
- 2. Haematoma- At sub-cutaneous and muscles layer in front of neck and upper part of chest.
- 3. Thyroid bone fracture 3rd to 6 ribs-both sides and sternal fractured- collesic cavity contain blood.



Heart ruptured

Lungs-Both sides congested and lacerated at places.

Spleen-ruptured.

Liver and kidney-intact.

Intestine-haemorrhage.

Stomach- empty.

Bladder-empty.”

7. The Court has now to consider the relevant evidence adduced at the trial to find whether those evidence(s) or piece of evidence, if connected to each other, completes the chain of circumstances or events which conclusively prove the guilt of the appellants. The relevant laws in this regard have aptly been discussed by the Hon’ble Supreme Court in the case of **Sharad Birdhichand Sarda vs. State of Maharashtra (AIR 1984 SCC 1622)**. The said legal principle was again reiterated in **Vikramjit Singh @ Vicky Vs. State of Punjab [(2006) 12 SCC 306]**. The legal principle in this regard enunciated by the Hon’ble Apex Court is that certain conditions must be fulfilled before the case against an accused can be said to be fully established. 1. The circumstances from which the conclusion of guilt is to be drawn should be fully established. 2. The facts so established should be consistent only with the hypothesis of the guilt of the accused and they should not be explainable on any other hypothesis except that the accused is guilty. 3. The circumstances should be of a conclusive nature and tendency. 4. They should exclude every



possible hypothesis except the one to be proved and 5. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused. While considering the case based on the circumstantial evidence, the Court has to bear in mind those golden principles while examining the relevant evidence produced at the trial.

8. Mr. Narayan, in his submission, stated that the learned trial court had heavily relied on the two confessional statements (Exts. 4 and 9) made by the appellant Diamond Kumar and the appellant Dular Yadav. A confessional statement of whatever nature should first clear three tests and then the relevancy thereof can be considered and examined. Is it true? Is it voluntary? Is it trustworthy? If the confessional statements/disclosures clears then the Court has to look for corroboration from reliable and independent source.

9. Having dwelt upon the legal aspects, we shall now examine the relevant evidence produced at the trial by the prosecution.

10. Savita Devi (P.W. 1) is the informant and wife of the deceased. Ashok Singh (P.W.2) and Mithilesh Kumar (P.W.4) are two other non official witnesses who are nephew and cousin respectively of the deceased. P.W. 3 is Dr. Praveen Kumar Sinha



who conducted the post mortem/autopsy on the cadaver and submitted the report (Ext. 2). P.W. 5 Prem Shankar Verma is the Station House Officer who recorded the Fardbayan (Ext. 3), proved the formal FIR (Ext. 6) and conducted investigation for two days only. P.W. 6 is the second Investigating Officer who conducted investigation and laid the Challan. P.W. 7 Ranjeet Ram, ASI is formal in nature who brought S.D. Entry from the police station to be produced at the trial. On behalf of the appellant Vijay Mistry, one defence witness was also examined to prove his alibi.

11. On going through the judgment of trial court as also the evidence on record, we find that the trial court has based the judgment on circumstantial evidence. There is admittedly no eye witness to the occurrence and the court below, relied much on the evidence of P.Ws 1, 2 and 4 as also the confessional statement of the appellants Diamond Kumar and Dular Yadav to establish the chain of circumstances. So we would like to discuss the evidence on record to find out as to whether the confessional statement of appellants Diamond Kumar and Dular Yadav, which are Exts. 4 and 9 respectively are above board for consideration. Both of them in their statement given under Section 313 Cr. P.C. have stated that they have not confessed their guilt before Police.

12. On careful scanning of both the confessional statement, we find that the appellant, Diamond Kumar, was apprehended by police



on 19.12.2011 at about 7 A.M. (P.W. 4 at Para-23). The Investigating Officer at para 27 has stated that he brought the appellant, Diamond Kumar, at Police Station at 10.15 AM. He did not interrogate him in village where 15-20 persons had assembled (para-17). P.W. 4 at para 1 of his evidence has stated that the appellant, Diamond Kumar confessed his guilt and on his disclosure, the dead body was recovered from the bed of Sakri river near a Tilha. The confession was recorded in presence of witnesses Mithlesh Kumar (P.W. 4), Ashok Kumar Singh (P.W.2), Lalan Singh and Ravindra Kewat. All the four have put signatures on Ext. 4. The confessional statement (Ext. 4) is very exhaustive running into five pages. We find that only page nos. 1, 2 and 5 bear the signature of appellant (Diamond). Out of four witnesses, who put signatures, only two were examined as P.Ws. 2 and 4. They are Gotias of informant (P.W. 1) related as nephew and cousin of deceased. The remaining two Lalan Singh and Ravindra Kewat, who witnessed the Ext. 4 have not been examined during trial. According to prosecution witnesses, the dead body was recovered only after disclosure made by appellant (Diamond Kumar) but the inquest report (Ext. 5) does not bear the signature of Diamond Kumar. The inquest report bears signature of Mithlesh Kumar (P.W. 4) and Md. Muslim (not examined) P.W. 4 has not stated about presence of appellant Diamond at the time of recovery of dead body and preparation of Ext. 4 (inquest report). The Investigating Officer



P.W. 5 at the bottom of inquest report has mentioned that in course of search the villagers exhumed the dead body from the sand. Neither the Investigating Officer nor any other prosecution witnesses say about the presence of Diamond at the time of making of inquest report. P.W. 4, Mithlesh Kumar, at para-18 of his evidence has stated that the rumour of recovery of dead body was spread by Lalan Singh on 19.12.2011 at 2 PM and soon thereafter about 100 people reached there. He has further stated the dead body was found concealed in sand. P.W. 4 is also the witness of confessional statement. He has stated in his evidence that confessional statement of Diamond was recorded in his presence. But in cross examination he has stated at para 14 that he visited at police station at 11 A.M. and found appellant locked in police Hajat. In course of talk, the police officer narrated him about the facts which was disclosed by Diamond. This witness P.W. 2 at para 19 has also stated that at about 1 1/2 or 2 P.M., a rumour of recovery of dead body spread in village and thereafter 100-200 people reached there. He has further stated about recovery of a Danda from the place of occurrence (Para 19). He has further stated that the dead body was exhumed from sand by the police.

13. Thus from the above, we find that the confessional statement of Diamond was not recorded immediately in presence of the villagers from where he was apprehended. He was firstly locked in



Hajat and after two hours, his confession was recorded. This fact finds support from the evidence of P.W. 2 and P.W. 4. The other two witnesses Lalan Singh, who signed the Ext. 4 and Ext. 5 (confession) and Md. Muslim have not been examined to establish the fact that the confessional statement and inquest report were prepared in their presence as well as in presence of Diamond Kumar. None of the prosecution witnesses say about presence of the appellant, Diamond Kumar, at the time of recovery of dead body and preparation of inquest report. Thus, in view of above facts, we find that the finding of court below that the dead body was recovered on the basis of confessional statement of Diamond Kumar is not established.

14. So far the confessional statement (Ext. 9) of appellant, Dular Yadav, is concerned we find that his confession was recorded on 20.12.2011 by P.W. 6, (the second Investigating Officer) who took charge on the same day. In first column of confession, we find that the Investigating Officer has mentioned the date of recording as 19.12.2011, which is apparently wrong. We further at column no. 5 of Ext. 9 find that the father's name of Dular Yadav has been described as Dular Yadav. The confession of Dular Yadav was recorded at Police Station and is running into five pages. The Ext. 9 has not been witnessed by any witness and the Thumb Impression affixed on confessional statement Ext. 9 has not been attested by any one. It is said that a rope was recovered and seized on the confession



of appellant, Dular Yadav, vide Ext. 8, but this seizure (Ext. 8) also does not bear signature or Thumb Impression of appellant, Dular Yadav. Of course, Ext. 8 bears signature of two witnesses, namely, Umesh Singh and Anuj Singh, but they too have not been examined by the prosecution. The Investigating Officer (P.W. 6) in his evidence has stated that the said rope was seized from the place situating 100 yards north east from the place wherefrom the dead body was recovered. But in cross-examination at para-23, the Investigating Officer says that he never visited the place where the dead body was recovered. The rope allegedly seized was produced in court and was marked as Material Ext. I. In paras 31, 32 and 33 of cross examination, the Investigating Officer has admitted that there is no mark of identification on the rope. He did not paste any paper or put any seal or mark on the rope (Ext. I) for its identification. There is nothing on record to connect the said rope with the crime in question.

15. On careful scanning of both the confessional statement (Exts. 4 and 9), we find that both were recorded by two different Investigating Officers independently on two consecutive dates i.e. 19.12.2011 and 20.11.2012. The statement of appellant, Diamond Kumar and Dular Yadav exposes two different versions on the point of manner of occurrence. Appellant, Diamond Kumar, says that the appellant Upendra Mistry caught the deceased and pressed his mouth and thereafter, they all assaulted the deceased. After committing murder,



they dragged the dead body and buried in the sand. He has not stated about use of rope by any body. The confession of appellant, Dular Yadav, gives different picture. In alleged confession, he has stated that the appellant, Diamond Kumar, was asked to keep watch on the movement of deceased at village Baksoti from where he had to give information on mobile regarding departure of deceased towards river side. The appellant, Diamond Kumar, accordingly informed Upendra Mistry over his mobile at 7.30 P.M. and thereafter, all the appellants proceeded towards river bed and on arrival of Jamuna Singh (deceased), Upendra Mistri, roped his neck and threw the deceased on the ground. They pressed his neck by the lathi of the deceased and also crushed his chest and face by their leg.

16. Both the appellants have retracted from their confessional statement at the time of recording statement under Section 313 Cr.P.C. In such circumstance it is necessary to examine as to whether the confessional statement which has been retracted by appellants can form a chain of circumstance to prove their guilt. In confessional statements (Ext. 4 and 9), both the appellants have stated that they had decided and finally eliminated the deceased as the deceased got them arrested by police in criminal case. But on record there is no such material except the evidence of P.W. 1 wherein the informant has stated that her husband had deposed against Upendra Mistri and Dular Yadav in a case in which they were arrested for about 2 or 3



years ago. She has not disclosed the case number. Both the confessional statements were recorded under police custody during investigation. The witnesses who appeared to support the confessional statement are relatives of the deceased. Their evidence in cross examination creates doubt about their presence at the time of recording of confession.

17. The Apex Court while dealing with importance of confession in ruling reported in **AIR 1966 Supreme Court Page 119** has observed that the law relating to confession is to be found generally in Sections 24 to 30 of the Evidence Act and Sections 162 and 164 of Cr. P.C. These provisions proceed upon the premise that confession made by accused while in the custody of a police officer are not to be trusted, and should not be used in evidence against him. The provisions are based upon grounds of public policy, and they should be given fullest effect. Thus, for the reasons recorded above, we are of the view that no part of the confessional statements Ext. 4 and 9 can be accepted in evidence. The court below has erred in accepting Ext. 4 and 9 as one of the chain to complete the circumstantial evidence against the appellants.

18. So far oral evidence is concerned, we find that there is admittedly no eye-witness to the occurrence. P.W. 1 is the informant and P.Ws. 2 and 4 are nephew and cousin of the deceased. P.Ws. 2 and 4 have witnessed the Fardbeyan and confessional statement of



appellant (Diamond). P.W. 4 has further witnessed inquest report of the deceased. The informant in her Fardbeyan has simply raised her doubt against the appellants as they had threatened her husband of dire consequences. The informant had suspicion in her mind that the deceased was instrumental in getting them arrested in some cases. The informant has named all the appellants on the version of P.Ws 2 & 4. The son of informant, Ranjit Kumar has also put his signature on Fardbeyan. But he has not been examined by the prosecution. He was the best witness on the point of enmity of appellants with the deceased. There is definite suggestion to P.W. 4 at para 32 and P.W. 5 at para 23 that the deceased was accused in a case in which father of appellant Diamond was murdered. The confessional statement was got prepared in collusion with police to implicate the appellants. The prosecution has not produced any oral or documentary evidence to establish the enmity or motive of appellants to commit murder of deceased. The Investigating Officer at para 21 has stated that the informant had not stated about any enmity of her husband with Diamond (appellant). The informant P.W. 1 at para 6 has said that she informed the police over mobile regarding the fact which she conceived from P.Ws. 2 and 4 and other two persons named in Fardbeyan.

19. The court below has given much emphasis on Ext. 4 and 9 as also on the evidence of P.W. 2 and 4 while convicting the appellants.



We have very carefully examined the oral and documentary evidence and for the reasons stated above we find and hold that the confessional statement (Exts. 4 and 9) as also the evidence of PWs. 1, 2 and 4 do not establish the complete chain of circumstance showing only the guilt of appellants. Both the confessional statements have not been corroborated by any independent witness. The witnesses P.W. 2 and 4 who came to support the confessional statement are close relatives of the deceased and they did not stand firmly the test of their cross-examination. The dead body was recovered and exhumed by villagers and not on the basis of confessional statement of appellant Diamond Kumar. There are many suspicious features in the evidence of P.Ws 2 and 4. The extra judicial confession of two appellants do not appear to be trustworthy, voluntary, and reliable. There is also complete lack of corroboration from independent witness. There is no other material for consideration which may be relevant for the chain of circumstance. The evidence of P.Ws. 2 and 4 as also Exts. 4 and 9 do not complete the chain of circumstance. In fact, it would be right to say that there is no chain of circumstance at all. We further find that there is absolutely no convincing evidence on record for convicting the appellants for the offence under Section 364/34 of the I.P.C.

20. In view of above discussions, we have no option but to allow all the four appeals and set aside the judgment of conviction and



order of sentence dated 10th January, 2013 passed by the learned Addl. Sessions Judge (Ad hoc)-III, Nawada in Sessions Trial No. 96 of 2012/31of 2012. The appellant Diamond Kumar shall be set at liberty, if not wanted in any other case. The other appellants who are on bail are discharged from the liability of their bail bonds.

21. Appeals are allowed.

(Sanjay Kumar, J)

I agree

(Kishore Kumar Mandal, J)

HR/ajaypd.

AFR/NAFR	AFR
CAV DATE	30.01.2017
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