

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No. 485 of 2013

Arising Out of PS. Case No.-145 Year-2010 Thana- Madanpur District- Aurangabad

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1. Rajballam Mahto S/o Lakshman Mahto, resident of village - Aat, P.S. - Madanpur, District - Aurangabad
 2. Balindra Mahto S/o Lakshman Mahto, resident of village - Aat, P.S. - Madanpur, District - Aurangabad
 3. Shiv Pyari Devi W/o Shri Rajballam Mahto, resident of village - Aat, P.S. - Madanpur, District - Aurangabad

... .. **Appellants**

Versus

The State of Bihar

... .. **Respondent**

Appearance :

For the Appellants : Mr. Gouranga Chatterjee, Advocate
Mr. Sunil Kumar Singh, Advocate

For the State : Mr. Ajay Mishra (A.P.P.)

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

and

HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 26-11-2018

Three appellants have jointly preferred the present appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') against judgment of their conviction and sentence passed in Sessions Trial No. 14 of 2011/14(A) of 2011. By judgment dated 17-04-2013, Sri Niranjana Singh, learned Adhoc Additional Sessions Judge - V, Aurangabad (hereinafter referred to as 'Trial Judge') has convicted aforesaid three appellants for commission of offence under Sections 302/34,



364/34 and 201/34 of the Indian Penal Code, 1860 (hereinafter referred to as 'I.P.C.'). By order dated 24-04-2013, the learned Trial Judge has sentenced aforesaid three appellants under Section 302/34 of the I.P.C. to undergo imprisonment for life, under Section 364/34 of the I.P.C., they were sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 10,000/- (ten thousand) each. In default of payment of fine, they were directed to further undergo simple imprisonment for one year. Further, by the said order under Section 201/34 of the I.P.C., they were sentenced to undergo imprisonment for three years. All the sentences were directed to run concurrently.

2. Short fact of the case is that on 09-07-2010, a written report was submitted by one Ramjee Mehta (P.W.4) nephew of the deceased (Parvati Kunwar) at 08:30 AM. In the said written report, it was stated that the informant was permanent resident of village Metaniya P.S. Rafigunj, District- Aurangabad. His aunt's village was Aat. The informant's फुआ (*fua*) Parvati Kunwar and फुफा (*fufa*) Kuldeep Mahto were issueless and this was the reason that the accused persons (appellants) persuaded his Fua to reside with them in their village. Since last 20 years, they were residing with Rajballam Mahto (appellant no. 1). The accused had also got transferred entire land from his maternal uncle (Fufa) and



thereafter, they were keeping both Fua and Fufa with them. About 8-10 years back, informant's Fufa Kuldeep Mahto suddenly died, however; the *shradh* ceremony was not done by Rajballam Mahto (appellant no. 1). Thereafter, informant's nephew Sujeet Mahto (P.W.2) and Deep Narayan Mahto (P.W.1) performed the *shradh* ceremony. After death of his fufa, his Fua Parvati Kunwar continued to reside in the house of Rajballam Mahto (appellant no. 1) and she was having meal with them. Since last two years, Rajballam Mahto and his family members had started torturing and assaulting his Fua (deceased), regarding which, his Fua on several occasions had gone to the village of the informant and informed about the said happening. The informant with his Fua after visiting village - Aat had also tried to convince the accused persons not to torture his fua. On 30-06-2010, telephonically the informant got information that his Fua in the night of 22-06-2010 was killed and her dead body was got disappeared. After getting such information, the informant went to the village Aat and inquired about his Fua, then Rajballam Mahto (appellant no. 1) and his family members did not give satisfactory reply. The informant thereafter made hectic search, but he could not get any information. The informant asserted in its written report that he was having full reason & believe that Rajballam Mahto (appellant



no. 1), his wife (appellant no. 3) and Balindra Mahto (appellant no. 2) had killed his Fua and disposed of the dead body. The said information was given by the informant in the police station on 09-07-2010. The informant stated in its written report that his Fua Parvati Kunwar was aged about 70 years. The informant requested to take appropriate action against the F.I.R. named accused persons.

3. On the basis of said written report, on 09-07-2010 at 08:30 AM itself, an F.I.R., vide Madanpur P.S. Case No. 145 of 2010, was registered under Sections 302/201/34 of the I.P.C. against all the three appellants. After investigation, the accusation against the appellants was found true and as such, on 12-10-2010 chargesheet was submitted against all the three F.I.R. named accused persons, who are appellants before this Court, under Section 364/34 of the I.P.C. On 09-12-2010 the learned Chief Judicial Magistrate, Aurangabad took cognizance of the offence under Sections 364/34 of the I.P.C. Thereafter, the case was committed to the court of sessions on 13-01-2011 and as such, it was numbered as Sessions Trial No. 14 of 2011. Firstly, on 25-03-2011, joint charge was framed against aforesaid three appellants under Section 364/34 of the I.P.C., however after about



three months i.e. on 15-06-2011, separate joint charge under Sections 302/ 34 and 201/34 of the I.P.C. was framed.

4. To establish its case on behalf of the prosecution, altogether 14 witnesses were examined. Out of 14 witnesses, Deep Narain Mahto and Sujeet Mahto, who have claimed to be nephew and cousin, were examined as P.W.1 and P.W.2 and in sum and substance, they deposed that on the alleged date of occurrence, they heard some cry of a woman from inside the house of the appellants to corroborate, as if, the Fua of the informant was being assaulted in the night at about 09:00 PM. P.W.4 Ramjee Mehta, who is own nephew of the deceased, is the informant of the case and he has proved his signature on the written report, which is marked as Ext. 1. P.W.3 Vidyanand Mahto and P.W.8 Krishna Mahto, though were examined in support of the prosecution case, on examination of their evidences, we do not find any fact showing involvement of either of the appellants, rather it goes to some extent against the prosecution case. P.W.5 Rameshwar Prasad Verma, P.W.6 Pramod Kumar Verma, P.W.7 Kishori Prasad Verma, P.W.9 Sangeeta Devi, P.W.10 Sarita Devi, P.W.11 Dewanti Devi, P.W.12 Kaushalendra Kumar Verma and P.W.13 Rawal Mahto all co-villager, since did not support the prosecution case, were declared hostile. In this case, during the trial, neither the



investigating officer was examined nor anything was brought on record, as if, the investigating officer during the trial was dead or alive. However, an Advocate clerk, namely Md. Imteyaz, who was examined as P.W.14, without being conversant or familiar with the writing or signature of the investigating officer has come forward to prove the written report, formal F.I.R. and endorsement on the F.I.R. Surprisingly, from the mouth of this witness, paragraph 1 to 64 of the main case diary was got exhibited. Similarly, paragraph 1 to 25 of the supplementary case diary was got exhibited by him and he also proved the chargesheet.

5. After completion of the prosecution evidence, on 18-01-2013, the statement of accused persons under Section 313 of the Cr.P.C. was recorded, in which, they claimed to be innocent. To demolish the prosecution case from the defence side, two witnesses were examined, namely Ram Kumar Singh and Kedar Kumar Verma as D.W.1 and D.W.2 respectively. It is case of the defence that the Fua of the informant was old aged lady, having weak memory and also mentally derailed and a plea was taken that often the victim lady used to disappear and subsequently, she was traced.

6. Sri Gouranga Chatterjee, learned counsel assisted by Sri Sunil Kumar Singh, learned counsel for the appellants, after



placing entire evidence on record, has argued that surprisingly, despite the fact that there was no cogent evidence on record and there was several inconsistencies in the evidence, the learned Trial Judge in a mechanical manner has passed the judgment of conviction and sentence. He has emphasized on the point that without any element of attraction of provision under Section 364 of the I.P.C., the learned Trial Judge has held appellants guilty under Section 364/34 of the I.P.C. He highlights that the provision contained in Section 364 of the I.P.C., in view of facts and circumstance of the present case, was not at all applicable. He submits that it is consistent case of the prosecution that voluntarily the Fua of the informant was residing with the appellants since last 20 years. Even after the death of her husband (Kuldeep Mahto), she continued to reside with the family of the appellants and on earlier occasion, there was no complaint against the appellants. According to Sri Chatterjee, since voluntarily the Fua of the informant (as also Fua of the appellants) was residing, there was no question of application of provision under Section 364 of the I.P.C. nor during trial, any evidence, contrary to this fact, has been brought on record, but to the reasons best known to the learned Trial Judge, the appellants have been held guilty under Section 364/34 of the I.P.C.



7. Besides this, by way of referring to the statement of the accused persons (appellants) recorded under Section 313 of the Cr.P.C., it has been argued by Sri Chatterjee, learned counsel for the appellants that no circumstance or evidence was explained to either of the appellants, as if, they were involved in kidnapping of the Fua of the informant and as such, in absence of any explanation or evidence explained to the appellants under Section 313 of the Cr.P.C., there was no reason for the learned Trial Judge to pass judgment of conviction and sentence under Section 364 of the I.P.C. So far as Sections 302/34 and 201/34 of the I.P.C. are concerned, on the basis of evidence of prosecution witnesses with the aid of defence witnesses, it has been argued that the deceased was an old lady and on earlier occasion also without any reason, she had left the house. He submits that during evidence, the prosecution witness particularly informant has stated that while after getting telephonic information regarding the occurrence, he went and met appellant no. 1 then, he was informed by appellant no. 1 that his fua had left the house and they were in search of the lady. It has been argued that P.W.1, P.W.2 and P.W.4 have consistently deposed that after the death of Fufa (Kuldeep Mahto), Fua (Parvati Kunwar) was getting old age pension of Rs. 200/- per month and 30 kg. of food-grains. According to Sri Chatterjee, if it



is a fact that Fua (Parvati Kunwar) was residing with the appellants, getting Rs. 200/- per month as old age pension and also food-grains, there was no reason for the appellants to eliminate her, rather continuance of such lady in the family of the appellants was beneficial for the family. According to learned counsel for the appellants, such circumstance indicates that there is complete absence of any motive for commission of offence under Section 302/34 or Section 201/34 of the I.P.C. Learned counsel for the appellants further submits that number of witnesses, who were supposed to be independent and cited as prosecution witness, since had not supported the false case of the prosecution, they were declared hostile. None of the independent witness from the village has come forward to depose in favour of the prosecution.

8. By way of referring to evidence of P.W.1 and P.W.2, he further submits that despite the fact that during investigation, they had not whispered about hearing of any noise inside house of the appellants, during trial, they have come forward to depose, as if, while they were moving by the side of the house of the appellants, they heard noise of cry from inside house and P.W.2 has deposed to the extent, as if, he went inside the house and tried to persuade the appellants not to assault the lady. Moreover, on examination of evidence of P.W.1, he stated that he heard the noise



from outside the house and never went inside the house. The evidence of P.W.1 is itself contrary, since it was never stated during investigation under Section 161 of the Cr.P.C. In the case, non-examination of the investigating officer has also seriously prejudiced the case of the appellants. Accordingly, it has been argued that the learned Trial Judge in absence of any evidence has passed an incorrect and illegal judgment of conviction and sentence, which is required to be interfered with.

9. Sri Ajay Mishra, learned Addl. Public Prosecutor on examination of entire evidence was not in a position to defend the prosecution case, however; even without any evidence he tried to justify the judgment of the learned Trial Judge.

10. Beside hearing learned counsel for the parties, we have minutely examined the entire evidence and *prima facie*, we are of the opinion that it is a fit case for passing judgment of clean acquittal. However, before recording such finding, it would be necessary to examine the evidences, which have been brought on record. At the very outset, it would be necessary to indicate what informant (P.W.4) has deposed during the trial.

11. The informant/P.W.4 Ramjee Mahto in his evidence has stated that occurrence had taken place on 22-06-2010, as he telephonically got information that in the night, Rajballam,



Balendra and Shiv Pyari Devi (all appellants) after assaulting, killed his Fua and disappeared the dead body. After getting such information, he went to the village of his Fua i.e. village Aat. He went to the house of the Rajballam Mahto (appellant no. 1). On enquiry, it was informed by Rajballam that his Fua had fled away. Subsequently, he got information that the dead body was disposed of. This was done due to the reason that land was given to Rajballam (appellant no. 1). He stated that she was getting old age pension and for that, she was assaulted. He proved his signature on the written report, which was marked as Ext.1. In cross-examination in paragraph-3, he stated that Kuldeep Mahto of village Aat was his Fufa, who was four brothers, however; he was not in a position to explain the name of all the said four brothers. He further stated that 15-20 years prior to the occurrence, there was partition in between brothers of his fufa. In paragraph-4, he stated that after partition, his fufa was residing in the house of his cousin brother Rajballam (appellant no. 1). His fufa had already transferred the land to Rajballam (appellant no. 1) and his fua and fufa were issueless. In paragraph-7, he stated that on telephone, Deep Narain (P.W.1) had given information about the occurrence. In paragraph – 8, he deposed that Deep Narain (P.W.1) had explained that fua was assaulted and her dead body was



disappeared. Telephonic information was given prior to 22-06-2010. About 2-4 days prior to 22-06-2010, telephonic information was given by Deep Narain (P.W.1). In paragraph-12 of his cross-examination, he stated that after getting information about the occurrence, he went to the house of Rajballam (appellant no.1). However, he did not go to the house of Deep Narain (P.W.1) and Sujeet Mahto (P.W.2). At this juncture, it is necessary to indicate that such act of the informant appears to be not believable. In normal course, once he had received information from Deep Narain (P.W.1) on telephone and he visited the said village, he would have certainly inquired from Deep Narain (P.W.1) regarding entire fact. He further in the said paragraph stated that only after lodging case in the police station, he went to the house of Deep Narain (P.W.1). This itself depicts about the conduct of the informant. Again, he stated that about the occurrence, he had not given information to the police in writing, but it was oral, whereas the F.I.R. has been initiated on the basis of written report duly signed by the informant. During the trial, he deposed that initially, he had put his signature. This witness in paragraph - 13 of his cross-examination has deposed that his Fua was getting Rs. 200/- per month as old age pension. She was also getting 30 kg. of rice every month. The said rice was being handed over to Rajballam



(appellant no. 1). In paragraph-16, suggestion was given to this witness that Parvati Kunwar (deceased) was not his own Fua nor Kuldeep Mahto was his own Fufa, however; same was denied. This witness also denied the suggestion that due to old age, Parvati Devi had lost the mental balance and earlier also on some occasion, she had left the house and Rajballam (appellant no.1) after search had brought back her to the house. On examination of evidence of P.W.4 i.e. informant, it is clear that he is only hearsay witness and he was informed by Deep Narain (P.W.1) regarding the occurrence.

12. Deep Narain, who was examined as P.W.1 in his evidence, has stated that on the date of occurrence in the night at 10.00 while he was moving in the lane beside the house of the appellants, from inside the house of appellant no. 1 (Rajballam Mahto), cry of 'जान बचाओ जान बचाओ' (*jaan bachao jaan bachao*) was coming. Thereafter, he returned back to his house. In the morning, he got information that Parvati Devi was killed and her dead body was disposed of. Had it been a case of receiving information regarding murder and disposal of the dead body, in normal course, F.I.R. would have been registered under Sections 302/34 of the I.P.C. Meaning thereby that this statement was developed by this witness during his evidence. In paragraph – 2,



he stated that his statement before the police was recorded one month after the occurrence. In cross-examination, his attention was drawn to his previous statement made before the police as to whether before the police he had made statement that at 10.00 in the night, while he was moving, he had heard sound from the house of the appellants and cry of 'जान बचाओ जान बचाओ' (*jaan bachao jaan bachao*) and he denied that it was incorrect that he had said this fact to the police. During trial, without any plausible explanation, the investigating officer was not examined. Instead, an Advocate clerk has come forward to exhibit the case diary and it was got exhibited. Since the investigating officer, without any plausible explanation, was not examined, it can be presumed that case of the defence was prejudiced. In paragraph - 5 of his cross-examination, this witness stated that after about five days from the date of hearing of sound of cry, he had informed Ramji Mahto (P.W.4), whereas P.W.4 in his evidence had stated that on the same night, he got telephonic information from P.W.1. In paragraph-10 of his cross-examination, this witness has stated that Kuldeep Mahto (fufa) husband of Paravati Kunwar (deceased) had already transferred entire his property to Rajballam Mahto (appellant no. 1), who died 10 years prior to the said occurrence. This witness further in paragraph-11 has stated that Rajballam (appellant no. 1)



earlier twice had ousted Parvati from the house, but he was not in a position to give the date, time and month of the said occurrence. This witness was also given suggestion that due to old age, the fua of the informant as well as the appellants had lost mental balance, however same was denied.

13. P.W.2 Sujeet Mahto in his evidence has stated that occurrence had taken place in the 10th month of the year, 2010. Meaning thereby that October, 2010, whereas, it was case of the prosecution that occurrence had taken place on 22-06-2010. He stated that in the night, when he reached near the door of the appellants, from inside, he heard the cry of Parvati Devi. She was assaulted by all the appellants. He stated that he went inside and persuaded the appellants not to do that. In paragraph-5 and 7 of his cross-examination, this witness has stated that he along with Deep Narain (P.W.1) had tried to save Paravati Devi. This itself contradicts the evidence of P.W.1. Deep Narain (P.W.1) was none else but his own brother, which fact has been stated in paragraph-7. In paragraph -10 of his cross-examination, he states that he was not aware as to who had filed the case. He further stated that he was not knowing as to who was Ramji Mahto son of Srinath Mahto, resident of village Metaniya, P.S. Rafiganj. This indicates that P.W.2 is completely inconsistent and he was not aware as to



what he was deposing, whereas fact remains that it was a consistent case that the informant (P.W.4), P.W.1 and P.W.2 were cousin brothers. Further, in paragraph-12, this witness deposed that since long he was knowing that Kuldeep with his wife Parvati was residing with Rajballam (appellant no. 1) in his house and Kuldeep was not having any issue from his wife. In paragraph-13, he deposed that the land of Kuldeep Mahto was being cultivated by the accused persons and he also wanted to cultivate the said land, for which, accused persons had started to fight. This indicates that this witness was having ill-will on the land of Kuldeep Mahto (husband of Parvati), which was already transferred to the appellants. This witness too in paragraph-15 stated that Parvati Kunwar was aged about 80-85 years, however; he denied that she was mentally derailed, but he accepted that the lady was getting Rs. 200/- per month as old age pension as well as food-grains from quota and she was residing and taking meal in the house of Rajballam (appellant no. 1). This witness was also given suggestion that the deceased had lost her mental balance and no one was knowing as to where she had gone, however he denied the same.

14. Other witnesses i.e. P.W.3 (Vidyanand Mahto) and P.W.8 (Krishna Mahto), who are co-villagers, have deposed that



they were not aware as to whether the said lady was alive or dead. She was residing in the house of Rajballam Mahto (appellant no. 1). Meaning thereby that at least, till the evidence of P.W.3 and P.W.8, no evidence was brought on record regarding death or murder of Parvati Kunwar. Fact remains that in this case, no evidence has been brought on record regarding death or disposal of the dead body, save and except so-called suspicion raised by the witnesses.

15. In the case, non-examination of the investigating officer has seriously prejudiced the case of the prosecution. No explanation has been given as to what was the reason for non-examination of the investigating officer. Instead of taking steps for securing attendance of the investigating officer, an Advocate clerk was introduced as P.W.14 to prove F.I.R. and even endorsement made by police officer. This witness has proved written report and it was stated that it was in the writing of officer incharge and it was marked as Ext.1/1. He also proved formal F.I.R. prepared by the officer incharge and it was marked as Ext.2. This witness further stated that endorsement on the written report was made by the officer in-charge, which was marked as Ext.1/2. Surprisingly, this witness has proved paragraph 1 to 64 of the original case diary marked as Ext.3, paragraph 1 to 25 of supplementary case diary



marked as Ext. 3/1 and chargesheet marked as Ext.4. In absence of the investigating officer, it was difficult for the defence to take contradiction of the witnesses made during investigation under Section 161 of the Cr.P.C., whereas at the time of evidence, attention of witnesses were drawn to their previous statement recorded during investigation. Since no plausible explanation was given regarding non-production of the investigating officer, adverse inference may be drawn against the prosecution.

16. The learned Trial Judge has committed serious error in convicting the appellants under Section 364/34 of the I.P.C., whereas in statement recorded under Section 313 of the Cr.P.C. of the appellants, no such suggestion or evidence was explained to them and as such, in absence of such explanation, the recording of the statement under Section 313 of the Cr.P.C. is contrary to the principle of natural justice. In absence of proper explanation of circumstances, the right of the appellants to be asked to give clarification was frustrated. Moreover, in absence of any evidence, there was no reason for passing the judgment of conviction and sentence under Section 364/34 of the I.P.C. Regarding application of Sections 302/34 and 201/34 of the I.P.C., we are in agreement with the submission of learned counsel for the appellants that no plausible material has been brought on record to suggest as to what



was the reason for taking step for eliminating fua of the informant, since the fact, which has been brought on record, reflects contrary picture. It is case of the prosecution that the lady was getting old age pension and also monthly food-grains and she was residing with the appellants, much earlier the husband of Parvati Devi had already transferred entire landed property to the appellants and as such, there was no motive left for the appellants to take such action, which would have curtailed such benefit of the appellants.

17. After going through the entire evidence, we are of the considered opinion that the learned Trial Judge has committed serious error in passing the judgment of conviction and sentence.

18. Accordingly, the judgment of conviction dated 17-04-2013 and order of sentence dated 24-04-2013 passed in Sessions Trial No. 14 of 2011/14(A) of 2011 (arising out of Madanpur P.S. Case No. 145 of 2010) by Sri Niranjan Singh, learned Adhoc Additional Sessions Judge - V, Aurangabad is, hereby, set aside and appeal is allowed.

19. The appellant no. 3 namely Shiv Pyari Devi is already on bail and since judgment of conviction and sentence has been set aside, she is discharged from the liability of her bail-bond. So far as appellant no. 1 & 2 are concerned, they are in custody and since the judgment of conviction and sentence has been set



aside, it is, hereby, directed to release both the aforesaid appellants
i.e. Rajballam Mahto and Balindra Mahto forthwith, if not wanted
in any other case.

(Rakesh Kumar, J.)

(Arvind Srivastava, J.)

Anay

AFR/NAFR	AFR
CAV DATE	NA
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