

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.72 of 2014

Arising Out of PS. Case No.-388 Year-1996 Thana- BANKA District- Banka

Rajesh Kumar Mahto, Son of Sri Santi Mahto, Resident of Village - Lakri Kola, P.S.- Banka, District- Banka.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

Criminal Appeal (DB) No. 114 of 2014

Arising Out of PS. Case No.-388 Year-1996 Thana- BANKA District- Banka

Bajrangi Yadav, Son of Late Fushari Yadav, Resident of Village - Lakrikola, P.S. and District -Banka

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In both the appeals)

For the Appellant/s	:	Mr. Ajay Kumar Thakur, Advocate Mrs. Kiran Thakur, Advocate Ms. Swati Sinha, Advocate
For the State	:	Mr. Ritwaj Kumar, Advocate Mr. A.K. Sinha, A.P.P.

CORAM: HONOURABLE DR. JUSTICE RAVI RANJAN

and

HONOURABLE MR. JUSTICE S. KUMAR

ORAL JUDGMENT

(Per: HONOURABLE DR. JUSTICE RAVI RANJAN)

Date : 28-06-2018

We have heard parties and have perused the records of this case.



The appellants have preferred these appeals assailing the judgment of conviction dated 03.12.2013 and order of sentence dated 11.12.2013 passed by 1st Sessions Judge, Banka in Sessions Trial Nos. 228 of 1997/234 of 2013 arising out of Banka P.S. Case No.388 of 1996 by which they have been convicted for the offences punishable under Sections 364/34, 302/34, 201/34 of the Indian Penal Code and they have been sentenced to undergo rigorous imprisonment for life and a fine of Rs. 10,000/- (Ten thousand) each for offence under Section 302/34 I.P.C. and, in default of payment of fine, they have further been sentenced to undergo rigorous imprisonment for a period of one year. Further both the appellants have been sentenced to undergo rigorous imprisonment for three years and fine of Rs. 5,000/- (Five thousand) each for the offence under Section 201/34 of I.P.C. and, in default of payment of fine, they have been sentenced to undergo rigorous imprisonment for six months. Further both the appellants have been sentenced to undergo rigorous imprisonment for 10 (Ten) years and a fine of Rs. 5,000/- (Five thousand) each for the offence under Section 364/34 of I.P.C. and, in default of payment of fine, they have further been sentenced to undergo rigorous imprisonment for six months. However, all the sentences have been directed to run concurrently.



The prosecution case, in brief, is that the fardbeyan of the informant Nageshwar Roy was recorded on 30.11.1996 at 9.00 A.M. near Chandan River. As per fardbeyan, the accused Kedar Yadav, Bajrangi Yadav and Rajesh Kumar Mahto used to extort ransom from vehicle which used to ply on Banka-Jamdaha road. On 25.11.1996, the aforesaid accused persons were extorting ransom from the vehicles in front of the house of the informant. Upon this, Kishor Rai, the nephew of the informant, objected and asked them not to extort money near his house. Upon this, Kedar Roy thrashed Singheshwar Rai and Kishore Rai and at the behest of villagers, the matter was settled with condition that ransom from the vehicle would not be demanded near the house of the informant. It is alleged that, at the time of thrashing, Kedar has threatened the nephew of the informant that up to 8 A.M. of the next day he be ready to face the dire consequences. After settlement, Kedar yadav told the nephew of informant that these are routine matter between father, sons and invited him to Paan shop for chewing betel. Upon this, the nephew of the informant namely Kishore Rai accompanied Kedar Roy to take betel and the informant went away to attend Shradh Ceremony. When Kishore Rai did not return even at the time of dinner, a search was made but he could not be found. On the next day in the morning, the



informant with his Bhabhi went to the house of accused Kedar, Bajrangi and Rajesh Yadav to enquire about Kishore, however, they said that Kishore had not returned with them. At the betel shop of Doro Mahto, it came to the light that after chewing betel, Kishore had returned with them and went with them somewhere else. Next day, search was made but in vain. The accused persons, namely, Kedar, Rajesh and Bajrangi Yadav, thereafter became traceless. Further case of the informant is that in the morning of 30.11.1996, the dead body of Kishore, dumped in the sand of Chandan river, was found. The informant is confident that accused Kedar Yadav, Bajrangi Yadav and Rajesh Yadav, after inducement on pretext of chewing betel, had taken away Kishore and after killing him concealed his dead body in the River.

On the basis of aforesaid fardbeyan, the FIR was registered under Sections 364, 302, 201, 34 of the Indian Penal Code vide Banka P.S. Case No. 388 of 1996. The police took up the investigation of the case. After investigation, the police submitted charge sheet against the accused including the appellants. Thereafter, the learned C.J.M., Banka took cognizance and committed the case to the court of sessions, where charges were framed under Section 302/34, 201/34 and 364/34 of the



Indian Penal Code, to which, the accused persons pleaded not guilty. Thereafter, trial started against the appellants.

Defence of the accused is completely denial of the occurrence and have pleaded that only on suspicion they have been falsely implicated.

During trial, the prosecution has examined altogether ten witnesses in support of its case. P.W. 1 is Yogendra Rai, P.W. 2 is Shankar Roy, P.W. 3 is Bongi Roy, P.W. 4 is Basant Roy, P.W. 5 is Suromala Devi, P.W. 6 is Dr. Sunil Kumar Jha, P.W. 7 is Sitabi Dom, P.W. 8 is Arun Kapri, P.W. 9 is Duro Mahto and P.W. 10 is Nageshwar Rai.

The defence has examined only one witness, i.e, D.W. 1 Jitendra Kumar in support of its case.

The trial court after hearing learned counsel for the parties and considering the evidence on record came to the conclusion that the prosecution has been able to prove the charges against the appellants and, as such, the judgment of conviction and order of sentence have been passed, as aforesaid.

Now this Court is required to reappraise the prosecution evidence to see as to whether the prosecution has been able to substantiate its case beyond the shadow of all reasonable doubts?



In the first information report, though suspicion of killing the deceased has been raised by the informant on three accused persons, namely Kedar Yadav, Bajrangi Yadav and Rajesh Kumar Mahto as all of them, according to the informant, were extorting money from the vehicles plying on the concerned road. It is specifically written that the nephew of the informant, i.e., the deceased Kishore Rai went with the accused Kedar Roy only for chewing betel. He has repeated this while being examined as PW 10. However, while being examined as PW 10, he appears to have made improvement by saying that all the three accused invited him for chewing betel and he went with all the three persons and never returned.

PW 1, Yogendra Rai, has also stated that Kedar Roy invited Kishore Rai to *Pan* shop for chewing betel, whereas the uncle of the deceased, namely, Shankar Roy, has stated that he went to the *Pan* shop with all the three accused persons and they took him towards west and he never returned. However, in paragraph 8, he has stated that at the time when the deceased Kishore Rai was objecting to demand the extortion money at his door-step about 70 – 80 persons assembled and all of them after some time returned to home and deceased, Kishore Rai, also returned with them and since then he could not meet with the



deceased. Thus, he demolishes the case that the deceased, Kishore Rai, was invited by the accused persons to the *Pan* shop. PW 3 has given another story. He has stated in his evidence that Kedar Yadav had invited Kishore Rai to *Pan* shop. He has not taken the name of the accused Bajrangi Yadav and in paragraph no.5, he has clearly stated that this occurrence is the game played by Kedar. P.W. 4 has also stated that Kedar and Rajesh invited the deceased Kishore Rai to betel shop. The mother of the deceased who has been examined as P.W. 5 has also stated that all the three accused had taken the deceased to *Pan* shop but it is very relevant that in paragraph no. 8 she has stated that betel shop is one K.M. away from her house, therefore, it would not be possible for her to see as to whether her son deceased Kishore Rai was taken to betel shop by the accused persons or not. She has stated that 100 – 200 persons assembled at the place of occurrence when the objection was being raised by Kishore Rai to extortion of money from the passing vehicles. Thereafter, she has stated that she had remained there for about an hour and returned back to her home and after one hour she has returned to place of occurrence after the aforesaid incidence on objection being raised by her son to her house and after one hour there was some Panchayati held in which 8 persons were there and, thereafter, everybody returned. When



her son did not come in the *Sharadh* ceremony in the village then everybody started looking as to what has happened to him. Thus, she completely gives a go-by to the last seen theory of betel shop. P.W. 8, Arun Kapri, has stated that Kedar Yadav has invited the deceased for chewing betel and he took away Kishore Rai with him. However, after he stated that the investigating officer did not take his statement then he was declared hostile by the prosecution but one thing is clear from his evidence that he was present at betel shop of Doro Mahto and Kedar Yadav took Kishore Rai with him. The appellants were obviously not found there by P.W. 8, Arun Kapri and P.W. 9 Doro Mahto who is the betel shop owner, has also stated that Kishore Rai and Kedar Yadav have come to his betel shop for chewing betel and both of them thereafter went when he stated that the investigating officer did not inquire anything from him, the prosecution declared him hostile but it is clear from his evidence that at his betel shop only Kedar Yadav and Kishore Rai came and the appellants were not there. P.Ws. 8 and 9 have stated that Kishore has already died.

It is a case of circumstantial evidence. The date of occurrence is 25.11.1996. Fardebeyan was recorded and F.I.R. was registered on 30.11.1996 when the dead body was found and autopsy was also conducted on the body on 30.11.1996. The



appellants have been made accused on the basis of last seen theory. Allegedly, three accused persons, namely, Kedar Rai, Bajrangi Yadav and Rajesh Kumar Mahto were extorting money from the plying vehicles on the road concerned in front of the house of the deceased which was objected by him which led to altercation between the parties. Hundred of people assembled there. Thereafter, Panchayati was also done and the matter was resolved. Some of the witnesses said that all the three accused persons invited the deceased to a betel shop for chewing betel. The informant in the first information report says that only accused, Kedar Yadav has invited him to betel shop but while being examined as P.W. 10, he has taken name of all the three persons which is departure from his original version.

Now, in such a situation, to come to a logical conclusion, the investigating officer was required to be examined, as he was the best person to say that while recording the statement under 161 Cr.P.C. what was reveled by them but unfortunately he has not been examined as witness which gives a fatal blow. The betel shop owner has stated that the only accused Kedar Rai came to his betel shop along with Kishore Roy. All of them thereafter went towards west. Though he has been declared hostile subsequently but this statement would be of much value as it also



stands supported by P.W.8, Arun Kapri and in such case, if Kedar Rai has only taken him away as there is no evidence of involvement of Bajrangi Yadav and Rajesh Kumar Mahto. In fact, the last seen theory has not travelled further as there is no cogent evidence at all even of abduction. This is very surprising that how the court below has convicted the accused persons for the charge of abduction of the deceased if he has willingly gone with the accused persons.

Mr. Ajay Kumar Thakur, learned counsel appearing for the appellants, has placed reliance upon a decision of the Hon'ble Supreme Court of India dated 23rd May, 2017 rendered in **Criminal Appeal No.560 of 2014 (Anjan Kumar Sarma & Ors. Versus State of Assam)** wherein it has been held that the failure of the accused to offer any explanation in his statement under Section 313 Cr.P.C. alone was not sufficient to establish the charge against the accused. The relevant passages from the aforesaid judgment are extracted as under:

“19. This Court in *Bharat v. State of M.P.*, (2003) 3 SCC 106, held that the failure of the accused to offer any explanation in his statement under Section 313, Cr.P.C. alone was not sufficient to establish the charge against the accused. In the



facts of the present case, the High Court committed an error in holding that in the absence of any satisfactory explanation by the accused the presumption of guilt of the Accused stood un-rebutted and thus the Appellants were liable to be convicted.

20. Mr. R. Venkataramani relied upon *Deonandan Mishra v. State of Bihar*, (1955) 2 SCR 570 at p.582 to buttress his submission that the circumstance of last seen together coupled with lack of any satisfactory explanation by the accused is a very strong circumstance on the basis of which the accused can be convicted. It was held by this Court in the above judgment as follows:-

“It is true that in a case of circumstantial evidence not only should the various links in the chain of evidence be clearly established, but the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. But in a case like this where the various links as stated above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation, and he offers no explanation, which if accepted, though not proved, would afford a reasonable basis for a conclusion on the



entire case consistent with his innocence, such absence of explanation or false explanation would itself be an additional link which completes the chain. We are, therefore, of the opinion that this is a case which satisfies the standards requisite for conviction on the basis of circumstantial evidence.”

21. It is clear from the above that in a case where the other links have been satisfactorily made out and the circumstances point to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction. The other judgments on this point that are cited by Mr. Venkataramani do not take a different view and, thus, need not be adverted to. He also relied upon the judgment of this Court in *State of Goa v. Sanjay Thakran*, (2007) 3 SCC 755 in support of his submission that the circumstance of last seen together would be a relevant circumstance in a case where there was no possibility of any other persons meeting or approaching the deceased at the place of



incident or before the commission of crime in the intervening period. It was held in the above judgment as under:-

“34. From the principle laid down by this Court, the circumstance of last seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after (sic of) a considerable long duration. There can be no fixed or straitjacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author of the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the



circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case.”

As we have held that the other circumstances relied upon by the prosecution are not proved and that the circumstances of last seen together along with the absence of satisfactory explanation are not sufficient for convicting the accused. Therefore the findings recorded in the above judgment are not applicable to the facts of this case.”

It is apparent from the aforesaid decision that in case where other links have been satisfactorily made out and the circumstances point to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an



additional link which would complete the chain. In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction. In the case in hand, there is no concrete evidence that the appellants also went along with the deceased to the betel shop as the question mark is there as to whether the deceased went only with Kedar Yadav or with all the accused persons. There is no evidence of abduction at all and almost all witnesses have stated that the Panchayati was done and the matter was resolved. The dead body was recovered after six days. There is nothing on record as to what has happened in between.

On such evidence, it would be very difficult to hold the accused persons guilty of committing murder of the deceased. So far the abduction is concerned, there is no evidence at all, therefore, conviction on that count also is liable to be quashed and set aside. Since the chain of circumstance could not be completed and established, we would hold that there are no sufficient material to brought on record by the prosecution to bring home the charges.

As a result, both these appeals succeed. The judgment of the conviction and order of sentence are set aside. The appellants are acquitted of the charges. Since the appellants are in custody,



they would be required to be released forthwith, if not wanted in any other case.

(Dr. Ravi Ranjan, J)

(S. Kumar, J)

V.K.Pandey/-

AFR/NAFR	N.A.F.R.
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