

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) No.1079 of 2013

Arising Out of PS. Case No.-11 Year-2010 Thana- BHELDI District- Saran

Mister Ali (Laddu) @ Mistar Ali, Son Of Enul Haque, a resident of Raipura,
P.S.- Bheldi, District- Saran

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Shri Harish Kumar, Advocate

For the Respondent/s : Shri Ajay Mishra, A.P.P.

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

and

HONOURABLE MR. JUSTICE ANJANI KUMAR SHARAN

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 30-07-2019

1. The sole appellant has approached this Court by filing the present appeal under Section 374(2) of the Code Of Criminal Procedure, 1973 {hereinafter referred to as the “Cr.P.C.”} against judgment of his conviction and sentence. The appellant by judgment dated- 20.09.2013 was convicted for the offence under Section 302 & 201 of the Indian Penal Code, 1860 {hereinafter referred to as the “I.P.C.”}. By order dated 23.09.2013 under Section 302 of the I.P.C. he has been imposed sentence to undergo imprisonment for life and under Section 201 of the I.P.C. he was directed to undergo rigorous imprisonment for three years. Both the sentences were directed to run concurrently. The judgment of conviction and sentence has been passed by Shri Arun Kumar Srivastava, learned 1st Additional Sessions Judge, Chapra {hereinafter referred to as the “trial judge”} in Sessions Trial No. 373 of



2010 {arising out of Bheldi P.S. Case No. 11 of 2010, G.R. No. 484 of 2010}.

2. Short fact of the case as per written report of the informant is that the informant- Sagir Alam (P.W. 3) on 16.02.2010 submitted a written information addressed to the Officer -in-charge , Bheldi Police Station, District – Saran. In the written report he disclosed that his brother Mister Ali (Laddu) / the appellant on 14.02.2010 in day time at about 2.00 P.M. had carried the son of the informant, namely- Ashif Ali (Allan) by way of providing *Pakauri* with him. Since even after one hour both of them did not return, the informant with his villagers and other neighbors started searching them. During search his brother- Mister Ali (appellant) did not go with him and he, on one pretext or the other, did not give proper reply. Thereafter, villagers and his entire family members pressurized Mister Ali only thereafter, he disclosed that he had carried Allan (deceased) towards Mahi river at Takiya Brahm Asthan and after pressing his neck he drowned him and killed. Thereafter, on listening aforesaid fact, villagers brutally assaulted him and carried him in search of son of the informant. The appellant disclosed the place where



slipper of Allan was found but Allan was not recovered. The informant disclosed that in the river he tried his level best to search his son but all efforts went in vain. He stated that for continuously two days he remained searching however, Allan was not found. The informant disclosed that he had reason to doubt that his son was kidnapped by Mister Ali (appellant) and he was killed thereafter. The reason for the occurrence was explained by the informant that he had got the marriage of wife of appellant solemnized with appellant's younger brother since appellant had deserted his wife. Subsequently, Mister Ali returned back and he started carrying vengeance against his family members and repeatedly he used to say that he would do something for implicating the entire family. On 16.02.2010 he produced Mister Ali (appellant) in injured condition before Bheldi Police Station and requested for taking appropriate action.

3. The written report was signed by the informant, which is dated 16.02.2010. On the basis of the said written report on the same day i.e. on 16.02.2010 at about 15.00 hours (3.00 P.M.) a formal F.I.R. vide Bheldi P.S. Case No. 11 of 2010 was registered for the offence under Section 364 of the



I.P.C. against the sole appellant. It has come that during investigation appellant, while under custody of Police, made confessional statement on 17.02.2010 in the morning at 6.00 A.M. Subsequently on the same day at 8.30 A.M. inquest report on the dead body of the son of informant was prepared. The dead body was found trapped in a net [चचरी] near a bridge which was under construction over river- Mahi. The Police after registering F.I.R. thoroughly investigated the case and finding accusation against the sole appellant true, submitted charge sheet on 23.03.2010.

4. After submission of charge sheet the learned Chief Judicial Magistrate, Saran at Chapra on 29.03.2010 took cognizance of the offence and case was committed to the court of Sessions on 11.06.2010. After commitment, the case was numbered as Sessions Trial No. 373 of 2010. Charge under Section 302, 201 of the I.P.C. was framed against the appellant on 25.06.2010 which was denied by him and appellant claimed to be tried. Accordingly, for establishing its case on behalf of prosecution altogether eight witnesses were examined. After closure of prosecution evidence, evidences and circumstances brought against the appellant were



explained to him and on 07.03.2013 his statement under Section 313 of the Cr.P.C. was recorded, however, since some of the relevant circumstances were not brought to the notice of the appellant, again on 04.06.2013 those circumstances were explained to him and statement of appellant under Section 313 of the Cr.P.C. was recorded on second occasion on 04.06.2013. The learned trial judge subsequently noticed that the Investigating Officer of the case was not examined and thereafter, in the case Investigating Officer Shri Nageshwar Prasad Yadav was examined as Court Witness i.e. C.W. 1 on 26.08.2013. Since the Court witness i.e. Investigating Officer was examined after statement of the accused was recorded under Section 313 of the Cr.P.C., again the circumstances which were subsequently brought on record were explained to the appellant and on 3rd occasion i.e. on 02.09.2013 his statement under Section 313 of the Cr.P.C. was recorded.

5. Out of eight prosecution witnesses, P.W. 2 -Nasima Parvin (wife of elder brother of the appellant) and P.W. 8 (Sayrun Begum) were examined on the point that they had lastly seen the deceased with the appellant. P.W. 3 {Sagir Alam} is the informant of the case and father of the deceased,



P.W. 7 - Dr. Ravi Shankar Singh had conducted post -mortem examination on the dead body of the deceased and C.W. 1 - Nageshwar Prasad Yadav had conducted investigation of the case and on the date of his evidence he had already superannuated, however, P.W. 1 - Bhola Kumar Ram, P.W. 4- Md. Idrish, P.W. 5 - Naushad Alam and P.W. 6 - Khusbu Begum who were not directly related with the informant did not support the prosecution case, and as such, they were declared hostile.

6. During prosecution evidence, altogether seven documents were got exhibited. Those are: written report of the informant Ext. 1, post mortem report of the deceased Ext. 2, signature of Officer -in- charge on formal F.I.R. and his writing Ext. 3, endorsement on written report made by the Officer-in-charge Ext. 4, inquest report Ext. 5, seizure list of slipper of deceased Ext. 6 and confessional statement of appellant recorded by the Police is Ext. 7.

7. Sri Harish Kumar, learned counsel for the appellant after referring entire evidence on record has argued that prosecution has not been able to establish its case beyond all reasonable doubts and it is a fit case for setting aside the



impugned judgment of conviction and sentence. He submits that save and except suspicion, there is no readable or admissible evidence on record. He highlights that none had seen the occurrence and a case was made out as if two witnesses had seen the deceased on 14.02.2010 at about 2.00 P.M. along with the appellant, however, during the trial no independent witness has come forward to support the prosecution case. Shri Harish Kumar submits that falsity of the case is evident from the fact that at least four witnesses, who were independent, have not supported the prosecution case, and as such, they were declared hostile.

8. According to Shri Harish Kumar, learned counsel for the appellant in the case best witness was the father of the informant regarding whom informant in his evidence has stated that he was informed by his father that the deceased was taken away by the appellant on pretext of providing *pakauri*, however, without any plausible explanation prosecution has not produced the father of the informant to be examined as prosecution witness. He further submits that prosecution without any plausible reason has not produced either witnesses to the seizure list or witnesses to the inquest



report. He further submits that there is apparent inconsistency in the evidence of P.W. 3- informant and his wife (P.W. 8) particularly on the point of animosity, and as such, in absence of any animosity in between appellant and informant or his family, there was no reason for the appellant to commit such crime. The reason for murder which was described by the prosecution was not enough to persuade the appellant to murder his own nephew. He highlights that in a murder case it was mandatorily required on the part of prosecution to establish the intention for committing crime which has not been established by the prosecution. He further submits that recovery of dead body of the deceased on the so- called confessional statement made before Police is not admissible in the eye of law. He further submits that appellant has already remained in custody for more than nine years. On aforesaid grounds it has been argued that the impugned judgment of conviction and sentence is liable to be set aside.

9. Shri Ajay Mishra, learned Additional Public Prosecutor supporting the impugned judgment of conviction and sentence submits that prosecution case is crystal clear. He submits that it is true that case is based on circumstantial



evidence as well as on the principle of last seen. According to Shri Mishra prosecution has successfully established its case that deceased was lastly seen with appellant and subsequently, dead body of deceased was found, and as such, this circumstance was enough for the learned trial judge to pass judgment of conviction and sentence. Shri Mishra submits that it is not only a case of last seen of deceased with appellant but it has been established that appellant has made exculpatory confession before the informant and other witnesses in which he himself had described that he had carried the deceased near Mahi river and after throttling he threw the dead body in the river. Besides this, it has been argued that it is true that confession made by accused before Police is not admissible, but if confession, even though made before Police, leads to recovery of a fact which was only within the knowledge of an accused, then that part of the confession is admissible and reliance can be placed on such evidence. Shri Mishra has highlighted that appellant made exculpatory confession before the informant and other witnesses. He was assaulted by the villagers and family members and on the date of filing of written statement / report, the appellant was handed over to



Police and he was taken into custody. It was done on 16.02.2010. In the early morning on the next day i.e. on 17.02.2010 at 6.00 A.M. confessional statement of appellant was recorded by Police, which has been marked as Ext. 7. After recording his confessional statement appellant was carried to the bank of river- Mahi where allegedly the deceased was thrown by the appellant. However, search was made and it was noticed that dead body was floated and subsequently, it was trapped in the net [चचरी] which was available beneath the under constructed Railway bridge over the river and only thereafter, inquest report was prepared near the river itself. Shri Mishra has shown the inquest report i.e. Ext. 5. In column no. 3 of Ext. 5 the place where dead body was found has been mentioned which indicates that it was found near the bank of Mahi river. According to Shri Mishra the fact that appellant had deserted his wife within three months of marriage and solemnization of marriage of his wife by the family members of the informant with another brother has been established by prosecution and same has been accepted by the appellant in his statement recorded under Section 313 of the Cr.P.C. He submits that taking clue from



this fact as well as the fact that informant in the written report had indicated that the said occurrence i.e. solemnization of marriage of wife of the appellant with appellant's younger brother had created grudge in the mind of the appellant and for consequences the appellant had threatened, which is highlighted from the written report itself. This indicates motive behind the occurrence. According to Shri Mishra all the three ingredients have been established by the prosecution to show connection of chain of circumstances. He submits that P.W. 2 and P.W. 8 in categorical term have deposed that on 14.02.2010 they had seen the appellant carrying the deceased providing biscuit / *pakauri* and thereafter, deceased was not seen and his dead body was subsequently recovered. The exculpatory confession of the appellant in which before the informant and others he confessed that he had eliminated the son of the informant and threw the dead body in the river and 3rd part is recovery of the dead body which was done primarily on the disclosure made by the appellant either in his confessional statement or in his exculpatory confession. The motive has also been established by the prosecution. According to Shri Mishra all those circumstances



categorically establish that it was a case of eliminating the minor son of the informant who was aged about eight years and thereafter, to disappear the evidence dead body was thrown in the river. Shri Mishra has further argued that oral evidence has also been corroborated by medical evidence. He submits that post mortem examination report also indicates that death of deceased had not occurred due to drowning rather death had occurred prior to drowning of the dead body and this is reason that neither in the stomach huge quantity of water was found nor even a single drop of water was found in the lungs of deceased. In such circumstances, as per learned Addl. Public Prosecutor the learned trial judge has committed no error in passing judgment of conviction and sentence.

10. In reply, Shri Harish Kumar, learned counsel for the appellant has submitted that evidence of last seen is a weak piece of evidence and only on the ground of last seen conviction and sentence may not be approved.

11. Besides hearing learned counsel for both the parties, we have minutely examined entire evidence on record and after going through the same *prima facie* we are of opinion that the learned trial Judge has committed no error in



passing the judgment of conviction and sentence, however, before proceeding it is necessary to examine the evidences, which have been brought on record.

12. The informant is none else but father (P.W. 3) of his minor deceased son, who on the date of occurrence was aged about 08 years. He in his evidence reiterated his stand which was disclosed in the written report which is the basis of the F.I.R. In his evidence he has identified the written report and same was marked as Ext. 1. He stated that occurrence had taken place on 14.02.2010. On the date of occurrence at 2.00 P.M. [day time] he was doing work in Tahipur village and he returned back to his home in evening whereupon his father informed that his son- Allan was seen with the appellant, who was providing *pakauri* however, till evening the appellant had not returned with Allan. In evening while appellant returned, he returned alone from whom enquiry was made. He was threatened, only then, he disclosed that he had killed Allan and throwed him in Mahi river The appellant was also assaulted, only then, he disclosed this fact. Thereafter along with appellant, informant and others went to the bank of river where they found slipper of Allan. After finding slipper the



villagers tied the appellant and kept with them. After tieing, the appellant on the next day was carried to Police Station and handed over to them. Two days thereafter dead body of Allan was found beneath the Railway bridge which was trapped in चचरा . This witness was cross- examined at length however, on going through the same we do not find any specific material which was enough for disbelieving the evidence of P.W. 3. He was given suggestion that the boy had gone for bathing in river and in that context he was drowned. He also denied the suggestion that with a view to capture the property of appellant he was falsely implicated. On examination of the evidence of P.W. 3 one thing is clear that he got information firstly from his father that his son was taken away by the appellant, however, father of the informant has not been examined, and as such, to the extent of version of last seen which fact has come through father of the informant may not be relied upon. However the second part of the evidence of PW. 3 which indicates that appellant himself confessed regarding the murder of son of the informant and throwing him in the river cannot be discarded. Moreover, after he made disclosure, the informant along with others and



appellant went to the bank of river where slipper of deceased was found.

13. P.W. 2 (Nasima Parvin) is the wife of elder brother of the appellant. In paragraph 1 of her examination -in- chief she categorically described that on the date of occurrence i.e. on 14.02.2010 she saw the appellant providing *biscuit* to the minor son of the informant and carrying him outside from the house. At that very time the son of informant – Allan was aged about eight years old. She further described that subsequently the appellant returned back alone. The family inmates enquired from him about Allan. Initially he refused to divulge anything thereafter he was threatened only then the appellant confessed that after strangulation he had thrown Allan in river Mahi. She further stated that two days thereafter i.e. on 17th February, 2010 dead body of Allan was found near the under constructed railway bridge over Bheldi river. The dead body was trapped in net [चकरा]. She further stated that her statement was recorded by Police and she identified the appellant in the dock. This witness was cross-examined at length. In paragraph 6 of her cross examination she stated that Allan (deceased) was her nephew. In paragraph



10 of her cross- examination her attention was drawn to her previous statement recorded under Section 161 of the Cr.P.C. during investigation where she stated that in her statement before the Police she had stated that appellant provided biscuit. At the time of examination of the Investigating Officer i.e. C.W. 1 namely, Nageshwar Prasad Yadav contradiction was taken and at page no. 46 C.W. 1 stated that before him this witness P.W. 2 had disclosed that at the time while the deceased was being taken away by the appellant, the appellant was providing something to the deceased for eating. Meaning thereby, that the word *biscuit* was not disclosed in the statement of P.W. 2 recorded during investigation but during trial she had referred about *biscuit*. Such inconsistency is immaterial for considering the credibility of this witness. Such error cannot be considered as a ground for raising any doubt on the credibility of such witness. On examination of the evidence of P.W. 2 both the parts are established i.e. she is a credible witness on the point of last seen of the deceased with the appellant and also confession made by the appellant before them and recovery of the dead body.



14. P.W. 8 – Sayrun Begum is the mother of the deceased and wife of the informant. This witness has stated that on the date and time of occurrence she was at her home and her son -Allan (deceased) was playing near the door. He was aged about 08 years. In paragraph 2 of her evidence she stated that appellant on the pretext of providing *biscuit* and for roaming taken away her son -Allan who did not return till 4.00 P.M. Thereafter, she gave telephone call to her husband (P.W. 3) and informed that her son had not returned thereafter her husband came back to his house. All the family members started searching her son however her son was not traced. In paragraph 3 of her examination- in -chief she stated that on the date of occurrence in evening at 7.00 P.M. the appellant returned back. On enquiry about her son initially he did not disclose but on threatening he disclosed and confessed regarding the occurrence which has elaborately been stated by P.W. 2. In cross- examination in paragraph 9 she reiterated that she had seen the appellant with her son and she thought that the appellant had gone with his son for providing *biscuit* etc. He had taken his son for moving somewhere however, she stated that she herself had seen that appellant had purchased



pakauri and after purchasing the same he went along with Allan. Her attention was drawn in paragraph 15 of her cross-examination to her previous statement recorded under Section 161 of the Cr.P.C. On examination of the evidence of this witness as well as evidence of Court witness – Investigating Officer at page no. 46 it appears that though she has not referred about biscuit still she was asked in paragraph 15 of cross- examination regarding such fact however, at the time of examination of Investigating Officer /C.W. 1 in last paragraph it is evident that this witness has not stated before him that the appellant had provided *biscuit*. Meaning thereby that this witness too has supported the prosecution evidence that the victim was persuaded to go with appellant on the pretext of providing something for eating. In evidence of P.W. 8 also all the three facts have emerged i.e. witnessing the deceased lastly with the appellant, confession made by the appellant before this witness and recovery of the dead body of the deceased.

15. P.W. 7 – Dr. Ravi Shankar Singh on 16.02.2010 was posted in Sadar hospital, Chapra and he conducted post mortem on the dead body of deceased however it appears that



inadvertently he has mentioned date of post mortem examination as 16.02.2010 whereas, it was conducted on 17.02.2010 and it commenced on the same day at 1.10 P.M. this was the reason that after examination and discharge, on recall this witness was examined and he clarified that it was slip of pen. However, while examining dead body of the deceased, he noticed anti mortem injuries on the person of the deceased and noticed the following facts:-

“Rigor mortis absent in all four limbs.
(Washerman or woman hands with palms). No
ligature marks over neck.

On dissection – All viscera congested
but intact, left chamber of heart full of blood and
right empty – stomach undigested food materials
and water.

Brain and skull N.A.D. (No abnormality
detected)

Urinary bladder -empty.

The cause of death was asphyxia (near
drowning) due to above mentioned ante mortem
injuries.

Time elapsed since death to P.M.
examination more than 24 hours.”

This witness further stated that post mortem report was in his writing and signature and it was marked as Ext. 2.

16. On examination of the evidence of P.W. 7 /Dr. Ravi Shankar Singh who conducted post mortem examination and also post-mortem examination report we are in agreement with the submission of Shri Mishra that post mortem report also does not support the version of the defence that it was a



case of drowning, rather it appears that dead body was having ante-mortem injuries and death had occurred due to *asphyxia*. The post-mortem report also makes it clear that lung was empty. Meaning thereby that no water was inhaled by the deceased.

17. The Investigating Officer was not initially examined by prosecution however, as Court Witness he was summoned and he was examined on 26.08.2013. In his evidence Shri Nageshwar Prasad Yadav/ the Investigating Officer of the case who on the date of evidence had already superannuated, identified the signature of Officer -in- charge on the F.I.R. and his writing, which was marked as Ext. 3. He also identified the endorsement of the Officer -in-charge on the written report, which was marked as Ext. 4. He identified inquest report, which has been marked as Ext. 5. During evidence he had also prepared seizure list relating to recovery of sleeper of the deceased, which has been marked as Ext. 6. After the appellant was handed over to Police in the next morning confessional statement of appellant was recorded by Police and same has been got marked as Ext. 7. He stated that on 16.02.2010 after *fardbyan*/ written report was recorded and



case was registered he was handed over investigation of the case. During investigation he inspected the place of occurrence. According to the evidence of this witness two place of occurrence was noticed by him. First was the house of the informant from where deceased was taken away by the appellant and another is in the village -Chakiya on the bank of Mahi river where deceased was allegedly murdered by strangulation and he was thrown in the river. During investigation he had recorded confessional statement of the appellant, which was marked as Ext. 7. In his evidence he stated that he recorded confessional statement of the appellant on 17.02.2010 in the morning at about 6.00 A.M. He accepted that appellant while was handed over by the informant and villagers, he was having altogether nine injuries. The sleeper was produced before him and he prepared production- cum- seizure list. He stated that in paragraph 9 of the case diary it was mentioned that his slipper was kept in *Malkhana*. Contradiction was taken in respect of previous statement of Nasima Parvin {P.W. 2} and Sayrun Begum (P.W. 8) which we have already discussed hereinabove. The inquest report i.e. Ext. 5 reflects that it was prepared on 17.02.2010 at about



8.30 A.M. near Bheldi near an under constructed Railway bridge over Mahi river. The confessional statement recorded by Police i.e. Ext. 7 makes it clear that appellant had made confessional statement before the Police. Since it was confession before Police it may not be treated as admissible evidence but only that part can be looked into which had led to recovery of the information which was within the knowledge of appellant i.e. bank of the river where son of the informant after strangulation was thrown and in the same river subsequently, after recording confessional statement dead body was recovered and inquest report was prepared. Confession of the appellant was recorded on 17.02.2010 at about 6.00 A.M. in the morning and inquest report has been prepared on the same day at 8.30 A.M. i.e. Ext. 5. However, at least four witnesses i.e. P.W. 1 , P.W. 4 , P.W. 5 and P.W. 6 were declared hostile though it was argued by Shri Harish Kumar, learned counsel for the appellant that none support of the prosecution case by four prosecution witnesses out of eight witnesses can be termed as fabrication of false case. The court is of opinion that merely because of the fact that some of the witnesses had not supported the prosecution case other



evidences, which are otherwise reliable, can not be ignored. The evidence of P.W. 2 and P.W. 8 is consistent on the point that deceased was lastly seen with the appellant. They are also consistent on the point that appellant made confession before them which had led the informant, his family members and other villagers to proceed to the place where dead body was thrown and thereafter, slipper of the deceased was found near the bank of the river. Accordingly, such evidence can not be ignored. Regarding animosity in the statement of the appellant recorded under Section 313 of the Cr.P.C. and other material on record, it is evident that appellant's wife who was deserted by him was got married with the brother of the appellant in which informant was instrumental. Informant in the written report itself has indicated that such event had created grudge in the mind of appellant and on number of occasions the appellant had given threat of consequences. It is true that in the case there is no eye witness to the actual occurrence but all the circumstances the connection of which has been established by prosecution are enough to come to conclusion that the learned trial judge has committed no error in passing judgment of conviction and sentence. The submission of



learned counsel for the appellant that the evidence of last seen is considered as a weak piece of evidence may not come into way in approving the judgment of conviction and sentence since it was not only a case of last seen of the deceased with the appellant, but disclosure made by the appellant to the witnesses regarding his culpability and recovery of the dead body. All those circumstances categorically establishes involvement of the appellant in the present case and as such, we are unable to accede to the submission made by learned counsel for the appellant that there is error in the judgment of conviction and sentence. Accordingly, judgment of conviction dated 20.09.2013 and sentence dated 23.09.2013 passed in Sessions Trial No. 373 of 2010 {arising out of Bheldi P.S. Case No. 11 of 2010, G.R. No. 484 of 2010 } is hereby approved. The appeal stands dismissed.

(Rakesh Kumar, J)

praful/-

(Anjani Kumar Sharan, J)

AFR/NAFR	AFR
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