

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.523 of 1996

1. Tuntun Chamar Son of Kuleshwar Das
2. Dina Nath Mochi alias Dina Nath Chamar Son of Ramdeo Mochi
Both resident of village Makhpa, P.S. Makhdumpur, District Jehanabad

... .. Appellants

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellants : Mr. Amish Kumar (Amicus Curiae)
Mr. Prince Kumar Mishra, Advocate
For the Respondent : Mr. Bipin Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH

and

HONOURABLE MR. JUSTICE CHANDRA PRAKASH SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

Date : 09-09-2022

The present appeal has been preferred 26 years ago, against the judgment of conviction and order of sentence dated 11.10.1996 passed by the 1st Additional District & Sessions Judge, Jehanabad in Sessions Trial No.14 of 1993 arising out of Makhdumpur P.S. case No.74 of 1986, whereby and whereunder the appellants have been convicted under Sections 148, 364/149 and 302/149 of the Indian Penal Code and have been sentenced to undergo R.I. for life under Sections 302/149 of the Indian Penal Code and R.I. for one year under Section 148 of the Indian Penal Code, but no separate sentence has been awarded to the appellants



under Sections 364/149 of the Indian Penal Code. Both the sentences of the appellants have been directed to run concurrently.

2. Prosecution case as per the statement of Lalti Devi (P.W.1) wife of deceased Ram Briksh Pandit recorded by S.I. of Makhdumpur P.S., in brief, is that about 5-6 days back, her husband Ram Briksh Pandit had gone to his native village Derhgaon and on 01.06.1986 at about 2:00 P.M. while she was at her house, she was told that some naxlites armed with rifle, pasuli, etc had caught hold of her husband Ram Briksh Pandit near Makfa Chamar Toli and her husband was being taken by them towards northern hillock. On getting this information, the informant along with her son rushed towards the said direction and when she reached near western side of Mian Pokhar, she saw that about 50 persons armed with rifle, gun and pasuli had tied the hands of her husband with rope and had kept him under a *neem* tree. The informant made request to release her husband, whereupon appellant Tuntun Chamar abused her and threatened to leave the place, otherwise she along with her children would also be killed. Accused Babu Chand, who held the rope, was also requested by the informant to release her husband, but he did not release him. Appellant Deenanath Mochi and accused Pradeep Mochi were also amongst the miscreants whom the informant identified, but she



could not identify the other miscreants. It is further alleged that after sometime the accused persons took away her husband towards east of the village. The informant started weeping but due to fear neither she nor any other villager dared to intervene. At this stage, her brother Harihar Pandit also came running and saw the accused persons taken persons taking away the husband of the informant. Thereafter the informant went to Makhdumpur Police Station along with her son and brother Harihar Pandit and gave her statement before the Officer-Incharge. On the basis of the statement of the informant, Makhdumpur P.S. case No.74 dated 01.06.1986 under Sections 147, 148, 341, 342/34 and 384 of the Indian Penal Code was instituted and the investigation was taken up. During course of investigation, on 03.06.1986, the I.O. received information that the dead body of Ram Briksh Pandit was found hanging with a tree at the place situated at a distance of about 500 yards south-east of village Dharaut, whereupon the Officer-Incharge reached there and found the dead body of deceased Ram Briksh Pandit hanging with a *Bargad* tree. There was also a letter (Ext-3) found alongwith the dead body of the deceased. As such, Section 302 I.P.C. was also added. Thereafter, the police submitted charge-sheet under Sections 147, 148, 149, 364 and 302 of the Indian Penal Code against five accused persons



including the appellants. The learned S.D.J.M., Jehanabad took cognizance of the offences and committed the case to the Court of Sessions and the trial court framed the charge under Sections 302/149, 148 and 364/149 of the Indian Penal Code against the accused persons including the appellants. The appellants pleaded not guilty and claimed to be tried.

3. During trial, the prosecution examined altogether six witnesses. Lalita Devi (P.W.1) is the informant of the case. Ram Lakhan Pandit (P.W.2) is son of deceased. Harihar Pandit (P.W.3) is brother-in-law of the deceased. Quasim Khan (P.W.4) is the Investigating Officer of the case. Md. Ashique is P.W.5. Ramanuj Prasad is P.W.6. The prosecution has also brought on record documents like the Inquest Report (Ext.2) and post-mortem report (Ext.4). Neither oral nor documentary evidence has been adduced on behalf of the defence.

4. By order dated 26.07.2022, Mr. Amish Kumar, learned advocate, was appointed as Amicus Curiae to represent the appellants at the cost of the State, as none had appeared on that date on behalf of the appellants.

5. Mr. Amish Kumar, learned Amicus Curiae, appearing for the appellants submits that the judgment of conviction and order of sentence are bad in the eye of law. The learned trial court has not



taken note of the lacunae in the case of the prosecution. It has been argued that the letter (Ext.3), which was found and seized with the dead body of the deceased, has not been proved by the prosecution to be in hand-writing of the appellants and the said letter also does not contain the name of the author. Therefore, in absence of the same, the involvement of the appellants with regard to murder of the deceased is concerned, becomes doubtful. Further, there is no eye-witness so far the commission of murder is concerned. Furthermore, the doctor, who conducted the *post-mortem* upon the dead body of the deceased, has not been produced as a prosecution witness during the trial and, as such, it has caused prejudice to the appellants. It has also been argued that the Informant (P.W.1) has denied the suggestion on motive in his cross-examination. Lastly, it has been contended that the *post-mortem* was conducted after 36 hours of the death.

6. Learned A.P.P. appearing for the State vehemently argues that during trial the prosecution has been able to prove the guilt of the appellants beyond all reasonable doubts. It has been argued that the present case is of abduction in order to commit murder. Therefore, in view of Section 106 of the Evidence Act, if the prosecution has been able to prove that the deceased was abducted in order to commit murder, then the burden will shift upon the



accused persons to explain the circumstances, which led to death of the deceased.

7. After hearing the arguments advanced by both the sides and perusing the material available on record, following issues arise for consideration: -

(I) Whether, in light of the evidence brought on record, the prosecution has been able to prove the charge of abduction in order to murder under Section 364 of the Indian Penal Code?

(II) Whether in the facts of the present case, Section 106 of the Evidence Act will be applicable and the burden to explain the circumstances which led to death of the deceased will be upon the accused persons?

8. In order to deal with the first issue, from perusal of record it appears that the prosecution has brought on record three witnesses P.W.1 (Informant), P.W.2 (son of deceased) and P.W.3 (brother-in-law of the deceased) on the point of abduction. We have perused the deposition of these witnesses and have found that they are consistent in their testimony. They have clearly stated that they saw the deceased was tied in ropes and the accused persons including the appellants were present armed with weapons. The Informant cried and requested the accused persons to release her



husband (deceased) but they did not release him. Rather, it has come in the depositions of P.W.1 and P.W.2 that when Informant requested for the release of her husband from the clutches of the accused persons, then Appellant No.1 Tuntun threatened the Informant and after abusing asked her to go away, else she would also be killed along with her children. Thereafter, the accused persons including the Appellants took the deceased with them. After three days, the dead body of the deceased was found hanging from the tree. We find that the prosecution has brought on record enough evidence by way of depositions of P.W.1, P.W.2 and P.W.3, who have witnessed the abduction of the deceased by the accused persons including the appellants.

The another requirement for attracting Section 364 of the Indian Penal Code is that the abduction should be done for the purpose of committing murder. On this point, we find it relevant to underscore here, that the threatening given to the Informant, by Appellant Tuntun that she along with her children would also be killed along with the fact that the accused persons had tied the deceased by ropes clearly indicates that the intention of the accused persons was that of murdering her husband. We are conscious of the fact that it can be argued that such words of threatening given to the Informant by the appellant Tuntun could



be put into the mouth of the accused persons during trial, by a related witness, in order to aggravate the offence. However, from the record it is apparent that the fact regarding threatening given by Appellant Tuntun is also mentioned in the fard-beyan of the Informant (Ext.1) and at that time the deceased was alive. Therefore, in view of the totality of circumstances, the intention of the accused persons including the appellants to commit murder of the deceased after abduction was evident at the time of abduction itself. Thus, we have no difficulty in reaching to the conclusion that the accused persons, including the appellants, had abducted the deceased for the purpose of murder.

At this juncture, we would refer with benefit to the judgment of the Hon'ble Supreme Court rendered in the case of ***State of west Bengal vs. Mir Mohammad Omar and Others*** reported in ***(2000) 8 SCC 382*** wherein the Hon'ble Supreme Court, in the similar facts, has observed as follows: -

“12.Abduction takes place when a person is compelled by force (or such person is induced by any deceitful means) to go from any place. In this case Mahesh was dragged away by the accused from two places, first at Chittaranjan Avenue and when he escaped from the grip of the abductors and perched himself in a hide out selected by him at Giri Babu Lane, from there also he was hauled out.



13. Section 364 IPC says, whoever abducts any person "in order that such person may be murdered or disposed of as to be put in danger of being murdered" he commits the offence punishable under the Section. So the important task of the prosecution was to demonstrate that abduction of Mahesh was for murdering him. Even if the murder did not take place, the offence would be complete if the abduction was completed with the said objective. Conversely, if there was no such objective when the abduction was perpetrated, but later the abductors murdered the victim, Section 364 IPC would not be attracted, though in such a case the court may have to consider whether the offence of culpable homicide (amounting to or not amounting to murder) was committed.

14. If the words attributed to the abductors can be believed we have no doubt that the abduction was done for the purpose of finishing him off. Knowing this position well, Sri P.S. Misra, learned Senior Counsel made a frontal criticism on the aforesaid evidence and contended that it is easy for interested witnesses to put such words in the mouth of the accused in order to aggravate the dimension of the offence. No doubt, witnesses can do so. But the question here is whether the aforesaid version of those witnesses was a concoction to embroil the abductors into the cobweb of a serious offence like Section 364 IPC. The reliability of that part of the evidence can be tested from different angles.



15. First is, even in the FIR PW-5 had quoted those words as spoken to by A-1, It must be noted that when FIR was given PW-5 had no reason to believe that Mahesh was not alive. If Mahesh had come back alive it is doubtful whether police would have seriously followed up the FIR. Next is, the temper which the assailants exhibited in the house of the deceased's sister (when she was the sole inmate present therein), is broadly indicative of the truculence of the intruders that they went there with some definite purpose. Mahesh was once caught by them on that night itself by PW-4 and then he was badly handled by them, If their intention was only to inflict some blows on the victim they would have stopped with what they did to him at that stage. But when Mahesh struggled and extricated himself from their clutches and escaped to another place at Giri Babu Lane these accused did not stop and they persisted in prowling for their prey and succeeded in tracing him out from that different area and hauled him out violently. Such repeated chase for Mahesh could, in all probabilities, be for his blood. Thus, all the broad features of this case eloquently support the version of the witnesses to conclude that the words attributed to the accused were really uttered by them.

16. For the aforesaid reasons, we have no difficulty to conclude that all the accused abducted Mahesh in order to murder him.”



Hence, in light of the evidence brought on record by the prosecution and the judgment referred above, we are of the considered opinion that the prosecution has been able to prove the charge under Section 364 of the Indian Penal Code against the appellants by bringing on record enough evidence.

9. So far the second issue is concerned, we find that the dead body of the deceased was found after three days from the date of abduction of the deceased. The dead body of the deceased was found hanging from a tree. The deceased was last seen by the Informant and others, when the accused persons including the appellants had taken him with them by abducting him. In the said facts of the case, it will be in the special knowledge of the accused persons including the appellants as to how the deceased died. We are of the opinion that the principle embodied in Section 106 of the Evidence Act will be applicable and the burden will be on the appellants to explain the death of the deceased. After minutely examining the record, we find that the appellants have not explained as to how the deceased has died. They have not disclosed anywhere that as to when they released the deceased from their custody or when the deceased parted with their company. Therefore, they have not discharged their burden. Thus, it has to be presumed that the appellants have caused the death of



the deceased. In this regard, we rely upon the case of **Mir Mohammad Omar (supra)** wherein the Hon'ble Supreme Court has observed the following: -

“33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reach a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case.

34. When it is proved to the satisfaction of the court that Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the court to draw the presumption that the accused have murdered him. Such inference can be disrupted if accused would tell the court what else happened to Mahesh at least until he was in their custody...

36. In this context we may profitably utilise the legal principle embodied in Section 106 of the Evidence Act



which reads as follows: "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

37. The section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference.

38. Vivian Bose, J., had observed that Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. In Shambu Nath Mehra v. The State of Ajmer the learned Judge has stated the legal principle thus:

This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are 'especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word 'especially' stresses that. It means facts that are pre-eminently or exceptionally within his knowledge."



Therefore, applying the aforesaid proposition of law in the facts of the present case, we are of the considered opinion that Section 106 of the Evidence Act will be applicable in the present case and the burden to explain the circumstances which led to death of the deceased will be upon the accused persons. However, this burden has not been discharged by the appellants.

10. In view of the findings arrived at on the issues formulated above and the law adumbrated by the Hon'ble Supreme Court in *Mir Mohammad Omar (supra)*, we are of the considered opinion that since the prosecution has been able to satisfactorily prove, by way of ocular evidence, that the deceased was abducted by the appellants for the purpose of committing murder and the appellants have not been able to discharge their burden by explaining as to how the deceased died, the learned trial court has rightly convicted the appellants.

11. Therefore, the present appeal is dismissed. The judgment of conviction and order of sentence dated 11.10.1996, passed by the 1st Additional District & Sessions Judge, Jehanabad in Sessions Trial No.14 of 1993 arising out of Makhdumpur P.S. case No.74 of 1986, are hereby affirmed. Since the appellants are on bail, therefore, their respective bail bonds are cancelled and



they are directed to be taken into custody for serving the remaining part of their sentence.

12. Before parting with this appeal, we record our appreciation for the able assistance rendered by Mr. Amish Kumar, learned advocate, appointed as Amicus Curiae, who has assisted this Court in this appeal. Therefore, as a gesture of appreciation we direct the Patna High Court Legal Services Committee to pay a sum of Rs.5000/- to Mr. Amish Kumar, learned advocate, appointed as Amicus Curiae by this Court by order dated 26.07.2022.

(Sudhir Singh, J)

(Chandra Prakash Singh, J)

Narendra/-

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