

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.568 of 2017

Arising Out of PS. Case No.-100 Year-2011 Thana- BARARI District- Katihar

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Imam Hussain, S/o Md. Nazrul @ Najrul Haq, R/o Village - Baisha
Govindpur, P.S. - Barari, District – Katihar.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Akash Keshav, Adv. (*Amicus Curiae*)
For the State : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and

HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 27-07-2023

There is no appearance on behalf of the

appellant/Imam Hussain.

2. Mr. Akash Keshav, the learned Advocate,

has been requested to assist this Court in this matter as

an *Amicus*.

3. Mr. Keshav has agreed to such request.

4. Heard Mr. Akash Keshav for the appellant

and Mr. Bipin Kumar for the State.

5. The appellant, who is the first cousin of



the deceased and is alleged to have killed his cousin, has been convicted for the offence under Section 302 of the Indian Penal Code *vide* judgment dated 14.01.2013 passed by the learned Addl. District and Sessions Judge-II, Katihar in Sessions Trial No. 510 of 2011, arising out of Barari (Semapur) P.S. Case No. 100 of 2011 (G.R. No. 1791 of 2011), and by order 19.01.2013, he has been sentenced to undergo R.I. for life for the said offence.

6. The conviction of the appellant is based on the deposition of the mother of the deceased, namely, Feratun Nisha, who has been examined as P.W. 1 in this case.

7. Before analyzing the evidence of aforesaid Feratun Nisha (P.W. 1), it is necessary to record certain facts.

8. The F.I.R. was lodged by Md. Shamsheer Ali (P.W. 7), who is the uncle of the deceased, alleging that on 14.07.2011, while he was in his field, his



son/Md. Naim, aged about eight years, came and informed him that a boy has died near Kunda-Bahiyar. On such information, he left the field along with his son and came back home. He did not find anybody at his home. He has further stated that on hearing a rumour, his family members had gone to Kunda-Bahiyar and there, they had found the dead-body of Sahiba Khatoon, his niece. The deceased, according to the informant, had gone to Kunda-Bahiyar for scraping grass. Many persons of the village arrived on *hulla*, who found the dead-body.

9. On the basis of the afore-noted *fardbeyan* statement, Barari (Semapur) P.S. Case No. 100 of 2011, dated 14.07.2011, was registered for investigation for offence under Section 302/34 of the I.P.C. against unknown.

10. During the course of investigation, the suspicion fell on the appellant, who was arrested and was put on trial.



11. The learned Trial Court, after examining ten witnesses on behalf of the prosecution, convicted and sentenced the appellant as aforesaid.

12. The learned *Amicus* has taken us to the entire deposition of all the witnesses and has submitted that from the circumstances narrated in the deposition of P.W. 7, the informant and P.W. 1, who is the mother of deceased.

13. P.W. 1 appears to have lied before the police as also before the Court. It has further been submitted that the informant (P.W. 7) has not supported the prosecution case and has been declared hostile. Two other witnesses, namely, P.Ws. 3 and 4 have also been declared hostile. Out of ten witnesses, P.Ws. 5, 6 and 10 are formal. Thus, the only evidence for convicting the appellant is the deposition of the mother of the deceased, whose statement but is not in consonance with the prosecution version.

14. Apart from this, it has been urged that



the charge against the appellant was under Section 376 of the I.P.C. also along with Section 302 I.P.C., but no evidence could be found with regard to any sexual attack on the deceased prior to her death and precisely for that reason, no conviction was recorded under Section 376 I.P.C. Even if, it has been argued, the deposition of P.W. 1 is believed, the only circumstance which is revealed is that the appellant had accompanied the deceased to Kunda-Bahiyar, who, himself, had come back and had told P.W. 1 that the deceased has been killed by somebody. This could be a circumstance to be taken as a starting point for the police to investigate, but no other circumstance, in chain, appears to have been brought by the prosecution for definitely accusing and charging the appellant for having killed his cousin, who stayed in the same house but with separate kitchen.

15. As opposed to the afore-noted arguments, Mr. Bipin Kumar, the learned APP has



submitted that the case is an open and shut case and there is no reason to disbelieve the mother of the deceased, who does not have any inimical relation with the family of the appellant. The appellant himself had informed P.W. 1 about the death of the deceased and at that time, P.W. 1 had seen blood spots on the hands of the appellant. She had even confronted the appellant that who else but him would have killed the deceased.

16. The other circumstance pointed out by the State is also based on the statement of P.W. 1 that along with the appellant and the deceased, another son of P.W. 1 had also accompanied them, but he was made to return home forcibly by the appellant. This act, therefore, unerringly points towards the appellant having taken the deceased to a desolate place and of having killed her. Even if no motive for killing the deceased could be established, but in criminal cases, it has been argued, where the evidence is complete with respect to the killing of the deceased, motive takes a



backstage and is not to be insisted upon to be proved for the prosecution to become successful.

17. On these grounds, it has been urged by the counsel for the State that the Trial Court was absolutely justified in convicting and sentencing the appellant.

18. The F.I.R. is lodged by the uncle of the deceased, who incidentally is the uncle of the appellant as well. No suspicion was raised by him. We have seen from the evidence of other witnesses that the family members of the informant had gone to Kunda-Bahiyar on learning about the death of a child. If this information was disseminated to him by his son/Md. Naim, Naim would have known that the deceased was none else but Sahiba Khatoon and this fact would have come to the knowledge of P.W. 7 through Md. Naim only. He came to know about deceased having been killed when he went to Kunda-Bahiyar.

19. The First Information Report was



lodged on 14.07.2011, which was recorded by one Chhote Lal Paswan, who has not been examined in this case. The case was investigated by Mr. Mahesh Sharma, who has been examined as P.W. 8.

20. His evidence completely discredits the deposition of P.W. 1, the mother of the deceased, which we shall see later.

21. On 14.07.2011, P.W. 8 was posted in Shyamapur Police Station as an A.S.I. He has proved the First Information Report (Exhibit-2) as he identified the handwriting of Chhote Lal Paswan. The case was handed-over to him for investigation. During the course of investigation, he claims to have gone to the place where the dead-body was found and, thereafter, recorded the statement of the mother of the deceased (P.W. 1) and others who also have been examined at the trial, but have not disclosed anything incriminating against the appellant. He has further deposed before the Trial Court that in order to unravel the mystery



regarding the death of the deceased, he deputed one spy. Later, he learnt secretly that the appellant was responsible for killing of the deceased and that he had been hiding in his maternal uncle's house falling under the jurisdiction of Barari (Semapur) Police Station. He, on such information, raided the house of Md. Nizam, the maternal uncle of the appellant and arrested the appellant from there.

22. Be it noted that even the inquest report was not prepared by P.W. 8. The inquest report had been prepared by Chhote Lal Paswan only, who, as we have noted, has not been examined as a witness.

23. With this statement of P.W. 8, it becomes clear that the information about the appellant having killed the deceased was not through the mother of the deceased, but on the information provided by the spy or else on the statement of P.W. 1, search would have been made and the appellant would have been arrested. It, therefore, appears that the deposition



made by P.W. 1, the mother of the deceased, is only an afterthought in order to put a seal on the theory proposed by the prosecution based on the information of a spy that the deceased has been killed by the appellant. We say so for the reason that till the inquest report was prepared and the dead-body was sent for *post mortem* examination, there was no whisper about the deceased having been raped and killed by the appellant. A U.D. case was registered with respect to a dead-body found in a desolate place near a water-body. Only after an information through spy came forth to the knowledge of P.W. 8 that this story has been spun in by the prosecution that nobody else except the appellant would have killed the deceased.

24. In this background, we need to examine the evidence of the informant (P.W. 7) and the mother of the deceased, namely, P.W. 1.

25. P.W. 7 has been declared hostile at the trial. He has though repeated the story told by him in



the *fardbeyan* but has stated that in this case, the appellant was arrested by the police. The police had never recorded his further statement and after the lodging of the First Information Report, he had deposed for the first time in Court. At this juncture, he was declared hostile by the prosecution. He has admitted that the deceased is his niece, whereas the appellant is his nephew.

26. Feratun Nisha (P.W. 1), who is the mother of the deceased, has a very interesting story to narrate. Had such story been true, there would have been no doubt in accepting the prosecution case, but the sequence of events narrated by her does not fit in the sequence of the rumour about the death of a child near Kunda-Bahiyar; people approaching the place where the dead-body was found; F.I.R. being lodged by P.W. 7, who too had gone to Kunda-Bahiyar where he had seen the dead-body of his niece and where P.W. 1 also was present; but the F.I.R. was registered against unknown.



27. The quality of the evidence of P.W. 1 is required to be analyzed in this background.

28. P.W. 1 has alleged that the appellant came and informed her that the deceased has been killed. She has further deposed that the deceased had gone along with the appellant and her another son to Kunda-Bahiyar, but from near the banks of the water-body, her son was made to return home. When the appellant had come to her, she found blood spots on his clothes and on his hands. She confronted the appellant that the deceased had accompanied him and, therefore, he ought to know who had killed the deceased. Thereafter, she left for Kunda-Bahiyar to find the dead-body of her daughter. If this story is correct, then she would have told about this to P.W. 7, who had also gone to Kunda-Bahiyar and had found the deceased lying dead with her lower garment pulled-down. The story of P.W. 1, therefore, at this point only becomes contaminated with conjured up facts.



29. There is yet another aspect to this part of the story.

30. If P.W. 1 could see blood spots on the clothes of the appellant and had entertained doubts about the appellant having killed the deceased, there was no reason for her to let the appellant go. The normal conduct of P.W. 1 would have been, under such circumstances, to get the appellant avested or take him along with her to Kunda-Bahiyar for finding out the dead-body. Thus, the whole story narrated by P.W. 1 becomes redolent with such suspicion that her deposition does not inspire confidence that it is the correct version.

31. The conduct of an accused could be relevant but if the whole story is disbelieved, such conduct cannot be factored in for coming to any right conclusion.

32. Section 8 of the Evidence Act provides that any fact would be rendered relevant if it shows or



constitutes a motive or preparation for any fact in issue or relevant fact. The conduct of any party, or of any agent to any party, to suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, to conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant, and whether it was previous or subsequent thereto.

33. Two explanations have been appended to Section 8 of the Evidence Act, both of which assume immense importance. The word 'conduct' in Section 8 does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of the Act and when the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct is relevant.



34. Had it been the intention of the appellant to create a defense for himself, showing his innocence against the act of murder of the deceased, he may have resorted to informing the mother of the deceased about death so as to divert the gaze of the family members from him and this could be a relevant fact. This piece of evidence would have become even more glaring when P.W. 1, the mother of the deceased, would have really seen blood drops on the clothes of the appellant.

35. Whether the appellant would display such naivety is not the question. The consideration is that in the event of the entire version of P.W. 1 having been demolished to the ground, if seen in the context of the deposition of the I.O., this is no conduct admissible under Section 8 of the Evidence Act for the Trial Court to have relied upon it for convicting the appellant. Precisely for this reason, neither P.W. 7 nor any member of the family of the appellant or the deceased



have supported the prosecution case.

36. Under normal circumstance, it would have been really necessary for the appellant to have explained as to how the deceased was killed, but that requirement would have been expected of him only if it were to be believed that the deceased was accompanied by the appellant in the first instance to Kunda-Bahiyar. But for the statement of P.W. 1, such fact has not been deposed to by any one of the witnesses. The most relevant persons in this regard would have been Md. Naim (son of the informant) or Habib, another son of P.W. 1, who was made to return half way at the insistence of the appellant.

37. Thus, we do not even know whether the appellant had accompanied the deceased to Kunda-Bahiyar where her dead-body was found.

38. If this evidence would have been garnered during the trial, namely, the appellant accompanying the deceased to Kunda-Bahiyar, the place



where the dead-body was found, the appellant would surely have been required to explain as to when she was killed and by whom and if the appellant had not seen such act, then he was also required to explain as to when did he leave the company of the deceased for her to be killed by somebody else.

39. As noted-above, we have entertained doubts about the very fabric of the prosecution case that the appellant ever accompanied the deceased for scraping grass.

40. Let this be tested from the other evidence on record.

41. There appears to be a definite motive of P.W. 1 of alleging against the appellant of having killed the deceased. In her anxiety to anyhow bring home the charges against the appellant, an allegation of sexual assault also has been raised. The appellant was charged for the offence under Section 376 of the I.P.C. as well along with Section 302, but no evidence could



be gathered. The doctor did not find any evidence of sexual assault on the body of the deceased. The deceased appeared to have died because of strangulation.

42. What could have been the motive for falsely implicating the appellant?

43. We have no acrobatic feats to know the mindset of P.W. 1, the mother of the deceased. It could be either strained relationship between the family of the appellant and the family of P.W. 1 or P.W. 1 was only trying to tow the line of the prosecution, especially that of the investigator, who was, somehow or the other, informed by the spy that possibly the appellant had committed the murder.

44. We are at a loss to understand as to why at all the deceased would be murdered by the appellant. They are cousins and the deceased has not been sexually assaulted.

45. A shortcut approach appears to have



been adopted by the police, which has been unwittingly supported by P.W. 1 for reasons unknown to us in pointing and accusing finger towards the appellant and holding him liable for the murder of the deceased.

46. With these evidence on record, benefit of doubt is required to be given to the appellant, who, we are told, is in custody for about twelve years by now.

47. We, therefore, set aside the impugned judgment of conviction dated 14.01.2013 and the consequent order of sentence dated 19.01.2013 passed by the learned Addl. District & Sessions Judge-II, Katihar in Sessions Trial No. 510 of 2011, arising out of Barari (Semapur) P.S. Case No. 100 of 2011 (G.R. No. 1791 of 2011) and acquit the appellant/Imam Hussain of the charges levelled against him.

48. Since the appellant, viz., Imam Hussain, is in custody, he is directed to be set at liberty forthwith unless his detention is required in any other case.



49. The appeal stands allowed.

50. Let a copy of this judgment be dispatched to the Superintendent of the concerned Jail forthwith for compliance and record.

51. The records of this case be returned to the Trial Court forthwith.

52. Interlocutory application/s, if any, also stand disposed off accordingly.

53. Before parting, we direct the Bihar State Legal Services Authority to pay an amount of Rs. 2,500/- (Rupees Two Thousand Five Hundred) to Mr. Akash Keshav, the learned *Amicus* as a consolidated fee for the services rendered by him. We acknowledge his able assistance in this case.

(Ashutosh Kumar, J)

(Vipul M. Pancholi, J)

Praveen-II/K.C. Jha

AFR/NAFR	AFR
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