

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.3800 of 2018**

Arising Out of PS. Case No.-208 Year-2017 Thana- CHANPATIA District- West Champaran

Birgun Sah, S/o Lotan Sah, R/o Village- Bhikhampur Bijbaniya, P.S.- Sirisiya
O.P., District- West Champaran.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Bimlesh Kumar Pandey, Adv.
For the Respondent/s : Ms. Anita Kumari Singh, APP

**CORAM: HONOURABLE MR. JUSTICE SHAILENDRA SINGH
ORAL JUDGMENT**

Date : 24-08-2023

1. Heard Mr. Bimlesh Kumar Pandey for the appellant
and Ms. Anita Kumari Singh for the State.

2. This appeal has been filed against the judgment of conviction dated 21.07.2018 and order of sentence dated 28.07.2018 passed by the learned District and Sessions Judge, West Champaran at Bettiah in S.Tr. No. 539/2017 arising out of Chanpatiya P.S. Case No. 208 of 2017, whereby and whereunder the sole appellant/Birgun Sah has been convicted for the offences punishable under Sections 304 Part II and 201 of the Indian Penal Code (in short IPC) and has been sentenced to undergo rigorous imprisonment for eight years and to pay a fine of Rs. 5000/-, in default of which, to further suffer imprisonment for a period of six months for the offence punishable under Section 304 Part II of IPC and rigorous imprisonment for three years for the offence



punishable under Section 201 of IPC. The sentences have been ordered to run concurrently.

3. The substance of the prosecution's case is that on 11.06.2017 at about 7:30 A.M., the informant's daughter namely Deepa Kumari aged about 7 years was playing near the door of her house, in the meantime the appellant/accused, who happens to be husband of the informant and father of the victim, came along with a *spade* and thereafter inflicted *spade* blows on the victim's neck and other parts of her body resulting in her death on the spot of occurrence. The informant further alleged that the appellant/accused and co-accused Nippu Sah took the body of the victim near the bank of *Tilawe* river after the commission of the alleged occurrence where they concealed the body of the victim (deceased).

4. After completion of the investigation, the police chargesheeted the appellant and kept the investigation pending against co-accused Nippu Sah and after cognizance, the case of the appellant was committed to the Court of Sessions and the appellant was charged for the offences punishable under Sections 302 and 201 read with 34 of IPC. During his trial, altogether 11 prosecution witnesses were produced and examined by the prosecution. In



documentary evidence, the following documents were produced, proved and marked as Exhibits :-

(i) Ex. 1 : Signature of one Kanhaiya Sah on the Inquest Report

(ii) Ex. 2 : An endorsement on Written Petition

(iii) Ex. 2/A : An endorsement by Chanpatia P.S.

(iv) Ex. 3 : Formal FIR

(v) Ex. 4 : Inquest Report

(vi) Ex. 5 : Seizure list of Spade (*Kudal*)

(vii) Ex. 6 : Postmortem Report

5. After the completion of the evidence of the prosecution, the statement of the appellant was recorded by the trial court explaining the circumstances appearing against him from the prosecution evidences which were denied by the appellant and he claimed himself to be innocent but he did not say anything in his defence. The appellant did not give any evidence in his defence.

6. The learned trial court convicted the appellant mainly relying upon the recovery of the dead body of the deceased and the spade, which was allegedly used in assaulting the victim, in following with the information given by the appellant after placing reliance upon the provisions of Section 27 of Indian Evidence Act.



7. It has been argued by learned counsel for the appellant that the appellant has been wrongly convicted for the alleged offences as the facts and evidences relating to the recovery of the dead body and the alleged weapon are not admissible in evidence and also not reliable and the most important witness, who is the informant, turned hostile and the evidence of other witnesses is also not sufficient to justify the conviction of the appellant and it is further argued that in actual the informant is not an eye-witness of the alleged occurrence as clearly evidents from the facts of the FIR.

8. Learned APP for the State has vehemently opposed the appeal and submitted that the appellant happens to be father of the deceased and his wife, who lodged the FIR (Exhibit-3), clearly made the allegation that it was the appellant who killed his seven years old daughter and the informant was an eye-witness of that occurrence and the dead body of the victim which was concealed by the appellant in *Tilawe* river was recovered in following with the information given by the appellant and thereafter the spade which was used by the appellant in the alleged crime was also recovered in following with the said information and these evidences are sufficient to prove the offences for which the



appellant has been convicted and there is no force in the instant appeal and the same is liable to be dismissed.

9. I have heard both the sides, perused the evidences available on the case record and also taken into account the statement of the convict. The main points for consideration are : -

(i) Whether the appellant killed his young daughter by inflicting spade blows on her body and thereafter disappeared her body by throwing it into a river ?

(ii) Whether the evidences given by the prosecution during trial are sufficient to prove the alleged offences or not ?

10. As per the FIR, the informant is an illiterate lady and she appears to be an eye-witness of the alleged occurrence, though the learned counsel for the appellant has argued that the informant is not an eye-witness of the alleged occurrence as the facts of the FIR clearly go to show that neither any resistance was made by the informant against the alleged occurrence being committed by the appellant nor any expression such as crying or raising an alarm or *hulla* was made by her when the appellant was inflicting spade blows on the body of the victim.

11. As per the FIR, the informant appears to be the most important witness of the prosecution as the prosecution has



claimed about her as she being sole eye-witness of the alleged occurrence. The informant was examined as P.W. 9 but she turned hostile. In the *Examination-in-Chief*, she did not say anything to support the allegations levelled by her in the FIR and the prosecution could not have elicited any fact to support the allegations in her cross-examination. The said witness simply deposed in her *Examination-in-Chief* that her daughter (victim) had gone out of her house to play and thereafter on hearing *hulla* she came out but did not find her daughter, after that she found the dead body of her daughter at the bank of *Tilawe* river and she became unconscious on seeing the dead body. The facts as stated by informant are completely contradictory to the facts of the FIR. It is important to mention that the informant is an illiterate lady so definitely she got the FIR written from some other person but in this regard the prosecution did not give the details of the person who had written the FIR and in this regard the Investigating Officer (P.W. 10) was cross-examined, who deposed in his cross-examination in para 10 that he did not investigate about the person who wrote the FIR. The said fact raises the possibility of giving the written information by someone to the police by taking thumb impression of the informant on it and there is no reliable material to show that the informant had got the knowledge of the facts of



the FIR before lodging the same and the said situation raises the possibility of misusing the illiteracy of the informant. As per the prosecution, the dead body of the victim was recovered from the bottom of *Tilawe* river on the basis of information given by the appellant and the said information was mainly relied upon by the learned trial court in view of Section 27 of the Indian Evidence Act. No doubt, an information leading to recovery of any relevant fact or article given by the accused in police custody is admissible in evidence as per the provision of Section 27 of the Indian Evidence Act but the prosecution is bound to prove such information. In normal course such type of information is recorded in writing but in the present matter the prosecution did not give any details regarding the form in which the appellant gave the said information leading to the recovery of the dead body of the victim nor the information was reduced in writing by the Investigating Officer and in this regard the Investigating Officer made a vague statement in his deposition. In respect of the recovery of the dead body of the victim, an inquest report (Exhibit 4) was prepared and the same was proved but it also does not show that the body of the victim was recovered in following with an information given by the appellant. The inquest report was prepared before two persons namely Kanhaiya Sah and Ashok Sah. But Ashok Sah was not



produced and examined by the prosecution, though Kanhaiya Sah was examined as P.W. 1 but he simply identified his signature on the inquest report and his evidence is also not sufficient to prove the information given by the appellant leading to the recovery of the dead body. Accordingly, the information which is stated to have been given by the appellant and leading to the recovery of the dead body of the deceased is inadmissible in the eyes of law and the learned trial court wrongly placed reliance upon the said information.

12. As per the allegation, the appellant used a spade in inflicting injuries to the victim. According to the evidence of the Investigating Officer, the said weapon was recovered from *Tilawe* river just some meters away from the recovery of the dead body in following with the statement made by the appellant. Though, the Investigating Officer prepared a seizure memo (Exhibit 5) regarding the recovery of the said spade in presence of two persons namely Sukhal Sah and Kanhaiya Sah and both were examined as P.W. 1 and P.W. 5 respectively but prosecution witness Sukhal Sah turned hostile and P.W. 1 Kanhaiya Sah did not say anything about the information on which basis the spade was recovered and he simply identified his signature on the recovery memo (Exhibit 5).



13. Like the information which is stated to have led to the recovery of the dead body of the victim, the second information concerned to the recovery of spade was also not proved by the prosecution during trial of the appellant which goes against the prosecution and also creates a serious doubt in prosecution's case. Here, it is important to mention that the spade recovered during the course of investigation, which is stated to have been used by the appellant in the alleged occurrence, was not sent to FSL for examination to find out any blood stain of the victim on it and also to confirm the same having been used in the alleged crime and the said negligence also goes against the prosecution. During trial, the prosecution failed to produce the alleged recovered spade before the trial court as a material object and this flaw also makes the prosecution's case weak.

14. The prosecution did not give any evidence to show that the recovered spade was having any stain of blood on it, so merely on the basis of recovery of the said spade it cannot be deemed that the same was used in the alleged crime. Here, it is pertinent to mention that the investigating officer (P.W. 10) deposed in para 11 of his cross-examination that the dead body of the victim had been sent for the *post-mortem* examination before the investigation was handed over to him and in para 8 he stated



that on the basis of information given by the appellant the dead body of the victim was recovered. From the said statements of the investigating Officer, one thing is quite clear that the information which is stated to have been given by the appellant might have been recorded by some other police official but regarding the said official, no details was given by the prosecution during trial.

15. In the present matter, except P.W. 1, P.W. 10 (I.O.) and P.W. 11 (Medical Officer) who conducted the *post-mortem* examination of the body of the deceased, all other prosecution witnesses were declared hostile including the informant P.W. 9. P.W. 1 simply proved his signature on the recovery memo. P.W. 10 (I.O.) failed to prove the information which is stated to have been given by the appellant leading to the recovery of the dead body of the victim and spade which was allegedly used in the crime and P.W. 11 (Medical Officer) simply proved the external and internal injuries found on the body of the deceased as well as cause of death of the deceased and the evidence of these witnesses is not sufficient to justify the conviction of the appellant for the offences punishable under Sections 304 Part II and 201 of IPC. Accordingly, this Court is of the considered view that the prosecution failed to prove the alleged offences beyond reasonable doubt against the appellant and the



evidence of the material witnesses, informant and Investigating Officer was not properly appreciated by the learned trial court and there is no sufficient evidence to justify the conviction of the appellant, hence the judgment impugned convicting the appellant and the order impugned sentencing the appellant for the offences punishable under Sections 304 part II and 201 of IPC are hereby set aside and the instant appeal stands allowed. Since the appellant is in jail, he is directed to be released forthwith, if his custody is not required in any other case.

16. Let the judgment's copy be sent to the concerned court and Jail Superintendent for immediate compliance of this judgment.

17. Let the LCR be sent back to the trial court.

(Shailendra Singh, J)

annu/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	29.08.2023
Transmission Date	29.08.2023

