

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.146 of 2017

Arising Out of PS. Case No.-60 Year-2011 Thana- RASULPUR District- Saran

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Pawan Tiwari, Son of- Radhaesharan Tiwari @ Ragho Sharan Tiwari
Resident of Village- Rasulpur P.S. Rasulpur, District Saran at Chapra.

... .. Appellant

Versus

The State Of Bihar

... .. Respondent

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Appearance :

For the Appellant/s	:	Mr. Ansul, Advocate
		Mr. Chandra Mohan Jha, Advocate
For the Respondent/s	:	Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH

and

HONOURABLE MR. JUSTICE CHANDRA PRAKASH SINGH

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

Date : 21-08-2023

Heard learned counsel for the appellant and learned A.P.P.
for the State.

2. The present criminal appeal has been preferred against the judgment of conviction dated 22.11.2016 and the order of sentence dated 02.12.2016, passed by Sri Birendra Kumar Mishra, Xth Additional Sessions Judge, Saran, Chapra in Sessions Trial No. 786/2011, arising out of Rasulpur P.S. case No. 60/2011, whereby and whereunder the appellant has been convicted for the offence under Sections 302 and 201 of the Indian Penal Code and sentenced to life imprisonment and a fine of Rs. 5000/- under section 302 of the Indian Penal Code, and five



years rigorous imprisonment and a fine of Rs. 3,000/- under Section 201 of the Indian Penal Code, and in default of payment of fine, the appellant has been directed to undergo additional rigorous imprisonment of two years and one year under Sections 302 and 201 respectively of the Indian Penal Code. It was further directed that the sentences so imposed shall run concurrently.

3. The prosecution case, as per the written report of the informant, is that the informant is resident of village Rasulpur. On 10.06.2011, the informant's son was sitting at his shop, around 11 a.m., the appellant, of the same village, came to the shop of informant and took his son along with him for some work. After three hours, when the informant's son did not return then the informant called his son on his mobile but it was found switched off. The informant further stated that at 8.00 p.m., he met with the appellant and asked about his son, on which he told that he got back his son from *Asahni* and left him near *Machhlihatta*. Thereafter, the appellant refused to say anything. The informant suspected that after calling his son, the appellant got him kidnapped.

4. On the basis of written report of the informant (PW 5), Rasulpur P.S. case No. 60 of 2011 was registered under Sections 365 and 120B of the Indian Penal Code and investigation was



taken up. In course of investigation, Sections 364, 302 and 201 of the Indian Penal Code were added. On completion of investigation, a charge-sheet was submitted under sections 364, 302, 120B, 201 of the Indian Penal Code vide Charge-sheet No. 77/2011 dated 08.09.2011. The learned jurisdictional Magistrate took cognizance of the offence. Thereupon charges were framed against the appellant to which the appellant pleaded not guilty and claimed to be tried.

5. During trial, the prosecution examined altogether nine witnesses, namely, PW1 Chandra Kumar Soni, PW2 Manoj Soni, PW3 Juganu Prasad Soni, PW4 Pradeep Kumar Gupta, PW5 Ramsudin Soni (the informant), PW6 Dr. Ravi Shankar Singh (doctor), PW7 Ramrati Devi, PW8 Surendra Paswan, PW9 Amit Kumar Manjhi. Prosecution has also produced exhibits as Ext. 1 -fardbeyan, Ext. 1/1 -formal F.I.R., Ext. 2 post-mortem report, Ext. 3 signature on fardbeyan, Ext. 4 signature on inquest report, Ext. 1/2 and 1/3 signature on inquest report. The defence has also produced five witnesses viz. DW1 Girish Tiwari, DW2 Meena Devi, DW3 Krishna Prasad, DW4 Farida Khatoon, DW5 Baliram Mishra and DW6 Rajesh Pandey in support of its case. Thereafter, the statement of the appellant was recorded under section 313 of the Cr.P.C. After conclusion of the trial, the learned



Trial Court convicted and sentenced the appellant in the manner indicated above.

6. The learned counsel for the appellant has submitted that the trial of case suffers from several infirmities that have been overlooked by the learned trial Court. Therefore, the impugned judgment is not sustainable in the eyes of the law. It has been argued that the appellant had just come to the shop of the informant (PW 5), from where the deceased and appellant went together to a village called *Asahani* for work. Afterward, they parted ways at *Macchlihatta*. It has been further argued that the time gap between the victim going missing and the recovery of her dead body is too long to apply the 'last seen theory'. It has been contended that the body of the deceased was recovered from the septic tank, which was in an advanced stage of decomposition and thus unidentifiable. Moreover, during the trial, PW 6 (the doctor) categorically stated that it was difficult to determine whether the dead body was male or female. The learned counsel for the appellant has further contended that the Investigating Officer (PW 8) carried out the investigation in a perfunctory manner. The articles on the basis of which the prosecution witnesses claimed to identify the dead body were neither seized during investigation nor produced in court during the trial.



Furthermore, PW 8 did not verify from the neighbours of the appellant regarding the last seen incident. It has thus been contended that there are severe lacunae in the prosecution's case, and the chain of circumstances does not unequivocally point toward the guilt of the appellant. Therefore, it is argued that the findings of the learned trial Court are legally flawed, incorrect in terms of facts, lacking in legal reasoning, devoid of merit, and that the judgment of conviction should be set aside.

7. On the other hand, the learned APP for the State has submitted that the judgment of conviction and the order of sentence under challenge require no interference, as the prosecution has proven the case beyond all reasonable doubt. It has been contended that the witnesses have been consistent in their testimonies, and there are no gaps in the prosecution's case. Further, it has been asserted that the deceased was last seen alive with the appellant. Subsequently, the deceased went missing, and his body was recovered from the exclusive possession of the appellant. Additionally, it has been pointed out that all the prosecution witnesses identified the body as that of the deceased, rendering the opinion of PW 6 inconsequential. Furthermore, it has been submitted that defects in the investigation by themselves cannot be grounds for acquittal. Investigation is not the sole area



for judicial scrutiny in a criminal trial. The learned A.P.P. thus submitted that in the present case, the chain of circumstances unequivocally points toward the guilt of the appellant. There are no gaps in the chain of circumstances, and the appellant's guilt has been satisfactorily proven by the evidence presented during the course of the trial. Hence, there are no infirmities in the judgment of conviction by the learned trial Court.

8. After hearing the arguments advanced by the learned counsels appearing for the parties and upon thorough examination of the entire material available on the record, the following issue arises for consideration in the present appeal:

“Whether the prosecution has successfully established beyond all reasonable doubt the incriminating chain of circumstances so as to hold the appellant guilty in the present case?”

9. With reference to the issue formulated above, we have given our anxious consideration to the entire material available on record. The present case is wholly based on circumstantial evidence. In such cases, the precedent is well settled. The prosecution has to knit together all the incriminating circumstances in a cogent way that the hypothesis of innocence of the accused is demolished and the circumstances so presented unerringly demonstrates the guilt of the accused. The **Hon’ble Supreme Court** in *State of Goa v. Sanjay Thakran, (2007) 3*



SCC 755 in paragraph 13 of the judgment has observed as follows:

“13.The prosecution case is based on the circumstantial evidence and it is a well-settled proposition of law that when the case rests upon circumstantial evidence, such evidence must satisfy the following tests:

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.”



In view of the above settled proposition of law, we now advert ourselves to the circumstances which the prosecution seeks to establish in the present case.

LAST SEEN

10. Upon the examination of the evidence of prosecution witnesses, namely PW 1, PW 2, PW 5, and PW 7, it is found that these prosecution witnesses in unison have stated in their evidence that the appellant on 10-06-2011 at about 11:00 AM came at the shop of the informant where the deceased was present. Thereafter, the appellant called the deceased and asked him to come along as he had to visit '*Asahani*' for some work. Then the deceased went along with the appellant on his motorcycle. Since then, the deceased had disappeared. Further, it is found that PW 5, in his deposition, has clearly stated that one Girish Tiwari (DW 1) informed him that both the appellant and the deceased visited him, as the appellant needed to collect money from him. This fact was also corroborated by the Investigating Officer (PW 8) in his testimony. Thus, these facts unmistakably establish that the last known sighting of the deceased was in the company of the appellant.

11. Furthermore, a meticulous review of the **Post-Mortem Report (Ext.-2)** in conjunction with the deposition provided by



PW 6 (the attending doctor) reveals a significant observation. The post-mortem was conducted on 18.06.2011 at 9:30 PM and it was opined by PW 6 that death had taken place at minimum 8 to 9 days preceding the post-mortem examination. Therefore, considering the last sighting of the deceased with the appellant, which was at 11:00 AM on 10.06.2011, it is apparent that the time of the deceased's demise falls within this time frame. It is well established that in order to bring home the charges on ground of 'last seen theory', the prosecution has the onus to prove that the time gap since the victim was last seen together with the accused and the subsequent recovery of her dead body is so less that the intervention by any third person is improbable. However, no straight jacket formula can be devised in such cases to determine as to what will be considered a reasonable time, but it should be established in light of the facts and circumstances of the case that the chain of circumstances is so proximately connected that the possibility of intervention by any other individual within the time frame is ruled out in entirety. In this regard, it would be relevant to refer to the decision of ***State of Goa v. Sanjay Thakran***, reported in ***(2007) 3 SCC 755*** wherein in paragraph 34, it was held 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.”

Therefore, taking into account the recovery of the body from the place (i.e. a septic tank inside the house), which was in the exclusive possession of the appellant, wipes out the possibility of any other person being the author of the crime during the intervening period. Thus, in the light of the factual matrix of the case and considering the legal position as indicated above, we are of the considered opinion that the prosecution has cogently established the circumstance of ‘last seen’ in the present case.

RECOVERY OF THE BODY FROM APPELLANT’S EXCLUSIVE POSSESSION

12. The most important circumstance which the prosecution has relied upon is recovery of the deceased’s dead body from the appellant’s place. From the perusal of the oral and documentary evidence, it is evident that the body of the deceased was recovered from the septic tank situated inside the appellant’s dwelling house. The investigating officer (PW 8), in his deposition, has categorically stated that on June 18, 2011, he conducted a search at the appellant's residence. During this search, the septic tank was opened in the presence of PW 5 and PW 2. Upon opening the tank, PW 8 witnessed the deceased's



body floating inside. Subsequently, the body was retrieved from the tank. This retrieved body was positively identified by PW 2 and PW 5 as that of the deceased. Additionally, PW 1, PW 3, and PW 7 also affirmed that they recognized the body by its clothing, *Kada* (bracelet), and false teeth. Moreover, PW 9, an independent witness in his deposition has supported the factual occurrence of the recovery of the dead body. Thus, in light of the facts discussed hereinabove the prosecution has discharged its burden of proving the conspicuous recovery of dead body from the exclusive possession of the appellant. As per Section 106 of the Evidence Act when any fact is especially within the knowledge of any person, the burden of proving the fact is upon him. In the instant case, since the appellant has not given any explanation as to how the body of the deceased came to his possession, warrants only inference possible is that it was the appellant who has committed the crime and in order to destroy the evidence hid the corpse in septic tank to decompose. Moreover, there is no material on record to show that somebody else has put the body therein. At this juncture, we would gainfully rely on the decision rendered by the Hon'ble Supreme Court in the case of *Nagendra Sah v. State of Bihar*, reported in (2021) 10 SCC 725 wherein



the Hon'ble Apex Court observed the followings in paragraphs 22 & 23:

“22.Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer proper explanation about the existence of said other facts, the court can always draw an appropriate inference.

23.When a case is resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the accused to discharge the burden under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused.”

Therefore, in the light of the factual discussion made hereinbefore and considering the aforesaid view of the Hon'ble Supreme Court in the given facts of the case, we reach to the conclusion that conspicuous recovery of the deceased's body from the appellant and his failure to tender any explanation is a major link in the chain of circumstances.

FALSE AND EVASIVE REPLY BY THE APPELLANT



13. So far as this circumstance is concerned, we have carefully perused the evidence of the informant (PW 5) as well as ***Ext. 1 (fardbeyan)***. It becomes apparent from the record that on the same day, PW5 inquired about the whereabouts of the deceased not once, but twice. During these inquiries, the appellant asserted that he had returned with the deceased from *Asahani* and mentioned that he had dropped him off at *Machhlihatta*. The appellant claimed to have no knowledge of the deceased thereafter. However, upon careful review of the available records, it is evident that there is no trace of information about the deceased's whereabouts until his lifeless body was discovered on 18.06.2011 within the septic tank of the appellant's residence. Therefore, the appellant's assertion that he parted ways with the deceased at *Macchlihatta* or *Chatti* stands as a dubious fabrication aimed at dispelling any potential suspicions. This fabricated explanation holds no credibility in light of the fact that the deceased's location remained unknown until the distressing discovery in the appellant's own property. Hence, this false and fabricated explanation is an additional link in the chain of circumstances as held by the ***Hon'ble Supreme Court*** in the case of ***Deonandan Mishra v. The State of Bihar*** reported in ***AIR 1955 SC 801***.



14. Considering the totality of the facts and circumstances of the case, this Court is of the considered opinion, that the prosecution has proved all circumstances against the appellant and the chain of circumstances is so complete which led to irresistible conclusion that it was the appellant alone, who had killed the deceased.

15. Accordingly, the appeal is dismissed. The judgment of conviction dated 22.11.2016 and the order of sentence dated 02.12.2016, passed by Sri Birendra Kumar Mishra, Xth Additional Sessions Judge, Saran, Chapra in Sessions Trial No. 786/2011, arising out of Rasulpur P.S. case No. 60/2011, is affirmed.

(Sudhir Singh, J)

(Chandra Prakash Singh, J)

Pankaj/-

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