

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.970 of 2006

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Brahamdeo Sah, Son of Sri Pati Sah, resident of Village- Pachaina Bazar, P.S.
Koilwar, District- Bhojpur.

... .. Appellant/s

Versus

The State of Bihar.

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Deepak Kumar (Amicus Curiae)
For the Respondent/s : Mr. Ram Chandra Singh, APP

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CORAM: HONOURABLE MR. JUSTICE SUNIL DUTTA MISHRA
ORAL JUDGMENT

Date : 21-11-2024

Heard Mr. Deepak Kumar, learned *amicus curiae*
appointed by the order dated 17.09.2024 and Sri Ram Chandra
Singh, learned APP for the State.

2. This appeal has been filed by the appellant under
Section 374(2) of the Cr.P.C. against the judgment of conviction
and order of sentence dated 03.11.2006 passed by the learned
Fast Track Court IInd, Ara, Bhojpur in Sessions Trial No. 248 of
2002, arising out of Ara Muffasil P.S. Case No. 127 of 2000
(G.R. No. 1664 of 2000) whereby and whereunder the appellant,
namely, Brahamdeo Sah has been convicted under Section 365
of the Indian Penal Code, 1860 (hereinafter referred to as
“I.P.C.”) and has been sentenced to undergo R.I. for seven years
and fine of Rs. 3,000/- and in default of payment of fine, he will
undergo R.I. for three months.



3. The facts of the case, in brief, is that Vinod Kumar Sah (PW-6) filed a complaint petition before the learned Chief Judicial Magistrate, Bhojpur, Ara and the same has been sent to the Officer In-charge, Ara Muffasil for registration and investigation of the case under Section 156 Cr.P.C. Thereupon, Ara Muffasil P.S. Case No. 127 of 2000 dated 22.06.2000 has been registered against the accused/appellant, Brahamdeo Sah for the offence under Sections 302, 201/34 of the I.P.C.

4. As per the prosecution case, on 06.01.2000 at 06.00 P.M. uncle of the informant, namely, Mahesh Sah was abducted by the appellant from the village house Pirauta where he was residing with the informant/ complainant. It is also alleged that the appellant had accompanied with 7 to 8 other miscreants and they took away the victim by force and had also taken Rs. 40,000/- alongwith his other belongings. It is further alleged that the appellant had committed murder of the victim, Mahesh Sah and cremated his dead-body to protect himself from legal punishment. After investigation, the I.O. filed the charge-sheet against the appellant, and after cognizance, the case was committed to the Court of Sessions where charge under Section 302 and 201 of the I.P.C. was framed against the appellant.



5. In order to establish the charge, the prosecution has examined seven witnesses. PW-1 is Sheo Jee Sah, PW-2 is Shambhu Thakur, PW-3 is Subhesh Sah, PW-4 is Mala Devi, PW-5 is Saraswati Devi, PW-6 is Vinod Kumar Sah (informant) and PW-7 Tarkeshwar Prasad is a formal witness.

6. On behalf of prosecution, three documents were exhibited. Ext.-1 is Complaint Petition, Ext.-2 is the case diary (para nos. 1 to 75) and Ext.-3 is the formal F.I.R. The photocopy of prescription of Doctor with respect to treatment and his death are marked as 'X' and 'Y' respectively for identification.

7. After closing of prosecution evidence, statement of the accused/ appellant under Section 313 Cr. P.C. was recorded in which he has denied the allegations and pleaded not to be guilty.

8. The defence has not produced any oral or documentary evidence.

9. On the basis of the prosecution evidence, the learned Trial Court has convicted and sentenced the appellant as stated above.

10. Learned *amicus curiae* submits that out of seven witnesses produced on behalf of prosecution, three witnesses



namely, PW-1, Sheo Jee Sah, PW-2, Shambhu Thakur and PW-5, Saraswati Devi were declared hostile as they have not supported the prosecution case. He further submits that PW-3, Subhesh Sah, PW-4, Mala Devi, PW-6, Vinod Kumar Sah (informant) are hearsay witnesses and there is no eye-witness as to the occurrence and none of the witnesses have supported the prosecution case. He further submits that the charge was not framed under Section 365 of the I.P.C. against the appellant and the learned Trial Court without any material against the appellant has convicted him under Section 365 of I.P.C. Accordingly, the instant appeal is liable to be allowed.

11. On the other hand, learned APP for the State submits that the prosecution has been able to prove its case and the instant appeal is liable to be dismissed.

12. I have carefully perused the record and considered the submissions advanced by the learned *amicus curiae* and learned APP for the State. Before proceeding to notice rival submissions, it would be apposite to notice testimony of the prosecution witnesses.

13. PW-1, Sheo Jee Sah has deposed that he does not know anything about the occurrence and he was declared hostile. PW-2, Shambhu Thakur also deposed that he had not



seen the occurrence and does not know anything about the occurrence. He was declared hostile. PW-3, Subhesh Sah in his deposition has stated that he had not seen the occurrence and he cannot say how Mahesh Sah had died. PW-4 Mala Devi, who is wife of Vinod Kumar Sah (informant), has deposed that she has not seen the occurrence and the facts with respect to occurrence has been stated by her husband. PW-5, Saraswati Devi deposed that she does not know about the occurrence and she has been declared hostile.

14. PW-6, Vinod Kumar Sah, is the informant/complainant of this case. He has deposed that he had gone to Nepal and after one month he came to his house then he was told by someone that his uncle Mahesh Sah had died and he filed the complaint petition (Ext.-1). In his cross-examination, he has stated that he does not know when or with whom Mahesh Sah (victim) had gone. He further admitted that deceased Mahesh Sah was a T.B. patient and appellant Brahamdeo Sah was providing him medicine and was serving him. He also performed the last rites of Mahesh Sah. He further admitted that he does not remember the name of the person on whose saying he has filed the case. He also admitted that he had not given statement before the appellant. PW-7, Tarkeshwar Prasad is a



formal witness who has identified the writing and signature of the I.O. Rajeshwar Singh in the case diary, para nos. 1 to 75 which is exhibited as Ext. 2 and formal F.I.R. bearing Ara Muffasil P.S. Case No. 127 of 2000. In his cross-examination, he has admitted that the said documents were not written before him and he has no personal knowledge about the same.

15. From the aforesaid depositions of the witnesses adduced on behalf of the prosecution, it appears that despite several opportunities, I.O. has not been examined in this case. There is no eye-witness to the occurrence and P.W.-1, 2 and 5 have been declared hostile. PW- 3 and 4 have also not supported the prosecution case and they are hearsay witnesses. Even PW- 6, who has filed the complaint case has not supported the prosecution case as he has categorically admitted that he does not know with whom Mahesh Sah had gone. He even failed to disclose the name from whom he came to know about the occurrence and he also admitted that he has not given any statement before the police.

16. Learned *amicus curiae* submits that it is not open to the Court to place reliance on the case diary maintained by the police under Section 172 of Cr.P.C. as a piece of evidence directly or indirectly except for the purpose for contradicting a



witness. He has referred and relied upon the judgment of the Hon'ble Apex Court in case of **Md. Ankoos and Ors v. The Public Prosecutor, High Court of A.P. Hyderabad** reported in **AIR 2010 SC 566**.

17. The Hon'ble Apex Court in the case of Md. Ankoos (*supra*) in para nos. 28 & 29 has observed as under:

“28 A criminal court can use the case diary in the aid of any inquiry or trial but not as an evidence. This position is made clear by Section 172(2) of the Code. Section 172(3) places restrictions upon the use of case diary by providing that the accused has no right to call for the case diary but if it is used by the police officer who made the entries for refreshing his memory or if the court uses it for the purpose of contradicting such police officer, it will be so done in the manner provided in Section 161 of the Code and Section 145 of the Evidence Act. The court's power to consider the case diary is not unfettered. In light of the inhibitions contained in Section 172(2), it is not open to the court to place reliance on the case diary as a piece of evidence directly or indirectly.

29. This Court had an occasion to consider Section 172 of the Code vis-à-vis Section 145 of the Evidence Act and Section 162 of the Code in Mahabir Singh v. State of Haryana [(2001) 7 SCC 148 : 2001 SCC (Cri) 1262] and it was stated as follows: (SCC p. 157, para 14)

“14. A reading of the said sub-sections makes the position clear that the discretion given to the court to use such diaries is only for aiding the court to decide on a point. It is made abundantly clear in sub-section (2) itself that the court is forbidden from using the entries of such diaries as evidence. What cannot be used as evidence against the accused cannot be used in any other manner against him. If the court uses the



entries in a case diary for contradicting a police officer it should be done only in the manner provided in Section 145 of the Evidence Act i.e. by giving the author of the statement an opportunity to explain the contradiction, after his attention is called to that part of the statement which is intended to be so used for contradiction. In other words, the power conferred on the court for perusal of the diary under Section 172 of the Code is not intended for explaining a contradiction which the defence has winched to the fore through the channel permitted by law. The interdict contained in Section 162 of the Code, debars the court from using the power under Section 172 of the Code for the purpose of explaining the contradiction.”

18. The learned trial Court has given specific finding that deceased Mahesh Sah was an old man suffering from T.B. disease whose death is admitted as natural death and the said finding is not under challenge.

19. Considering the entire material available on record, it is not possible to conclude that the appellant/convict before this Court had committed the offence under Section 365 of Indian Penal Code.

20. In the light of above discussions, the appellant/convict is certainly entitled for benefit of doubt as the prosecution has failed to establish his guilt by adducing clear, cogent, trustworthy and clinching evidence. In the result, the appellant deserves to be allowed and is accordingly allowed.

21. The impugned judgment of conviction and order



of sentence dated 03.11.2006 passed by the learned Fast Track Court IInd, Ara, Bhojpur in Sessions Trial No. 248 of 2002 are accordingly **set aside**. The appellant is acquitted from all the charges levelled against him.

22. It appears from the record, vide order dated 15.02.2007, this Court had granted bail to the appellant on furnishing bail bond during pendency of this appeal. Since the appellant is already on bail, he is discharged from the liability of the bail bond.

23. Before parting with this appeal, this Court records the appreciation for the assistance rendered by Mr. Deepak Kumar, learned *amicus curiae*. Patna High Court Legal Services Committee is hereby directed to pay Rs. 7,500/- to Mr. Deepak Kumar, learned *amicus curiae* in this case as a consolidated fee for the services rendered by him.

24. Let the Trial Court record be returned to the Court concerned.

(Sunil Dutta Mishra, J)

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AFR/NAFR	NAFR
CAV DATE	N.A.
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