

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.399 of 2017

Arising Out of PS. Case No.-131 Year-2015 Thana- KISHANGANJ District- Kishanganj

1. Murti Devi W/o Late Mahesh Chouhan,
 2. Vicky Sonar, S/o Late Mahadev Sonar,
Both R/o Mohalla - Moti Bag, P.S. and Distt. - Kishanganj
- Appellants

Versus

The State of Bihar Respondent

with

CRIMINAL APPEAL (DB) No. 360 of 2017

Arising Out of PS. Case No.-131 Year-2015 Thana- KISHANGANJ District- Kishanganj

Sushil Prasad Saha @ Bhoti S/o- late Devendra Lal Saha Resident of Kasera
Patti, P.S. and District- Kishanganj. Appellant

Versus

The State of Bihar Respondent

Appearance :

(In CRIMINAL APPEAL (DB) No. 399 of 2017)

For the Appellants : Mr. Diwakar Sinha, Advocate

Mr. Ravish Mishra, Advocate

For the Respondent : Mr. Dilip Kumar Sinha, Addl.PP

(In CRIMINAL APPEAL (DB) No. 360 of 2017)

For the Appellant : Mr. Ajay Kumar Thakur, Advocate

Mr. Ashish Kumar Ghosh, Advocate

Ms. Vaishnavi Singh, Advocate

Mr. Padmanabh Kashyap, Advocate

For the Respondent : Mr. Dilip Kumar Sinha, Addl.PP

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

and

HONOURABLE MR. JUSTICE SHAILENDRA SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date : 10-07-2024

These two criminal appeals have been preferred for setting aside the judgment of conviction (hereinafter referred to as the ‘impugned judgment’) dated 25.01.2017 and the order of sentence (hereinafter referred to as the ‘impugned order’) dated 30.01.2017 passed by learned Additional District and Sessions

Judge-II-court, Kishanganj (hereinafter referred to as the 'learned trial court') in Sessions Trial No. 415 of 2015, CIS No. 243 of 2015 arising out of Kishanganj P.S. Case No. 131 of 2015 registered for the offences punishable under Sections 302, 201/34 of the Indian Penal Code (in short 'IPC').

2. By the impugned judgment and order, the learned trial court has been pleased to convict the appellants for the offences punishable under Sections 302/34 and 201/34 IPC and they have been ordered to undergo life imprisonment and pay a fine of Rs.10,000/- for the offences punishable under Section 302/34 IPC. For the offences committed under Section 201/34 IPC, they have been sentenced for five years rigorous imprisonment with a fine of Rs.5,000/- each. In case of non-payment of fine amount, the appellants shall undergo an additional simple imprisonment of one year each. The learned trial court has directed that the sentence awarded under Section 302/34 IPC would start after the appellants would complete the sentence awarded to them for the offence punishable under Section 201/34 IPC.

Prosecution Story

3. The prosecution story is based on the *fardbeyan* of Daharu Chauhan (PW-1) who is the brother of the deceased, recorded by Nawal Kishore Yadav, S.I. Kishanganj Police Station

(PW-8) on 20.04.2015 at 10:15 am at Motibagh, Ward No. 7, P.S. and District-Kishanganj.

According to the informant (PW-1), he was making statement in the house of his deceased brother Mahesh Chauhan. According to him, the previous Tuesday, date not known, a quarrel was taking place between his brother Mahesh Chauhan and his wife Murti Devi between 8:00 pm and 10:00 pm. Murti Devi was saying that she would not leave him alive and that he would be killed. The informant claimed that his brother Mahesh Chauhan was a simple person and was earning his livelihood by working as a labourer. The conduct of Murti Devi was not good and she was persuaded on many occasions in the village that she should not keep someone in her house during night hours. The informant alleged that Vicky Sonar, son of late Mahadev Sonar and Dashrat Mahto who is *Saru* of the deceased, both residents of village-Motibagh and Sushil Prasad Saha @ Bhoti, son of Yogendra Saha, resident of Jagarnath School near Shitla Mandir were often visiting the house of Murti Devi and there was a talk in the village that Murti Devi had illicit relationship with all the three persons.

The informant further alleged that since the last Tuesday i.e. the day the quarrel took place, Mahesh Chauhan went missing and hectic search were on for him. The informant alleged that in the

morning of 20.04.2015, some bad smells were coming from the house of deceased Mahesh Chauhan. Murti Devi had left the house with her children after locking the rooms. This information was passed on to the police station whereafter police officers came with police force and in presence of Magistrate when the earth of the floor of the kitchen room of the deceased house was dug, the dead body of deceased Mahesh Chauhan was found. The dead body was taken out from the earth and the same was identified. The informant claimed that the above-named three persons acted in conspiracy with Murti Devi, wife of the deceased and committed the crime. The *fardbeyan* has been signed by PW-1 and one of his brothers namely Bal Kishan Chauhan (PW-2) has witnessed the same by putting his thumb impression. In course of evidence, it has been marked as Exhibit '1'.

4. After investigation of the case, police submitted a chargesheet against Murti Devi, Vicky Sonar, Sushil Prasad Saha @ Bhoti and one Santosh Saha. The investigation against Dashrath Mahto @ Kalu, Saru of the deceased remained pending. Upon filing of the chargesheet, the learned Magistrate took cognizance of the offences under Sections 302/34 and 201/34 IPC. After supply of police papers, on finding that the offences alleged are

triable by a court of Session, the records were committed to the court of Session.

5. In the trial court, charges were read over and explained to the appellants who denied the charges and claimed to be tried. Accordingly, charges were framed under Section 302/34 and 201/34 IPC.

6. In course of trial, on behalf of the prosecution, altogether eight witnesses were produced to adduce oral evidences. The prosecution exhibited certain documents as exhibits. The name of the prosecution witnesses and the documents exhibited on their behalf are being shown hereunder in the tabular form:-

List of Prosecution Witnesses:

P.W.-1	Daharu Chauhan (informant)
P.W.-2	Balkishan Chauhan
P.W.-3	Sonu Kumar
P.W.-4	Pradeep Chauhan
P.W.-5	Urmila Devi
P.W.-6	Dr. Rafat Hussain
P.W.-7	Dr. R.P. Singh
P.W.-8	Nawal Kishore Yadav (I.O.)

List of Exhibits:-

Exhibit ‘1’	Signature of the informant on the <i>fardbeyan</i>
Exhibit ‘1/1’	<i>Fardbeyan</i>
Exhibit ‘2’ and ‘2/1’	<i>Post mortem</i> report and signature of the doctor on it respectively

Exhibit '3'	Formal FIR
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7. After completion of the prosecution evidence, the statement of accused persons were recorded under Sections 313 of the Code of Criminal Procedure. The accused-appellants pleaded innocence.

8. The defence on behalf of Sushil Saha @ Bhoti produced two witnesses, namely, Naveen Kumar Saha (DW-1) and Mamun Rashid (DW-2).

Findings of the Learned Trial Court

9. After appreciation of the evidences available on the record, the learned trial court found that it is only the son of the deceased (PW-3) who is an eye witness to the occurrence. No other prosecution witness is an eye witness, they have only deposed to the extent that in the night of the date of occurrence of murder of Mahesh Chauhan, accused Vicky Sonar, Murti Devi and Sushil Saha @ Bhoti were present in the house and they saw that Murti Devi was quarreling with Mahesh Chauhan and that from the next day, Mahesh Chauhan was missing and Murti Devi had fled away with the children after locking the house. All the witnesses have stated that when bad smells were coming out from the house of Mahesh Chauhan, then they informed the police station and on arrival of police, the house was opened and from the

kitchen the dead body was recovered from beneath the earth. The trial court recorded that in the cross-examination of the prosecution witnesses, the defence has not brought any contradiction in the prosecution case and there is nothing to show that when the quarrel was taking place between Mahesh Chauhan and his wife, the accused Sushil Saha @ Bhoti and Vicky Sonar were not present in the house.

10. The learned trial court further found that in fact, both the defence witnesses have admitted that accused Sushil Saha used to go to the house of Murti Devi to pacify the quarrel between Murti Devi and her husband. It has been held that the deceased was not seen after the night when he was seen in his house where the accused persons were present. The trial court ultimately held that even if the evidence of PW-3 would not have been on the record, the circumstances of the case indicate that Mahesh Chauhan has been murdered only and only by accused Vicky Sonar, Sushil Saha @ Bhoti and Murti Devi.

Submissions on behalf of the Appellant, Sushil Prasad Saha @ Bhoti in Cr. Appeal (DB) No. 360 of 2017

11. Mr. Ajay Kumar Thakur, learned counsel has led the argument on behalf of the Sushil Prasad Saha @ Bhoti in Cr. Appeal (DB) No. 360 of 2017 whereas Mr. Diwakar Sinha, learned

counsel has argued on behalf of the appellants Murti Devi and Vicky Sonar who are the appellants in Cr. Appeal (DB) No. 399 of 2017.

12. Mr. Thakur, learned counsel for the appellant submits that there is a vague suspicion in saying about the illicit relationship between the appellant and wife of the deceased. Referring to the deposition of the informant (PW-1), learned counsel submits that in his examination-in-chief, he has stated that when he was returning to his house from his shop at around 07:00 pm and reached near the house of Mahesh, he had seen a quarrel taking place between Mahesh and his wife, he stopped for a while and after pacifying them, he went. At this stage, he has stated that in the courtyard of Mahesh, there were 2-3 persons but he could not identify them. Next day in the evening, the family members told him that Mahesh was not being seen. After four days, he smelled bad breath while passing through the house of Mahesh then he disclosed this to his brother Bal Kishan Chauhan (PW-2). He states that when he sent his wife Lalmuni and *Bhabhi* Urmila to go to the house of Mahesh, they went there and found that the house was locked. According to this witness, police came in the evening and went to the house but nothing could be found in the night whereafter police left saying that they will come in the

morning. In the morning at 09:00 am, police came and after breaking open the door, when they started inspecting then in the kitchen room, it was found that flies were buzzing there and on finding that police asked Kishun Chauhan to dig the place by a spade. On digging the said place, the dead body was found.

13. Learned counsel submits that the statement of PW-1 differs as regards the time when he had seen Mahesh and his wife quarreling with each other. In the *fardbeyan*, he has stated it was 08:00-09:00 pm whereas in his examination-in-chief, he has stated that it was 07:00 pm. It is further submitted that in the *fardbeyan* PW-1 has not stated about the presence of this appellant when Mahesh Chauhan and his wife were quarreling and his wife Murti Devi was threatening him that he would be killed. In his examination-in-chief, he has stated that 2-3 persons were present in the courtyard but he did not identify, therefore, neither in the *fardbeyan* nor in his examination-in-chief in course of trial, PW-1 has stated about the presence of the appellant Sushil Saha @ Bhoti in the house of the deceased.

14. Learned counsel further submits that in paragraph '3' of his deposition, PW-1 has stated that when he asked Sonu aged about 12 years and Sunny aged about 8 years both the sons of Mahesh Chauhan, then the younger one told him that his mother,

Bhoti and Vicky had together killed his father by putting a pillow over his mouth and then his dead body was concealed under the earth. It is submitted that Sunny, the youngest son of the deceased has not been interrogated either by police under Section 161 CrPC or in course of trial.

15. Learned counsel submits that in paragraph '6' of his deposition, PW-1 has stated that Murti Devi was working in the house of Sushil for cleaning utensils. Sushil Was never being called in the house and he had no concern with Murti Devi. Thus, learned counsel submits that in the cross-examination, PW-1 has made a completely different statement as regards the relationship between the appellant Sushil Saha @ Bhoti and Murti Devi which are totally inconsistent with his statement in *fardbeyan*, hence, it is to be taken as a contradiction in the statement of PW-1. The defence suggested to PW-1 that to usurp the land of Murti Devi, a false case was registered against her and in fact, after killing his brother, PW-1 had lodged a false case and falsely implicated her. PW-1 denied this suggestion. He has stated in paragraph '13' of his deposition that information was given to police on 19th April at about 04:00 pm but police did not register it and took the information. At this stage, he had not given any name to police. In paragraph '15', he has stated that he had lodged the case on

suspicion basis. He had not seen anybody killing the deceased and he had suspicion against the accused persons. He had not signed on the seizure list of the dead body.

16. It is further submitted that contrary to his statement in the *fardbeyan* that the lock of the door of the house of the deceased was opened by breaking the door and the dead body was recovered in presence of Magistrate, PW-1 has stated in paragraph '16' of his deposition that on the direction of police, the villagers broke open the lock of the house of Mahesh and they also broke open the lock of the kitchen room but he cannot say whether the broken locks were seized by police. He has further stated that when police reached the place of occurrence, there were 400-500 people but he had not talked to anyone and in this case, only his family members are witnesses and no outsider is a witness. Learned counsel submits that the fact that PW-1 had not named the appellant and the youngest son of the deceased who is said to have given the name of the appellant claiming himself an eye witness was not interrogated by police under Section 161 CrPC and has not been examined in course of trial would show that PW-1 who claims to have visited the house of Mahesh Chauhan on the date of occurrence i.e. 14th April, 2015 had not seen the appellant in the courtyard of the deceased.

17. Learned counsel further submits that Bal Kishan Chauhan (PW-2), who is the elder brother of PW-1, had not gone to the house of Mahesh Chauhan on 14th April but he says that when he was returning to his house, on way he met PW-1 who told that a quarrel is taking place in the house of Mahesh then PW-2 claims that he had gone there and saw that Bhoti, Vicky Sonar, Murti Devi and Mahesh were there. Murti Devi, Vicky and Bhoti were pressurising Mahesh, Murti Devi told PW-2 to get out from her house as it was her personal matter. This witness has further deposed on the line of PW-1 that after 3-4 days, he smelled bad breath and then had told this to his family members. In addition, he claimed that he had also gone to the Ward Commissioner to inform about the missing of his brother Mahesh. Learned counsel submits that in his examination-in-chief, PW-2 has admitted that his statement was recorded after 5-6 days from the date of recovery of the dead body.

18. It is submitted that PW-2 has made a false statement before police with an after-thought only after 5-6 days and his statement is wholly unreliable. Learned counsel points out that in paragraph '7' of his deposition, PW-2 has stated that his nephew Sunny had disclosed to him about the murder having been committed by Bhoti, Vicky and Murti Devi. This witness has

stated that he has deposed after hearing his nephew. He admits that he had not got the statement of his nephew Sunny recorded by the Daroga. According to this witness, Sunny had disclosed it to him before his statement before the S.P. Learned counsel, therefore, submits that this witness had come at a belated stage to make statement before Daroga and he claims that he has deposed after hearing from his nephew who has himself not been examined by the I.O. in course of investigation.

19. Learned counsel submits that from the evidence of Sonu Kumar (PW-3) who is a child witness, it would appear at first instance that the learned trial court has not properly examined the competence of this witness to understand the issue in respect of which he had appeared to depose. It is pointed out that the deposition of PW-3 took place on 7th day of January, 2016 but when the learned trial court asked him the date and month, he said that it is 7th day but the month is of April. Learned counsel submits that the statement made by PW-3 in his examination-in-chief is a dramatic one. He has stated that on 14th, the month and year he did not remember at about 12 O'clock in the night, he was sleeping but on hearing the shout of his father, he got awoken and when he went to open the door, it was found locked. PW-3 states that when he saw outside through the window then found that there was a

key which he could access from his hands and then from the gap between the doors, he opened the lock and came out in the courtyard where he found that the in the mouth of his father a pillow cover was forced and Vicky, Bhoti and his mother Murti Devi chopped the finger of his father by a knife, cut his nose and mouth and penetrated a rod in the head of his father from one side and took it out from the other side. He identified accused persons in the light. They put the dead body in a ditch and thereafter put hot water and salt. His mother was showing him a knife.

20. PW-3 has further stated that after concealing the dead body of his father, Vicky, Bhoti and his mother ate chicken. In the morning, his mother cooked breakfast for him and his brother and then after serving them breakfast, she took them to Churipatti and on the same day, she took them to Dalkola and from there went to Katihar where they were kept and when they were being brought via Tegharia, Kishanganj then police caught hold of them. His elder father (PW-2) came to the police station and brought him and his brother then he disclosed the whole story to his elder father (PW-2).

21. Learned counsel submits that this child witness (PW-3) is a tutored witness, he has been prepared to depose in this case by PW-2 which would be evident from the fact that even though

PW-3 was caught hold of by police on 22.04.2015 itself which would appear from the deposition of the I.O. but the I.O. has shown arrest of only Murti Devi on 22.04.2015. According to PW-3, he and his brother were handed over to PW-2 by police after the police caught hold of them when they were returning with their mother via Tegharia, Kishanganj. Thus, it may be safely concluded that PW-2 brought both the sons of the deceased from the police station on 22.04.2015. It has come in evidence that PW-3 was examined by the I.O. on 18.05.2015 i.e. after 26 days only, during this period, he was in the company of PW-2 and was fully dependant upon him. The another son Sunny about whom PW-2 had claimed that he had given an eye witness account of the occurrence to him was never produced before the I.O. for his statement.

22. Learned counsel further submits that the manner of occurrence as alleged by PW-3 claiming himself an eye witness is identically the same and one which PW-2 claimed on the basis of the information received from Sunny (not examined). Pointing out to the examination-in-chief of PW-2 in which he has given the manner of occurrence as disclosed by Sunny (not examined), learned counsel submits that to make the said statement, PW-3 was tutored to say the same and one thing.

23. At this stage, learned counsel points out the evidence of the Doctor, namely, Dr. Rafat Hussain (PW-6) who had conducted the *post mortem* of Mahesh Chauhan on 20.04.2015 at 01:35 pm. The Doctor had found four injuries on the body of the deceased and he opined that the cause of death is due to asphyxia and shock as a result of strangulation. A ligature mark 1” in width between thyroid cartilage and sternal notch running horizontally continued around the neck. This injury was the cause of death. The *post mortem* report was signed by two Doctors, PW-6 and PW-7 which has been marked as Exhibit ‘2’. It is submitted that the *post mortem* report of the deceased completely rules out the manner of occurrence as deposed by PW-2 and PW-3. Learned counsel, therefore, submits that in this case, the prosecution story saying that the appellants Sushil Saha @ Bhoti was found in the house of Murti Devi on 14th April, 2015 between 08:00-10:00 pm and that he had participated in the alleged crime are not based on clinching evidences. PW-1 and PW-4 being family members of PW-2 are not taking name of Sushil Saha @ Bhoti.

24. Learned counsel further submits that PW-2 has stated in paragraph ‘5’ of his deposition that he had lodged a missing report of his brother Mahesh but the said missing report has not been brought on record. The I.O. (PW-8) has stated that he

had not mentioned that he had perused the station diary. PW-2 himself admits that in the missing Sanha lodged on 18.04.2015, he had not taken anybody's name. The I.O. has also not mentioned that when he went to the village, he found the door locked. Learned counsel points out that the I.O. (PW-8) has stated that he took *fardbeyan* at 10:15 am but the FIR was lodged at 02:30 pm. It is submitted that in the meantime, the dead body was sent for *post mortem* at 12:50 pm, therefore, for about 2 hours 35 minutes, the FIR was not registered and for that reason only on the *post mortem* report, no case number is mentioned. It is submitted that non-mentioning of the case number on the *post mortem* report would only show that for about 4 hours 15 minutes from the time of recording of the *fardbeyan*, the prosecution story was in embryo, otherwise such a delay could not have taken place particularly when it is noticed that the distance between the place of occurrence and the police station is only four kilometers.

25. Learned counsel submits that the evidence of the child witness (PW-3) is that he had not disclosed the occurrence to his maternal grandfather, maternal grandmother, maternal uncle and *Mausi* for 2-3 days. He has stated that he had gone to 'Dalkola', which is in fact the village of Dashrath Mahto @ Kalu (*Saru* of the deceased). It is submitted that Dashrath Mahto being

brother-in-law of Murti Devi was residing in a rented house in village-Motibagh, he was the original resident of Village-‘Dalkola’, the fact that after the occurrence Murti Devi had left with her children and had gone to the village-Dalkola where she did not stay and went to her parents’ house would further show that Murti Devi may have illicit relationship with her brother-in-law and she had gone at first instance to village-Dalkola but apprehending that she may be arrested there or some suspicion may be raised against Dashrath Mahto who was already made an accused in this case, she did not stay there and left for her parents’ house. In these circumstances, it is submitted that the prosecution has miserably failed to bring any cogent evidence to prove the guilt of the appellant Sushil Saha @ Bhoti beyond all shadow of doubts.

26. Learned counsel has relied upon the judgment of the Hon’ble Supreme Court in the case of **K. Venkateshwarlu versus State of Andhra Pradesh** reported in **(2012) 8 SCC 73**, **Digamber Vaishnav and Another versus State of Chhatisgarh** reported in **AIR 2019 SC 1367** and **Pradeep versus State of Haryana** reported in **AIR 2023 SC 3245** to show that under what circumstances and in what matter, the testimony of a child witness is required to be appreciated.

27. Learned counsel has further placed before this Court the judgment of the Hon'ble Supreme Court in the case of **Sharad Birdhichand Sarda versus State of Maharashtra** reported in (1984) 4 SCC 116 and the judgment in the case of **Raghunatha and Others versus State of Karnataka** reported in AIR 2024 SC 1692 to submit that an accused cannot be convicted on mere suspicion, no matter how strong it may be.

Submissions on behalf of the Appellants Murti Devi and Vicky Sonar in Cr. Appeal (DB) No. 399 of 2017

28. Mr. Diwakar Sinha, learned counsel for the appellants, Murti Devi and Vicky Sonar has while endorsing most of the submissions of learned counsel for the appellant, Sushil Prasad Saha @ Bhoti, submits that the case of Vicky Sonar stands on identical footing with that of Sushil Prasad Saha @ Bhoti. PW-1 and PW-4 have not taken name of Vicky Sonar and the evidence of the child witness (PW-3) is unworthy of reliance, he is a tutored witness who has been produced before police after about 26 days of his continuous stay in the company of PW-2.

29. Learned counsel submits that so far as the appellant Murti Devi is concerned, on her behalf defence has suggested to the prosecution witnesses, namely, PW-1 and PW-2, who are the brothers of the deceased, that they had falsely implicated the

appellant Murti Devi with sole purpose to usurp her land property after killing her husband. It is submitted that according to PW-1, in his *fardbeyan* recorded on 20.04.2015, Murti Devi was found quarreling with her husband in between 0:800-10:00 PM and she was threatening her husband that he would be killed but in his examination-in-chief, PW-1 has stated that when he reached near the house of Mahesh at about 7:00 PM from his shop then he had seen the quarrel between Mahesh and his wife and thereafter, he had pacified them and left for his house. According to him, he had not seen Mahesh thereafter for three days. This witness does not say that he had not seen Murti Devi in her house for three days after the said occurrence. There is no evidence on the record to show that on the very next day, Murti Devi had left her house with her children after locking the same.

30. Learned counsel submits that in paragraph '3' of his deposition, PW-1 has stated that when he inquired from the two sons of the deceased, namely, Sonu and Sunny, then the younger one had told him that his mother, Bhoti and Vicky Sonar together killed his father by smothering him with the help of a pillow pressing on his mouth and thereafter they had concealed him beneath the earth. PW-1 does not disclose in his deposition that when did he inquire from the two sons of the deceased. Evidences

have come that both sons of the deceased were taken into custody by PW-2 from the Police Station on 22.04.2015 and thereafter they were in the company of PW-1 and PW-2 in their house. It is submitted that during this period, they were tutored, however, the eldest son namely Sonu, aged about 12 years was produced before the I.O. on 18.05.2015, the youngest son Sunny who had told about the manner of occurrence to PW-1 was not produced before the I.O. for his statement.

31. It is submitted that regarding Dashrath Mahto, who was one of the accused in this case, PW-1 had categorically stated that Murti Devi had illicit relationship with him also but contrary to his statement in the *fardbeyan*, PW-1 has stated in paragraph '4' of his examination-in-chief that he had not raised any doubt about Dashrath Mahto. Thus, according to learned counsel for the appellants, there is no evidence that Murti Devi was missing from the morning of the date of occurrence. The house of this witness is situated at a distance of hardly 50 steps from the house of Murti Devi, therefore had it been a case that Murti Devi was missing from the very next day of the occurrence, it would not have taken three days to PW-1 to suspect that his brother Mahesh was not being seen. In his sanha given to police, he had not taken name of

any of the appellants and he has clearly stated that he had given name of the accused persons on suspicion.

32. As regards evidence of PW-2 also, learned counsel submits that in his examination-in-chief, he has only stated that he had not seen his brother Mahesh for 3-4 days and he thought that he had gone somewhere. PW-2 claims that he had gone to the Ward Commissioner and had told him about the missing of his brother. PW-2 did not claim that during these 3-4 days, he had not seen Murti Devi in her house and that he had told the Ward Commissioner that Murti Devi had left her house after locking the same.

33. Learned counsel submits that the prosecution witnesses are totally inconsistent on the point as to how the police entered into the house of the deceased. According to PW-1, he had gone to the Police Station on 19th April itself in the evening hour to inform the police that his brother was missing and police had come to the house of Murti Devi. He has stated that police had opened the door and went in the courtyard, he has stated that police had first broke open the door of the house and then broke open the door of the kitchen. But even PW-1 is not consistent in his statement when he states in paragraph '16' that on the asking of police, villagers had broken the lock. There is no seizure list of the

locks or the doors which were broken by police or at the instance of police. Police had not recovered the dead body in the evening of 19th April and went away saying that they would come in the morning. In the morning only the dead body was recovered. It is submitted that in this case no inquest report has been proved by the prosecution and the manner of occurrence as stated by PW-2 and PW-3 stands falsified from the postmortem report proved by the Doctor (PW-7).

34. It is further stated that PW-5 Urmila Devi is the *gotni* of Murti Devi, she has stated in paragraph '3' of her deposition that Murti Devi was not working in the house of Sushil rather her daughter was working. PW-5 has stated that she made her statement on the basis of what she had heard. She was suggested by the defence that the deceased was killed in the night and his dead body was concealed under the earth. PW-5 was also cross-examined saying that she had not made statement before police that Murti Devi was absconding from the very next day and she had also not informed the police that a search was being made for Mahesh for last four days. It is pointed out that the daughter of Murti Devi, about whom it is stated that she was working in the house of Sushil, was not produced before the I.O. therefore, a material witness who was present in the house has been withheld.

35. Learned counsel submits that Pradeep Chauhan (PW-4) has also made statement that he had not seen Mahesh Chauhan on the next day, this witness had enquired about him only after three days and found that the door was locked. There is no statement of PW-4 that he had not seen Murti Devi in her house for those three days. In paragraph '5' of his deposition, he has stated that he had not seen anybody killing Mahesh Chauhan and he has further stated that he had not told Daroga that the son of Mahesh Chauhan had told them about the murder of Mahesh Chauhan. According to him, the name of the three accused were told by the son but at the time of statement made by PW-4 before the I.O. he had not said the names.

Submissions on behalf of the State

36. Mr. Dilip Kumar Sinha, learned APP for the State, has opposed both the appeals. It is submitted that PW-3 is a child witness who has withstood the test of cross-examination. He is a reliable witness, he had seen the occurrence, therefore his testimony is required to be relied upon by this Court. So far as the other prosecution witnesses, namely, PW-1, PW-2, PW-3, PW-4 and PW-5 are concerned, they are the members of the family and close relatives of the deceased Mahesh Chauhan. These witnesses have given the circumstances which are relevant for purpose of

this case and it would appear from their deposition that they had seen Murti Devi quarreling with the deceased Mahesh Chauhan on last Tuesday. The last Tuesday, as stated by PW-1 in the *fardbeyan*, would be 14th April 2015. PW-2 and PW-5 have stated about the presence of Sushil Saha @ Bhoti, Vicky Sonar and PW-5 has further taken name of Dashrath Mahto in the house. Dashrath happen to be the *jija* of Murti Devi, he was living in the village in rented house even as his original village is Dalkola. The witnesses have stated about the illicit relationship of Murti Devi with Sushil Saha @ Bhoti, Vicky Sonar and Dashrath Mahto. All the prosecution witnesses are consistent that after the said quarrel, which took place in the night of 14th April, 2015, they had not seen Mahesh Chauhan outside his house and ultimately when the bad smells were coming out of his house, the matter was reported to police and the dead body of Mahesh Chauhan was recovered from the kitchen room which was concealed beneath the earth.

37. Learned APP submits that the conduct of Murti Devi after the occurrence would be a relevant factor to be considered. Murti Devi had locked her house and left the village with her children, she had gone to Dalkola and then to Katihar where her parents were residing. In order to conceal herself, she was moving from one place to another but was ultimately arrested by police on

22.04.2015 while she was moving via Tegharia-Kishanganj. Murti Devi was residing with her husband in the same house, therefore the circumstances under which her husband died would come within her special knowledge and in view of Section 106 of the Indian Evidence Act, burden would shift upon her to prove the circumstances under which her husband was found killed and his dead body was concealed inside the kitchen room. Learned APP therefore submits that the learned trial court has rightly convicted all the appellants and sentenced them for the charges levelled against them.

Consideration

38. We have heard learned counsel for the parties and carefully perused the records.

39. From the testimonies of the prosecution witnesses as recorded hereinabove, to this Court it appears that the informant (PW-1) has not stated that he had seen two appellants, namely, Sushil Saha @ Bhoti and Vicky Sonar in the courtyard of Mahesh Chauhan on the day of quarrel (the last Tuesday). PW-1 has raised a suspicion that these two appellants often used to come in the house of Murti Devi. Another accused, Dasrath Mahto, who happened to be the *jija* of Murti Devi, was also visiting her and PW-1 had raised a suspicion that they had illicit relationship with Murti Devi but in his cross-examination, PW-1 has categorically stated in paragraph '6' that

Sushil was never called in the house of Murti Devi and he had no concern with her. PW-1 has not seen these two appellants present in the house of Mahesh Chauhan either at the time of the quarrel between him and his wife or at any time during the night hour, therefore, no irresistible conclusion may be reached by this Court on the basis of evidence of PW-1 that Sushil Saha @ Bhoti and Vicky Sonar had any illicit relationship with Murti Devi and that they were present in the courtyard of her house on 14th April, 2015 when a quarrel was taking place between Mahesh Chauhan and his wife.

40. So far as the evidence of PW-2 is concerned, he is one of the brothers of the deceased and PW-1. He has put his thumb impression as a witness to the *fardbeyan* in which there is no mention about the presence of Vicky Sonar and Sushil Saha in the courtyard of the deceased on the alleged date of occurrence. The I.O. did not record his statement immediately after the *fardbeyan* of PW-1. He made his statement 5-6 days after the recovery of the dead body. During this period, there was a development, on 22.04.2015 Murti Devi along with her two sons was found moving via Teghariya-Kishanganj, she was intercepted by police and arrested. PW-3 has stated that he and his brother were with their mother when police arrested their mother and then their *bade papa* (PW-2) had brought them from the Police Station. Conspicuously, the I.O. has shown arrest of only Murti Devi and the presence of the two children were

not shown. It is crystal clear from the evidences on the record that both the sons of the deceased started living with the family of PW-2 from 22.04.2015.

41. This Court finds that PW-2 has stated in paragraph '7' of his deposition that he had made statement after hearing from his nephews. According to him, his nephew Sunny had told him that his mother, Vicky and Bhoti had committed murder of his father Mahesh Chauhan but the said nephew Sunny was not interrogated by the I.O., his statement was not recorded under Section 161 CrPC and obviously, he is not a witness in this case, therefore, the statement of PW-2 that his nephew Sunny had seen the occurrence and had narrated to him the manner of occurrence would not carry any evidentiary value. He has made statement after 5-6 days before the I.O. and prior to this, he had not raised any suspicion at any stage against the appellants. This witness was suggested that he had killed his brother Mahesh, who was mentally feeble and had got his land recorded in his name. In paragraph '4' of his deposition, PW-2 has stated that he had got recorded a sanha through Munshi Ji on 18th April, 2015 in the house of Lal Muni but in the said sanha, he had not given name of any person and he had a suspicion that his brother Mahesh had been missing, therefore he had given Sanha. To this Court, it appears from the evidence of PW-2 that he has come out with a story about the presence of Sushil Saha and Vicky Sonar in the

courtyard of Mahesh Chauhan on 14th April, 2015 only at a belated stage and he himself claims that he made statement on the basis of what he came to know from his nephew Sunny but Sunny has not been examined in this case, in these circumstances, PW-2 cannot be said to be a reliable witness.

42. So far as Sonu Kumar (PW-3) is concerned, at the time of his deposition, he was aged about 10 years, therefore, at the time of occurrence, he was little less than 10 years. As regards his competence to depose, this Court has a doubt because when the learned Presiding Officer of the trial court asked him the name of the month, he said that it was month of April whereas he was deposing on 7th day of January, 2016. PW-3 has given a very dramatic story of how he came out of his room. This Court is unable to believe him that the key of the lock of the door was kept on the window, he could reach to the key through the window from his hand and then through the gap between the door, he opened the lock. It seems totally unbelievable to this Court that this witness can open the lock put from the outside the door by inserting his hand in the gap of the door. Further, this Court finds that the manner of occurrence as disclosed by him has been totally ruled out by the *post mortem* report of the deceased which has been proved by the Doctor (PW-7) as Exhibit '2'. The *post mortem* report of the deceased is being extracted as under:-

“On Post-mortem examination following ante-mortem findings found on the body of the deceased:

1. Lacerated wound $1\frac{1}{2}'' \times 1\frac{1}{4}'' \times 1\frac{1}{4}''$ at lower lip dislocation of lower right and left incisors.
2. Lacerated wound $3\frac{1}{4}'' \times 1\frac{1}{4}'' \times 1\frac{1}{4}''$ at nose with fracture of nasal bone.
3. Ligature mark $1''$ in width between thyroid cartilage and sternal notch running horizontally continuous around the neck, on dissection of neck muscles of neck underneath the ligature is contused, mucosa of larynx and trachea found congested.
4. Swells $3'' \times 3''$ at right chest wall laterally at upper part.

cause of injury hard and blunt substance in injury nos.

1, 2 and 4

A ligature in injury no. 3

Time passed since death 3-7 days.”

In our opinion the cause of death is due to asphyxia and shock as a result of strangulation.

43. PW-3 has stated in paragraph ‘13’ that his father was a drunkard and on a day he was taking liquor, quarrel used to take place. He had gone with his mother Murti Devi to “Churipatti” by a rickshaw together with Jyoti and his brother. They had gone to Kabristan from Motibagh, took a rickshaw at Gandhi Chowk and from “Churipatti”, they had gone to Dalkola by rickshaw. He had gone to the house of his *Mausi* in Dalkola where he took his meal and from there he went to Katihar to the house of his maternal grandfather where he had stayed for 2-3 days. A close reading of the testimony of PW-3 would show that his mother was arrested

on 22.04.2015, if according to PW-3 he along with his mother had stayed in the house of his maternal grandfather for 2-3 days only, it means he had gone there on 19th April only. The prosecution story is that Murti Devi had locked the door and fled away from the next morning of last Tuesday which is not getting corroborated from the evidence of PW-3. He was playing with the children but he had not disclosed about the occurrence to anyone. PW-3 has stated on his own in course of his deposition that his mother had falsely told to the people that the agnates had killed her husband, she was falsely pretending of weeping. This Court finds that PW-3 remained with his mother throughout, had gone to the place of his *Mausi* and then maternal grandfather but he never disclosed the occurrence before anyone. This Court believes that only after he came in the company of PW-2 and remained under his complete control, as a result of tutoring, he came out with a story that on the date of occurrence, he had seen the whole occurrence. To this Court, it appears that PW-3 cannot be taken as a star witness and he cannot be put in the category of a wholly reliable witness, therefore, conviction on the basis of the sole testimony of PW-3 would not be safe.

44. PW-4 and PW-5 are the other prosecution witnesses who have also deposed in support of the prosecution case but they

are not the eye witnesses to the occurrence. PW-4 is the cousin son-in-law of PW-1 who resides in the same village even as his paternal house is at Forbesganj. This witness had not seen Sushil Saha @ Bhoti and Vicky Sonar in the house of Mahesh Chauhan when the quarrel was taking place between Mahesh Chauhan and his wife. This witness has also stated that he had not seen anybody committing murder of Mahesh Chauhan and he had not told to Darogaji that the son of Mahesh Chauhan had told him about the murder of his father. Thus, the evidence of PW-4 does not implicate Sushil Saha and Vicky Sonar. This witness has not stated about any suspected illicit relationship between Murti Devi and the other two appellants.

45. Urmila Devi (PW-5) is the wife of Jageshwar Chauhan. She is *gotni* of Murti Devi. This witness has stated that when she went in the courtyard of Murti Devi, she found that she was quarreling with her husband Mahesh Chauhan. She had seen Sushil, Vicky and Dashrath there. According to this witness, in the morning she had seen that Murti Devi had left after locking the house but if the statement of PW-5 is considered together with the evidence of PW-1 and PW-2, it would be found that they have specifically stated that only after about 3-4 days when they did not see their brother Mahesh Chauhan then they had sent the female

members to find out the whereabouts of Mahesh Chauhan and then only it was found that the door was locked. If the statement of PW-5 is believed then on 15.04.2015 itself the prosecution side had come to know that Murti Devi had fled away after locking the door but this was not reported to police immediately. Contrary to her statement in her examination-in-chief, in her cross-examination she has stated that she had told to Darogaji that she along with her *gotni* and many other people had gone there. From the evidence of PW-5 also, it appears that she had deposed on the basis of the information which are claimed to have been given by PW-3 after he was handed over by police to PW-2. It is evident from her statement that prior to recovery of the dead body and at the time of recording of Sanha, she had not made any statement about the presence of Vicky and Santosh in the house of Murti Devi.

46. A complete analysis of the prosecution evidences on the record would lead this Court to take a view that the prosecution has failed to establish the case against appellants Sushil Saha @ Bhoti and Vicky Sonar. In a case based on circumstantial evidences, the criminological chain 'must' be established so that the Court can record a finding of guilt. No sufficient evidence much less a clinching evidence of illicit relationship of the appellants Sushil Saha @ Bhoti and Vicky Sonar with Murti Devi

and/or their participation in the killing of Mahesh Chauhan could be established from the evidences available on the record, hence, this Court sets aside the judgment of the learned trial court as regards the conviction of Sushil Saha @ Bhoti and Vicky Sonar giving them benefit of doubt. Sushil Saha @ Bhoti is on bail, therefore, he is discharged from the liability of his bail bonds. Vicky Sonar is in jail, he shall be released forthwith, if not wanted in any other case.

47. Having said so, we find that so far as the case of Murti Devi is concerned, she would stand on a different footing. In her case, the prosecution has established that on 14th April, 2015, she was found quarreling with her husband Mahesh Chauhan. She was present in the house that night, her husband Mahesh Chauhan was not seen after the said night of quarrel and later on, his dead body was recovered from the kitchen room of his house. The conduct of Murti Devi in fleeing away with the children after locking the door and then going to the village of her sister and then from there, to her parents where she stayed for 2-3 days and she was telling them that her husband has been killed by his agnates but in this regard, no information was given to police and she was moving from one place to another with the children, would be sufficient to take a view that in this case, Section 106 of the Indian

Evidence Act would apply and the burden would shift upon Murti Devi to prove the circumstances under which her husband was killed and his dead body was buried in the kitchen room. She has failed to discharge her burden. This would give rise to an adverse inference against her. We, therefore, take a view that the chain of circumstantial evidence insofar as it relates to Murti Devi, is complete and would lead this Court to conclude that the prosecution has been able to prove the guilt of Murti Devi beyond all reasonable doubts. In these circumstances, her conviction and sentence by the learned trial court is upheld.

48. In result while Cr. Appeal (DB) No. 360 of 2017 is allowed, Cr. Appeal (DB) No. 399 of 2017 is partly allowed in respect of the appellant Vicky Sonar only.

49. Both the appeals stand disposed of accordingly.

(Rajeev Ranjan Prasad, J)

(Shailendra Singh, J)

SUSHMA2/-

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