

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.676 of 2017

Arising Out of PS. Case No.-131 Year-2012 Thana- SIWAN CITY District- Siwan

Md. Adil Son of Late Ali Akhtar @ Bangali Mian, Residnet of Village-
Makhdum Sarai, Police Station- Siwan Town, District- Siwan.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with
CRIMINAL APPEAL (DB) No. 598 of 2017

Arising Out of PS. Case No.-131 Year-2012 Thana- SIWAN CITY District- Siwan

Husna Tara Khatoon Wife of Late Sabir Ali Ansari, resident of Mohalla
Islamia Nagar, Laxmipur, P.S. Siwan Town, District- Siwan.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (DB) No. 676 of 2017)

For the Appellant/s : Mr. Ansul, Advocate
Mr. Satish Kumar Sinha, Advocate
Mr. Javed Aslam, Advocate

For the Respondent/s : Mr. Km. Shashi Bala Verma, APP

(In CRIMINAL APPEAL (DB) No. 598 of 2017)

For the Appellant/s : Mr. Ansul, Advocate
Mr. Satish Kumar Sinha, Advocate
Mr. Javed Aslam, Advocate

For the Respondent/s : Mr. Abhimanyu Sharma, APP

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and
HONOURABLE MR. JUSTICE JITENDRA KUMAR
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 31-07-2024

Both the appeals have been taken up together

and are being disposed off by this common judgment.



2. We have heard Sri Satish Kumar Sinha and Sri Ansul, learned Advocates for the two appellants and Sri Abhimanyu Sharma, learned APP for the State.

3. One Sabir Ali, a crane operator in Saudi Arabia is alleged to have been killed by his wife Husna Tara Khatoon [appellant in Cr. Appeal (DB) No. 598 of 2017] along with her paramour Md. Adil [appellant in Cr. Appeal (DB) No. 676 of 2017].

4. Both the appellants have been convicted under Sections 302/34, 201/34 of the IPC and Section 27A of the Arms Act *vide* judgment dated 15.04.2017 passed by the learned 5th Additional District & Sessions Judge, Siwan in connection with Sessions Case No. 401/2012 (CIS No. 1727/2013), arising out of Siwan Town P.S. Case No. 131 of 2012. By order dated 24.04.2017 they have been sentenced to undergo R.I. for life, to pay a fine of Rs. 50,000/- for the offence under Section 302/34 of the IPC; R.I. for three years, to pay a fine of Rs. 5000/- for the offence under Section 201/34 of the IPC; R.I. for four



years, to pay a fine of Rs. 10,000/- for the offence under Section 27A of the Arms Act. In default of payment of fine to further suffer S.I. for six months.

5. All the sentences have been directed to run concurrently.

6. The Trial Court has but acquitted the appellants under Section 120B of the IPC.

7. For the convenience of exposition, we deem it appropriate to refer to the facts of this case in sequence.

8. The brother of the deceased viz. Zahir Ansari (P.W. 4), who is also the neighbour of the deceased, last saw him on 18.04.2012 and since then the deceased was not to be heard of. On 01.05.2012, a Sanha was lodged by P.W. 4 reporting to the police that his brother (deceased) is not to be found. He had come from Saudi Arabia about three months ago. A request was made to search for him.

9. On 02.05.2012, the police came to the house of the deceased and excavated a soak-pit situated in the



southern extremity of a semi-constructed room without a door. The dead body of the deceased was recovered. Some wearing apparels were also found along with the dead body. It appeared to the police that perhaps salt was put in the soak-pit. The clothes and the soil were seized by the police. A recovery memo was prepared which was signed by P.W. 4 and another brother of the deceased viz. Ashraf Ali Ansari (P.W. 1). The report was drawn up by one Ashish Mishra, Sub-Inspector, who has not been examined at the Trial.

10. After the recovery, the FIR was lodged by P.W. 4 on 02.05.2012 only at 8.00 P.M. at the house of the deceased stating that the deceased resided with his wife in the house in question. He had only recently returned from a foreign country where he was employed. P.W. 4 further alleged that the wife of the deceased (appellant no. 1) displayed a deviant social behaviour which led to the domestic squabbles between the deceased and her.



11. A soak-pit was dug-up in the house at the instance of the wife of the deceased on 18.04.2012 which was filled up with mud on 19.04.2012. From that day only, P.W. 4 never saw his brother. Despite search at all places, no clue could be found. Thereafter, the recovery of the dead body was made. P.W. 4, therefore, asserted that the deceased was killed by his wife along with appellant/Adil with whom the wife had an unholy relationship and Hidayatulla, Iqbal as well as one Munna.

12. On the basis of the aforementioned written report, a case *vide* Siwan Town P.S. Case No. 131 of 2012 dated 02.05.2012 was registered for investigation for offences under Sections 302, 201 and 120B of the IPC.

13. Appellant/Husna Tara Khatoon was arrested on the same day. It further appears from the records that appellant/Adil surrendered to the process of law on 05.05.2012. Iqbal, the younger brother of appellant/Husna Tara Khatoon was also chargesheeted along with the appellants but his case was transmitted to the Juvenile



Justice Board for determination of the guilt. With respect to others, the investigation was pending. The investigation was concluded with respect to the appellants, who were sent up for trial.

14. The prosecution chose to examine six witnesses on behalf of the prosecution, whereas only two defence witnesses were examined. Based on the materials on record, the Trial Court thereafter convicted and sentenced the appellants as aforesaid.

15. At the first blush, the case appeared to be an open and shut one with the recovery of the dead body from his own house, where he had been residing with his wife. The reason for the wife to kill her husband was perhaps the extra-marital relationship which she had been carrying with appellant/Adil.

16. A staid presumption.

17. We have noticed from the records that the Sanha lodged by P.W. 4 was never brought on record. However, to satisfy our curiosity, we looked at the police



papers and found that in the aforementioned Sanha, there is no reference of any soak-pit having been dug on a particular day and the same having been covered up on the next day.

18. This, otherwise, may not have been an important information but according to the prosecution case, the day on which the soak-pit was filled up, the deceased was not to be heard of or seen. In this context and that also when P.W. 4 and his other brothers were suspecting the hand of the wife of the deceased, it was necessary for P.W. 4 to have shared such information.

19. Be that as it may, the police swung into action a day after, when the dead body was recovered. If the wife of the deceased was arrested immediately after the recovery, it would presuppose that the wife was present in the house. Till the recovery, there was no suspicion on her. It was therefore imperative on the part of the police team to take her signature on the seizure list unless she were



treated as an accused even before the recovery process began.

20. We have already noted that there is no arrest memo on record which is very surprising.

21. That apart, what has caught our attention is that without any clue, the police party carried out an exhumation process and recovered the dead body. The process was never photographed. No photographs of the dead body also was taken. No permission was sought from the local administration for digging up the soak-pit in the house of somebody, who till then had not been made accused in the case. There was not even a wee bit suspicion against the other residents of the house. Apart from this, there was no effort of the investigator (P.W. 5) to know about the inmates of the house. Who all resided in that house was one of the first things to have been found out by the investigator.

22. Nothing of this kind was done.



23. The dead body which was identified by the brothers of the deceased viz. P.W. 4 and P.W. 1, was sent for post-mortem examination to Siwan hospital. It appears from the records that a medical team was constituted comprising Dr. A.A. Ghani, Medical Officer, Dr. R.C. Thakur and Dr. Sushil Singh, Civil Assistant Surgeons to undertake the process.

24. It further appears that they refused to conduct the post-mortem examination.

25. These facts have not been brought on record but inferred from the deposition of the doctor and the I.O. who have been examined as P.Ws. 6 and 7 at the Trial.

26. The permission of the Chief Judicial Magistrate, Siwan for taking the dead body to P.M.C.H. for forensic inputs has also not been brought on record.

27. The only reason that we can infer regarding the refusal of the medical team to conduct post-mortem at Siwan is that the dead body would have been so decomposed that it would not have been possible without



the forensic inputs to identify the cause of death or the time of death. There perhaps could be no other reason except this. In that case, it was of utmost necessity for the prosecution to have sent all the recovered and seized items like wearing apparels and salt mixed soil to be sent for forensic examination at Government Laboratory. The post-mortem examination in that case had to be conducted under the supervision of forensic experts.

28. Surprisingly, we find that Dr. Arun Kumar Singh of P.M.C.H. conducted the post-mortem examination on 04.05.2012 at 4.00 P.M. This was a regular post-mortem examination without any forensic input. The dead body was brought and identified by Birendra Sah and Babu Lal Chaudhary, the two Constables and P.Ws. 1 and 4, the brothers of the deceased.

29. Another very curious disclosure was made in the post-mortem examination. We may, however, state that even in the inquest proceedings, the officer conducting it had found that perhaps the deceased was killed by some



weapon and his dead body was buried. In the post-mortem examination, gun-shot wound was found on the head. That was an entry wound, the margin of which was found to be blackened. The brain was liquified. One corck and 25 pellets were recovered from the cranial cavity. The time of death was assessed at 2-3 weeks approximately. The cause of death was head injury and the nature of violence was by firearm. In the column regarding external appearance of the deceased, P.W. 6 only stated that the skin was found to be peeled off. The body was covered with soil and salt like white granular substance. The pellets recovered from the cranial cavity were kept in a clean glass vial, properly labelled and sealed, perhaps for it to be examined forensically.

30. Alas! the investigator did not consider it necessary to send those for any forensic examination.

31. This is the stage at which we started entertaining serious doubts about the entire recovery process; the dead body having been correctly identified



and the report of P.W. 6 in the post-mortem examination to be correct.

32. If a medical team comprising three doctors could not undertake the post-mortem examination perhaps for complete decomposition of the dead body, how was it that P.W. 6 conducted the process with such ease that he could even assess the time of death. The brain matter was found to be completely liquefied with 25 pellets embedded in the cranial cavity. If salt was added to the mud, the entire body would have been liquefied.

33. The doubt began from the time, when without the FIR having been registered, a raid was made in the house of the deceased, where appellant/ Husna Tara Khatoon was also present. The FIR is recorded by P.W. 4 only after the so-called recovery. Appellant/ Husna Tara Khatoon was arrested there and then, but there is no arrest memo available on record.



34. It cannot be a co-incidence that one after the other, there would be such lapses by the investigator.

35. That apart, there was no permission for exhumation and no photography was done. Even the police officer who drew up the recovery *challan* has not been examined at the Trial.

36. Cumulatively, these grounds make the prosecution case absolutely doubtful, so far as appellant/ Husna Tara Khatoon is concerned.

37. We will refer to the aspect of the onus of appellant/ Husna Tara Khatoon to explain as to how the dead body was found in the soak-pit in her house, somewhat later.

38. With this so-called evidence having been collected, at the trial, the two of the brothers of the deceased *viz.* Ashraf Ali Ansari and Saghir Ansari P.Ws. 1 and 2 came up with an absolutely new story.



39. As noted above, both the brothers are also the neighbours. P.W. 2 resided with P.W. 4, whereas P.W. 1 has his own house nearby. That in the FIR, P.W. 4 had suspected the infidelity of appellant/ Husna Tara Khatoon to be the guiding factor for murdering the deceased.

40. P.W. 1 claimed at the Trial that on 19.04.2012, at about 8-9 P.M., he heard a sound of firing coming from the house of the deceased. He rushed there and saw Adil, Iqbal and Munna coming out of the house. Appellant/Adil was said to be armed with a rifle. When P.W. 1 asked appellant/ Husna Tara Khatoon about the nature of sound produced, she explained that it could be a sound of fire crackers. When P.W. 1 asked for his brother, Husna Tara Khatoon is said to have told him that he has already left for foreign country. He has further stated before the Trial Court that he always saw Adil visiting the house of the deceased.

41. The deceased was one of the five brothers, out of whom one had died. Similarly, Saghir Ansari (P.W.



2), who was residing with his brother Zahir Ansari (P.W. 4) also claims to have gone to the house of the deceased on 19.04.2012, on the sound of firing. He also got the same response from the appellant/ Husna Tara Khatoon that perhaps the children had exploded crackers and the deceased had left for foreign country. He further reiterated that a day before the occurrence, a soak-pit was dug-up which was filled up on the next day. He had doubted that perhaps the deceased was murdered and buried in such pit and, therefore, the Sanha was lodged.

42. At this stage, it would be necessary to again repeat that in the Sanha, there was no reference of any soak-pit or any suspicion against Husna Tara Khatoon or Adil.

43. From the deposition of P.W. 2, it further appears that at the time of exhumation, a huge restive crowd had collected at the P.O.

44. Was there any opposition of the local persons?



45. We do not know for the reason that nothing has been said about the process by the investigator and nobody else *viz* any neighbour has been examined at the Trial.

46. There is yet another disclosure by P.W. 2 that the deceased had been employed in Saudi Arabia for the last 16-18 years. He served as a crane operator and was earning good money. He always used to send money from Saudi Arabia and with that money, Husna Tara Khatoon used to purchase lands in the name of her relatives. There was a partition in the family of the deceased about 16 years ago. Perhaps this information was elicited only for the purposes of quelling the suggestion that perhaps the witnesses *viz.* the brothers wanted to appropriate the property of the deceased and that could have been done only by blaming the wife of the deceased for his murder.

47. A nephew of the deceased *viz.* Khaliullah Ansari has been examined as P.W. 3. He was very specific before the Trial Court that appellant/ Husna Tara Khatoon



had illicit relationship with Adil who regularly visited her and which was not to the liking of the deceased. On 19.04.2012, he had seen Adil, Iqbal and Munna at the house of the deceased along with Husna Tara Khatoon. He had heard that a soak-pit was dug-up at the instance of Husna Tara Khatoon which was filled up again on 20.04.2012. Because Sabir Ali (deceased) was not to be found after that, suspicion about the appellants became very strong.

48. The informant/P.W. 4 claims to have learnt about the occurrence for the first time on 27.04.2012. This is highly inexplicable as Sanha was recorded only on 01.05.2012 and the deceased was not to be found from 19.04.2012. Perhaps P.W. 4 had learnt that there was a telephone call from Saudi Arabia intimating that the deceased had not yet reached his place of employment. If this be so, then there is no explanation for the Sanha to be lodged by him on 01.05.2012. When P.W. 4 had gone to the police station to lodge the aforementioned report about the



missing of the deceased, he was accompanied by 20 to 25 persons, mainly neighbours, but none of them have come forward to support the prosecution case or at least about the process of recovery of dead body.

49. This takes us to the evidence of the investigator, a plain reading of which completely demolishes the entire prosecution fabric. At the relevant time, P.W. 5/Ramesh Kumar Mishra was posted in Siwan Town police station. The exhumation process was conducted on 02.05.2012 and the report was prepared by Ashish Kumar Mishra.

50. With respect to the P.O., the investigator had found the house of the deceased to be half-constructed. On entering the main door, there was a courtyard. At the southern end of the courtyard, lay a room without a door. The dead body, according to the investigator, was recovered from the soak-pit dug-up in that room. To the east of the house of the deceased is one poultry farm of Ali Ashraf @ Munna, who too is suspected to have illicit



relationship with Husna Tara Khatoon. There is a house of one Dost Ali whereafter the house of P.W. 1 is situated.

51. The investigator has admitted that though the salt mixed soil and the undergarments of the deceased was also recovered along with the dead body but those were never sent for any forensic examination. He never referred to Sanha No. 131 of 2012, which has been referred to above, in the case diary. At the time of recording of the fardbeyan, Husna Tara Khatoon along with her children were present. He again admitted that no fact was entered in the police diary about any process of digging the soak-pit. The members of the crowd helped in the process.

52. Who all were they was not found to be important by the investigator to be noted in the police papers. As noted above, no recovered item was sent for any forensic examination. No photograph of the dead body also was taken. If the photograph would have been taken of the dead body, perhaps such doubts about the correctness of the post-mortem report would not have



been entertained by us. No *Challan* was prepared by him for taking the dead body to Patna after the medical team at Siwan refused to conduct the post-mortem examination.

53. With respect to the accusation against Adil, the investigator has said that P.W. 1 had not told him that at the time of occurrence, he was present in his house and that on hearing the sound of firing from rifle, he had gone to his brother's house where he had found Adil and others. Similarly, Saghir Ansari (P.W. 2), the other of the brothers claiming to have heard the sound of firing had not told him about any such event and his having gone to the house of the deceased and having met appellant/Adil and others there.

54. During the course of investigation, he further declared before the Trial Court that no information was received by him regarding any illicit relationship of Husna Tara Khatoon with anyone, even Adil.

55. With this background, we find the post-mortem report to be absolutely doubtful.



56. The learned Advocate for the appellants have argued that it appears that instead of a dead body, a carcass was moved from Siwan to Patna and P.W. 7 unwittingly followed the line of the prosecution. If the deceased would have received gun-shots and it were discernible, there would have been reference of it in the inquest report. Even otherwise, *viz.* without any reference of gun-shot in the inquest report, the assertion of P.W. 7 would have been accepted, if the pellets would have been sent for forensic examination.

57. What happened to those pellets?

58. One of the daughters of appellant/Husna Tara Khatoon has appeared as a defence witness. She has though admitted that the dead body of her father was recovered from the soak-pit of the house but has claimed that appellant/Husna Tara Khatoon had gone to her mother's house for a week when the recovery process had begun. She was never examined by the investigator during the investigation.



59. As such, her statement as a defence witness does not inspire confidence but it does strike us that even if it is accepted that a dead body was recovered from the soak-pit in the house of the deceased, would appellant/Husna Tara Khatoon be under an obligation to explain the circumstances, bringing her case within the mischief of Section 106 of the Evidence Act?

60. Section 106 of the Evidence Act reads as follows:

"106. Burden of proving fact especially within knowledge.--When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.



61. The word “*especially*” stresses that it means facts that are preeminently or exceptionally within the knowledge of the accused. If Section 106 of the Evidence Act were to be interpreted otherwise, it would lead to a very startling conclusion that in a murder case, the burden lies on the accused to prove that he did not commit the murder because who would know better than he that he did or not (refer to ***Shambhu Nath Mehra v. The State of Ajmer; AIR 1956 SC 404***).

62. The law is very trite that the provision of Section 106 of the Indian Evidence Act applies only to those cases where the prosecution has succeeded in establishing 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. 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 106 is not relevant at all [refer



to ***Nagendra Sah v. State of Bihar, (2021) 10 SCC 725***].

63. In this context, it would also be necessary for us to state that presumption of a fact is permissible under the Indian Evidence Act. A fact which is otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, a Court exercises a process of reasoning and reaches a logical conclusion as the most probable position. This proposition derives its strength from Section 114 of the Evidence Act. It empowers the Court to presume the existence of any fact which is likely to have happened. In that process, a Court must have regard to the common course of natural events, natural human conduct etc. in addition to the facts of the case. In these circumstances only, the principle embodied in Section 106 of the Evidence Act can be utilized. However, this provision does not relieve the prosecution of its burden of proving the case.



64. After having said that, we must also explain that it is not always that a prosecution is called upon to explain every fact before employing the tool of Section 106 of the Evidence Act.

65. In the ***State Of West Bengal vs Mir Mohammad Omar & Ors; (2000) 8 SCC 382***, where the assailants had dragged the deceased out of his house and his mangled body was found lying in the hospital on the next day, the Trial Court had convicted the accused only under Section 364 of the IPC, holding that the evidence with respect to murder could not be established.

66. The Supreme Court did not agree with such proposition and held very pithily that the pristine rule of onus on prosecution, for sure, admits of intelligent reasoning. The doctrine of presumption is not alien to the rule nor it impairs the temper of the rule. The Supreme Court went on to explain in the aforementioned case that if the traditional rule is allowed to be wrapped in pedantic



coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.

67. However, the Supreme Court cautioned that application of Section 106 of the Evidence Act has to be done with utmost care and caution. It cannot be used to support a conviction without the onus having been discharged by the prosecution. There would be no application of Section 106, if it appears from the evidence that apart from the accused, there were other persons also who could have thrown light or who could have explained away the circumstances (refer to ***Anees vs. The State Govt. of NCT of Delhi; AIR 2024 SC 2297***).

68. Applying the aforementioned principles in the case in hand, we find that the prosecution has not been able to establish that (i) appellant/Husna Tara Khatoon was present in the house at the time of the recovery; (ii) that the house in question was not accessible to anyone except appellant/Husna Tara Khatoon; (iii) that nobody else resided in the house except the deceased and



appellant/Husna Tara Khatoon and her children and (iv) that the place of recovery was not in an open place which could not have been accessed by anybody else.

69. We have referred to the evidence of the witnesses and the complete lack of alacrity on the part of the investigator in not proving such basic facts. With respect to the illicit relationship of appellant/Husna Tara Khatoon with others, apart from Adil, is highly ludicrous as one of such persons is none else but her younger brother.

70. With the evidence of P.Ws. 1 and 2 having been completely busted, there is nothing on record to justify the implication and conviction of appellant/Adil.

71. To tie the strings together, we have found the prosecution case to be faltering at every corner for the reason that the deceased went missing since 19.04.2012 but Sanha was lodged on 01.05.2012, in which there was no reference of any soak-pit or any suspicion against appellant/Husna Tara Khatoon. Without any FIR, a raid was made in the house of the deceased and the soak-pit



was dug-up and a dead body was recovered. All this was without the permission of any higher authority. The process was not video-graphed. Even the person who drew up the recovery memo has not been examined at the Trial.

72. The other ground which has weighed with us is that in the event of a medical team refusing to undertake post-mortem examination, how could another doctor at another hospital agree for the same and give a report without specifically giving the stage of decomposition of the dead body.

73. The forensics have been totally forgotten by the prosecution, making the case absolutely doubtful. We have also entertained doubts about the dead body having been correctly identified by the witnesses.

74. For the aforementioned reasons, we find the judgment of conviction and order of sentence to be absolutely lacking in merits.

75. We set aside the judgment and order of conviction and set the appellants free.



76. Appellant/Husna Tara Khatoon is on bail. She is discharged of her liabilities under the bail bonds.

77. Appellant/Md. Adil is in jail. He is directed to be released from jail forthwith, if not wanted or required in any other case.

78. Both the appeals are allowed.

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

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

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

(Ashutosh Kumar, J)

(Jitendra Kumar, J)

krishna/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	01.08.2024
Transmission Date	01.08.2024

