

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.867 of 2018

Arising Out of PS. Case No.-130 Year-2014 Thana- SUGAULI District- East Champaran

Vikash Kumar, S/o Krishna Tivari @ Krishna Mistri, R/o Village- Hasanpur,
P.S.- Sugauli, District- East Champaran.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Binay Kumar, Advocate

Mr. Md. Irshad, Amicus Curiae

For the Respondent/s : Ms. Usha Kumari No-1, Spl.P.P.

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

and

HONOURABLE MR. JUSTICE SHAILENDRA SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date : 15-07-2024

Heard Mr. Binay Kumar, learned advocate for the appellant, Ms. Usha Kumari No. 1, learned Special PP for the State and Mr. Irshad, learned Amicus Curiae.

2. The present appeal has been preferred for setting aside the judgment of conviction dated 16.05.2018 (hereinafter referred to as the 'impugned judgment') and the order dated 17.05.2018 (hereinafter referred to as the 'impugned order') passed by learned 1st Additional Sessions Judge-cum-Spl. Judge, SC/ST Act, East Champaran, Motihari (in short 'trial court') by which the sole appellant in this case has been convicted for the offence punishable under section 302 of the Indian Penal Code (in short 'IPC') and has been ordered to undergo imprisonment for life and to pay a fine of



Rs. 10,000/. In case of default in payment of fine, he has been ordered to further undergo imprisonment for six months.

Prosecution Story

3. The prosecution story is based on the written report dated 12.05.2014 written by one Naresh Raut (P.W.-4). The informant alleged that on 12.05.2014 at about 12:00 noon, the named accused persons (1) Ajay Kumar Sah and (2) Vikas Kumar both resident of village Hasanpura, P.S. Sugauli, Dist- East Champaran came to the house of the informant and took away his younger brother Dinesh Raut to Sikrahana river on the pretext of taking bath. It has been alleged that both the accused persons killed Dinesh Raut by causing drowning in the river and thereafter they fled away.

4. On the basis of the written report Sugauli P.S. Case No. 130 of 2014 dated 12.05.2014 was registered under section 302, 34 IPC. After investigation of the case, the investigating officer (I.O.) submitted a chargesheet under sections 302, 34 IPC and under section 3(i)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (hereinafter referred to as the 'SC/ST Act') against Vikash Kumar and Ajay Kumar. On 01.12.2014, cognizance was taken. It is worth mentioning at this stage that the records of the another co-accused Ajay Kumar was separated and



sent to the Juvenile Justice Board, Motihari vide order 30.10.2015.

On finding that the case is Sessions triable, the records were committed to the court of learned Sessions Judge, East Champaran, Motihari. The records were later transferred to the court of learned 1st Additional Sessions Judge-cum-Special Judge, SC/ST Act.

5. From the records, it further appears that on 30.11.2015, charges under section 302 IPC and under sections 3(i)(v) of the SC/ST Act were read over and explained to the present appellant in Hindi which he denied and claimed to be tried.

6. On behalf of the prosecution, as many as 11 prosecution witnesses were examined and documentary evidences were marked as Exhibits. The list of witnesses and the exhibited documents are as under : -

P.W. 1	Krishna Devi	
P.W. 2	Reeta Devi	
P.W. 3	Jitendra Raut	
P.W. 4	Naresh Raut	Informant
P.W. 5	Motilal Raut @ Motilal Malli	
P.W. 6	Munna Raut	
P.W. 7	Sita Ram Yadav	
P.W. 8	Bodh Yadav	
P.W. 9	Dr. Prabhat Prakash	
P.W. 10	Dr. Uday Shankar Pathak	
P.W. 11	Raju Kumar	Investigating Officer

Exhibit 1	Signature of the informant on Fardbeyan
Exhibit 2	Postmortem report of deceased Dinesh Malli
Exhibit 3	Formal FIR

7. After completion of the prosecution evidence, the



statement of the accused-appellant was recorded under section 313 Cr.P.C. He pleaded innocence and submitted that he has been falsely implicated in this case due to village politics. No oral or documentary evidence has been adduced on behalf of the defence.

Submissions on behalf of the appellant

8. Mr. Binay Kumar, learned counsel for the appellant submits that in this case there is no witness to the occurrence, the whole prosecution case is based on circumstantial evidence but the circumstances completing the criminological chain have not been established beyond all reasonable doubts, therefore, the conviction of the appellant in the present case is bad in law and the same is liable to be set aside.

9. Learned counsel has taken this Court through the deposition of the prosecution witnesses to submit that from the evidence of the prosecution witnesses it would not be established that there was any prior enmity between the deceased and the appellant, therefore, no motive has been established by the prosecution in the present case. It is his submission that merely because the appellant was not found present at the river when the dead body was found, it can not be inferred that the appellant had a motive.

10. Learned counsel has relied upon the judgment of the



Hon'ble Supreme Court in the case of **Sharad Birdhichand Sarda vs. State of Maharashtra** reported in (1984) 4 SCC 116=AIR 1984 Supreme Court 1622 (paragraph '151'). Reliance has also been placed on the judgment of the Hon'ble Supreme Court in the case of **Surajdeo Mahto and another vs. State of Bihar** reported in AIR 2021 SC 3643 to submit that the fact of the "last seen" should not be weighed in isolation or be segregated from the other evidence led by the prosecution. It is his submission that in absence of any corroborative evidence to the last seen theory, the appellant has been wrongly convicted by the learned trial court.

Submissions on behalf of the State

11. On the other hand, Ms. Usha Kumari No. 1, learned Special PP for the State would submit that in the present case, the prosecution has led definite evidences to demonstrate that the deceased was in the company of the appellant lastly, the time gap between the deceased leaving in the company of the appellant from his house and recovery of his dead body is very small and the fact that the appellant was absconding after the occurrence proves his motive and apart from all these circumstances, the postmortem report (Exhibit-2) and the evidence of the Doctor (P.W.-9) fully corroborate the prosecution case that he was killed immediately after he left in the company of the appellant. The Doctor has found



the cause of the death of the deceased due to smothering and he has opined in his cross-examination that smothering is not possible due to drowning in water. Under these circumstances, section 6 of the Evidence Act is clearly attracted and the burden would shift upon the appellant to explain the attending circumstances which led to the death of the deceased. In the present case, the appellant has failed to discharge his liability to demonstrate the circumstances.

12. Learned Special PP submits that even the corroborative evidences on the record, the criminological chain of circumstantial evidence is fully established and the learned trial court has rightly convicted and sentenced the appellant for the offences under section 302/34 IPC. Referring to the same judgment of the Hon'ble Supreme Court in the case of Surajdeo Mahto (supra), learned Special PP submits that in the said case even though the prosecution had not established beyond doubt that the deceased had an affair with the sister of the appellant No. 1, from the attending circumstances it was found that the learned trial court has correctly recorded that motive as alleged had been sufficiently proved by the prosecution. In paragraph '29' of its judgment in the case of Surajdeo Mahto (supra), it is submitted that the Hon'ble Supreme Court has relied upon a three judge Bench decision of the Hon'ble Supreme Court in the case of **Satpal vs. State of Haryana**



(2018) 6 SCC 610 and reading of that would show that the circumstances such as time when the deceased was last seen with the accused and the recovery of the corpse being in very close proximity of time, the accused owes an explanation under section 106 of the Evidence Act with regard to the circumstances under which death may have taken place. If the accused offers no explanation, or furnishes a wrong explanation, absconds, motive is established, and there is corroborative evidence available inter alia in the form of recovery or otherwise forming a chain of circumstances leading to the only inference for the guilt of the accused, in compatible with any possible hypothesis of innocence, conviction can be based on the same. The Hon'ble Supreme Court has observed that each case will have to be examined on its own facts for invocation of the doctrine of last seen.

13. We have also heard Md. Irshad, learned Amicus Curiae who has also submitted that in this case the circumstantial evidences are not suggesting as to what would be the motive behind killing of the deceased.

Consideration

14. We have heard learned counsel for the parties and perused the records received from the learned trial court.

15. In the present case, the informant (PW-4) has stated in



his examination-in-chief that on 12.05.2014 at about 11.00 AM when he was in his house, Vikash and Ajay both came and took away his brother Dinesh Raut (deceased) towards the river on the pretext of taking bath. When he asked, he was told that they would come in 10-15 minutes only but after one hour there was a hulla that there is a dead body in the river. PW-4 himself along with the villagers reached near the bank of the river and found that dead body of his brother was lying there but Vikash and Ajay were not present. This was informed to the police station whereafter a written report was submitted, police came and recorded the statement of the informant. He has proved his signature on the written report as Exhibit-1.

16. From the pattern of the cross-examination, it would appear that the defence has not suggested that on 12.05.2014 the appellant had not gone to the house of the informant and taken away his brother. The defence suggested to PW-4 that Vikash had informed this witness about drowning of his brother in the river. The suggestion itself proves presence of the appellant with the deceased right from the time of leaving from the house of the deceased till his death. PW-4 denied the said suggestion, therefore, it appears from the evidence of PW-4 that the defence has not cross-examined him to extract any contradiction in his statement as



regards taking away of his brother by the appellant on the pre-text of taking bath in river Sikrahana. This witness has categorically stated that he had taken the dead body to Dr. Sameer Sinha but Vikash had not gone there and he had been absconding. The evidence of the PW-1 who is mother of the deceased, PW-2, the Bhabhi of the deceased and the PW-3, a neighbour of the deceased would show that all of them have stated that the deceased had been taken away by the appellant and within 1-1.30 hour his dead body was found at the bank of the river.

17. This Court further finds that the father of the deceased (PW-5) and the cousin brother of the deceased (PW-6) have also supported the prosecution case. PW-2 who is Bhabhi of the deceased has stated in paragraph '4' of her evidence that prior to the said occurrence there was a scuffle between this appellant and the deceased in the orchard. She had made statement before the police after the occurrence saying that Ajay and Vikash both had fled away. The independent witness has denied the suggestion of the defence that Dinesh Raut (deceased) had died due to drowning. He denied the suggestion of the defence that three persons were regularly going to the river for taking bath. He has stated that after the occurrence Vikash was absconding.

18. The doctor (PW-9) has also supported the prosecution



case inasmuch as after explaining the kind of injuries present on the body of the deceased and giving his opinion that the cause of death was due to smothering, in his cross-examination the doctor has categorically stated that “cause of death smothering is not possible due to drowning in water.” In his postmortem report (Exhibit-2), he has recorded that no fluid of muddy water was present in the stomach. Only semi digested food material was present. He had found that the face of the deceased was swollen, lips are livid and face congested. He had found bloody froth from mouth and nostril. Eye ball was protruded with conjuctival hemorrhage. There was food sodden and abrasion over both feet of great toe size 3 cm x 1 cm. Right side of heart was full of dark fluid blood and left empty. Thus, doctor (PW-9) and another doctor (PW-10) both have deposed in support of the prosecution. PW-10 has stated in his cross-examination that in case of drowning the presence of muddy water will be found in stomach.

19. We, therefore, find from the evidences on the record that the prosecution witnesses have established beyond all reasonable doubts that the deceased was in the company of the appellant lastly before his death and when his dead body was found at the river, this appellant was absconding. The death was not due to drowning rather it was smothering and there were other injuries



on the body of the deceased.

20. So far as judgment cited before this Court is concerned, the facts of the case in Surajdeo Mahto & Anr. (supra) are quite different and distinct. In the said case, the deceased boy had gone from his village on 05.04.1987 whereafter his dead body was recovered on 12.04.1987. The Hon'ble Supreme Court considered the principles laid down in the case of Sharad Birdhichand Sarda (supra) and further three judge bench decision in the case of Satpal (supra). This Court thinks it useful to quote paragraphs '27', '28' and '29' of the judgment in the case of Surajdeo Mahto (supra) as under:-

"27. This Court, in its much-celebrated judgment of *Sharad Birdhichand Sarda v. State of Maharashtra*⁸, has elaborately considered the standard necessary for recording a conviction on the basis of circumstantial evidence and has further held :

"153.xxxxxxxx

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established.

Xxxxxxxx

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) The circumstances should be of a conclusive nature and tendency,

(4) They should exclude every possible hypothesis except the one to be proved, and

(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

8. (1984) 4 SCC 116:AIR 1984 SC 1622



These five cardinal principles have been reiterated on numerous occasions, including in the recent decisions in *Mohd. Yunus Ali Tarafdar v. State of W.B.*⁹ and *R. Damodaran v. State Represented by the Inspector of Police*¹⁰. Keeping these conditions in mind, we shall now examine the case at hand.

28. It appears to us that the following circumstances need to be considered to arrive at the guilt of the appellants : (i) last seen theory; (ii) motive, and (iii) false information provided and subsequent conduct of the appellants.

(i) Last seen theory

29. The case of the prosecution in the present case heavily banks upon the principle of “last seen theory”. Briefly put, the last seen theory is applied where the time interval between the point of when the accused and the deceased were last seen together, and when the victim is found dead, is so small that the possibility of any other person other than the accused being the perpetrator of crime becomes impossible. Elaborating on the principle of “last seen alive”, a three-Judge Bench of this Court in *Satpal v. State of Haryana*¹¹ has, however, cautioned that unless the fact of last seen is corroborated by some other evidence, the fact that the deceased was last seen in the vicinity of the accused, would by itself, only be a weak kind of evidence. The Court further held :

9. (2020) 3 SCC 747: AIR 2020 SC 1057

10. 2021 SCC Online SC 134: AIR 2021 SC 1173

11. (2018) 6 SCC 610: (AIR 2018 SC 2142)



“ ... Succinctly stated, it may be a weak kind of evidence by itself to found conviction upon the same singularly. But when it is coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the corpse being in very close proximity of time, the accused owes an explanation under Section 106 of the Evidence Act with regard to the circumstances under which death may have taken place. If the accused offers no explanation, or furnishes a wrong explanation, absconds, motive is established, and there is corroborative evidence available inter alia in the form of recovery or otherwise forming a chain of circumstances leading to the only inference for guilt of the accused, incompatible with any possible hypothesis of innocence, conviction can be based on the same. If there be any doubt or break in the link of chain of circumstances, the benefit of doubt must go to the accused. Each case will therefore have to be examined on its own facts for invocation of the doctrine.”

21. The position of law as regards Section 106 of the Evidence Act is crystal clear. It has been considered in the case of Satpal (supra) and the Hon'ble Supreme Court has clarified that if the accused fails to offer any plausible explanation, an adverse inference can be drawn against the accused.

22. This Court finds that in this case the appellant is unable to offer any explanation as regards the circumstances leading to death of Dinesh Raut (deceased).

23. The incriminating materials which were brought by the prosecution against the appellant were placed before him at the stage of Section 313 Cr.P.C., the appellant had an opportunity to explain the



circumstances which was specifically put to him that he along with another accused had gone to the house of the deceased and took him on the pretext of taking bath to river Sikaharna where he was drown in the river killing him. The appellant never denied to have gone to the house of the appellant and returned from there taking away the victim with him. The recovery of dead body is in close proximity of time. The fact that the appellant was absconding and the postmortem report (Ext.-2) corroborates the prosecution case are other factors which would go against the appellant.

24. In the kind of the materials present on the record, we find no infirmity in the judgment of the learned trial court.

25. This appeal is dismissed.

26. We also appreciate the assistance provided by Mr. Md. Irshad, learned Amicus Curiae in course of hearing of this case. Patna High Court Legal Services Committee is directed to pay an honorarium of Rs.10,000/- to Mr. Md. Irshad, learned Amicus Curiae, within one month from the date of receipt/production of this order.

(Rajeev Ranjan Prasad, J)

(Shailendra Singh, J)

arvind/annu-

AFR/NAFR	
CAV DATE	
Uploading Date	18.07.2024
Transmission Date	18.07.2024

