
(1987) 04 PAT CK 0037
In the Patna High Court
Case No : Criminal Appeal No. 195 of 1985

Dinesh Roy

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 10-04-1987

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 302, 313, 376
Penal Code, 1860 (IPC) — Section 302, 376

Citation : (1987) PLJR 671

Hon'ble Judges : P.S. Mishra, J;A. Singh, J

Bench : Division Bench

Advocate : Kanhaiya Pd. Singh, B.N. Sen and Chandrasen Prasad Singh, for the Appellant; Lala Kailash Behari ., for the Respondent

Final Decision : Dismissed

Judgement

P.S. Mishra, J.—A minor girl Mina Kumari aged about 14 years only was raped and killed in a lonely orchard, None saw the occurrence and the witnesses testifying in the court could say no more than stating that when they left the orchard Mina Kumari remained behind and at a short distance the appellant was present spading a ridge. On purely circumstantial evidence learned 3rd Additional Sessions Judge, Darbhanga has found the charges under sections 302 and 376 of the Indian Penal Code proved against the appellant. On 10.12.1986 Mina, the informant's daughter had gone to collect fire-wood and dried leaves along with Manju Kumari (P.W. 2). Anju Kumari (P.W. 1) and Fuleshwari Devi. The first two are minor girls and the third is an elderly lady. They, however, left for their respective houses and Mina remained behind collecting fire-wood at Satiyara Ban. She did not return until 5 p.m. in the evening. The informant went in search of Mina along with several persons of the village and found her dead body having sharp injuries over her neck, chin and other parts of the body, clothes removed from her breast and Salwar pulled down up to thigh. Informant learnt from Anju Kumari and Manju Kumari that they had seen one person preparing ridge near the orchard when they had left Satiyara Ban and Mina stayed behind. Having

found his daughter ravished and killed he informed the police. P.W. 5, the Officer-in-Charge and the Investigating Officer arrived on the information and took charge of the dead body, prepared inquest report and sent it to the hospital for post mortem examination. P.W. 6, who was the Medical Officer, in charge Department of Forensic Medicine at Darbhanga Medical College Hospital, held post mortem examination at about 12 a.m. on 11.12.1984 and found several ante mortem injuries upon the dead body of Mina Kumari. He gave a report of his findings in the said examination and has deposed affirming that there were ante mortem injuries upon the dead body of Mina Kumari which injuries had caused her death. Several persons suspected to have committed the offence were arrested by the police including the appellant who was taken in custody on 13.12.84. Before, however, he was taken in custody, he was examined by A.K. Yadav (P.W. 6) at Darbhanga Medical College Hospital on 11.12.84 at 3.45 p.m. He found several injuries upon the appellant.

2. In the trial the prosecution examined two girls, Anju Kumari and Manju Kumari and the lady Fuleshwari Devi who were with Mina Kumari collecting fire wood and dried leaves in the Satiyara Ban, until they left together leaving Mina behind in the orchard, the informant, the victim's father, the Investigating officer and the doctor who held autopsy and examined the injuries of the appellant. In their deposition in the court the two girls and the lady P.Ws. 1, 2 and 3 have testified that they had gone to the orchard at Satiyara Ban to collect fire-wood and dried leaves with Mina Kumari but since the latter had not collected enough fire-wood, she climbed upon a mango tree and remained behind when they returned to their village. They have deposed that at the time they returned there was none else except the appellant who was digging earth by Kudal for making ridge. The informant (P.W. 4) has deposed that when he found that Mina had not returned until the evening at about 5 P.M. he went looking for her and found her dead body on the northern end of the orchard at Satiyara Ban. He was accompanied by several co-villagers. They found the dead body having sharp injuries over the neck, chin and other parts, clothes removed from her breast and her Salwar pulled down up to thigh. He has also deposed that he had learnt from P.Ws. 1 and 2 that they had left Mina Kumari alone in the orchard because she had not collected sufficient fire wood and she had climbed upon a mango tree for collecting fire-wood. He has said that P.Ws. 1 and 2 had told him that a man was in a nearby field besides Mina who was preparing ridge. P.W. 6 has deposed that Mina's dead body had one grazed abrasion 6" x 1/2" on the left side of the back. Grazing being directed downwards another abrasion measuring 3" x 1/4" on right lower side of the back with evidence of grazing, two incised wounds measuring 1 1/2" X 1/2" X 1/4" and 3" x 1/2" x 1/4" in front of the neck directed from side to side with the margins and underlying tissues found cut. In this the muscles, vessels and upper part of the traches were found completely cut with extensive infiltration of blood inside the wound. He also found six more incised wounds on the chin, cheek and chest. His examination further revealed that there were dead, broken and intact spermatozoa in the vaginal canal suggesting the

commission of sexual inter-course with the girl within 18 to 24 hours from the time of the examination. Cause of death, according to him, was haemorrhage and shock within 18 to 24 hours from the time of the post mortem examination. In his deposition he has also affirmed that he had found injuries upon the appellant in his examination which were:-

- (i) One crescentic 1/4" long scratch abrasion on left aol of the nose.
- (ii) One crescentic 1/4" long scratch abrasion over tip of the nose.
- (iii) Two smaller crescentic scratch abrasions on under surface of the chin towards right side with adjacent bruising.
- (iv) One scratch abrasion infront of the neck towards right side in the lower part of the neck. There was another 1/8" scratch abrasion 3" above the previous abrasion on right side of the neck.
- (v) One 1/6" elliptical scratch abrasion on outer side of dorsum of left band.
- (vi) One bruise with associated abrasion 1/2" x 1/4" on back of left fore-arm in the lower portion.
- (vii) Corresponding graze abrasions one each on lower portion of both the knees; each measuring 1/2" x 1/4".

In his opinion the injuries were caused within 24 to 36 hours from the time of the examination. The Investigating Officer (P.W. 5) has stated that he visited the place of occurrence in the night of 10.12.84 itself and found the dead body of Mina Kumari in the orchard which body he sent for post mortem examination on the same day.

3. Learned Counsel for the appellant has contended that the evidence of P.Ws. 1 to 3 that the appellant was the man preparing the ridge, is not free from doubt, no T.I. parade was ever held and the witnesses were made to identify the appellant in the court. Truth or otherwise of such evidence of identification could have been ascertained had there been a T.I. parade held. By not holding any T.I. parade, the prosecution has made the evidence of identification of the appellant by P.Ws. 1 to 3 suspect. He has also contended that evidence of P.Ws. 1 to 3 takes the case no further than suggesting that when they left the orchard the appellant was at a short distance of the orchard and besides him and Mina Kumari there was none when they returned to their houses. This is in itself no circumstance even to hold that the appellant was the only person last seen with the victim. At least, according to Learned Counsel, this does not rule out the possibility of some other person arriving and committing the offence. He has submitted that injuries found upon the appellant do not suggest in any manner that he had some scuffle with Mina kumari and he sustained injuries at her hand while committing the offence. He has contended that two circumstances, namely, (i) that the appellant was seen at a place near the orchard in which orchard the victim was collecting firewood when P.Ws. 1 to 3 returned to their nouses and (ii)

that there were some injuries found upon the appellant are together not enough to create a chain of circumstances to point out unerringly against the appellant that he and none else committed the offence.

4. It has been often repeated that witnesses may lie but the circumstances do not. At the same time the courts have cautioned themselves that where there is no eye witness and the case against the accused depends entirely on circumstantial evidence the standard of proof required to connect the accused on such evidence is that the circumstances relied upon must be fully established and the chain of evidence furnished by these circumstances should be so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. The courts proceed to examine evidence in a case always believing that the accused is innocent. This presumption of innocence has to hold the field until the circumstances or the evidence destroy it. It is due to this presumption of innocence it is followed almost as rule that the accused is entitled to all reasonable benefit of doubt. While this has to be borne in mind by a court considering evidence against the accused, it cannot, however, forget its social accountability. A reasonable doubt, it has been pointed out invariably, is the doubt of a legally attuned mind and not that of a sceptic or vacillating mind. Circumstances taken independent of each other may not go beyond the realm of suspicion but together they may create a chain to exclude possibilities of other kind for the offence. This is why the courts have always reminded themselves that the circumstances should be examined together and their cumulative effect should be taken into consideration and when they are taken as one integrated entity in a chain whether they destroy the presumption of innocence or not. In *Deenandan Mishra v. The State of Bihar* (AIR 1955 S.C. 801) the law on the subject has been stated as extracted:--

It is true that in case of circumstantial evidence not only should the various links in the chain of evidence be clearly established, but the completed chain must be such as to rule out a reasonable likelihood of the innocence of the accused. But in a case where the various links have been satisfactorily made out and the circumstances point to the accused as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation, and he offers no explanation, which if accepted though not proved, would afford a reasonable basis for a conclusion on the entire case consistent with his innocence, such absence of explanation or false explanation would itself be an additional link which completes the chain."

5. The above rule applied to the appreciation of substantial evidence has been reiterated in different words but has remained unchanged. In *Sharad Birdhichand Sarda versus State of Maharashtra* (AIR 1984 S.C. 1622) a Bench of Supreme Court has chosen to state the conditions which must be fulfilled before a case against an accused based on circumstantial evidence can be said to be fully established. It has said therein:--

(1) the circumstances from which the conclusion of guilt is to be drawn should be

fully established. The circumstances concerned "must or should" and not "may be" established.

(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.

The Bench has chosen to call the above principles as five golden principles, the Panchshil of the proof of a case based on circumstantial evidence. These principles are applied only to emphasise that the accused must be and not merely may be guilty before a court can convict and the mental distance between may be and must be is long and divides vague conjectures from sure conclusions. To the above, however, there is a rule added as an exception where it is found that the accused alone was in the position of explaining his conduct but he failed to do so or furnished explanations but were found to be false. This in itself becomes an additional link to lend assurance to the court that the accused is guilty. Explaining, however, when and how this may be applied in a given case the Supreme Court in *Sharad versus State of Maharashtra* (supra) has pointed out:-

"Before a false explanation can be used as additional link, the following essential conditions must be satisfied :

(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved.

(2) the said circumstances point out to the guilt of the accused with reasonable definiteness, and

(3) the circumstance is in proximity to the time and situation.

If these conditions are fulfilled only then a Court can use a false explanation or a false defence as an additional link to lend an assurance to the Court and not otherwise.

6. It is not necessary to add references of the cases laying down the principle how evidence of circumstantial nature should be considered and applied. In a plethora of cases the cardinal principle, presumptions of the innocence of the accused, benefit of a reasonable doubt and proof wholly inconsistent with the innocence of the accused are repeated. The courts, however, have to act on the

facts of each case and test on the touch stone of preponderance of probability the case brought before it and ensure that the case is not in the realm of "may be" and it on the evidence adduced, is in the realm of "must be" before the judgment of guilty is pronounced.

7. I have stated the principles after stating the facts and indicating the evidence adduced on behalf of the prosecution so that the circumstances noted above may be tested with such care as the Courts have desired for the cases solely dependent upon circumstantial evidence.

8. Section 313 of the Code of Criminal Procedure which speaks of the power to examine the accused says :

(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court-

(a) may, at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub-section (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them;

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

Sub-section (4) of section 313, Cr.P.C. has spelled out that the answers given by the accused may be taken into consideration by the Court as a circumstance in itself. Learned Sessions Judge as provided u/s 313, Cr.P.C. questioned the appellant and gave him opportunity to explain the circumstances appearing in the evidence against him. One such circumstance appearing against the appellant was that injuries were found upon nose, hand and chin caused at about the time the victim girl was killed and raped. In answer to the said circumstance the appellant has stated :

Another circumstance appearing against him was again derived from certain injuries found on his knees. In answer to that the appellant has said.

Besides the above two explanations, the appellant when asked to answer whether he was in Satiyara Ban on the date and time of the occurrence, has

stated that he was in Raj High School, Hasan Chak, Darbhanga at that time. A perusal of the injury report and the deposition of P.W. 6 is enough to show that his explanation that injuries on the nose, hand and chin were caused by a child aged about 5-6 months only is false. His plea that he was assaulted by the police at the Police Station is also not supported by any material whatsoever and it is not possible to accept as true his statement that he was assaulted at the Police Station by the police. Injuries caused on the knees, are apparently caused due to his kneeling down on a rough surface. Injuries on the nose, hand and chin noticed in the report of P.W. 6 are such which could be caused at the hands of the victim who did not easily surrender to the lust of the accused. He has stated that he was in Raj High School, Hasan Chak, Darbhanga on the date of occurrence but has not led any evidence whatsoever and left it unproved. This again cannot be accepted as true particularly when three witnesses have deposed that they had seen the appellant preparing the ridge when they left the orchard for their house leaving the victim girl alone behind alone in the orchard. I would have hesitated in accepting uncorroborated testimony of identification of the accused (appellant) by the witnesses, namely, P.Ws. 1 to 3 but it is well settled that the evidence of identification is one which is done in the court and not one which is done elsewhere. Test Identification parades are held to serve dual purpose to lend" assurances to the prosecution during investigation on the one hand and corroboration of the testimony of identification of the witnesses in the court on the other hand. In the absence of a T.I. parade evidentiary value of the identification in the court is undoubtedly weakened. But there is no rule to reject such testimony altogether merely because no Test Identification Parade was held. Evidence of a witness without such verification or corroboration may inspire confidence and a court of law may not hesitate in accepting testimony of a witness identifying the accused in the court. In the instant case the three identifying witnesses had no animus of any kind against the appellant. They had no interest of their own except the interest of justice in identifying the accused whom they had seen when they left the orchard. P.Ws. 1 and 2 are child witnesses. It is well settled that if found not wanting in intelligence and understanding and not shown to have been tutored, testimony of a child witness is more reliable than the testimony of any other witness. There is nothing on the record to suggest that they were tutored or could be tutored. There is nothing also on the record to show that P.Ws. 1 and 2 were not able to fully understand what they were asked to answer or what they deposed in the court. The scene, on recollection by them of the victim still in the orchard and the appellant preparing the ridge in a field nearby, could vividly remain with them once they found that Mina Kumari had been cruelly ravished and brutally killed. I find no reason not to accept the testimony of P.Ws. 1 and 2 and identification by them of the appellant in the court as the person who was in the field preparing the ridge. Their evidence is corroborated by the testimony of P.W. 3 and there is no infirmity in her testimony to discredit her evidence. Their evidence together proves beyond any doubt that the appellant was near the place of occurrence, that is to say, the orchard alone besides the victim when they last saw Mina

Kumari (victim) alive. I have taken notice of the evidence of P.W. 6 which testifies that the appellant had sustained injuries at about the time of the occurrence and these injuries could be caused at the hands of the struggling victim of rape. The two circumstances undoubtedly create a chain suggesting that the appellant in all probability was the man who raped and killed Mina Kumari by giving false explanations to the circumstances appearing against him and advancing false defence that he was not present at the place of occurrence on the date Mina Kumari was killed, the appellant has himself provided the additional link to take the case beyond the realm of "may be" and into the realm of "must be." There can be little doubt that Mina Kumari was raped before she was killed. P.W. 6 has shown some vacillation when examined about it but has affirmed by admitting that there were such marks available that Mina had been subjected to sexual intercourse within 18 to 24 hours of the post mortem examination. I am satisfied that the prosecution has been able to prove its case beyond reasonable doubt against the appellant. Circumstances unerringly point out that the appellant has committed offence of rape and murder of Mina Kumari, a girl aged 14 years only. There is no error committed by the learned Sessions Judge in convicting him under sections 376 and 302 of the Indian Penal Code. The imposition of sentence upon him of rigorous imprisonment for life u/s 302 and 7 years u/s 376 is rather lenient. There is no merit in this appeal. It is accordingly dismissed.

Abhiram Singh, J.

I agree.