

(2013) 01 PAT CK 0014

In the Patna High Court

Case No : Criminal Appeal (DB) No. 135 of 1990

Lakshmeshwar Singh @ Laxmeshwar Singh and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 04-01-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 201, 302, 34, 364

Citation : (2013) 01 PAT CK 0014

Hon'ble Judges : Shyam Kishore Sharma, J; Aditya Kumar Trivedi, J

Bench : Division Bench

Advocate : Puskar Narain Shahi, Mr. Sandeep Kumar, Patanjali Rishi and Anil Singh, for the Appellant; Ajay Mishra, Assistant Public Prosecutor, for the Respondent

Judgement

Honourable Mr. Justice Aditya Kumar Trivedi

1. These two appeals bearing Cr. Appeal No. 135 of 1990, Cr. Appeal No. 194 of 1990 along with Cr. Appeal No. 165 of 1990 (which abated on account of death of appellant Yogendra Rai @ Bhoni Rai and Dinesh Singh) have been filed by the appellants Jagan Sahni, Dinesh Singh (since deceased) Suresh Singh, Ajay Singh, Mahesh Singh, Uma Shankar Singh, Yogendra Rai @ Bhoni Rai (since deceased), Lakshmeshwar Singh respectively against judgment of conviction and sentence dated 13.04.1990 passed by First Additional Sessions Judge, Sitamarhi in Sessions Trial No. 160 of 1982 whereby and where under all the above named appellants have been found guilty for an offence punishable under Sections 302/ 34, 201 of the IPC and further each of them directed to undergo R.I. for life u/s 302/ 34 IPC and R.I. for seven years u/s 201 of the IPC. Furthermore, appellant Jagan Sahni separately independently been found guilty for an offence punishable u/s 364 of the IPC and further sentenced to undergo R.I. for 10 years with a direction to run the sentences concurrently. Ram Kripal Singh (not examined) gave his fardbeyan (Ext. 2) on 13.07.1981 at about 07:30 P.M. at Akhta O.P. in presence of his co-villager Chandeshwar Singh, Sadanand Singh,

Awadh Singh, Chunchun Singh alleging inter alia that on 05.07.1981 at about 09:00 P.M. Jagan Sahni came to his house and took away his brother Ramprit Singh (deceased) on account of having been called by Dinesh Singh, his co-villager. At that very time, he was not present at his house as he was at Dhankaul (Nepal) for the agricultural purpose. When he returned back on 10-07-1981, his Bhabho narrated the event and on account thereof, he had recorded Sanha at Majorganj P.S. Then, thereafter he made hectic search but in vain. During course of search, today i.e. on 13.07.1981 when he reached at village-Bakhar, he came to know with regard to presence of dead body lying near Kothiyaghat. He rushed there and found skeleton of a human being. When he reached near skeleton, he found one vest of "Kathai" colour which he identified belonging to his brother. He also found underwear and identified it to be of his brother. One knife was found in a pocket of underwear which he also identified belonging to his brother. The skeleton was headless. From aforesaid materials he claimed identification of skeleton to be that of his brother Ramprit Singh which was also endorsed by his companions and so he put suspicion against Jagan Sahni who deceitfully took away his brother to Dinesh Singh who happens to be a notorious criminal and who in association with his other companions namely Suresh Singh, Ajay Singh, Mahesh Singh, Uma Shankar Singh, Laxmeshwar Singh, Yogendra Rai Dinesh Singh, son of Rajdeo Singh murdered his brother, cutting away his neck and then threw away the dead body to screen themselves from legal prosecution. The motive for occurrence has been shown as Dinesh Singh was apprehensive that at the behest of deceased he was arrested by the police. It had further been disclosed that villagers have heard sound of firing on the alleged date.

2. On the basis of aforesaid fardbeyan Bairgania P.S. Case No. 44 /1981 was registered proceeded with investigation and its cumulation ended in submission of charge sheet whereupon accused persons were put on trial and ultimately faced with the consequences which happens to be the subject matter of instant appeal.

3. The defence case as is evident from the mode of cross-examination as well as from the statement recorded u/s 313 of the Cr.P.C. is of complete denial of occurrence as well as that of false implication. However, neither any DW nor any Exhibit has been brought up on record on behalf of appellant / accused.

4. While assailing the judgment of conviction and sentence recorded by the learned trial court, it has been asserted by the learned counsel for the appellant that virtually it happens to be a case of no evidence in the background of the fact that none of the witnesses have claimed to be an eye-witness to occurrence. Also submitted that even accepting the case falling under the category of circumstantial evidence, the chain of circumstance is found to be missing and on account thereof the finding recorded by the learned trial court appears to be mechanical one. It has further been submitted that so far conviction recorded u/s 364 of the IPC is concerned, again the prosecution has failed to bring home the

change with positive evidence that deceased was deceitful taken away Jagan Sahni with an intention to commit murder or to be secretly confined for that purpose. Therefore, after scrutinizing and analyzing the evidence available on the record so adduced on behalf of prosecution, it cannot be said that prosecution has succeeded in proving its case beyond all reasonable doubts.

5. At the other hand, while supporting the finding arrived at by the learned trial court, it has been submitted on behalf of learned APP that the finding recorded by the learned trial court is based upon the material available on the record. It has further been submitted that with regard to motive, PW-2 have specifically stated which the defence failed to demolish. In likewise manner there happens to be consistent evidence of PW-1 and PW-3 so far theme of last seen is concerned. As such, the finding recorded by the learned trial court did not attract any sort of interference.

6. Before having an analytical approach over the evidence produced by the prosecution, it looks pertinent to have a glance thereof. Altogether eight PWs have been examined on behalf of prosecution out of whom PW-1 is Sandhya Devi, PW-2 is Jagarnath Singh, PW-3 is Chandeshwar Singh, P.W.-4 is Awadh Kishore Singh, PW-5 is Dr. Shankar Prasad Khaitan, PW-6 is Chunchun Singh, PW-7 is Udai Nath Jha, PW-8 is Sada Nand Singh. With regard to status of the witnesses, PW-4, PW-6 and PW-8 were declared hostile by the prosecution as they failed to support the case of the prosecution. PW-7 happens to be the Investigating Authority while PW-5 is doctor who had conducted postmortem. Thus, the case rest upon testimony of three PWs that means to so PW-1, PW-2 and PW-3. In likewise manner had also exhibited Ext.-1 postmortem report, Ext.-2 fardbeyan, Ext.-3 formal FIR, Ext.-4 carbon copy of inquest report. As discussed above, neither any DW nor any exhibit has been made on behalf of defence.

7. After hearing rival contentions as well as going through the evidence on record it is abundantly clear that none of the prosecution witness happens to be an eye-witness to occurrence. It is also apparent from their testimony that alleged occurrence took place in two parts. The first part happens to be with regard to taking away deceased Ramprit Singh by Jagan Sahni, while second part happens to be with regard to murder of Ramprit Singh. It is also apparent from evidence of witnesses that only headless skeleton was seized and so the Exhibit-4 inquest report as well as Ext.-1 the postmortem report clearly and specifically disclosed that the skeleton was unidentifiable. The witnesses also claimed to have identified the skeleton only on the basis of the vest, underwear and the knife.

8. As per prosecution version, the deceased was taken away from his house by Jagan Sahni at 09:00 P.M. on 05-07-1981 while skeleton was recovered on 13-07-1981. There is no evidence brought up on record on behalf of prosecution that during aforesaid intervening period whether deceased was found alive or dead or was ever seen / not seen. When this aspect is taken together that Ext.-1 the postmortem, the matter became much more confused. As per finding of

doctor, PW-5, the following ante mortem injury has been found over skeleton.

I. Head was cut at cervical 7 vertebrae probably by sharp cutting object and missing, (including neck)

II. Intervertebral joint between T9 and T10 was found broken.

III. One hole of about 1/3" in diameter was found in T10 vertebrae on right side from the back to front directing upwards.

IV. Tip of 6th rib of right side, (fractured).

V. Bones of little and ring finger of right hand missing.

VI. All the bones of left hand missing.

VII. Patella bone of both knee joints missing.

VIII. Bones of both feet missing below ankle joint.

IX. No soft tissue present on skeleton.

As per opinion of the doctor the following finding are: Injury No. 1 above was by sharp cutting object probably. Injury No. 2 was by firearm probably.

9. On a query over time elapsed since death, the doctor had opined that no definite opinion can be given. That means to say whether the deceased was done to death on 05.07.1981 or 06.07.1981 or 13.07.1981 that gone into mine. Further, non-presence of muscle tissue, membrane, skin over skeleton was not on account of decomposition of body rather it was on account of having fallen pray of dog, crow and vultures.

10. In the aforesaid background now the ocular evidence has to be looked into. From the evidence of PW-8, it is evident that the case rest upon last seen theory. To support the same, as is evident only PW-3 came forward. PW-3 save and except disclosing that he had seen these accused persons while was staying at the house of Ram Sajivan Singh, also become doubtful in absence of examination of Ram Sajivan Singh. Apart from the fact that the evidence at a glance appears to be shaky and inconclusive without having corroboration. How far theory of last seen should be accepted to zero the accused, the same found to be elaborately dealt with in a case of Sahadevan and another Vs. State of Tamil Nadu, .

31. With the development of law, the theory of last seen has become a definite tool in the hands of the prosecution to establish the guilt of the accused. This concept is also accepted in various judgments of this Court. The Court has taken the consistent view that where the only circumstantial evidence taken resort to by the prosecution is that the accused and deceased were last seen together, it may raise suspicion but it is not independently sufficient to lead to a finding of guilt. In Arjun Marik and Others Vs. State of Bihar, , this Court took the view that the where the appellant was alleged to have gone to the house of one Sitaram in the evening of 19th July, 1985 and had stayed in the night at the house of

deceased Sitaram, the evidence was very shaky and inconclusive. Even if it was accepted that they were there, it would, at best, amount to be the evidence of the appellants having been last seen together with the deceased. The Court further observed that it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record a finding that it is consistent only with the hypothesis of guilt of the accused and, therefore, no conviction, on that basis alone, can be founded.

32. Even in the case of State of Karnataka Vs. M.V. Mahesh, , this Court held that merely being last seen together is not enough. What has to be established in a case of this nature is definite evidence to indicate that the deceased had been done to death of which the respondent is or must be aware as also proximate to the time of being last seen together. No such clinching evidence is put forth. It is no doubt true that even in the absence corpus delicti it is possible to establish in an appropriate case commission of murder on appropriate material being made available to the Court.

33. In the case of State of U.P. Vs. Satish, , this Court had state that the principle of last seen comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible.

34. Undoubtedly, the last seen theory is an important event in the chain of circumstances that would completely establish and / or could point to the guilt of the accused with some certainty. But this theory should be applied while taking into consideration the case of the prosecution in its entirety and keeping in mind the circumstances that precede and follow the point of being so last seen.

Hence the factum of last seen, as suggested and placed by prosecution is found to be non-tenable in the eye of law.

11. With regard to other part that means to say taking away deceased Ramprit Singh by Jagan Sahni in the night of 05.07.1981, by deceitful means for the purpose of murder or secretly confining for said purpose also appears to be doubtful from own conduct of the prosecution. PW-1 who happens to be Bhaujai of deceased and who claimed herself to be present at her house at the time when Jagan Sahni had come to her house and took away Ramprit Singh on the pretext of being called by Dinesh, does not attract the ingredients of Section 364 of the IPC when her cross-examination at para-5 is to be taken into consideration which suggest:-

12. The PW-2 did not utter a word on this score.

13. PW-3 in examination-in-chief had said that he had seen Ramprit in company with Jagan Sahni. Then had disclosed that accused Dinesh Singh, Mahesh Singh, Suresh Singh, Yogendra Rai and Dinesh Singh son of Rajdeo Singh along with others counting 9 to 10 were also accompany Ramprit Singh and Jagan and

going towards Bagmati Colony. Further he disclosed that on 10.07.1981 he was informed by the brother of Ramprit Singh that Ramprit Singh had not returned after 05-07-1981. This Chandeshwar Singh happens to be the an attesting witness apart from having accompanied the informant at the time of recording of fardbeyan at Akhta Outpost. In fardbeyan the informant had not disclosed the aforesaid event. Absence of aforesaid relevant material in the fardbeyan is suggestive of the fact that had PW-3 seen the appellants/ accused in company of deceased Ramprit Singh then in that event certainly he ought to have disclosed the same to the informant and the ultimate result would have been having the aforesaid allegation levelled in the fardbeyan itself. Absence of aforesaid relevant material in the fardbeyan is suggestive of the fact that PW-3 has subsequently been brought into picture or he himself came forward and the reason behind it happens to be admitted by the PW-3 itself under para-10 of his cross-examination. From such kind of inadequate, sketchy evidence it is found difficult to concur with the finding arrived at by the trial court. Consequent thereupon appeal is allowed. The judgment of conviction and sentence recorded by the learned trial court is set aside. Appellants are on bail, hence they are discharge from its liability.