
(2013) 03 PAT CK 0087

In the Patna High Court

Case No : Criminal Appeal (DB) No"s. 11 and 24 of 1989

Nagina Rajbanshi

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 14-03-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 223
Penal Code, 1860 (IPC) — Section 201, 302, 34, 364

Citation : (2013) CriLJ 3818

Hon'ble Judges : Navaniti Prasad Singh, J;Ashwani Kumar Singh, J

Bench : Division Bench

Advocate : Akhileshwar Prasad Singh, Alok Kumar Sinha and Mrs. Anita Kumari Singh, for the Appellant; Dilip Kumar Sinha, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Ashwani Kumar Singh, J.—These appeals are directed against the judgment and order dated 23.12.1988, passed by the learned Sessions Judge, Nawadah in Sessions Trial No. 5 of 1989 whereby the appellants have been held guilty under Sections 302, 364 & 201 of the Indian Penal Code and sentenced to undergo R.I. for life u/s 302, R.I. for ten years u/s 364 and R.I. for three years u/s 201 of the Indian Penal Code. However, the sentences have been ordered to run concurrently. Before we proceed on the merits of the case, it is pertinent to note here that while we were proceeding with hearing of these appeals, we noticed that in the judgment under the appeals the age of the appellants have been noted as 18 years in respect of appellant Nagina Rajbanshi and 15 years in respect of appellant, Pappu Rajbanshi alias Ram Balak Rajbanshi which would, prima facie, make them minors on the date of occurrence. We further found that the appellant Pappu Rajbanshi alias Ram Balak Rajbanshi had taken the plea of juvenility in the trial court. We also noticed from the record that the appellant Pappu Rajbanshi alias Ram Balak Rajbanshi had raised the plea of juvenility before the learned Chief Judicial Magistrate, Nawada and the learned Chief

Judicial Magistrate, Nawadah had taken into consideration this fact in his order dated 07.12.1987 while his application for bail was being considered.

2. Thus, we thought it appropriate that the Juvenile Justice Board, Nawada (for short "the Board") should consider the case of both the appellants in respect of their age at the time when the offence is alleged to have been committed. We, thus, by order dated 14.12.2011, directed the Board to hold an enquiry into the matter and send a report to this Court.

3. In compliance with our dated 14.12.2011, the board held an enquiry in respect of the age of the appellants. The appellants filed their respective matriculation certificate before the Board in course of enquiry. The Board sent the certificates to the Bihar School Examination Board, Patna for verification and upon verification they were found to be bona fide and genuine. The date of birth of the appellant Pappu Rajbanshi alias Ram Balak Rajbanshi, recorded in the matriculation certificate, is 10.06.1972 and therefore on the date of occurrence, he was found to be 14 years 11 months and 6 days old. So far as the appellant Nagina Rajbanshi is concerned, his date of birth recorded in the matriculation certificate, is 21.06.1968 and as such he was found to be above 18 years on the date of occurrence. After holding enquiry, by order dated 12.03.2012, the Board held the appellant Pappu Rajbanshi alias Ram Balak Rajbanshi to be a juvenile in conflict with law. However, the appellant Nagina Rajbanshi was held to be a major. The board has sent its report to this Court which is on record- Once, the appellant Pappu Rajbanshi alias Ram Balak Rajbanshi has been held to be a juvenile being less than 16 years of age, he could not have been charged with or tried for any offence together with a person who is not a juvenile, in view of provisions contained in Section 223 of the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law for the time being in force.

4. In that view of the matter, the trial itself of the appellant Pappu Rajbanshi alias Ram Balak Rajbanshi would stand vitiated. It may also be noted here that neither State nor any of the appellants have challenged the findings of the Board.

5. However, we are not passing any order in that regard for the reasons to be recorded herein below in the judgment.

6. On the written information submitted by P.W.9, A.S.I. Chandrika Singh, on 16.5.1987 at 8.30 p.m., Hasua P.S. Case No. 36 of 1987 was registered under Sections 302 and 201 of the Indian Penal Code against unknown. According to the informant, on 16.5.1987 at about 10 a.m., an information was given by Chaukidar Parmeshwar Rajwar which was entered into the Station Diary as Station Diary Entry No. 316 dated 16.5.1987. In order to make an enquiry about the information received from the Chaukidar, the informant proceeded to enquire into the matter and when he reached near the well at village Oaro, he found a dead body of an unknown child aged about three years floating. At his instruction, the dead body was taken out and in presence of two villagers, inquest report of the dead body, was prepared. The body was highly

decomposed. Skin was peeling off from almost all places of the body. The whole body was swollen and foul smell was emanating from it. The deceased child was wearing a nylon Ganji of white colour. The body was sent for postmortem examination to Nawadah Sadar Hospital. The informant alleged that some unknown person seems to have killed the boy and in order to conceal the evidence threw his dead body into the well.

7. The Officer-in-Charge, Hasua police station himself took up the investigation of the case. In course of investigation, he inspected the place of occurrence and recovered one more dead body of a woman from the well in question. He prepared the inquest report of the dead body of the unknown female and sent the same for postmortem examination. On conclusion of the investigation, he submitted chargesheet in the case against the two appellants. The learned Chief Judicial Magistrate, Nawadah took cognizance of the offence and committed the case to the court of Sessions for trial. The trial court framed charges u/s 364/34, 302/34 and 201/34 of the Indian Penal Code against the appellants.

8. In course of trial, altogether 11 witnesses, were examined on behalf of the prosecution. Out of them, P.W.1 Ved Brat, is the doctor who held the postmortem examination. P.W.2 Wasisth Yadav, is a hearsay witness. P.W.7 Ishwari Singh and P.W.10 Madan Pandey, are the formal witnesses. P.W.8 Vijay Singh, has been declared hostile by the prosecution. P.W.9 Chandrika Singh, is the informant of the case and P.W. 11 Ashok Kumar Singh, is the investigating officer of the case. P.W.3 Bhola Kewat, P.W.4 Uma Kumari, P.W.5 Rambriksh Sonar and P.W.6 Dhanpati Devi, are witnesses on the point of last seen.

9. Apart from the oral testimony, the prosecution has also proved several documents in course of trial in order to prove the charges which are as follows:--

- (a) Postmortem report of the child-Ext-1.
- (b) Postmortem report of the deceased woman Ext-1/1.
- (c) Inquest report of the deceased female Ext-2
- (d) Signature of P.W.8 Vijay Singh on the inquest report of the deceased female Ext-2/1.
- (e) The inquest report of the deceased child Ext-3.
- (f) The written report on the basis of which FIR was instituted Ext-4.
- (g) The formal FIR Ext-5.
- (h) The negatives of the photographs Ext-6 to 6/5.
- (i) The Positives of the photograph Ext-7 to 7/5.
- (j) The Station Diary Entry Ext-8.

10. Apart from the documentary evidence, the prosecution has also proved

material exhibits which are as follows:--

(a) Saree material Ext-1

(b) Bangles material Ext-2.

11. In the present case, it would be proper to discuss the evidence adduced by the investigating officer first. The investigating officer, namely, Ashok Kumar Singh (P.W. 11) was the Officer-in-Charge of Hasua police station at the relevant time. He has stated that on 16.05.1987 at about 10 a.m., Chaukidar Parmeshwar Rajwar, came to the police station and informed the police on the basis of which Station Diary Entry No. 316 was recorded. He has proved the Sanha entry which has been marked as Ext-8. He sent P.W.9 Chandrika Singh to enquire about the information received in the police station. At about 8.30 p.m., P.W.9 Chandrika Singh, came to the police station and submitted his written report on the basis of which the FIR was instituted. He inspected the place of occurrence himself and found large number of flies inside the well. He smelled foul and at his instance a Jhagger with aid of rope was dipped inside the well. The Jhagger got entangled with something heavy. When it was taken out it was found to be a stitched gunny bag. When the stitches of the gunny bag were cut in presence of villagers, it was found that a dead body of some unknown female was concealed in the gunny bag. According to him photographs of the corpse were taken. He has stated that he prepared the inquest report and sent the dead body for postmortem examination. According to him in course of investigation, he received confidential information that the two corpse recovered from the well were of the Sautan of the sister of Chaukidar Parmeshwar Rajwar and her child. He has further stated that on 29.05.1987, P.W.6 Dhanpati Devi, came to the police station. She identified the photographs of the two corpse as of her daughter Sarswati Devi and her son. She also identified the clothes of the two deceased in the police station. He subsequently, arrested both the appellants and took them on police remand. He recorded the statement of witnesses and on conclusion of investigation submitted chargesheet in the case.

12. In cross-examination, the investigating officer admitted that he did not investigate as to whether the appellants had gone to Kolkata or not. He also admitted that he did not put the seized clothes of the two deceased on test identification parade.

13. P.W.1, Dr. Ved Brat, had conducted postmortem examination on the corpses of the two deceased on 17.05.1987. He has proved their postmortem reports which have been marked as Ext-1 and 1/1. He has stated that the corpses were in highly decomposed condition. The corpses were brought and identified by constable Motichandra Chaudhary, Homeguard Shailendra Kumar and Chaukidars Parmeshwar Rajwar, Prasadi Paswan and Garib Lal Yadav. According to P.W. 1, the death would have taken place more than five days back. In cross-examination, he admitted that he did not find any mark of violence in any of the body due to decomposition. He also admitted that the corpses were barely

recognizable.

14. P.W.2, Wasisth Yadav, is an hearsay witness. He had neither seen the appellants coming to Kolkata nor seen the dead body of the two deceased.

15. P.W.3, Bhola Kewat, stated that on 11.05.1987 at about 12.30 when he came on road, Sarswati Devi told him that her husband had met with an accident and is admitted in Biharsharif Hospital. He has further stated that Sarswati Devi had gone along with her two sons and the two appellants who had come to call her at Calcutta.

16. In cross-examination, he admitted that he had no personal acquaintance with Sarswati Devi. However, he knew her as she resided in the same mohalla at Calcutta.

17. P.W.4, Uma Kumari, stated that the appellant Pappu Rajbanshi alias Ram Balak Rajbansi had come to her house to call her mother on the pretext that her father had met with an accident. On such information, her mother along with her two brothers went together with the appellants. Subsequently, after few days, her father came to Kolkata and when her grand mother (Nani) enquired from him regarding her mother, he expressed complete ignorance about her. She stated that later on, she came to know that her mother and the two brothers were killed.

18. P.W.5, Rambriksh Sonar, has also corroborated the statement of P.W.4 Uma Kumari. He is brother of Sarswati Devi. In cross-examination, P.W.5 has stated that police had recorded his statement as well as the statement of his mother and niece Uma Kumari 5-6 days after Sarswati along with her two kids had left Kolkata. He further admitted that at the time of recording the statement, the police had also shown the photographs. It is relevant to mention here that in examination-in-chief itself, P.W.5 stated that Umesh Rajbanshi had come to Kolkata after 14-15 days of departure of Sarswati Devi and her two kids along with the appellants. P.W.5 has also admitted that his sister frequently used to visit her matrimonial home at Nawadah and stayed there for several days. According to him, she never complained about her husband's family members. He further admitted that the first wife of Umesh Rajbanshi along with her son also used to come and stay at Kolkata of and on.

19. P.W.6, Dhanpati Devi, has also corroborated the story of the appellants coming to Kolkata and taking away Sarswati Devi and her two sons on the pretext of her husband meeting with an accident. According to her, subsequently, Umesh Rajbanshi came to Kolkata after ten days. When enquiry was made from him about Sarswati Devi and her two sons, he expressed ignorance about them. He took Rs. 100/- from her and went away. She has stated that neighbours told her that her son-in-law had not met with any accident and as such, after about four days, she went to Hasua police station. The investigating officer had shown her photographs which were identified as the photograph of her daughter Sarswati Devi and grandson, Gopal. She has stated that there is no trace of another grandson, namely, Krishna who went along with Sarswati Devi. In cross-

examination, she has admitted that she did not visit the place from where the alleged dead bodies were recovered. She also admits that she had not seen the corpses but she could identify their photographs. She stated that she went to Hasua police station after about ten days of the arrival of Umesh Rajbanshi at Kolkata and stayed in the police station for about 15 days.

20. P.W.7 Ishwari Singh has proved his signature on the inquest report of unknown female, which has been marked as Ext-2. In cross-examination, he admitted that the dead body was not recovered in his presence. He also admitted that he had never gone near the well. According to him, the inquest was prepared on road and the place where his signature was obtained was about two K.M. away from the village Oarobigha.

21. P.W.8, Vijay Singh, has also proved his signature on the inquest report of the unknown female, which has been marked as Ext-2/1. He has also stated that the dead body was not recovered in his presence and his signature was obtained subsequently. He has been declared hostile by the prosecution.

22. P.W.9, Chandrika Singh, is the informant of the case. He has proved the inquest report of the unknown child, the written statement and formal FIR which have been marked as Exts-3, 4 and 5 respectively.

23. P.W.10, Madan Pandey, is the photographer who had taken photographs of the deceased female and child. He has proved the negatives of the photographs which have been marked as Ext-6 to 6/5 and the positives of the photographs which have been marked as Ext-7 to 7/5.

24. Taking into consideration the materials on record as also after hearing the parties, we find that the only incriminating evidence against the appellants is that they had gone to Kolkata on 11.05.1987 and Sarswati Devi and her two sons had accompanied them. Thereafter, there is absolutely no evidence to connect them with the alleged offence. There is no eye witness to the commission of murder. There is no evidence that the appellants were seen in an around the place where the occurrence took place immediately before or immediately after the occurrence. None had seen the appellants either throwing the deceased persons into the well while they were alive or after their death.

25. We further find that the initial information regarding the occurrence was sent to the police by the Chaukidar Parmeshwar Rajwar. However, Parmeshwar Rajwar has not been examined by the police in course of trial. Similarly, the other Chaukidars and constables who had taken the dead body of the two deceased for postmortem examination have not been examined in course of trial. The prosecution has submitted no explanation for their non-examination.

26. We find that Umesh Rajbanshi was an important witness in this case. The two deceased were his wife and son. The prosecution story is that the appellants took the deceased Sarswati Devi along with her two sons on the pretext that Umesh Rajbanshi had met with an accident and was hospitalized at Biharsharif.

Appellant Nagina Rajbanshi happens to be his son as well from the first marriage. The prosecution has failed to examine even Umesh Rajbanshi in this case. There is no explanation as to why Umesh Rajbanshi has not been examined.

27. We further find that P.W.9 Chandrika Singh and P.W.11 Ashok Kumar Singh at whose instance, the corpses were recovered and taken out from the well, have stated that villagers were called at the time of recovery of the corpses. However, the prosecution has failed to examine any villager on the point of recovery. The two witnesses to the inquest have not supported the prosecution case. Thus, there is no independent person to corroborate the story of recovery of the dead body of the unknown female and child from the well in question.

28. We further find that the doctor did not find any external or internal injury on any of the body. Hence, a case of drowning cannot be ruled out. There is nothing on record on the basis of which, it can be said that it was a case of homicidal death.

29. We further find that according to the doctor, the corpses were so decomposed that it was barely recognizable. Admittedly, P.Ws. 4, 5 and 6 have not seen the corpses but they claim to identify their photographs. The defence has challenged the identity of the two deceased. If the corpses were so decomposed that it was barely recognizable, it would have been really difficult for any one to identify them on the basis of their photographs.

30. We find from the evidence that the investigating officer of the case has stated that the dead body of the unknown female was recovered from a stitched bag. However, in course of trial, no bag was produced in court. The story that the stitches of the bag were cut in presence of the witnesses, has also not been corroborated by any witness.

31. We find from the evidence that the material exhibits were never put on test identification parade in course of investigation. The investigating officer has not proved even the seizure list of the material exhibits produced in court in course of trial. In our view, the identification of such material exhibits for the first time in court in course of trial is of no consequence. We also find from the evidence that according to P.W.5 Rambirksh Sonar, the police went to Kolkata 5-6 days after Sarswati Devi had left her house. According to him, the police had also recorded his statement as well as the statement of his mother and niece and shown them some photographs. Such statement of P.W.5 makes the whole case suspicious. By that time, even the dead body of the two deceased were not even recovered.

32. In the case of circumstantial evidence, motive becomes a material factor. The prosecution has not assigned any motive for abduction of the deceased Sarswati Devi and her sons in course of trial. To the contrary, it has come in evidence that the deceased Sarswati Devi had cordial relationship with her husband Umesh Rajbanshi and with the family members of the first wife. There is evidence on record that the first wife used to visit Kolkata and Sarswati Devi used to visit the

village home of Umesh Rajbanshi. The witnesses examined on behalf of the prosecution have not alleged any motive against the appellants for committing the crime.

33. We further find that the investigating officer has admitted in evidence that he had not investigated on the point as to whether the appellants had ever visited Kolkata or not.

34. In the present case, in absence of any direct evidence, the case rests solely on the proof of circumstances. It is well settled that when a case rests on proof of circumstances, such evidence must satisfy three tests:--

(a) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(b) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;

(c) The circumstances, taken cumulative, should form a chain so complete that there is no escape from the conclusion that within all human possibility the crime was committed by the accused and none else.

35. The evidence of circumstances brought in the present case is not of unimpeachable character. The mere fact that the appellants and the deceased were seen together at Kolkata does not by itself lead to irresistible inference that the appellants must have murdered the two deceased. The chain is not complete.

36. Thus, in absence of any clear and cogent evidence pointing to the guilt of the appellants, the judgment of conviction and order of sentence passed by the trial court cannot be sustained. Accordingly, the appeals are allowed. The impugned judgment of conviction and order of sentence dated 23.12.1988 are set aside. As we have already recorded the judgment of acquittal on merits, we are not passing any separate order in respect of the appellant Pappu Rajbanshi alias Ram Balak Rajbanshi, who upon enquiry by the Board, has been held to be a juvenile in conflict with law on the alleged date of occurrence. Since the appellants are already on bail, they are discharged from the liabilities of their bail bonds.

Navaniti Prasad Singh, J.

I agree.