

(1991) 05 PAT CK 0018
In the Patna High Court
Case No : Criminal Appeal No. 267 of 1988

Shayam Nandan Singh and Others APPELLANT
Vs
The State of Bihar RESPONDENT

Date of Decision : 09-05-1991

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 157, 6
Penal Code, 1860 (IPC) — Section 302, 34, 354

Citation : (1991) 39 BLJR 1298 : (1991) CriLJ 3350 : (1991) 2 PLJR 441

Hon'ble Judges : Nunumani Prasad Singh, J; Bimalendu Narayan Sinha, J

Bench : Division Bench

Advocate : Brajkishore Prasad, Akhileshwar Pd. Singh, Ashok Kumar Mitra No. 2, Gopal Pd. Roy and Anil Singh, for the Appellant; K.P. Gupta, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Bimalendu Narayan Sinha, J.—These three appellants who are full brothers were tried by the 4th Additional Sessions Judge, Gaya in Sessions trial No. 35/88, 559/86 in respect of murder of Surji Devi allegedly committed on 11th of March, 1986 at village Akhanpur, P.S. Tekari, District-Gaya and they have been convicted u/s 302 read with 34 I.P.C. and sentenced to undergo rigorous imprisonment for life.

2. The case of the prosecution as presented before the Court through witnesses may be briefly stated. On 11-3-1986 Mungeshwari Devi (since dead) along with her daughter Surji Devi (the deceased had gone to her land in Bagicha Baghar for harvesting Masuri crop. At about 5.30 p.m. Surji Devi began to make bundles of the harvested Masuri crop. At that very time these three accused suddenly came there from north direction. Accused Shyam Nandan Singh was armed with a Pasuli and he asked Surji Devi not to remove the bundles of Masuri crop and they caught hold of the Masuri bundles. Thereafter they felled down Surji Devi

the deceased, on the ground and tried to rape her. Surji Devi -- the deceased raised alarm. But accused Brijnandan Singh and Jainandan Singh caught hold of her arms and accused Shayam Nandan Singh cut her neck with Pasuli and thereafter the accused persons fled away. On hearing alarm P. Ws. Suba Yadav, Ram Lakhan Yadav, Karu Yadav, Kameshwar Yadav and Birja Yadav ran towards the place of occurrence, P.Ws. Suba Yadav, Ram Lakhan Yadav, Kameshwar Yadav and Birja Yadav saw the accused persons fleeing away. On reaching to the place of occurrence P.Ws. found the dead body of Surji Devi the deceased, lying on the ground with injury, her neck in pool of blood. Mun-geshwari Devi (since dead) narrated about the occurrence to these P.Ws. and thereafter Mungeshwari Devi went to the Police Station along with these P.Ws. and Chaukidar Brij Kishore Paswan (not examined) to lodge information.

3. On the statement of Mungeshwari Devi (since dead) P.W. 8 Suresh Singh recorded the first information report (Exhibit-2) on the same night, i.e., on 12-3-1986 at 1.30 a.m. After usual investigation the police submitted charge-sheet against the accused. Thereafter the case was committed to the Court of Session and the trial proceeded.

4. The accused pleaded not guilty to the charges and claimed to be tried. Their defence was that they have been falsely implicated due to previous enmity and that the prosecution witnesses have themselves committed murder of Surji Devi somewhere in the village and brought her dead body to the place of occurrence and altogether a false case has been hoisted against these accused.

5. The prosecution examined altogether 11 witnesses. Out of them P.W. 3 Karu Yadav and P.W. 11 Raja Yadav were tendered by the prosecution. P.W. 10 Sakaldeo Yadav is a formal witness, who has proved his singature-Exhibit-1/1 on the FIR (Exhibit-2). P.W. 1 Suba Yadav, P.W. 2 Ram Lakahn Yadav, P.W. 4 Kameshwar Yadav and P.W. 5 Birja Yadav, claimed to have gone towards the place of occurrence on hearing alarm and saw the accused persons fleeing away from the place of occurrence. P.Ws. 1, 2, 4, 5 and 7 Ganauri Yadav claimed to have learnt about the occurrence from Mungeshwari Devi. P.W. 6 Lakshman Yadav is father of the deceased and on the date of occurrence he was at Patna and on being informed regarding the incident he came to his village home and came to learn about the occurrence from his wife Mungeshwari Devi. P.Ws. 5 and 7 are also witnesses on inquest report in respect of the dead-body of the deceased Surji Devi. P.W. 8 Suresh Singh is the Investigation Officer of the case, P.W. 9 Dr. Mithilesh Kumar Sinha held post-mortem examination on the dead-body of the deceased.

6. Learned trial court placing reliance mainly on the evidence of P.Ws, 1, 3, &4 has accepted the prosecution case and convicted the accused under Sections 302/34 I.P.C. It appears that all these accused persons were also charged u/s 354 I.P.C. and accused Shayam Nandan Singh was also charged u/s 302 I.P.C. simpliciter but the trial court has not recorded his findings in respect of these charges against the accused.

7. Learned counsel for the accused has not challenged the factum of murder of the deceased Surji Devi near about the alleged time of occurrence and it also stands proved . on the evidence of P.W. 8, A.S.I. Suresh Singh and P.W. 9 Dr. Mithilesh Kumar Sinha. P.W. 8 has stated in his evidence that on 12th March, 1986 he held inquest over the dead body of the deceased Surji Devi and prepared inquest report (Exhibit-3) in presence of P.Ws. Girja Yadav and Ganauri Yadav and forwarded the dead-body of the deceased Surjit Devi for post-mortem examination. The evidence of P. W. 9 Dr. Mithilesh Kumar Sinha is that on 12-3-1986 while posted as Professor and Head of the Department of Forensic Medicine Magadh College, Gaya at 3.30 p.m. he conducted the postmortem examination on the dead-body of the deceased Surji Devi and found the following ante mortem injuries on her person :

1. Transverse incised wound 5" x 2" 31/2" over front of the neck in the middle.
2. Two crescentic abrasions over outer quadrant of left breast on upper part and two crescentic abrasions over left side of labia which was bruised and swollen.
3. Abrasion over front of the left knee joint 2 1/2" x 2". On dissection of injury No. 1 the doctor found all structure of neck in front including 4th and 5th cervical vertebra and larynx trachea sharply cut. In the opinion of the doctor the death of the deceased had taken place due to shock and haemorrhage mainly due to injury No. 1 and the time elapsed since death was 18 to 24 hours at the time of holding post-mortem examination. On these evidences it is fully established that Surji Devi died as a result of injuries found on her person.

8. But it has been submitted by the learned counsel for the appellants that on the evidence produced on behalf of the prosecution it remains far from being established that these accused persons inflicted those injuries on the person of the deceased.

9. It may be mentioned that Mungesh-wari Devi -- the first informant was the eyewitness of the occurrence. It appears from the evidence of P.Ws. 1 & 6 that Mungeshwari died before the evidence of P.Ws. recorded in the trial and, therefore, she could not be examined. Under the circumstances, the learned trial court has correctly held that the case depends entirely on circumstantial evidence available in this case, the learned trial court has placed reliance on the evidence of P.Ws. 1, 2, & 4, whose evidence is that at the relevant time they rushed to the place of occurrence on hearing alarm and they saw the accused persons fleeing away and when they reached at the place of occurrence they saw the deceased Surji Devi lying dead there with injuries on her person and that Mungeshwari Devi, the first informant narrated to them the entire occurrence and told them that the accused Brijnandan Singh and Jainandan Singh had caught hold of arm, of Surjit Devi and Shayam Nandan Singh cut her neck with Pasuli. The evidence of P.W. 5 is also to the same effect, but the learned trial court has not rightly accepted his evidence because he does not appear to be a trustworthy witness.

10. Learned counsel for the appellants has submitted that the only circumstance the trial court could have used against the accused-appellants was that they (P.Ws.) saw the accused persons fleeing away but that circumstance itself is not incriminating one and, therefore, does not in any way implicate the accused persons and that the learned trial court has illegally taken into consideration the evidence of P. Ws. 1, 2 & 4 about what they learnt from Mungeshwari Devi, the first informant regarding the alleged occurrence after they had reached at the place of occurrence. It may be mentioned that the learned trial court has held that these three P.Ws. learnt regarding the manner in which the murder of Surji Devi had been committed by the accused persons through the informant-Mungeshwari Devi, and he has taken into consideration this circumstance also in coming to the conclusion regarding the guilt of these accused persons.

11. The learned counsel for the appellants has submitted that the FIR cannot be looked into for any purpose if the persons on whose statement it was recorded is not examined as a P.W. as the statement contained in the F.I.R. can be used only to contradict or corroborate the first informant and none-else.

12. Learned counsel for the State on the other hand has drawn my attention to a decision of the Supreme Court in the case of Bandela Nagaraju v. State of A.P. 1984 Cri LJ 674 and has rightly submitted that the F.I.R. in the present case can be used u/s 6 of the Evidence Act (hereinafter called as "the Act"). Section 6 of the Act provides that the facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places. Illustration (a) of Section 6 of the Act reads thus:

"A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction is a relevant fact."

In the present case on the facts of the prosecution case Mungeshwari Devi -- the first informant had accompanied her daughter to the field and the entire occurrence had taken place in her presence and thereafter on hearing alarm the persons including P. Ws. 1, 2, 4 and 5 reached there to whom she narrated about the occurrence and disclosed the names of the accused persons and immediately thereafter she went to the police station with them situated at the distance of 12 Kms. from the place of occurrence and lodged F.I.R. (Exhibit-2). Thus, whatever was said by her to the P.Ws. or in the F.I.R. (Exhibit-2) after the occurrence forms part of the same transaction and thus is relevant fact u/s 6 of the Act.

13. But it has been rightly submitted by the learned counsel for the appellants that the statement made by the first informant Mungeshwari Devi to the P.Ws. and in the F.I.R. cannot be used as substantive piece of evidence. The statement of Mungeshwari Devi to those P.Ws. and in the F.I.R. could have been used as corroborative evidence u/s 157 of the Act, if Mungeshwari had been examined as a witness in the trial. Section 157 of the Act reads as follows :--

"In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact; may be proved."

It is apparent that two things are required for this section to apply. The first is that a witness should have given testimony with respect to some fact and the second is that he should have made a statement earlier with respect to the same fact at or about the time when the fact took place or before any authority legally competent to investigate the fact. In the present case the very first condition is not fulfilled as Mungeshwari Devi being dead could not be examined as a witness in the trial.

14. Under these circumstances, whatever has been said by P.Ws. 1, 2, 4 and 5 regarding the occurrence including the motive for the occurrence, as they learnt from Mungeshwari Devi cannot be used as evidence against the accused as substantive piece of evidence.

15. Hence, the only circumstance which can be used against the accused-appellants is that these P.Ws. saw them fleeing away immediately after they had reached near the place of occurrence on hearing alarm. On this point there is evidence of P.Ws. 1, 2, 4 and 5. The learned trial Court has rightly not accepted the evidence of P.W. 5 as he found him not a trustworthy witness. So far P.W. 1 is concerned, he has said in his evidence that he saw the accused fleeing away but the accused Shyam Nandan Singh was armed with a Pasuli. But it appears from the evidence of P.W. 8 A.S.I. Suresh Singh, the Investigating Officer that P.W. 1 SubaVadav in his statement before him had not stated that at the time of fleeing away Shyam Nandan was armed with Pasuli. P.Ws. 2 and 4 had not stated that at the time the accused were seen fleeing away any of them were armed with a weapon. Thus, even the evidence of P.Ws. 1, 2 and 4 is accepted on this point their evidence is that these accused persons were seen fleeing away. But, there is no evidence that at the time of fleeing away any of these witnesses had actually seen them armed with any weapon. In this situation, this circumstance alone cannot be taken as incriminating circumstance against the accused. The learned trial Court placing reliance on a decision of this Court in *Dinesh Roy v. The State of Bihar* 1987 PLJR 671 : (1988 Cri LJ NOC 8 (Pat) has stated the approach to be made in the cases based on circumstantial evidence but the trial Court has erred in the application of the same to the facts of the present case. The importance of legal principles lies more in their application to a given state of facts than in their recital in the judgment. The settled principle of law regarding circumstantial evidence is that each chain of circumstance being relied upon by the prosecution has to be fully established beyond doubt; that the chain of circumstance so established should be complete and they should be consistent only with the guilt of the accused; that the circumstances should be of conclusive nature and tendency; and that the circumstances should actually exclude every reasonable hypothesis as to the innocence of the accused. Law regarding the

case of circumstantial evidence is that in practical application it requires exclusion of any other alternative hypothesis of innocence of the accused.

16. In the present case, the circumstance that the accused persons were seen fleeing away and when the P. Ws. reached at the place of occurrence, they found the deceased Surji Devi lying dead with injuries on her person, do not lead to the only conclusion that she had been murdered by the accused persons. Who killed her? How and why she was killed? By what weapon she was killed? On these points there is complete lack of evidence either direct or circumstantial. The mere fact that these accused persons were seen fleeing away is not a circumstance which excludes every reasonable hypothesis as to the innocence of the accused.

17. As has been rightly pointed out by the learned counsel for the appellants, the learned trial court has erred in not putting to the accused-appellant while examining him u/s 313 of the Code of Criminal "Procedure, 1973 (hereinafter to be called as "the Code"), the circumstances which have been used against him for coming to the finding regarding his guilt. Section 313 of the Code requires that every circumstance appearing in the evidence against the accused is to be put to the accused personally to enable him to explain the same. But, in the present case, none of the circumstances which have been used by the trial court for coming to his finding regarding the guilt of the accused was put to the accused when he was being examined u/s 313 of the Code. For this reason also this circumstance cannot be used against him as incriminating one.

18. Thus, on consideration of the facts and circumstances and the evidence discussed above, I find and hold that the prosecution has failed to prove its case beyond reasonable doubt and the conviction and sentence passed against the accused-appellants cannot be sustained.

19. I, accordingly, allow this appeal, set aside the conviction and sentence passed against these appellants. The appellants are being discharged with the liabilities of their bail bonds.

N.P. Singh, J.

20. I agree.