
(2007) 04 PAT CK 0108
In the Patna High Court

The State of Bihar

APPELLANT

Vs

Birendra Yadav and Binod Yadav

RESPONDENT

Date of Decision : 03-04-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 366
Penal Code, 1860 (IPC) — Section 201, 302, 34, 376

Citation : (2007) 04 PAT CK 0108

Hon'ble Judges : Chandramauli Kr. Prasad, J; Abhijit Sinha, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Chandramauli Kr. Prasad and Abhijit Sinha, JJ.—Capital punishment inflicted on the two accused, namely, Birendra Yadav and Binod Yadav by the Additional Sessions Judge, Fast Track Court No. 1, Bhagalpur in Sessions Trial No. 379 of 1999 has necessitated this reference u/s 366 of the Code of Criminal Procedure. The two accused aggrieved by the judgment of conviction and order of sentence have preferred appeal which has been registered as Criminal Appeal No. 692 of 2004.

2. Both reference and the appeal were heard together and are being disposed of by this common judgment.

3. Prosecution started on the basis of the statement given by P.W.6 Ramashish Yadav before the Sub-Inspector of Police of Pirpainti Police Station on 5.8.1998. The aforesaid statement was given by the Informant in a Sugarcane field where the dead body of his daughter Nilam Kumari was lying. According to the informant on 4.8.1998 he had gone to his house at 7'o clock in the morning in connection with some domestic works whereas his wife Chinta Devi and the daughter Nilam Kumari aged about eight years were alone at the temporary dwelling house in Madhuban Diyara. At 7.30 a.m. on 4.8.1998 said Nilam Kumari had gone out for cutting grass but when she did not return till 9.30 a.m. her brother P.W.4 Sunil Kumar Yadav alongwith their mother went searching for her

in the nearby agricultural field but she could not be found. They presumed that she might have gone to the village either by boat or swimming. At 5'o clock in the evening on 4.8.1998 when the informant came to his temporary residence at Madhuban Diyara he came to know about aforesaid fact and having found that she had not gone to the house at Madhuban Tola they went to search her alongwith other persons. In the morning he found her dead body lying in the eastern ridge of the sugarcane field of co-villager Kailash Yadav situated at a distance of about 300 yards to the north-east of the temporary house at Madhuban diyara. He found deep black wound on the right side of forehead as also on the right cheek and blood had trickled down from her nose and mouth. According to him semen was also stuck in her private parts. Accordingly, the informant came to the conclusion that his daughter Nilam Kumari was murdered after committing rape on her. In the First Information Report he suspected the hand of the two accused herein in commission of the crime, as their houses are situated near the temporary dwelling house of the informant and are infamous and men of licentious character. According to the informant they had absconded in suspicious manner since the occurrence. On the basis of the aforesaid information Pirpainti Police Station Case No. 145 of 1998 was registered u/s 376 and 302/34 of the Indian Penal Code and the investigation was entrusted to P.W.7 Radha Mohan Singh, Sub-Inspector of Police who had recorded the statement of the informant. Police after investigation submitted charge-sheet u/s 376, 302 and 201/34 of the Indian Penal Code. After the learned Magistrate took cognizance of the offence and ultimately the case was committed to the Court of Sessions for trial where they have been charged for committing rape on Nilam Kumari in furtherance of their common object punishable u/s 376/34 of the Indian Penal Code.

4. They were also charged for committing the murder of Nilam Kumari in furtherance of common intention punishable u/s 302/34 of the Indian Penal Code. Besides, they have been charged for committing the offence punishable u/s 201 of the Indian Penal Code. Accused persons denied to have committed any offence and claimed to be tried.

5. Prosecution in support of its case had altogether examined eight witnesses. P.W.1 Pukar Yadav, P.W.2 Dharamdeo Rai, P.W.3 Rajendra Yadav have been declared hostile by the prosecution. P.W.4 Sunil Kumar Yadav, P.W.5 Chinta Devi and P.W.6 Ram Ashish Yadav respectively are the brother, mother and father of the deceased and have been examined to prove the circumstance pointing towards the guilt of the accused persons. P.W.7 Radha Mohan Singh is the Sub-Inspector of Police, who had recorded the statement of the informant, investigated case and ultimately charge-sheeted them. P.W. 8 Dr. Bishnu Deo Prasad is an Assistant Professor who conducted post mortem examination of the dead body of Nilam Kumari.

6. It is relevant here to state that the informant is the resident of village Madhuban Tola but in order to look after the cultivation they have made

temporary structure (dera) at Madhuban Diyara. The Madhuban Diyara and Madhuban Tola are intervened by river Ganga and for going from Madhuban Diyara to Madhuban Tola and vice-versa one has to cross river Ganga.

7. P.W.1 Pukar Yadav in his examination-in-chief had stated that he did not know anything about the occurrence excepting that the daughter of the informant Nilam Kumari had died. According to him, his statement was not recorded by the Police during the course of investigation. P.W.2 Dharamdeo Rai had stated that he did not know Nilam Kumari and further it is not known whether she is dead or alive. He has categorically stated that during the course of investigation his statement was not recorded. The aforesaid witnesses saying so, the prosecution declared them hostile and cross-examined them. During the cross-examination they denied to have stated to the police during investigation that while they were returning to the village Madhuban Tola from Madhuban Diyara, by boat, they saw the two accused also on the same boat. P.W.3 Rajendra Yadav in the examination-in-chief has stated that he heard that after committing rape Nilam Kumari was murdered at Madhuban Diyara but he showed his ignorance as to the accused persons involved in the same. He had also stated that his statement was not recorded by the police during the course of investigation. After that the witness was declared hostile and cross-examined by the prosecution when he denied to have given any statement during the course of investigation that while he was returning to his village from Madhuban Diyara by boat, the two accused persons were also boarded in that boat. P.W.4 and P.W.5 Sunil Kumar Yadav and Chinta Devi are the brother and mother respectively of the deceased Nilam Kumari. They have stated that on 4.8.1998 at 7'o clock the deceased Nilam Kumari had gone out to cut grass but did not come back and although attempts were made to trace her out but she could not be found. On the following day her dead body was found in the sugarcane field of Kailash Yadav situated near the Basa of Birendra Yadav and there was mark of injury on her forehead and private parts. Semen was also found stuck on her private parts. According to their evidence, the two accused persons herein after committing rape on her had murdered her. In paragraph 3 of the examination-in-chief P.W.4 Sunil Kumar Yadav has stated that prior to the occurrence the two accused persons had quarreled with him in respect of cattle and threatened him to teach a lesson. In the cross examination in paragraph 6 he has asserted that during the course of investigation he had stated to the police that prior to the occurrence the two accused had quarreled with him and threatened to teach him a lesson. P.W.5 Chinta Devi in paragraph 2 of the examination-in-chief had stated that eight days ago a dispute in respect of cattle had taken place with the accused persons and they had threatened to teach them a lesson within eight days. In paragraph 7 of the cross-examination this witness had stated that she did not remember whether said fact was stated to the police during the course of investigation.

8. P.W.6 Ramashish Yadav is the father of the deceased and according to him he had returned to his house at Madhuban Tola from Madhuban Diyara on 4.8.1998, whereas his wife Chinta Devi P.W.5 and daughter Nilam Kumari aged eight years

stayed back. On 4.8.1998 in the evening when he returned to the Diyara he was told by his wife that Nilam Kumari had gone to cut grass at 7.30 a.m. but had not returned. He was told by his wife that attempt was made to trace her out but could not be found, his son P.W.4 Sunil Kumar Yadav also came and said that despite search Nilam Kumari could not be found out. This witness also went in search of his daughter but as the darkness was setting in he also returned. On the following day i.e. 5.8.1998 he alongwith P.W.1 Pukar Yadav, P.W.2 Dharmdeo Rai and his son and wife went in her search and found the dead body of Nilam Kumari lying in the Sugarcane field of Kailash Yadav having mark of blows on her right cheek and both thigh and further semen was stuck on the leg below the thigh. In paragraph 3 of the examination-in-chief he has stated that ten days prior to the occurrence the two accused had threatened him to teach lesson. In paragraph 4 of the examination-in-chief he has stated that the accused persons were staying in the village even after the occurrence but from the day following the occurrence the two accused persons were found absconding from the village. In paragraph 9 of the cross-examination he denied the suggestion that he had not stated before Sub-Inspector of Police during the course of investigation that ten days ago of the occurrence accused persons had threatened him. P.W.7 is the Investigating Officer of the case and according to his evidence after he had received the information that a dead body was thrown in a Sugarcane field after committing murder he went there and recorded the statement of P.W.6 Ramashish Yadav. He had also prepared the inquest report and proved the same. During the Course of investigation he had sent the dead body for post mortem examination to Bhagalpur, inspected the place of occurrence, recorded the statement of the witnesses and submitted charge-sheet. P.W.7 in paragraphs 6, 7 and 8 of cross examination had clearly stated that P.W.4 Sunil Kumar Yadav, P.W.5 Chinta Devi and P.W.6 Ramashish Yadav had not stated before him during the course of investigation that prior to the occurrence the two accused had quarreled with them and threatened to teach them a lesson.

9. P.W.8 Dr. Bishnu Deo Prasad, at the relevant time was posted as Assistant Professor in the department of Forensic Medicine in the Jawahar Lal Nehru Medical College, Bhagalpur and conducted the post mortem examination of dead body of Nilam Kumari and found the following ante mortem injuries on her person:

- (i) Lacerated wound of size 1" x 1" was present on the vagina at five (5) o'clock position.
- (ii) Lacerated wound of size 1/2" x 1/2" was present on the lower lip.
- (iii) Bruise of size 1" x 1" was present on the right side of the forehead including right temporal region end of the head.
- (iv) Bruise of size 1/2" x 1/2" was present on right cheek.

10. In his opinion, the cause of death was smothering which is a type of asphyxia. He has further stated that time elapsed between the death and the

post mortem examination is 30 to 60 hours.

11. Appellants denied to have committed offence and pleaded false implication. However, no witness has been examined. From the trend of the cross examination their defence further appear that they have been falsely implicated on account of the land dispute. The trial Court on appraisal of evidence came to the conclusion that the prosecution has been able to prove its case beyond all reasonable doubts and accordingly, convicted and sentenced the accused persons as above. For coming to the aforesaid conclusion, the circumstances pointing towards the guilt of these accused persons have been referred in paragraph 16 of the judgment, which we quote here for ready reference:

(i) The fardbeyan of informant was recorded on 5 August, 1998 soon after detection of dead body of his small daughter which was ravished lying in a sugar-cane field which does not suffer from embellishment. It disclosed the name of accused persons therein as culprits.

(ii) Eight days preceding to the incident, there has been a dispute followed by quarrel in between the informant and accused persons in which the informant and his family was threatened with dire consequences.

(iii) The accused persons are reckless persons who soon after the incident had left the village and were absconding.

(iv) Basa of the accused situated near the place of occurrence.

(v) On investigation during which there had been supervision by the superior police Officer, complicity of the accused persons with the alleged crime came to light and

(vi) Testimonies of witnesses (P.Ws.4, 5 and 6) are consistent pointing out guilt of accused persons as perpetrator of crime which finds further support from the medical evidence and too from the evidence of the Investigating Officer.

All these circumstances taken together in a chain of sequence, unerringly point out guilt of the accused persons with the crime which was perpetrated on the person of deceased on the basis of which they can be held guilty.

12. Mr. Abhay Kumar Singh, appearing on behalf of the accused persons submits that the circumstances brought on record in no way points towards the guilt of the accused persons. He submits that according to the First Information Report the informant suspected the hands of the two accused persons as they are infamous and men of licentious character. However, there is no evidence on record to substantiate that. He further points out that during the course of trial P.Ws. 4, 5 and 6 have stated that these accused persons had threatened to teach them lesson 8 to 10 days prior to the incident but this important fact was not disclosed to the police during the course of investigation. In this connection Mr. Singh has drawn our attention to the evidence of the Investigating Officer in paragraphs 6, 7 and 8 of the cross examination, wherein he has categorically

stated that no such statement was made before him during the course of investigation. He submits that this circumstance relied on by the trial Court has not at all been proved and, as such, same is fit to be ignored.

13. Mr. Lala Kailash Bihari Prasad, Additional Public Prosecutor, appearing on behalf of the State as also Mr. Bhagat, appearing on behalf of the Informant contend that mere omission to disclose the aforesaid fact during the course of investigation itself shall not be sufficient to discard the evidence of P.W.4 to 6 on this point. In support of the submission reliance has been placed on a Division Bench Judgment of this Court in the case of Ramji Ram and Others Vs. The State of Bihar and our attention has been drawn to the following passage in paragraph 18 of the judgment which reads as follows:

The investigating Officer as a matter of fact did not make probe on these lines and he admitted whatever was put in his mouth by the cross examining lawyer and he made such statements even though there was no mention thereof in the case diary. Faulty investigation, however, cannot by itself lead to total demolition of the prosecution case if it can otherwise stand ignoring the fallacy. The prosecution version in the present case is established on the basis of trustworthy testimony of the eye witnesses.

14. In the present case, there is no direct evidence to connect the two accused persons with the crime and the prosecution wants to bring home the charge on the basis of circumstantial evidence. It is trite that in order to sustain conviction on circumstantial evidence the prosecution must establish that the chain of circumstances only unerringly point to the guilt of the accused and is inconsistent with his innocence.

15. Having considered the rival submissions, we find substance in the submission of Mr. Singh and the authority relied on by Mr. Prasad is clearly distinguishable. It is relevant here to state that according to the First Information Report informant suspected the hands of these two accused persons on the ground that they are infamous and men of licentious character. However, there is no evidence to support that allegation. During the course of trial the witnesses have come out with entirely different story. According to P.W.4 Sunil Kumar Yadav, P.W.5 Chinta Devi and P.W.6 Ramashish Yadav, these accused persons had threatened them 8 to 10 days prior to the incident to teach them a lesson but this important event has not been disclosed to the Investigating Officer during the course, of investigation. The Investigating Officer during the course of investigation had clearly stated that no such statement was made during the course of investigation. In the face of it is difficult on fact to accept the case of the prosecution that the accused persons threatened the informant and the witnesses to teach them a lesson to constitute a circumstance showing towards their guilt. Not only this, there is no material on record to show that appellants were in the Madhuban Diyara on the date when the occurrence had taken place.

16. Another circumstance which heavily weighed with the learned Judge while

recording the conviction is that accused persons are reckless persons and absconded from the village. There is no material to show that accused persons are reckless persons and involved in crime of such nature. Mr. Singh, points out that P.W.5 and P.W.6 although have stated that the accused persons had fled from the village, however from paragraph 4 of the evidence of P.W.6 it is evident that accused persons were staying in the village even after the occurrence and from the day following the occurrence they were found absconding from the village. The best evidence on this question would have been the Investigating Officer of the case but during his examination he has not whispered a word that these accused persons had fled from the village after the incident.

17. Another circumstance relied on by the trial Court to convict the accused is that soon after the detection of the dead body their names have been disclosed in the First Information Report. We are of the opinion that this circumstance alongwith the other circumstances taken together unerringly do not point out to the guilt of the accused. Informant is not an eye-witness to the occurrence and had merely suspected that the accused persons had committed the crime only on the ground that they are licentious persons.

18. The value attributed by Court in cases in which the occurrence is reported promptly to the police shall have no application in cases in which the prosecution depends fully on circumstantial evidence.

19. The learned Judge considered the location of the temporary dwelling house from near the place the dead body was recovered to be a circumstance pointing towards their guilt. True it is that during the course of trial witnesses have stated that Basa of the accused persons are situated near the place from where the dead body was recovered but there is nothing on record to show that infact the accused persons were found in the Basa on the date of incident. In our opinion mere location of the Basa of the appellants near the place of occurrence is not a circumstance which points towards the guilt of these accused persons. The learned Judge while convicting the accused was heavily swayed by the fact that on an investigation and supervision by the superior Police Officers complicity of the accused persons with the alleged crime had come to light. We are of the opinion that the conclusion arrived at by the Investigating Officer or for that matter superior Police Officers during the course of supervision cannot be said to be a circumstance pointing towards the guilt of the accused persons.

20. True it is that a child aged about eight years has been subjected to rape and murdered but in the state of evidence on record we don't feel it safe to sustain the conviction of the appellants. We are of the opinion that the chain of circumstances relied on by the prosecution unerringly do not point out to the guilt of the appellants and hence we are inclined to grant him benefit of doubt and we do it accordingly.

21. Accordingly, the reference made by the learned Judge is rejected and the Criminal Appeal filed by the appellants is allowed, their conviction and sentence

is set aside. They are in jail, they be set at liberty forthwith unless required in any other case.