

(2003) 11 PAT CK 0068

In the Patna High Court

Case No : Death Reference No. 2 of 2002 and Criminal Appeal No. 113 of 2002

The State of Bihar

APPELLANT

Vs

Ehsan Shah @ Md. Ehasan and PuloShah @ FulioShah @ Md.
Fulo
 Ehsan Shah @ Md. Ehasan and PuloShah @
FulioShah @ Md. Fulo Vs The State of Bihar

RESPONDENT

Date of Decision : 17-11-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 366
Penal Code, 1860 (IPC) — Section 201, 302, 364

Citation : (2004) 1 PLJR 348

Hon'ble Judges : S.N. Jha, J;B.N.P. Singh, J

Bench : Division Bench

Advocate : Suraj Nr. Pd. Sinha, Jitender Narain Sinha, Ram Shankar Prasad and Sanjay Kumar Sinha, for the Appellant; Damodar Pd. Tewary, for the Respondent

Final Decision : Allowed

Judgement

S.N. Jha and B.N.P. Singh, JJ.—On 18.11.95 a dead body was seen in the mustard field of Hemant Rai at village Dadhia Belar under police station and district Samastipur. The village Chaukidar informed Dafadar Ram Swarth Singh about it. He went to the place and found the dead body. He thereafter went to the police station and lodged a report with the Sub Inspector of Police. As the Investigating Officer was not examined at the trial, it is not known as to what steps were taken by him on receipt of the report. On 28.12.95 P.W.9 Md. Kalam went to the police to make inquiry about his missing brother. After he was shown the photograph of the aforesaid dead body and his belongings, namely, spectacles, clothes and chain, he identified them as those of his brother Saheb Ali Ansari. Md. Kalam disclosed that on 17.11.95 at about 2 P.M. Phulo Shah and Ehsan Shah, the Appellants herein, came to his house at village Musapurvanchak and asked his brother to accompany them to the market saying that pumping set could be purchased at less price at Samastipur. Md. Kalam told them that sum of Rs. 4400/- available with him after sale of the oxen, may not be sufficient for

purchase of the pumping set and asked Saheb Ali Ansari not to go. However, on insistence of Phulo Shah, his brother agreed and accordingly went along with them. However, he did not return. After two days he went to the house of Phulo Shah and Ehsan Shah at village Fatehpur Baghi. They told him that his brother had returned the same day in the evening. On inquiry about the pumping set he was told that the machine could not be purchased. Md. Kalam stated that he made hectic search for his brother. He also went to Calcutta but did not find trace of him. On his return from Calcutta Taslim Mian asked whether he could find his brother. He also informed him that he had seen his brother going to east of Tajpur on a rickshaw along with Appellants in the evening of 17.11.95. Md. Kalam thereafter went to the bus stand, met people to find trace of his missing brother and finally went to the police station where he was shown photographs etc. on the basis of which he concluded that his brother had been killed on or about 17.11.95.

2. The police recorded the statements of Md. Kalam, said Md. Taslim and one Ravindra Kumar Singh, who claimed before the police u/s 161 Code of Criminal Procedure to have met Md. Kalam at Samastipur bus stand and informed him about the recovery of a dead body of a Muslim in the mustard field of Hemant Kumar Rai of Dadhia Belar. "The police also recorded the statements of witnesses who had seen the dead body in the mustard field at Dadhia Belar on 18.11.95. After completing the necessary formalities, charge sheet was submitted against the Appellants who were apprehended in the meantime on the basis of statement of Md. Kalam and Md. Taslim and they were thus put on trial.

3. At the trial the prosecution examined 11 witnesses to prove its case out of whom P.W.1 Sita Ram Bhagat, P.W.2 Ram Chandra Rai, P.W.3 Hemant Kumar Rai, P.W.5 Firoz Ahmad and P.W.6 Arun Kumar Roy were examined on the point of recovery of dead body in the mustard field of P.W.3 Hemant Kumar Rai. P.W.7 Raja Ram Mohan Rai and P.W.8 Rambilash Pandit were examined on point of inquest. Said Md. Kalam, Md. Tasleem and Ravindra Kumar Singh were examined as P. Ws. 9, 10 and 11. The latter, however, did not support the prosecution case and he was declared hostile. The Appellants did not examine any witness in defence. As is evident from the trend of cross-examination they took the usual plea of innocence and false implication. At the end of trial the trial court convicted the Appellant under Sections 302, 364 and 201 of the Penal Code and sentenced them to death. The court referred the sentence to this Court for confirmation u/s 366 Code of Criminal Procedure; the Appellants meanwhile also preferred appeal. Both the reference and the appeal were taken up for hearing together.

4. Shri Suraj Narain Pd. Sinha, learned Counsel for the Appellants, submitted that it is a case of circumstantial evidence and the Appellants' conviction is based on solitary circumstance of "last seen". He contended that as a matter of fact having regard to the conduct of P.W. 9 Md. Kalam it is doubtful that the deceased had left in the company of the Appellant on the fateful day, for, if it

were so, being own brother, it was expected of him to lodge a missing information with the police. Nothing of the kind was done until 28.12.95 when he went to police station to make inquiry after coming to know about the recovery of a dead body sometime back. Counsel submitted that even if the evidence of P.W. 9 read with the evidence of P.W. 10 is accepted to be correct, the fact that the deceased had gone to Samastipur in the company of the Appellants and was never seen or heard of thereafter cannot be conclusive of their guilt. Counsel also submitted that, as a matter of fact, in the absence of the examination of Investigating Officer the accused has suffered prejudice as they were deprived of knowledge of course of investigation between 18.11.95 and 28.12.95. There is also, counsel submitted, no evidence to show that it was a case of homicidal death of the deceased in the absence of medical evidence as the doctor too was not examined who could throw light about the cause of death.

5. In our opinion, in facts and circumstances of the case it is not necessary to go into various aspects of the case, for the Appellants' conviction is based on the solitary circumstance of "last seen" and evidence on the point of "last seen" too does not appear to be inspiring. We agree with the counsel that if it were true that the deceased had gone in the company of the Appellants on 17.11.95, for purchase of pumping set, after he did not return it was expected of Md. Kalam to inform the police about his missing. His evidence that he made hectic efforts to trace him is vague in the absence of positive and specific details about the efforts made by him. It is true that P.W. 10 somewhat corroborated that claim of P.W. 9 but that was after his return from Calcutta. Even if we were to rely on the evidence it would appear that all that he said amounted to the deceased and the Appellants being seen together. This solitary circumstance, in our opinion, is not conclusive of the Appellants' guilt. There is no evidence on the record to show as to how long three of them were together. The dead body was found in the next evening on 18.11.95. Sufficient time had elapsed during the intervening period. We do not find any proximity of time between the deceased and the Appellants last seen together and the recovery of the dead body. The Appellants belonged to village Fatehpur Baghi whereas the dead body was found in village Dadhia Belar at a distance of 3 kms.

6. It is true that conviction can be awarded on the basis of circumstantial evidence as it is not possible to expect direct evidence in each and every case. However, it is well settled that circumstances should be such as to form a complete chain inconsistent with the hypothesis of innocence of the accused and consistent with his guilt. In the facts and circumstances, we do not think the prosecution has proved its case beyond all reasonable doubts and, therefore, we are of the view that the Appellants are entitled to benefit of doubt.

7. In the result, the conviction and sentence awarded to the Appellants are set aside and they are acquitted of the charges. Both the Appellants are in jail, they are directed to be released forthwith, if not wanted in any other case.

8. The appeal is thus allowed and the reference is answered accordingly.