IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.901 of 2013

Arising Out of PS. Case No.-22 Year-2012 Thana- PURAINI District- Madhepura

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Khusbu Khatoon, D/o Md. Nazam Sah, Wife of Late Md. Tarik, Resident of Village - Aurlaha, P.S. - Puraini, District – Madhepura.

... ... Appellant/s

Versus

The State of Bihar

... ... Respondent/s

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Appearance :
For the Appellant/s : Mr.Dinesh Prasad Verma, Advocate.
Mr. Rohit Kumar Sharma, Advocate.
For the Respondent/s : Mr.Ajay Mishra, APP.

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CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR
and
HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL)
Date : 12-04-2019

Heard Mr. Dinesh Prasad Verma, learned counsel, assisted by Mr. Rohit Kumar Sharma, learned counsel for the appellant and Mr. Ajay Mishra learned Additional Public Prosecutor for the State on this criminal appeal.

2. This criminal appeal has been preferred against the Judgment and Order of conviction dated 11.06.2013 and Order of sentence dated 13.06.2013 passed by Adhoc Additional Sessions Judge-IV, Madhepura in Sessions Trial No. 139 of 2012 arising out of Puraini P.S. Case No. 22 of 2012 whereby the learned trial court acquitted the accused Md. Sajir giving

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him benefit of doubt while convicted the accused Khusbu Khatoon for the offence punishable under Section 302/34 of the Indian Penal Code and sentenced her to undergo life imprisonment and also slapped her with the fine of Rs. 10000/- and in case of default of payment of fine to further undergo S.I. for six months under the aforesaid Section.

3. Factual matrix of the case is that Puraini P.S. Case No. 22 of 2012 was instituted under Section 302/34 of the Indian Penal Code against the accused Khusbu Khatoon, Md. Ashish and one unknown miscreant on the basis of the fardbeyan of Md. Sahabudin, Son of Late Md. Nasarat Ali recorded by S.I. Lalit Mohan Singh on 02.04.2012 at 02:00 PM at village Aurlaha at the door of Md. Najam with the allegation in succinct that marriage of younger brother of informant namely Md. Tarik was performed with the daughter of Md. Najam namely Khusbu Khatoon of village Aurlaha one year back. On 31.03.2012, his brother had gone to his marital house to take back his wife on bidai. On 02.04.2012 at around 11:30 AM, he got telephonic information from village Aurlaha that his brother has been eliminated. On the said information, he alongwith others arrived at the marital house of his brother and found the blood drenched dead body of his brother lying on the

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chowki in the said house having grievous injury on his neck. On making query from the locals, he learnt that his sister-in-law Khusbu Khatoon (wife of the deceased) was having cordial relation with Md. Ashish who had made plan to perform marriage with Khusbu Khatoon after eliminating his brother and in execution of the aforesaid plan, his sister-in-law and her lover Md. Ashish along with one another miscreant have committed murder of his brother by assaulting on his neck by means of sharp edged weapon on 02.04.2012 at 11 AM.

4. Aforesaid case was investigated by the police and on conclusion of the investigation, I.O. submitted charge-sheet against the accused Khusbu Khatoon and Md. Sajir under Section 302/34 of the Indian Penal Code keeping the investigation pending against Md. Ashish.

5. On receiving the chargesheet and the case diary and perusing the same, the learned Magistrate took cognizance of the offence and committed the case to the court of sessions and after commitment and on transfer finally the case came in the seisin of Adhoc Additional Sessions Judge-IV, Madhepura for trial.

6. Charge against the accused Khusbu Khatoon and Md. Sajir was framed under Section 302/34 of the Indian Penal

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Code. Charge was read over and explained to them by the Court to which they pleaded not guilty and claimed to be tried.

7. To substantiate its case, in ocular evidence, the prosecution has examined altogether thirteen prosecution witnesses namely, Md. Razzak as PW-1, Md. Sakil as PW-2, Md. Nizam who happens to be father of the appellant Khusbu Khatoon as PW-3, Afsana Khatoon aunt of the deceased as PW-4, Anjuman Khatoon mother of the appellant Khusbu Khatoon as PW-5, Md. Nasiruddin as PW-6, Md. Raish who happens to be seizure list witness of dabiya as PW-7, Abdul Jabbar who also happens to be seizure list witness of dabiya as PW-8, Narendra Yadav as PW-9, informant Sahabuddin brother of the deceased as PW-10, Naiyar Alam, another brother of the deceased as PW-11, Dr. Akhilesh Kumar who had conducted the autopsy of the cadaver of the deceased as PW-12 and I.O. of the case namely Lalit Mohan Singh as PW-13. Out of the aforesaid witnesses, PW-2, PW-3, PW-4, PW-5, PW-6, PW-7 and PW-9 turned hostile. Prosecution has also filed and proved some documents by way of documentary evidence in the case.

8. Statement of the accused persons was recorded under Section 313 of the Code of Criminal procedure. The case of the defence is complete denial of the occurrence. Accused

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persons have also examined two witnesses namely Md. Arshad as DW-1 and Md. Mahboob as DW-2 in buttress of their case.

9. After hearing the parties and perusing the record, the learned trial court passed the aforesaid Judgment and Order of conviction and sentence as detailed in the earlier paragraph.

10. Being aggrieved and dissatisfied with the aforesaid Judgment and Order of conviction and sentence, convict Khusbu Khatoon has preferred this Criminal Appeal.

11. The point for consideration in this case is, as to whether the prosecution has been able to bring home the charge levelled against the appellant beyond all reasonable doubts or not.

12. It is submitted by learned counsel for the appellant that there is no eye witness of the occurrence. Virtually it is a case of circumstantial evidence. But the circumstances are also not tightly linked to give the hypothesis of the guilt of the appellant. It is further submitted that only incriminating material against the appellant is her confessional statement allegedly leading to recovery of blood stained dabiya used in the occurrence, but the said confessional statement is not admissible in evidence. PW-8 has stated that I.O. brought the aforesaid dabiya before him at the P.S. and took his signature on the

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seizure list which creates serious doubt about the recovery of dabiya from the place of occurrence on the basis of the confessional statement of the appellant. It is further submitted that though blood stained soil and blood stained dabiya were recovered and seized at the place of occurrence but the same have not been sent to FSL for its chemical examination by the I.O. and barring aforesaid confessional statement and alleged recovery, there is no other cogent evidence indicating the complicity of the appellant in the occurrence. Thus, prosecution has utterly and miserably failed to substantiate the prosecution case and bring home the charge levelled against the appellant beyond all reasonable doubts by adducing consistent, trustworthy and reliable evidence. Hence, aforesaid judgment and order of conviction and sentence passed against the appellant is liable to be set aside and the appellant is entitled to be acquitted.

13. On the other hand, learned APP for the State advocating the correctness and validity of the impugned Judgment and Order of conviction and sentence submitted that the informant who happens to be brother of the deceased and PW-11 Naiyar Alam who also happens to be another brother of the deceased have fully supported the prosecution case. The

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dead body of the deceased was found in his marital house i.e. in the house of the appellant's father, hence there is presumption about complicity of the appellant in the occurrence. It is further submitted that besides that appellant has confessed her guilt in the occurrence and on the basis of the disclosure of the appellant, dabiya used in the occurrence was also seized by the police and learned trial court correctly appreciating the facts and evidence available on record has rightly passed the impugned Judgment and Order of conviction and sentence which is liable to be upheld and this criminal appeal is shorn of merit and is liable to be dismissed.

14. From perusal of the record, it appears that out of thirteen witnesses examined by the prosecution, seven witnesses happen to be material witnesses of the occurrence. Out of the seven material witnesses, PW-1 is a hearsay witness as in Para-5 of his cross-examination he has denied to have witnessed the occurrence and PW-2, PW-3, PW-4 and PW-5 have turned hostile. The only material witnesses left to be examined are PW-10 Sahabuddin and PW-11 Naiyar Alam. Out of them, PW-10 happens to be brother of the deceased and the informant of the case while PW-11 is another brother of the deceased.

15. From perusal of the testimony of the informant

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Sahabuddin (PW-10) and PW-11 Naiyar Alam, it appears that they do not happen to be eye witness of the occurrence rather they have stated that the deceased had gone to his marital house to take back the appellant on bidai. He was murdered in the said house and his dead body was found on the chowki in the said house. They have further stated that Khusbu Khatoon was having cordial relation with Md. Sajir and Md. Ashish and hatching conspiracy they have committed murder of their brother by means of dabiya by slitting his neck. From perusal of the testimony of the aforesaid two witnesses, it appears that they have stated that the appellant Khusbu Khatoon was having cordial relation with other accused persons namely Md. Sajir and Md. Ashish but there is no cogent evidence to establish the cordial relation between them as aforesaid two witnesses happen to be mere hearsay witnesses of the aforesaid fact and no other evidence either ocular or documentary has been brought on record by the prosecution to establish the existence of the aforesaid cordial relation between the appellant and aforesaid two accused persons.

16. From perusal of the record, it appears that only incriminating material came against the appellant is the murder of the deceased in her paternal house and recovery of the blood

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stained soil, blood stained dupatta and confessional statement of the appellant leading to recovery of the blood stained dabiya used in the occurrence. But in our considered opinion, aforesaid incriminating material is not sufficient to establish the complicity of the appellant in the occurrence. As confessional statement itself is not admissible in evidence and is hit by Section 25 of the Indian Evidence Act. So far as recovery of blood stained dabiya on the basis of the aforesaid confessional statement is concerned, though as per the statement of the I.O. Lalit Mohan Singh (PW-13) as given by him in Para-5 of his examination-in-chief Khusbu Khatoon took out blood stained dabiya from the grass and weed located beside the place of occurrence i.e. paternal house of the appellant, but in quite contradiction to the said statement, he has stated in Para-26 of his cross-examination that said dabiya was recovered from the North East corner of the barandah of her house. Moreover as per the statement of the I.O., after recovery of the aforesaid dabiya it was seized at the place of occurrence. But PW-8 namely Abdul Jabbar who happens to be seizure list witness of the said dabiya has stated in Para-5 of his cross-examination that when he arrived at the police station, the officer-in-charge of the police station asked him to put his signature on the seizure list

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of the weapon which was brought before him in the police station. He had not read over the contents of the said seizure list to him. Aforesaid aspect of the case creates serious doubt about the recovery of the dabiya at the place of occurrence on the basis of the confessional statement of the appellant. Moreover aforesaid confessional statement has also not been exhibited by the prosecution. Thus we find that the said confessional statement has not led to any recovery and it has no evidentiary value in the eye of law. Moreso, as per the account of the I.O. itself, aforesaid blood stained soil, dupatta and blood stained dabiya were not sent to FSL for its chemical examination to establish that the blood was human blood and is of group of deceased and dabiya bears the finger print of the accused. Thus the prosecution has utterly and miserably failed to establish any incriminating material against the appellant.

17. From perusal of the fardbeyan of the informant, it appears that the aforesaid fardbeyan of the informant Sahabuddin was recorded at the door of Md. Nizam in the village Aurlaha. I.O. (PW-13) has also stated in Para-16 of his cross-examination that he had recorded the fardbeyan of the informant in the village Aurlaha, but in quite contradiction to the aforesaid aspect of the case and statement of the I.O.,

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informant (PW-10) has stated in Para-13 of his cross-examination that from his house he went to Aurlaha and from Aurlaha he went to police station along with the police and police after noting down all the things obtained his signature at the police station. He has further stated that police had noted down of his own and had simply obtained his signature on the same. Aforesaid aspect of the case creates serious doubt about sanctity of the fardbeyan and the prosecution case.

18. On examination of the evidence of the defence witnesses, we find that both the defence witnesses i.e. Md. Arshad (DW-1) and Md. Mahboob (DW-2) have unanimously stated that at the time of occurrence appellant was in the field along with her parents.

19. As per the submission of learned APP, under Section 106 of the Indian Evidence Act the burden of proving innocence lies upon the appellant as the dead body of the deceased was found in her paternal house, but aforesaid submission does not appear to be convincing and plausible as house in question is the paternal house of the appellant and is also inhabited by her parents and several family members and moreover they have not been made accused in the case. Though parents of the appellant have been examined as prosecution

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witnesses namely PW-3 and PW-5 respectively who have turned hostile. Thus, the prosecution has failed to substantiate its case by establishing all the circumstances leading to hypothesis of the guilt of the appellant in the occurrence.

20. Hon'ble Apex Court in **Shard Birdhichand Sarda Vs. State of Maharshtra reported in 1984 (4) SCC 116** has postulated the cardinal principle regarding the appreciation of circumstantial evidence by holding that whenever the case is based on circumstantial evidence, the following features are required to be complied with and proved by cogent evidence:

(i) The circumstances from which the conclusion of guilt is to be drawn must or should be and not merely may be fully established (ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty (iii) The circumstances should be of a conclusive nature and tendency; (iv) They should exclude every possible hypothesis except the one to be proved; and (v) there must be a chain of evidence so complete as not to leave any reasonable ground from the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been

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done by the accused. Hon'ble Apex Court in **Kanhaiya Lal Vs. State of Rajasthan reported in (2014) 4 Supreme Court Cases 715** has been pleased to rule that the circumstances of last seen together does not by itself necessarily lead to inference that it was accused who committed crime. There must be something more establishing connection between accused and the crime, that points to guilt of accused and none else. Mere non-explanation of being last seen together with deceased person on part of accused, by itself cannot lead to proof of guilt against him. It is further held that where a case rests squarely on circumstantial evidence, inference of guilt can be justified only when all incriminating facts and circumstances are found to be incompatible with innocence of accused or guilt of any other person. Circumstances from which an inference as to guilt of accused is drawn have to be proved beyond reasonable doubt.

21. In the facts and circumstances of the case, we find and hold that the prosecution has utterly and miserably failed to substantiate the prosecution case and bring home the charge levelled against the appellant beyond all reasonable doubts by adducing consistent, trustworthy and reliable evidence. Hence, the impugned judgment and order of conviction and sentence passed by the learned trial court against the appellant is set aside

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and the appellant is acquitted of the charge levelled against her. As the appellant is in custody, she is directed to be released from the custody forthwith, if not wanted in any other case. Accordingly, this criminal appeal stands allowed.

(Rakesh Kumar, J)

(Prakash Chandra Jaiswal, J)

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