

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) No.352 of 2017

Arising Out of PS. Case No.-291 Year-2014 Thana- BARHARIA District- Siwan

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1. Saddam Hussain @ Samir Raja, son of Sahebjan Miyan @ Md Sahabj.
2. Khushnuma Khatoon, Wife of Saddam Hussain, Both Resident of Village- Babuhata, P.S. Barharia, District- Siwan.

..... Appellant/s

Versus

The State of Bihar

..... Respondent/s

=====

with

CRIMINAL APPEAL (DB) No. 405 of 2017

Arising Out of PS. Case No.-291 Year-2014 Thana- BARHARIA District- Siwan

=====

Khushnuma Khatoon Wife of Saddam Hussain @ Samir Raj, resident of village - Babuhata, P.S. Barharia, District - Siwan

..... Appellant/s

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Indian Penal Code, 1860 - Section 363, 364, 364A and 302 r/w 34

Indian Evidence Act, 1812 - Section 65B

Appellants/accused persons were convicted by the Trial Court under Section 363, 364, 364A and 302 r/w 34 of I.P.C by the Trial Court and sentenced to undergo, inter-alia, R.I for life and the fine of Rs. 1 lakh each.

Held that the C.D.R and the S.D.R without a certificate under Section 65B of Indian Evidence Act is not admissible piece of evidence.

Judgment of Hon'ble Supreme Court in Anvar P.V. v. P.K. Basheer and Ors., (2014) 10 SCC 473 and Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and Ors., (2020) 7 SCC 1] were relied on.

Held that there is nothing on record to certify that dead body was of the son of PW-2 and PW-3.

Prosecution story was disbelieved, hence appellants were acquitted of charges leveled against him. Appeal allowed.

[Para- 3, 9, 23, 26, 31]

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Appearance :

(In CRIMINAL APPEAL (DB) No. 352 of 2017)

For the Appellant/s : Mr. Amir Alam, Advocate

For the Respondent/s : Mr. Satya Narayan Prasad, APP

(In CRIMINAL APPEAL (DB) No. 405 of 2017)

For the Appellant/s : Mr. Anil Chandra, Advocate

For the Respondent/s : Mr. Satya Narayan Prasad, APP

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and
HONOURABLE MR. JUSTICE NANI TAGIA



ORAL JUDGMENT**(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)****Date : 24-01-2024**

1. We have heard Mr. Amir Alam, the learned Advocate for the appellants/Saddam Hussain @ Samir Raja and Khushnuma Khatoon in Cr. Appeal (DB) No. 352 of 2017 and Mr. Anil Chandra, the learned Advocate in Cr. Appeal (DB) No. 405 of 2017. The State has been represented by Mr. Satya Narayan Prasad, the learned APP.

2. The couple/appellants who are alleged to have kidnapped the victim/Abu Bakar for the purposes of ransom and then strangled to death and his dead body was concealed in a drain.

3. For the afore-noted charge, the appellants have been convicted under Sections 363, 364, 364A and 302/34 of the Indian Penal Code *vide* judgment dated 24.01.2017 passed by the learned 5th Additional Sessions Judge, Siwan in Sessions Case No. 115 of 2015 (Reg No. 71 of 2015), arising out of



Barharia P.S. Case No. 291 of 2014. By order dated 02.02.2017, the appellants have been sentenced to undergo R.I for life and to pay a fine of Rs. 1,00,000/- each for the offence under Section 302 of the IPC and R.I. for life and to pay a fine of Rs. 1,00,000/- each again for the offence under Section 364A of the IPC. No separate sentence has been awarded under Sections 363 and 364 of the IPC. In case of default of payment of fine, each of the appellants have been directed to undergo R.I. for two years. Eighty (80) percent of the amount of fine has been directed to be paid to the parents of the deceased, who are the actual victims of the occurrence.

4. The sentences have been directed to run concurrently.

5. The FIR was lodged by the mother of the deceased, viz., Noor Jahan Khatoon (P.W. 3) which was recorded at 10.00 P.M. in the night of 18.07.2014.

6. P.W.3 has alleged that on the same



day, at about 04:30 P.M., she had received a telephone call from mobile no. 9934449363, apparently from her niece, viz., Gulshan, who wanted the deceased/Abu Bakar, aged about nine years, to be sent with an umbrella to pick her up as it had been raining. Without verifying any further and showing extreme gullibility, P.W. 3 is said to have sent her son with an umbrella to bring Gulshan. When the son (deceased) of P.W. 3 did not return for quite some time, she grew suspicious. However, at about 07:45 P.M., another telephone call came from the same number, viz., 9934449363, but then this time, there was a male voice on the other side, commanding that Rs. 8,00,000/- be paid by the family for securing the release of her son. Because of the rains, neither P.W. 3 nor P.W. 2 (her husband) went to the police station, but chose to visit the place where the son had been sent to bring Gulshan. Local persons available there informed them that a young male with a veiled female had taken away a 12 year old



child on a motorcycle. On this information, the police was informed about the occurrence at about 10:00 P.M. when the *fardbeyan* of P.W. 3 was recorded by one Daya Shankar Prasad (P.W. 7), the Officer-in-Charge of the police station.

7. Be it noted that the *fardbeyan* was scribed by one Suraj Singh, who has not been examined at the Trial. One Imamul Haque (not examined) was the witness to the *fardbeyan* statement.

8. On such statement, initially a case under Sections 363 and 364A was registered for investigation *vide* Barharia P.S. Case No. 291 of 2014, dated 19.07.2014. Later, i.e. on 22.07.2014, Sections 302/201 were added after the dead body was recovered some time on 19.07.2014.

9. The fulcrum of the prosecution case is the investigation with respect to the mobile telephone number which was used, firstly by somebody masquerading as Gulshan and then seeking ransom



amount of Rs. 8,00,000/- from the parents of the deceased.

10. The C.D.R. (Call Detail Record) and the S.D.R. (Software Define Radio) was called for by the Investigator. On the analysis of the reports, the investigator immediately reached to one Maimunnisa, said to be the mother of appellant/Saddam, from whom a mobile telephone bearing no. 8002545019 was recovered. This telephone number would not have been of any consequence but for the fact that on this telephone number, there had been several calls from the number which was used for the ransom call, viz., 9934449363. The frequency of the calls on the telephone number of Maimunnisa provided the smoking gun to the police to go to the house of one Laxman Deo Mishra in Bhawani Bazar from where also, two mobile telephones were recovered, about which no reference is required to be made because those mobile numbers were perhaps never used in the commission of the



crime.

11. However, from the C.D.R. of the aforementioned two mobile numbers recovered from the house of Laxman Deo Mishra, it was deciphered (but how, which remains unknown to us) that the ransom call was made from 9934449363, which number was being used to talk with the holder of telephone no. 8002549019, which was recovered from the mother of appellant/Saddam.

12. During the course of further investigation and search, a black coloured veil and a Hero Honda Passion motorcycle was recovered from the house of Laxman Deo Mishra, for which a seizure list was prepared. The telephone no. 9934449363 from which the ransom call was made stood in the name of one Aisha Khatoon, about whose relationship with the appellants remains unknown till date.

13. Based on these sporadic telephone call records, very curiously, the Investigator jumped to the



conclusion that it was the appellant/Saddam and his wife/Khushnuma who had managed to get the deceased out of his house; kidnapped him; demanded ransom and ultimately killed him and concealed his dead body which apparently is said to have been recovered by the police on 19.07.2014 only from near a water body, from a place at about 3 Kms. from the house of the appellants.

14. Based on the afore-noted evidence, the appellants were charge-sheeted and were put on Trial.

15. The Trial Court after having examined eight witnesses on behalf of the prosecution including the Doctor and the I.O., convicted and sentenced the appellants as aforesaid. Along with the oral testimony, six documents were also marked on behalf of the prosecution which included the formal FIR; the seizure lists; the inquest report (Exhibit- 4); the post-mortem report (Exhibit- 5); and the call detail records (Exhibit- 6).



16. The name of the appellants had not transpired till 10:00 P.M. in the night of 18.07.2014 as would appear from the *fardbeyan* statement. However, the Investigator (P.W. 7) has categorically stated before the Trial Court that at about the same time, i.e. 10:00 P.M. in the night, one Maqsood Ali (P.W. 2), father of the victim/deceased had given a telephonic information to him that on the asking of Gulshan, his son was sent to bring her at about 04:30 P.M.; but later at about 08:00 P.M., the same caller had asked for ransom amount of Rs. 8,00,000/-. The ransom call was attended by Imamul Haque, who has not been examined at the Trial and is said to be the neighbour of P.W. 2. He is also the signatory to the *fardbeyan* statement.

17. The reason for not recording this information and making it the basis for the FIR was the non-disclosure of the names of the appellants!

18. Very surprisingly, however, we have



found that in the format of the FIR, the time stated for receiving the information and recording the FIR is 02:00 P.M. in the day of 19.07.2014. This may not assume any significance but for the fact that till the time the FIR was registered, neither P.W. 2 nor P.W. 3, who is the de-facto complainant, had known about the appellants. It was only much later that the story was developed that four of the witnesses, viz., Abdul Jabbar (P.W. 1), Hashimuddin Ansari (P.W. 4), Manu Ali (P.W. 5) and Chockat Ram (P.W. 6) had seen the deceased looking for a lady and later he being whisked away by the appellants. Perhaps, the prosecution was of the view that plurality of evidence with respect to identification of the appellants would go a long way in proving the prosecution case, little realizing that the test of cross-examination clearly debunked such claim of the prosecution of having unravelled and resolved the mystery.

19. During the Trial, attention was drawn of



all these witnesses, viz., P.Ws. 1, 4, 5 and 6, when they claimed to have spoken to the police about their having identified the appellants taking away the deceased but the Investigator has denied that any such statements were made by them during the investigation.

20. Obviously, therefore, the story was weaved only on the basis of the assumption of the Investigator, perhaps on the analysis of the C.D.R. and S.D.R. of few telephone numbers. It is also very surprising that neither Maimunnisa nor Boka, another person who was in the loop of the telephone calls or Laxman Dev Mishra or for that matter, Aisha, who perhaps is the holder of the telephone number which was used for talking to P.W. 3 for ransom, have been made accused in this case.

21. The story, therefore, remains completely un-decrypted.

22. A motorcycle and a black-coloured veil



is said to have been recovered from the house of Laxman Dev Mishra. We have not been able to lay our hands on any evidence which would certify that it belonged to the appellants. Investigation papers however revealed that the appellants had taken refuge in the house of Laxman Dev Mishra because they had married, which was to the chagrin of the family members of both the parties. However, this has not come in any way in the Trial Court Records.

23. The other aspect of the matter which needs no elaborate discussion is that the C.D.R. and the S.D.R., which though have been marked by the prosecution, cannot be said to be any admissible piece of evidence in the absence of the requirements under Section 65B of the Indian Evidence Act, 1872 having been complied with [refer to **Anvar P.V. v. P.K. Basheer and Ors., (2014) 10 SCC 473** and **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal and Ors., (2020) 7 SCC 1**].



24. There is yet another fault-line in the prosecution version. The dead body is said to have been recovered on the showing of appellant/Saddam. The inquest was prepared by one Ashok Kumar Singh (not examined) before two witnesses, viz., Raj Kishore Prasad and Rajeev Kumar Ranjan, who have also not been examined at the Trial.

25. What was the information given by appellant/Saddam has not been stated by the Investigator in his deposition before the Court. In that event, even such information which had led to the recovery of the dead body, remains completely inadmissible in evidence [refer to ***Rajesh and Anr. v. State of M.P., 2023 SCC OnLine SC 1202*** and ***Shahaja @ Shahajan Ismail Mohd. Shaikh v. State of Maharashtra, 2022 SCC OnLine SC 883***].

26. That apart, there is nothing on record to certify that the dead body was of the son of P.Ws. 2 and 3. There is no identification of the dead body on



record. Even the post-mortem report does not clear the cob-webs. The dead body was found to have been drowned in water. There is no such sign of the dead body lying submerged in water for any time in the post-mortem report.

27. How was that possible?

28. Doctor Azhar Ahmad Ghani (P.W. 8), who is said to be one of the members of the medical team which had supervised the post-mortem examination, has deposed that there was a ligature mark on the neck of the deceased. The tracheal mucosa was found congested. However, the hyoid bone was completely intact. The rigor mortis had not vanished from the body. The time fixed for death was 6 to 24 hours from the post-mortem examination.

29. Had the deceased been thrown in the water-body from where it is said to have been recovered and about which there is no evidence on record except the statement of the Investigator that the



dead body was recovered, there would some sign noticeable in the post-mortem report. There is none.

30. We have started doubting whether the dead body was of the deceased of the case.

31. All these grounds coalesce to convince us that the Trial Court went along with the assumption of the Investigator that it was appellant/Saddam, aided by his wife/Khushnuma who had kidnapped and killed the deceased. Along the continuum, the Trial Court placed unwavering reliance on the story, without caring for the basic law for appreciating evidence.

32. With these set of evidence, the conviction of the appellants is highly unjustified and cannot be allowed to be sustained.

33. For the reasons noted by us, the judgment of conviction and order of sentence is set aside and the appellants are acquitted of the charges levelled against them.

34. Cr. Appeal (DB) No. 352 of 2017



stands allowed.

35. Appellant/Saddam Hussain @ Samir Raja is in jail. He is directed to be released forthwith from jail, if not detained or wanted in any other case.

36. Appellant/Khushnuma Khatoon is on bail. Her liabilities under the bail bonds are discharged.

37. However, this takes us to the other issue, viz., appellant/Khushnuma Khatoon having filed another appeal, during the pendency of Cr. Appeal (DB) No. 352 of 2017, without stating that there was an earlier appeal filed on her behalf along with her husband and in that case, the prayer for suspension of sentence was disallowed.

38. In this occasion, namely in Cr. Appeal (DB) No. 405 of 2017, the later appeal filed by appellant/Khushnuma, her sentence was suspended.

39. When the afore-noted facts were discerned, notice was issued to Mr. Anil Chandra, the learned Advocate who gave his explanation that he had



filed the appeal on the asking of the mother of appellant/Khushnuma, who had no idea that already an appeal had been filed *vide* Cr. Appeal (DB) No. 352 of 2017.

40. The mother of appellant/Khushnuma is present in the Court at the time of hearing of this appeal.

41. We accept the explanation offered by Mr. Anil Chandra, the learned Advocate who has put in more than three decades in practice before this Court. He perhaps was taken for a ride by an old woman who herself was not aware about an earlier appeal having been filed.

42. Considering the age of the mother of appellant/Khushnuma and the explanation offered by Mr. Anil Chandra, Advocate we do not consider it appropriate to pursue the matter any further and drop the issue herein.

43. We, however, permit Mr. Anil Chandra



to withdraw Cr. Appeal (DB) No. 405 of 2017.

44. Cr. Appeal (DB) No. 405 of 2017 now stands dismissed as withdrawn.

45. Let a copy of this judgment be dispatched to the Superintendent of the concerned Jail forthwith for compliance and record.

46. The records of this case be returned to the Trial Court forthwith.

47. Interlocutory application/s, if any, also stand disposed off accordingly.

(Ashutosh Kumar, J)

(Nani Tagia, J)

Sauravkrsinha/
Sunil-

AFR/NAFR	AFR
CAV DATE	NA
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