IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.150 of 2014

Arising Out of PS. Case No.-129 Year-2009 Thana- BARAULI District- Gopalganj

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Saroj Kuer Wife Of Late Gulab Bhagat R/O Village - Batardeh, P.S.- Barauli, District- Gopalganj.

... ... Appellant

Versus

The State Of Bihar

... ... Respondent

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Appearance :
For the Appellant : Mr. Amit Kumar Rakesh, Advocate
Ms. Poonam Kumari, Advocate
For the Respondent : Mr. Dilip Kumar Sinha, APP

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE KHATIM REZA

ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 17-10-2022

The appellant has preferred this appeal under Section 374(2) read with Section 389(1) of the Code of Criminal procedure, challenging the impugned judgment of conviction dated 23.01.2014 and the order of sentence dated 29.01.2014 passed by learned Additional Sessions Judge-IV, Gopalganj, in Sessions Trial No. 38 of 2010/67 of 2010, whereby the sole appellant has been convicted and sentenced as under: -

Convicted under Sections	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
302/34 of the Indian Penal Code	Life	10,000/-	Three months simple imprisonment
328/34 of the Indian Penal Code	Five years rigorous imprisonment	3,000/-	Two months simple imprisonment

The sentences have been ordered to run concurrently.

2. We have heard Mr. Amit Kumar Rakesh, learned counsel appearing on behalf of the appellant and Mr. Dilip Kumar Sinha, learned Additional Public Prosecutor for the State.

3. P.W.-4, Shanti Kunwar, is the informant of Barauli P.S. Case No. 129 of 2009 and is the widow of the deceased. Her written report addressed to the Station House Officer, Barauli Police Station, in the district of Gopalganj is the basis for registration of the First Information Report, levelling Sections 328 and 302 read with Section 34 of the Indian Penal Code. The date and time of receipt of information regarding the commission of offence in the police station as mentioned in the First Information Report is 03.10.2009 at 11 am. The date of occurrence is 02.10.2009. The distance between the police station and the place of occurrence, as mentioned in the First Information Report, is four kms.

4. The prosecution's case as unfolded in the written report of the informant is that in the morning of 02.10.2009, the informant's husband Chandrama Yadav, the deceased, had left the house telling the informant that he was going to ease himself. She anxiously waited for him till 4 pm in the evening. He, however, did not return. Being perturbed regarding the whereabouts of her

husband, she started making searches, during the course of which, she was informed by the brother of her father-in-law, Paras Choudhary (PW-3)(uncle of the deceased) that the deceased had died in the house of this appellant. She disclosed in the written report that the deceased was on inimical term with accused Bhutkul Yadav, Subhash Yadav, Nand Lal Prasad and Harish Chandra Prasad and, therefore, under a conspiracy with this appellant, they got the deceased killed and were intending to get the dead body disappear, but before they could do so, she and the villagers assembled near the dead body and when the police came, she gave her written report on 03.10.2009.

5. The Investigating officer prepared the inquest report (Exhibit-2) on 03.10.2009.

6. The records demonstrate that the appellant was arrested on 03.10.2009 itself from her house. The dead body was sent for postmortem examination. The postmortem examination was conducted at 2.30 pm on 03.10.2009, when following external and internal ante mortem injuries were found: -

> *"External Injuries: -*
>
> *(i) Blood stained discharge from nose, bluish discoloration of face lip, Lt. and Rt. eyes closed, mouth partially opened. External genitalia normal.*
>
> *On dissection: -*

Scalp intact, brain congested. No intracranial haemorrhage, trachea normal, chest intact, heart-both chambers empty, both lungs congested. All viscera congested – No free fluid. Stomach – contention of mucosa present. Small amount of fluid present. Intestine-contained fluid and gases. Urinary bladder empty.

Time elapsed since death – within 36 to 72 hours.

Cause of death – visceras preserved for chemical analysis and opinion reserved."

7. Time elapsed since death was found to be between 36 to 72 hours. For ascertaining cause of death, viscera was preserved for chemical analysis and was sent to the Forensic Sciences Laboratory. The result of examination of viscera by the F.S.L. in its report dated 23.02.2011, reads thus: -

"Result of Examination of Viscera – Aluminium phosphite was detected in the dark brown fluid content in the seven plastic dibbas.

Aluminium Phosphite commercially known as sulphos is a severe gastro intestinal irritant. It is used as grain preservative and is highly poisonous."

8. The police submitted its charge-sheet against this appellant, who was under custody, on 29.12.2009. The Court took cognizance of the offence and committed the records to the Court

of Sessions for trial. Thereafter, charge was framed against the appellant for commission of the offence punishable under Section 302, 328 read with 34 of the Indian Penal Code. As the appellant denied the charge against her, she was put to trial. At the trial, altogether eight prosecution's witnesses were examined, as under: -

No.	Name	Remarks
PW-1	Jokhan Yadav	
PW-2	Hari Nand Yadav	Father of the deceased
PW-3	Paras Choudhary	Uncle of the deceased
PW-4	Shanti Devi @ Shanti Kunwar	The informant
PW-5	Saiyad Samim Ahmad	First Investigating Officer
PW-6	Usman Ahmad	Second Investigating Officer
PW-7	Dr. Sunil Kumar Ram	Who had conducted the postmortem examination of the dead body
PW-8	Dr. Sanjiv Kumar	A Doctor, who proved his signature on the postmortem report.

9. After closure of the evidence of the prosecution witnesses, the circumstances emerging in their evidence against the appellant were explained to the appellant in compliance of the requirement under Section 313 of the Code of Criminal Procedure in the following manner: -

"प्रश्न : आपने गवाहों का बयान सुना है।

उत्तर: जी हॉ।

प्रश्न : आपके विरूद्ध साक्ष्य है कि आप दिनांक–2.10.09 को ग्राम बतरदेह, थाना–बरौली, जिला–गोपालगंज में अन्य अभियुक्तों के साथ षडयंत्र कर सूचक शांन्ति देवी के पति चंद्रमा यादव को जहर देकर हत्या कर दिये थे ?

उत्तर : यह गलत है।

प्रश्न : सफाई में क्या कहना है ?

उत्तर : सफाई साक्ष्य देंगे।"

10. The defence examined five witnesses in its support, namely, DW-1 Jatashankar Pandit, DW-2 Gorakh Pandey, DW-3 Upendra Pandey, DW-4 Lal Babu Bhagat and DW-5 Rajendra Bhagat.

11. At the trial, the prosecution got exhibited following documentary evidences: -

(a) Exhibit-1, 1/1	Written report of the informant and the signature of witness to the written report.
(b) Exhibit-2, 2/1	Inquest report bearing signatures of PW-1 and PW-3
(c) Exhibit-4, 4/1	Postmortem report bearing signature of the doctor.
(d) Exhibit-5	Forensic report of Forensic Sciences Laboratory.

12. It appears from the evidence of PW-1 that the deceased was his maternal uncle. The deceased was a resident of village Kataharibari. The dead body of the deceased, according to the prosecution’s case, was found in the house of this appellant at village Batardeh. PW-1 deposed, at the trial, that the distance between house of the deceased and the place of occurrence is

nearly 6-7 kms. He learnt about the occurrence when the informant had phoned him that the deceased was killed. He reached the informant's house at 6 pm, where Paras Choudhary, Hari Nand Yadav (PW-2) were already present. He was told by the informant that Bhutkul Yadav, Subhash Yadav, Harendra Prasad and Nand Lal Yadav had called the deceased from his house and they got the deceased killed by this appellant by administering poison. He reached at the place of occurrence in the next morning at 5-6 am when he found the dead body of the deceased lying in a bed of the appellant. In his cross examination, he further said that the distance from Village Batarded (place of occurrence) and village Kataharibari (the informant's village) is one km. He denied the suggestion that the deceased was suffering from epilepsy and he had suffered epileptic attack and to save him, he was taken by the appellant in her house in course of which he died.

13. PW-2, father of the deceased, supported the prosecution's case that the deceased had gone to ease himself in the morning and he had seen the accused persons, namely, Bhutkul Yadav, Ashok Yadav, Nand Lal Prasad, Harendra Prasad and Subhash Yadav with him. He further deposed that Ashok Yadav was not there with him. He learnt that his son had been done to death by administering poison, whereafter, he had called the police

and he had also gone with the police and found the dead body of the deceased lying in the appellant's house. The body had turned blue and blood was oozing from his nose. He gave the time when the deceased was going to ease himself as at 4 am. It is noteworthy that in paragraph 10 of his cross examination, he deposed that he learnt at 12 pm that the deceased was killed by administering poison and he had gone to the police station at 6 pm, whereafter police came at 7 pm. Giving the description of the place where the dead body of the deceased was lying, he deposed in his evidence that on the southern side, there was a well and on the northern side, a road. On the eastern side, house of Harendra Prasad was there. There was a house on the western side, where the dead body was lying, but he did not know as to who was the occupant of the said house. He further deposed that the police had taken the statement of the informant in his presence and ten minutes thereafter, his statement was recorded by the police. He also denied the suggestion that the deceased was suffering from epilepsy and died of epileptic attack.

14. PW-3, the uncle of the deceased, also deposed that the deceased had left at 11 am upon telling the informant that he was going to ease himself. He, however, did not return thereafter and at 4 pm, it was learnt that the deceased had been done to death

in the house of the appellant. He thereafter went to the police station. Police came at the house of the appellant. He had also gone there and had seen the dead body of the deceased lying in the bed of the appellant. He also deposed that informant's statement was recorded by the police when the police had arrived at the place of occurrence and an inquest report was prepared. He expressed his inability to tell as to who had learnt first about the death of the deceased and who had told him that the deceased had died. He was also not able to tell as to when he had gone to the house of the appellant. He further deposed that the police had come at 8 pm in the night. He further deposed that the informant had given the written report to the police at the residence of Saroj Kuer (the appellant), and that the informant had reached at the place of occurrence after the police and PW-3 had already arrived there. He too denied the fact that the deceased was suffering from epilepsy.

15. PW-4 Shanti Kunwar supported the prosecution's case and reiterated her version as disclosed in the written report that the deceased had enmity with the accused persons. She further deposed that her husband had witnessed the accused Bhutkul Yadav and Subhash Yadav with the appellant in objectionable situation and, therefore, they had got him killed. During the course of her cross-examination, she disclosed that when her father-in-law

had disclosed to her about death of the deceased, apart from her (PW-4), PW-3 (Hari Nand Yadav) and other villagers were also there.

16. Contrary to the evidence of PW-3 (paragraph 9), the informant deposed that she had reached the place of occurrence before the police had arrived. In her deposition, she deposed that on the north of the room where the dead body was kept, there was house, on the south, house of the appellant, on the east, house of Harendra Prasad and on the west, house of one Dhanraj Mahto were there.

17. From the deposition of the first Investigating Officer (I.O. for short) (PW-5), it is evident that he had assumed the charge of the investigation on 03.10.2009. After receiving information, when he reached the place of occurrence, he was told that the informant had gone back to her village Kataharibari. He went there (Kataharibari) and after recording her written statement, he again returned to the place of occurrence. According to him, the dead body of the deceased was found lying in a wooden bed on the west of which was the house of the appellant and on the north, a courtyard. He was not able to say as to whether there was any bed-sheet lying on the bed. He further deposed that the informant had told him that the said house belonged to the

appellant. He, however, subsequently deposed that the accused persons had told him that the house was of the appellant. He denied the suggestion that the place from where the dead body was recovered was not the house of the appellant, rather the appellant's house was adjacent to the place where the dead body was lying. The second Investigating Officer assumed the charge one week thereafter, on 10.10.2009. After assuming charge, he sent the viscera to the Forensic Sciences Laboratory under the orders of his superior officers.

18. PW-7, the doctor at Sadar Hospital, Gopalganj, who had conducted the postmortem examination of the dead body of the deceased, has opined that the time elapsed since the death of the deceased at the time of postmortem examination at 2.30 pm was within 36 to 72 hours. He proved the viscera report exhibited as 'Exhibit-5', the result of examination of which has been quoted hereinabove.

19. The defence witnesses in their deposition consistently testified that the deceased was suffering from epilepsy and that he might have died of epileptic attack.

20. Upon scrutiny and appreciation of evidence adduced at the trial, the trial court has recorded conviction and sentenced the appellant for imprisonment for life by the judgment of

conviction and order of sentence, which are under challenge in the present appeal.

21. Mr. Amit Kumar Rakesh, learned counsel appearing on behalf of the appellant has highlighted the material inconsistencies in the prosecution's case to buttress his submission that the conviction of the appellant is unsustainable. He has, at the outset, drawn our attention to the evidence of the doctor (PW-7). According to him, the death of the deceased has been reported to have occurred between 36 hours to 72 hours before the postmortem examination. He has submitted that the postmortem examination was conducted at 2.30 pm on 03.10.2009, meaning thereby, that at 4 am in the morning of 02.10.2009, the deceased was not alive as according to the postmortem examination, the deceased had died sometime between 29.09.2009 at 2.30 pm to 2.30 am on 02.10.2009. He submits that the evidence of the informant that the deceased had left the house at 4 am on 02.10.2009 becomes doubtful in view of the postmortem report and evidence of the doctor. He has further submitted that the witnesses are inconsistent on the point as to when they learnt about the death of the deceased. Whereas, the father of the deceased has deposed that he learnt about the death of the deceased at 12 in the noon of 02.10.2009, according to his brother, Paras Choudhary

(PW-3), he learnt about his death at about 4 pm. The informant also deposed in her statement that she learnt about the death of the deceased at 4 pm on 02.10.2009. He has submitted that though the informant (PW-4), father of the deceased Hari Nand Yadav (PW-2) and uncle of the deceased Paras Choudhary (PW-3) have deposed that the police was informed on the date of occurrence itself, i.e., 02.10.2009, it is evident from the evidence adduced at the trial that the First Information Report was registered on the basis of the written report of the informant addressed to the Station House Officer on 03.10.2009. He has further submitted that the place of occurrence has not been proved at the trial in view of the description of the boundary furnished by different eye witnesses of the place where the dead body of the deceased was found lying. He has submitted that the place, where the dead body of the deceased was found, cannot be said to be lying in the house of the appellant and the entire case of the prosecution becomes doubtful.

22. Mr. Dilip Kumar Sinha, learned Additional Public Prosecutor appearing on behalf of the State, has submitted that the prosecution has been able to establish at the trial that the dead body of the deceased was lying in the house of the appellant. Upon examination of viscera, the Forensic Sciences Laboratory has found presence of highly poisonous substance in the viscera.

Accordingly, two facts, one that the deceased died of poisoning and his dead body was lying in the house of the appellant at the time of the death of the deceased stood proved at the trial. In such circumstance, it was incumbent upon the appellant to have explained the circumstances in which the deceased died, in view of the provision under Section 106 of the Indian Evidence Act, as the circumstances, in which the deceased died in the house of the appellant, was within her special knowledge. As she failed to explain the circumstance in which the deceased died, the learned trial court has rightly convicted the appellant of the offence punishable under Section 302, 328 read with Section 34 of the Indian Penal Code.

23. We have perused the impugned judgment and order of the trial court and we have given our thoughtful consideration to the rival submissions made on behalf of the parties. As has been noted above, it is the prosecution's case that since the dead body of the deceased was found lying in the house of the appellant and the medical report disclosed presence of highly poisonous substance in the viscera of the dead body of the deceased, these circumstances establish that the deceased was done to death by the appellant by administering poison. It will be worthwhile mentioning, at this juncture, that there is evidence that any poison was recovered from

the house of the appellant. There is no evidence that any container, empty or otherwise for storing poisonous substance was recovered either from the house of the appellant or from the appellant's possession. The prosecution has failed to prove the motive on the part of the appellant to kill the deceased, except for a vague narrative in the deposition of the informant that that the deceased had seen the other co-accused persons with the appellant in objectionable position. There is no evidence adduced at the trial to prove this aspect of the matter.

24. Apparently thus, there is no clear motive proved by the prosecution for the appellant to have killed the deceased by administering poison.

25. We consider, at this juncture, useful to notice the celebrated judgment of the Supreme Court in the case of ***Sharad Birdhichand Sarda v. State of Maharashtra*****,** reported in **(1984) 4 SCC 116**, wherein the Supreme Court, dealing with essential requisites to establish a case of murder by administering poison, has laid down in paragraph 165 as under: -

> "***165.*** *So far as this matter is concerned, in such cases the court must carefully scan the evidence and determine the four important circumstances which alone can justify a conviction:*

(1) there is a clear motive for an accused to administer poison to the deceased,

(2) that the deceased died of poison said to have been administered,

(3) that the accused had the poison in his possession,

(4) that he had an opportunity to administer the poison to the deceased."

26. In case of ***Sharad Birdhichand Sarda*** (supra), it was proved by the prosecution that the deceased had died of poison, and secondly it was also proved that there was an opportunity to administer the poison. The Supreme Court, however, noticed that the prosecution had not proved by any evidence that the appellant of that case had the poison in his possession. The Supreme Court reversing the High Court's decision, which was under challenge before it, made following observations in paragraph 167: -

167. *The comment made by the High Court appears to be frightfully vague and absolutely unintelligible. While holding in the clearest possible terms that there is no evidence in this case to show that the appellant was in possession of poison, the High Court observes that this fact may be proved either by direct or indirect (circumstantial) evidence. But it fails to indicate the nature of the circumstantial or indirect evidence to show that the appellant was*

in possession of poison. If the Court seems to suggest that merely because the appellant had the opportunity to administer poison and the same was found in the body of the deceased, it should be presumed that the appellant was in possession of poison, then it has committed a serious and gross error of law and has blatantly violated the principles laid down by this Court. The High Court has not indicated as to what was the basis for coming to a finding that the accused could have procured the cyanide. On the other hand, in view of the decision in Ramgopal case [(1972) 4 SCC 625 : AIR 1972 SC 656] failure to prove possession of the cyanide poison with the accused by itself would result in failure of the prosecution to prove its case. We are constrained to observe that the High Court has completely misread and misconstrued the decision in Ramgopal case [(1972) 4 SCC 625 : AIR 1972 SC 656] . Even prior to Ramgopal case [(1972) 4 SCC 625 : AIR 1972 SC 656] there are two decisions of this Court which have taken the same view. In Chandrakant Nyalchand Seth case [Criminal Appeal No 120 of 1957, decided on February 19, 1958] this Court observed thus:

> *"Before a person can be convicted of murder by poisoning, it is necessary to prove that the death of the deceased was caused by poison, that the poison in question was in possession of the accused and that*

poison was administered by the accused to the deceased. There is no direct evidence in this case that the accused was in possession of potassium cyanide or that he administered the same to the deceased."

27. After having carefully gone through the evidence on record, we can safely hold without any demur that in the present case also, the prosecution has miserably failed to prove that the appellant was in possession of poison.

28. In addition to the above, we are also of the opinion that there are certain glaring aspects which cannot be overlooked and create reasonable doubt over the prosecution's case, some of which have been highlighted by learned counsel for the appellant. The prosecution's case that the deceased was alive at 4 am on 02.10.2009 becomes doubtful in view of the evidence of the Doctor (PW-7), on the point of the time elapsed since the death of the deceased. Furthermore, the father of the deceased (PW-3) is said to have learnt about the death of the deceased at 12 in the noon of 02.10.2009. The informant, on the other hand, has stated that she learnt about the death and the fact that the dead body was lying in the house of the appellant at 4 pm. She further deposed that the appellant and other accused persons were making attempts to get the dead body disappeared and, therefore, she and the villagers were present there to ensure that the dead body was not

removed. Evidence of PW-1 (the sister's son of the deceased) has given a different narrative to the effect that he had reached the house of the informant in the evening at 6 pm where the informant, Paras Choudhary (PW-3) and Dina Nath Yadav and Hari Nand Yadav (PW-2) were present. He reached at the place of occurrence next day at 5-6 am in the morning. The distance between the house of the informant and the appellant, according to him, was one km.

29, It is consistent case of the prosecution's witnesses that the police had come in the evening of 02.10.2009, drawn the inquest report and had examined the witnesses also. Inquest report (Exhibit-2) on the other hand, suggests that the same was prepared on 03.10.2009. The written report, which is the basis for registration of FIR, was apparently submitted on the next day of the alleged occurrence, which is mentioned in the written report itself.

30. Still further, the circumstance that the appellant was present in her house when she was arrested on 03.10.2009, *prima facie*, goes to suggest that she did not have a guilty mind as in normal course of her conduct she would have attempted to escape.

31. It is settled position of law that in a case of circumstantial evidence, it is the duty of the prosecution to demonstrate, based on the evidence adduced at the trial, that the

facts established are consistent only with the hypothesis of the guilt of the accused and should not be explainable on any other hypothesis. In case of ***Sharad Birdhichand Sarda*** (supra), the Supreme Court has lucidly enunciated five golden principles, which constitutes '*panchsheel*' of the proof of a case based on circumstantial evidence in paragraph 153, which reads as under: -

> ***"153.*** *A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:*
>
> *(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.*
>
> *It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 1783] where the observations were made : [SCC para 19, p. 807 : SCC (Cri) p. 1047]*
>
> *"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can*

convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) 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,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

32. Based on the discussions hereinabove and scrutiny of the evidences of the prosecution witnesses, as noted above, we are of the view that, as a matter of fact, the prosecution has failed to prove it conclusively as to whether it was a case of suicide or homicide, let alone a case of murder committed by this appellant. The circumstances proved by the prosecution are of not such conclusive nature and degree as to deduce that the guilt of the

appellant is the only possible hypothesis, excluding every possible hypothesis.

33. In view of the discussions as above, finding of conviction recorded by the trial court, in our opinion, is unsustainable. Consequently, the order of sentence is also vitiated.

34. Resultantly, the impugned judgment of conviction dated 23.01.2014 and the order of sentence dated 29.01.2014 passed by learned Additional Sessions Judge-IV, Gopalganj, in Sessions Trial No. 38 of 2010/67 of 2010 are hereby set aside.

35. The appellant is in custody. Let her be released forthwith, if not required in any other case.

36. This appeal is accordingly allowed.

(Chakradhari Sharan Singh, J)

(Khatim Reza, J)

Pawan/-

AFR/NAFR	NAFR
CAV DATE	N/A
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