

Bicky Kumar Mahton and ors. Vs. State of Bihar

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Court : Patna

Decided On : Nov-06-2004

Judge : Indu Prabha Singh and C.M. Prasad, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 201, 302 and 364

Appeal No. : Criminal Appeal (DB) No. 386 of 2001

Appellant : Bicky Kumar Mahton and ors.

Respondent : State of Bihar

Advocate for Def. : Ashwini Kumar Sinha, APP

Advocate for Pet/Ap. : Y.C. Verma, Adv.A.K. Thakur, Adv.

Prior history : C.M. Prasad, J. 1. The appeal is against the judgment dated 17th July, 2001 of the 3rd Additional Sessions Judge, Begusarai passed in S.T. No. 191 of 2000/ 23 of 2001, whereby each of the three appellants has been convicted under Section 302 read with Section 34 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life and also a fine of Rs. 7,000/- and, in default of payment of fine, to suffer rigorous imprisonment for 8 months. Each of the appellants has also been conv

Judgement :

C.M. Prasad, J.

1. The appeal is against the judgment dated 17th July, 2001 of the 3rd Additional Sessions Judge, Begusarai passed in S.T. No. 191 of 2000/ 23 of 2001, whereby each of the three appellants has been convicted under Section 302 read with Section 34 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life and also a fine of Rs. 7,000/- and, in default of payment of fine, to suffer rigorous imprisonment for 8 months. Each of the appellants has also been convicted under Section 364 read with Section 34 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for 7 years and also a fine of Rs. 5,000/- and, in default of payment of fine, to suffer rigorous imprisonment for six months. Each of the appellants has also been convicted under Section 120B read with Section 34 and 201 read with Section 34 of the Indian Penal Code but no separate sentence has been passed under these counts.

2. The informant Shankar Sah (PW 6) gave a written petition with his L.T.I. to the Officer In-charge of Bhagwanpur Police Station on 26th February, 2000 alleging therein that on 23rd February, 2000 at about 4.00 p.m., his son Pankaj Kumar (the deceased) aged about 14 years had gone away with appellant Bicky Kumar Mahaton for bringing soil but he did not come back. He searched for the boy in the house and when he was not found there, he (the informant) thought that he (the deceased) would have gone to his another residential house at Bhagwan Chowk and would have stayed there. In the ensuing morning, when his son (the deceased) did not return, he searched for him and also enquired of the villagers. The boy was not found at the other residential house at Bhagwan Chowk nor at any other place in the village. The informant kept on searching for the boy and he learnt from some villagers that the three appellants and one Baudha Kumar Sah (whose trial was separated due to he being a juvenile) had kidnapped his son Pankaj Kumar (the deceased) on 23rd February, 2000 at about 6.00 p.m. and that they had kept the boy confined somewhere. The informant alleged that Gopal Sao (the appellant) had enmity, hence, he suspected that due to that enmity the accused persons had kidnapped the boy. On receiving the written report, the Officer, In-charge, Bhagwanpur Police Station registered a First Information Report and commenced investigation and on completion of investigation, charge-sheet was submitted and the appellants have been convicted and sentenced, as above.

3. As many as 8 witnesses were examined by the prosecution. PW 6 Shankar Sah is the informant himself. PW 4 Manju Devi is the mother of the deceased. PW 2 Umesh Kumar Sah is the cousin of the informant. PW 1 Bishwambhar Pandit was examined on the point that he had seen the deceased going with the appellants but this witness has turned hostile and he has not supported the prosecution case on this point. PW 3 Dr. Pramod Kumar Singh is the doctor who had held the post mortem examination on the dead body of the deceased. PW 5 Ram Shankar Jha is the Anchal Adhikari in whose presence the dead body of the deceased was dug up and recovered from the field of one Siddheshwar Singh. PW 7 Ramashish Sah is a formal witness who has proved the protest petition filed by the informant before the Chief Judicial Magistrate during investigation of the case. PW 8 Kaushal Kumar Verma, the then Officer In-charge of Bhagwanpur Police Station is the I.O. of the case.

4. The appellants had examined three defence witnesses during the trial. DW 1 Shivajee Sao and DW 2 Deo Narayan Paswan are the two witnesses about whom it is stated that the confessional statement of the appellants was recorded by police and these witnesses had signed the confessional statement as witnesses to the recording thereof but these witnesses were produced by the appellants and in their evidence these two witnesses have not supported the prosecution story about the confession having been made in their presence and they have stated that their signatures were obtained at the Police Station on blank papers. The evidence of DW 3 Dhunmun Mochi is not of any substance because this witness has simply deposed that he had not seen the dead body of the deceased and that any confessional statement of the appellants was not recorded in his presence and that he had no knowledge about the recovery of the dead body. Thus, this witness had no knowledge about the occurrence.

5. As per the prosecution witnesses, it is proper to discuss the evidence of the doctor first. The doctor PW 3 has testified that on 27.2.2000 at about 4.50 p.m. he had conducted the post mortem examination on the dead body of the deceased and he had found as under :

(i) Conjunctive were red and congested. Secretion from nose and mouth coming out. Eyes and tongue protruded. There were bruises and scratches over front of neck. Post mortem lividity over back was noticeable. On dissection trachea was found broken.

Opinion.--Death was due to throatling and asphyxia. Time elapsed since death 3-4 days.

Thus, according to the medical evidence, as adduced by the doctor, the deceased was killed by way of throatling 3-4 days prior to 27.2.2000.

6. The evidence of the I.O. is also important to be discussed before the evidence of other witnesses is taken up. The I.O. (PW 8) deposed that on 26.2.2000, the informant (PW 6) came to the Police Station and gave him a petition on the basis of which he recorded the FIR (Ext.-4) He recorded the further statement of the informant. He also stated that he recorded the statement of witness Makhan Tanti who stated before him that he had seen the deceased going with the appellants but the prosecution has not examined witness Makhan Tanti during the trial. Any explanation has also not been furnished for non- examination of Makhan Tanti. The I.O. further deposed that he also recorded the statement of Bishwambhar Pandit (PW 1) who simply stated before him that when he had met Shankar Sah, the informant he had disclosed to him all the facts and he had advised him to come to the P.S. Thus, there is nothing specific in the statement of Bishwambhar Pandit as recorded by the I.O. about this witness having seen this witness going with the appellants. It may be mentioned here that Bishwambhar Pandit was examined by the prosecution as PW 1 and he turned hostile and did not support the prosecution case on the point that he had seen the deceased going with the appellants.

7. The I.O. (PW 8) deposed that he had recorded the confessional statement of appellant. Bicky Kumar in presence of witnesses Shivjee Sah (DW 1) and Deo Narayan Paswan (DW 2). The confessional statement of appellant Bicky Kumar was marked as Ext-5. But this is important to be mentioned here that the two witnesses, namely, Shivjee Sah and Deo Narayan Paswan in whose presence the confessional statement is said to have been recorded were not examined by the

prosecution but by the appellants and these two witnesses stated that any confessional statement was not recorded in their presence and that their statements were taken at the P.S. on plain paper. The I.O. also deposed that he had recorded the confessional statement of Gopal Sao and Bhola Chaurasia (appellants) and Baudha Kumar. The confessional statement of these persons were proved respectively as Exts-5/2, 5/3 and 5/1. The confessional statements are also said to have been made in presence of witness Shivjee Sah and Deo Narayan Paswan. But as already stated, they have not supposed the factum of confessional statement having been made in their presence. The I.O. further deposed that he prepared the inquest report of the deceased and sent the dead body for post mortem examination.

8. The I.O. himself deposed that he learnt from the confessional statement of the appellants that after, murdering the deceased, they had buried the dead-body in the ploughed sweet potato field of Siddheshwar Singh, hence, he called the Circle Officer on sending requisition and in presence of the Circle Officer, the place in the field was dug up and the dead body of the deceased was taken out. Thus, according to this evidence of the I.O. the confessional statement of appellants led to the recovery of the dead body of the deceased. It is well known that a confession made by an accused before the police while he is in custody cannot be proved in view of the provisions under Section 26 of the Evidence Act, but the confession becomes admissible to the extent to which it leads to the recovery of a fact. In the instance case, the appellants are said to have confessed before the police that they killed the deceased and buried the dead body in the ploughed sweet potato field of Siddheshwar Singh. The confession of each of the appellants was separately recorded. The evidence of the I.O. shows that on the basis of that part of the confession of the appellants that they had buried the dead body in the ploughed sweet potato field of Siddheshwar Singh, the dead body was recovered from that field in presence of the I.O. Therefore, provisions of Section 27 of the Evidence Act makes the confessional statement admissible to the extent that the accused persons had buried the dead body at the place from where it was recovered.

9. PW 5 Ram Chandra Jha, the Anchal Adhikari deposed that on 27th February, 2000 he received information from Police that three culprits were apprehended and a boy was murdered and that the dead body of the deceased had to be excavated for which his presence is required, hence, he went to the place situated near Middle School, Mehrauli where he saw three adult and one minor accused apprehended by the Police. He also deposed that after his arrival there, the chaukidar obtained kudal and khurpi and the sweet potato field situated there was dug up and the dead body of a body about 14-16 years old was taken out from the ground there and that an inquest report under carbon process was also prepared there. He proved his signature (Ext-1/1) on the carbon copy of the inquest report. He also deposed that two persons Dinesh Sah and Umesh Sah (PW 2) had identified the dead body of the deceased.

10. The informant (PW 6) deposed that his son Pankaj Kumar (the deceased) was kidnapped and murdered on 23.2.2000. He further deposed at Paras-2, 3 and 4 of his evidence that appellant Bicky had come to his house at 4.00 p.m. and he had called his son and taken him away with him for cutting and bringing soil. But Pankaj Kumar did not return. When he did not return his (informant's) wife (PW 4) enquired of Bicky (appellant) as to where he left Pankaj (the deceased) then Bicky had replied that he (the deceased) had gone to his dera (another residence) at Bhagwanpur. He continued to depose that Pankaj did not come back even in the ensuing morning. Hence, he sent his daughter Priyanka to his dera and Priyanka returned from dera and informed him that Pankaj was not there. Learning this, the family members started crying and wailing. The informant further deposed that when he went to his dera on 25.2.2000, in course of searching his son (the deceased) he found 2 purias (chit of written paper) there. He got the purjas read and he learnt that it was written in the purias 'Let Shankar know it that his son (the deceased) is in their custody and that he would be released, if Rupees two lacs is kept in the Anganbari School. The informant said that taking back the 2 purjas when he came to his house, he also found 2 other purjas at the darwaja of his house. He further deposed that taking those letters, he came to the P.S. and gave those letters to the Officer In-charge there. He further deposed that he got one petition written by his nephew Dabbu and after putting his L.T.I on the same gave it to the Police at the P.S. He also deposed that the originals of the purjas received

by him had been handed over to the Police at the P.S. and that photo copies were retained by him.

11. The informant (PW 6) continued to depose that Darogajee had come to the village but Bicky (the appellant) was not found. Again when Darogajee came at night at 12.00 hours, appellant Bicky was apprehended at that time. He also deposed that Darogajee got Bicky write some papers in his writing and when he compared Bicky's writing with the writings on the Purjas, it tallied with the writing. He also deposed that Bicky disclosed the names of other culprits Gopal Sah, Bholu Chaurasia (the appellant) and Baudhu Sah and thereafter they were also arrested. Darogajee asked the appellants about the occurrence and then all the appellants, confessed before Darogajee that they had buried the dead body in the sugar potato field of Siddhnath Singh and that the appellants also indicated the place where the dead body was buried. Then the informant deposed that Darogajee called the Circle Officer and after arrival of the Circle Officer, the field was dug up and the dead body of the deceased was recovered. He further deposed that an inquest report was also prepared. About the cause of occurrence, the informant stated that he and appellant Gopal carried on some business and that his (informant's) business had flourished, hence Gopal had got animous and had threatened that he would ruin him, hence, the appellant alleges that it was due to that grudge that appellant Gopal killed the deceased. Thus, the informant is not an eye-witness to this case. He simply says that the deceased had been called and taken away by the appellants for cutting soil and bringing it and that when his wife had enquired from appellant Bicky about the whereabouts of the deceased, appellant Bicky replied that the deceased had gone to his dera at Bhagwanpur. The informant says about the confession having been made by the appellants that they had buried the dead body in the sweet, potato field of Siddhnath Singh. He (informant) does not mention about any details of confession as to the manner of occurrence as confessed by the appellants.

12. PW 4 Manju Devi is the mother of the deceased. She deposed that on the date of occurrence, at 4.00 p.m., appellant Bicky came to her house and asked Pankaj (the deceased) to accompany him for bringing soil, Soil is used in preparation of Lahthi (lac bangles). She deposed that Pankaj (the deceased) went out of his

house with Bicky and that she also came out of the house with Pankaj and she had seen Gopal, Bhola (deceased) Bauddha (another accused whose trial was separated) standing on the pitch road outside the house. She further deposed that Pankaj went away with the appellants and Bauddha. Pankaj did not return in the evening but Bicky (the deceased) came back. Hence, she asked Bicky as to where Pankaj was then Bicky had replied that Pankaj had gone to his dera at Bhagwanpur. He further deposed that she did not search for Pankaj in the night thinking that he was at the dera at Bhagwanpur but when Pankaj did not come back in the ensuing morning, she sent her daughter to the dera and the daughter returned back and reported that Pankaj was not there at the dera. Knowing this, she started weeping and wailing and the neighbours and villagers started searching for Pankaj in the village and in the relations. She further deposed that she learned that for the purpose of extorting money the three appellants and Baudhu had confined and concealed her son but she did not say from whom she learnt it. She further deposed that her son was searched for 2 days but he could not be traced and that on the 3rd day, one letter was found at the dera and the other at the darwaja of her house wherein it was written that Rupees two lacs had to be kept at Anganbari School, else the boy would be killed. She also deposed that her husband took those letters to the Police Station and informed to Police. Thus, this witness says that the deceased had been taken away by appellant Bicky and others and that the deceased was searched for 2 days but he could not be found. It is relevant to note here that the informant has not disclosed this fact in the First Information Report that his wife had disclosed to him that the appellants had taken away the deceased with them; rather he has mentioned that he learnt from the villagers that the deceased had been kidnapped. PW 2 who is the uncle has said in his evidence that Bishwambhar Pandit (PW 1) and Makhan Pandit had told him that they had been the deceased going with the appellants but Bishwambhar Pandit has not stated that this fact and he has turned hostile and Makhan Pandit has not been examined by the prosecution, PW 4 further deposed that Police had apprehended the appellants and enquiry by Police, the appellants had stated that they had killed her son and had buried the dead body in the sweet potato field of Siddhnath Singh. Learning this, she got struck and lost her consciousness. On regaining consciousness, she went near the Middle School

and saw that the dead body of her son was there. At para 13 of her cross-examination, she deposed that she had disclosed to her husband, dewar and bhaisur that she had suspicion on the appellants. Her husband, has been examined as PW 6 and the dewar is PW 2. But the dewar had not disclosed in his evidence that the PW 4 had disclosed it before him. The husband (PW 6) in his evidence stated that his wife (PW 4) had enquired from Bicky about the whereabouts of the deceased who had disclosed that the deceased had gone to his dera but the informant has not disclosed this fact which was an important fact in his FIR lodged before the Police.

13. Umesh Kumar Sah (PW 2) is the cousin of the informant. He deposed that Pankaj who is the elder son of the informant had been kidnapped on 23.2.2000 and that despite search, he could not be found at any of the relations or other places. He further deposed that Bishambhar Pandit and Makhan Pandit had disclosed before him that they had seen the deceased going with the appellants. As already stated earlier, Bishambhar Pandit (PW 1) and Makhan Pandit (not examined) have not supported this fact of having communicated this witness that they had seen the deceased going with the appellants. As already, stated earlier, Bishambhar Pandit (PW 1) and Makhan Pandit (not examined) have not supported his fact of having communicated this witness that they had seen the deceased going with the appellants. This witness has further deposed that the appellants had confessed before Police that they had burried the dead body to the field of Siddh Nath Singh situated in the back side of the School i.e.. Middle School, Mahdauli and that after confession of the appellants, the Police got the dead body dug up and recovered from that field in presence of the Anchal Adhikari. So far the question of making confession is concerned, this witness simply says that the appellants had confessed that they had burried the dead body. This witness does not say that the appellants had also confessed about the killing the deceased. In the evidence of this witness, the confession of the appellants has not been stated in the words of the language in which the confession was made by the appellants.

14. During argument, the learned counsel for the appellants argued that the informant says in his evidence that the appellant Bicky had come to his house and he had called the deceased and took him away for cutting soil and bringing it and

that when the deceased did not return in the evening his wife (PW 4) enquired from Bicky as to where the deceased was whereupon Bicky had replied that the deceased had gone to his dera at Bhagwanpur. This is a very important fact in order to show that the appellant Bicky had taken the deceased with him. But it is curious to find that the informant does not disclose this fact in his written petition filed before the I.O. which constitutes the FIR. Thus, this has not been disclosed at the earliest point of time and, therefore, there are reasons to suppose that this is an addition and embellishment in the case of prosecution. The informant's wife (PW 4) who is the mother of the deceased has also stated in her evidence that Bicky had come, called the deceased and took him away with him and that at that time, the other appellants were also on the road outside the house and she also deposed in Para 13 of her evidence that she had disclosed before her husband, (PW 6), dewar (PW 2) and bhai sur about her suspicion on the appellant. Thus, when she had disclosed it before the informant and PW 2 and the boy was searched for 2 days, but still this fact was not disclosed in the FIR. Due to non-disclosure of this important fact at the earliest time, makes a reason to think that this is an afterthought introduced in the case of prosecution at the stage of evidence.

15. As to the confessional statement as is said to have been made by the appellants no witness gives the details of the confession as made by the appellants with regard to the manner of commission of the offence and the witnesses simply say that the appellants confessed to have killed the deceased and to have buried the dead body in the field of Siddheshwar Singh. The language used by the appellants while making confession has not been reproduced or disclosed by the witnesses. The I.O. who was the Officer In-charge of the concerned Police Station recorded the confessional statement of the appellants in detail and on the basis of the confessional statement, he learnt that after commission of the offence, the appellants had buried the dead body of the deceased in the sweet potato field of Siddheshwar Singh and on being pointed out by the appellants, he got the dead body dug up and recovered from that field. Admittedly, the confessional statement as made by the appellants, is confession before the Police. No doubt, two villagers, namely, Shivjee Sao and Deo Narayan Paswan had signed the confessional statements (Ext-5 Series) in witness of its

having been recorded in presence of two witnesses, (PWs 1 and 2) but they denied in Court that the statement was recorded in their presence. Here the confessional statements are confessions recorded by Police. The provisions of Section 26 of the Evidence Act enjoin that no confession made by a person while he is in custody of Police unless it be made in presence of a Magistrate, shall be proved against him. In the instant case, a Magistrate i.e. Anchal Adhikari was called by the Police but he has not witnessed the making of confession by the Police in his presence. The Anchal Adhikari has simply stated in his evidence that he was called by Police for digging up and taking out the dead body in his presence. Thus, the confession is a confession pure and simple made before the Police while the appellants were in custody of Police. Hence, the confession is not admissible under the law. But further the provisions under Section 27 of the Evidence Act provide as to how and of which information or confession received from the accused may be proved. This section provides that when any fact is proved to as discovered in consequence of information received from a person accused of any offence, in custody of a Police Officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved. The I.O. has proved that the appellants had confessed before him that they had buried the dead body in the sweet potato field of Siddheshwar Singh and that on being indicated by the appellants, he had dug up and recovered the dead body from the sweet potato field of Siddheshwar Singh. Thus, the informant (PW 6) and the deceased's mother (PW 4) have also stated in their evidence that the appellants had confessed that they had buried the dead body in the sweet potato field of Siddheshwar Singh, from where it was recovered. Thus, the prosecution has been able to prove the recovery of the dead body on being pointed out by the appellants hence that portion of the confession of the appellants that they had buried the dead body in the sweet potato field of Siddheshwar Singh is fit to be relied upon.

16. During the argument, the learned counsel for the informant argued that the informant has stated that Darogajee had got Bicky write something on paper and it tallied with Bicky's writing on the letters received by him. Hence, it was further argued that this very fact makes the appellants connected with the crime of kidnapping. But this has to be mentioned here that no such letter has been proved

in Court nor there is an explanation why it was not proved on the record when according to the informant, it had been given to the I.O. Besides this, the I.O. has not deposed in his evidence that he had asked the appellant Bicky to write on paper and that he had compared the writings. Therefore, in such view of the matters, this evidence of the informant that the writings were compared and it tallied does not help the prosecution, in any manner.

17. During the argument, learned counsel for the appellants argued that witness Manju Devi who is the mother of the deceased has given altogether a different story in her statement before the Police as against her evidence adduced in Court. But on perusal of the evidence of Manju Devi and the I.O., it was found that the defence did not care to confront the witness Manju Devi to that portion of her statement as contained in the case diary nor such statement was proved through the evidence of the I.O. Hence, there is no scope for considering the submissions of the learned counsel that the statement of Manju Devi as in the case diary which goes against her evidence in the case may be considered for impeaching the credibility of PW 4 or the manner of occurrence as propounded by the prosecution.

18. Thus, in view of the facts and circumstances of the case, as discussed above, it is found that the prosecution has been able to prove the confessional statement of the appellant leading to recovery of the dead body that the appellants had buried the dead body in the sweet potato field of Siddheshwar Singh from where the dead body was recovered. These materials are sufficient to constitute offence under Section 201, IPC making each of the appellants liable to be convicted under this section. The trial Court has convicted each of the appellants under this section. There does not appear to be any disability in passing sentence by this Court at this stage. In view of the nature of offence it is felt that a sentence of rigorous imprisonment for 7 years to each of the appellants will meet the ends of justice. Therefore, each of the appellants is sentenced to undergo R.I. for 7 years under Section 201, IPC. The appellants will stand acquitted of the charge under Section 302/34, 364/34 and 120B/34, IPC.

19. In the result, the appeal is partly allowed in the manner as indicated above. The bail bonds of the appellants are cancelled. The trial Court will take steps for

arrest of the appellants for serving out the sentence as above.

I.P. Singh, J.

20. I agree.

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