

(2005) 02 PAT CK 0133

Patna High Court

Case No: Criminal Appeal (DB) No. 250 of 2001

Dulari Kewat and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision: Feb. 8, 2005**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 302, 34

Citation: (2005) PLJR 835**Hon'ble Judges:** Sadanand Mukherjee, J**Bench:** Single Bench**Advocate:** Ajay Kumar Thakur and Bimal Kumar, for the Appellant; Lala Kailash Bihari Prasad, for the Respondent**Final Decision:** Allowed

Judgement

Sadanand Mukherjee, J.

The appellants by preferring this appeal have assailed the judgment dated 29/5/2001 and order dated 30/ 5/2001 passed by 1st Additional Sessions Judge, Nalanda at Biharsharif in Sessions Trial No. 526/94 convicting and sentencing them to undergo R.I. for life u/s 302 / 34 of the Indian Penal Code (in short, IPC). The case of prosecution, in short, is that on 16.12.93 the Informant Kusum Devi (PW-11) after taking meal was in her house along with her children and her husband Doman Kewat. At about 9 PM appellant Sadhu Kewat came to her house and called her husband and hearing the call her husband came out of the house and she also came out of her house with him. Appellant Sadhu Kewat asked the husband of informant to accompany him to his house for some urgent work. Informant raised objection but appellant Sadhu Kewat assured her that he would bring her husband back. The husband of informant left his house with appellant Sadhu Kewat. Informant waited the return of her husband till 12 O'clock in the night but when he did not come she apprehended that something had happened and she then awakened her

sister-in-law Manju Devi (PW-7) and her neighbour Kailash Kewat (PW-4) and told them that her husband left the house with appellant Sadhu Kewat at about 9 PM but had not returned till then. All the three started searching the husband of informant and went to the house of appellant Sadhu Kewat and found his house bolted from inside and no body responded inspite of calls. Informant apprehended that her husband had been killed by appellant Sadhu Kewat and she tried her level best to open the gate of the house but she did not succeed. At about 6 AM in the morning when police patrolling party reached there after hearing the rumours the informant told the police that her husband had been taken away by appellant Sadhu Kewat on the previous night and house of appellant Sadhu Kewat was bolted from inside and not being opened in spite of calls. The police party with the help of villagers got the house of appellant Sadhu Kewat opened and then informant found that dead body of her husband was lying in the verandah of the house. On seeing the dead body it appeared to informant that appellant Sadhu Kewat, his father appellant Dulari Kewat and his wife appellant Girija Devi by assaulting with hard and blunt substance on the head of her husband had committed his murder. Fard beyan of informant was recorded by SI Mangal Soran of Bind Police Station on 17.12.93 at about 7 AM at the house of informant in which she clearly stated that her husband had no enmity with appellant Sadhu Kewat or his family members and she was not knowing why her husband was killed and she further stated that in the night she had heard "hulla" of "Chor-Chor". On the basis of Fard beyan of informant a case u/s 302 / 34 IPC was registered against the appellants and police after investigation submitted charge sheet. Cognizance of the case was taken and case was committed to the court of session where charge u/s 302 / 34 IPC was framed against all the three appellants and on their denial to the charge they were put on trial and after trial they were found guilty and were convicted and sentenced to undergo R.I. for life u/s 302 / 34 IPC.

2. The case of appellants as it appears from the trend of cross examination of prosecution witnesses is that deceased himself was a thief and on the night of occurrence in the absence of appellants he entered in their house for committing theft but was caught by villagers who assaulted him and he died. No witness on behalf of the appellants has been examined.

3. In order to prove its case, the prosecution has examined 11 witnesses. Dwarika Prasad (PW-1), Chandeshwar Kewat (PW-8) and Mantu Kewat (PW-9) have not supported the case of prosecution and have been declared hostile. Krishna Paswan (PW-2) has simply stated that inquest report of the dead body of deceased was prepared on which he put his LTI. Murari Kewat (PW-3) has said that on 16.12.93 at about 10 PM he came to know that appellant Sadhu Kewat after committing the murder of Doman Kewat had fled away from the village along with his family members but he has not disclosed from whom he learnt about the death of Doman Kewat. Kailash Kewat (PW-4) and Nawal Kishore Kewat (PWd-5) are said to be the witnesses who had accompanied the informant in search of her husband. Dr.

Mahadeo Dubey (PW-6) is the doctor who had held autopsy on the dead body of deceased. Ramdeo Kewat (PW-10) is father of deceased who at the time of occurrence was at Ara where he had gone for harvesting paddy and he has said that on receipt of Information about the death of deceased he came to village where informant and his daughter told him that appellants had taken away the deceased and committed his murder. Kusum Devi (PW-11) is the informant. The evidence of Manju Devi (PW-7), "Nanad" of informant who is said to have accompanied the informant in search of deceased has not been considered by the court below on the ground that she did not appear for her further-cross examination.

4. Dr. Mahadeo Dubey (PW-6) has said that on 17.12.93 he was posted as Civil Assistant Surgeon, Sadar Hospital, Biharsharif and on that day, at about 1.50 PM he held post mortem examination on the dead body of Doman Kewat and found three linear incised wounds 1 1/2" x 1/4" x skin deep on the back of left middle thigh, one linear sharp cutting injury 1/2" x 1/4."x skin deep over the lower end of the left leg, incised wound 2" x 1/2"x muscle deep over right forehead above right eyebrow, sharp cut injury 1/2" x 1/ 4"x muscle deep over upper lip below nose, on lower lip and on right cheek. He has further said that fracture of front upper two teeth, fracture of lower three teeth, fracture of left mandible and crush injury involving left face, left jaw, left eyeball, left cheek, left forehead 4 1/2" x 3 1/2" deep to cavity involving all the structures, blood vessels, fracture of left orbital and left frontal bones with lacerated brain matters and blood clots were found and in his opinion, death was caused by shock and hemorrhage due to aforesaid injuries, out of which incised wounds were caused by sharp cutting weapon and remaining injuries were caused by hard and blunt substance and time elapsed since death was within 24 hours. He has proved post mortem examination report (Ext.1). From his evidence it is established that death of deceased was homicidal.

5. Kusum Devi (PW-11), informant, is the wife of deceased and she has said that on the day of occurrence at about 9 PM she along with her husband and children was in her house when appellant Sadhu Kewat came and asked her husband to accompany with him to his house for some urgent work and although she protested because it was late in the night but appellant Sadhu Kewat assured her to bring her husband back and thereafter her husband left with appellant Sadhu Kewat, When he did not return for about two hours she along with her "Nanad" Manju Devi (PW-7) and Kailash Kewat (PW-4) went to the house of appellant Sadhu Kewat and found that his house was bolted from inside and in spite of calls no body opened the door and she then suspected that her husband had been killed. She has further said that when in the morning police came, she along with police went to the house of appellant Sadhu Kewat and at that time also door of house was closed from inside and police got the door broken and when she entered into the house she found the dead body of her husband lying on the verandah and entire face of dead body was crushed. She has further said that she suspected that appellants had committed the murder of her husband and about motive in para-3 of her evidence she has said that

her husband had some altercation with appellant Sadhu Kewat at the time of collecting subscription for Durga Puja. She has said that Fard beyan was recorded by police which was read over to her and on which she put her LTI. Kailash Kewat (PW-4) in his evidence has said that on 16.12.93 he was sleeping in his shop when at about 9.30-10.00 PM informant came to him and told that appellant Sadhu Kewat had taken away her husband for some work assuring that he would bring him back but her husband had not returned till then. He has further said that he, informant and Manju Devi (PW-7) went to the house of appellant Sadhu Kewat and found the door of his house bolted from inside and there was complete silence there and no body opened the door inspite of calls and he then apprehended that appellant Sadhu Kewat might have committed the murder of Doman Kewat. He has further said that because of night he did not go to the police station but in the morning at about 6 O'clock he went there and thereafter along with police and a number of villagers went to the house of appellant Sadhu Kewat and found the door of his house closed and on the order of the police door was broken and when he entered into house he found dead body of Doman Kewat lying in Northern Verandah of house of appellant Sadhu Kewat and rope was tied in the waist and legs of deceased and face of deceased was crushed. He has further said that he suspects that all the three appellants jointly committed the murder of deceased and about motive he has said that in the Durga Puja some altercation took place between the appellant Sadhu Kewat and deceased Doman Kowat. Nawal Kishore Kewat (PW 5) has said that on the day of occurrence at about 9 PM appellant Sadhu Kewat had gone to the house of deceased Doman Kewat for calling him and when wife of deceased started searching her husband he met her and when she told him that her husband had not returned, he then told her that appellant Sadhu Kewat had taken her husband with him and thereafter he, informant, Manju Devi and Kailash Kewat went to the house of appellants where they found that door of the house was closed from inside which was not opened inspite of calls and informant started weeping and when on the next day in the morning police came and got the door of the house broken, he along with police entered into the house and found the dead body of the deceased lying in the verandah and face of deceased was crushed and rope was tied in the hands and legs. He has further said that appellants committed the murder of deceased because on the occasion of last Durga Puja an altercation had taken place between the deceased and appellant Sadhu Kewat. He has also said that at the time of his entry in the house of appellant Sadhu Kewat appellants were not there. The informant has also said that when dead body of her husband was found in the house of appellant Sadhu Kewat appellants were not there. The evidence of this witness that when informant was searching her husband, she met him and told him that her husband had been taken away by Sadhu Kewat is altogether a new story which is against the case of prosecution that deceased was taken away from his house where at that time informant who is wife of deceased was present. Informant has nowhere said that when she started making search of her husband she met this witness and told her that her husband had gone with appellant Sadhu Kewat.

Similarly Kailash Kewat (PW-4) has also not said that this witness was with them when he and informant had gone to the house of appellant Sadhu Kewat.

6. In the fard beyan as well as in her evidence the informant has said that at about 9 PM appellant Sadhu Kewat came to her house and took away her husband with him and when her husband did not return for 2-3 hours, she then went to the house of Kailash Kewat (PW-4) and thereafter to the house of appellant Sadhu Kewat but evidence of Kailash Kewat (PW-4) is that on 16.12.93 at about 9.30-10.00 PM Informant came to his house and said that her husband had left the house with appellant Sadhu Kewat.

7. In this case, so far appellants Dulari Kewat and Girija Kewat are concerned there is absolutely no evidence either direct or circumstantial against them. Even in their examination u/s 313 Cr.P.C. only this much has been asked from them that evidence against them is that they committed the murder of deceased which they denied. From the evidence on record I do not find that there is any evidence that these appellants committed the murder of deceased. Even the question that dead body of deceased was recovered in their house has not been put to them. So, I find that so far these two appellants are concerned, it is the case of no evidence against them. So far appellant Sadhu Kewat is concerned, only evidence against him is that he on 16.12.93 in the night had gone to the house of deceased and took the deceased with him on the pretext of some urgent work at his house and thereafter deceased did not return and on the next day in the morning dead body of deceased was recovered from the house of this appellant. It is true that this appellant in his examination u/s 313 Cr. P.C. admitted that dead body of deceased was found in his house but then in view of specific evidence of Kailash Kewat (PW-4) and informant who are the witnesses who had gone to his house that this appellant or his other family members w(sic) a not present in the house from where dead body was recovered does not prove the case against this appellant also for committing the murder of deceased only on the ground that dead body of deceased was found in his house. The case of defence is that deceased was a thief and in absence of appellants he had entered in their house for committing theft but was seen by the villagers who assaulted him and he died.

8. Learned counsel on behalf of the appellants has argued that informant herself in the Fard beyan has said that on the night of occurrence she had heard "hulla" of "Chor-Chor" but in her evidence in court she has denied to have heard any such "hulls". He has further argued that informant was examined by I.O. In her restatement also she had stated about the hearing of "hulla" of "Chor-Chor" on the night of occurrence but she denied it and her attention to this contradiction has been drawn in para-16 of her evidence but since prosecution has not examined the I.O. so, it has prejudiced the case of appellants. Further argument on behalf of the appellants is that in Fardbeyan informant has stated that Fardbeyan was recorded at her house but in her evidence she has said that her Beyan was recorded inside the

house of appellant Sadhu Kewat where dead body of her husband was found. The next argument advanced on behalf of the appellants is that the evidence of informant is that in the night when she went to the house of appellant Sadhu Kewat, she found the door of the house closed from inside and it was not opened inspite of calls and 20-25 persons assembled there and when the door was not opened they also left the place but she along with Kailash Kewat (PW-4) remained there but Kailash Kewat (PW-4) has said that when the door of the house of appellant Sadhu was not opened he returned to his village Shyam Bigha leaving the informant and her daughter there and because of fear he remained in his house for whole night and in the morning he went to police station and narrated the entire incident and his statement was recorded by police but not at the police station but in the house of appellant Sadhu Kewat on which he put his signature. Learned counsel of appellants has argued that prosecution has not brought on record this statement of Kailash Kewat which was the earlier statement about the occurrence. Lastly, learned counsel appearing on behalf of appellants has argued that so far appellant Sadhu Kewat is concerned, only this much has come against him that he took the deceased with him from his house on the night of 16.12.1993 but the evidence of prosecution witnesses on this point is not convincing because there is major contradiction even on the point of taking away the deceased with him by this appellant in the evidence of PWs. 4 and 11 who are the only witnesses on this point and they have developed the story of motive saying some altercation between the deceased and appellant at the time of Durga Puja which is against the statement of informant made by herself in Fard beyan that her husband had no enmity with appellant Sadhu Kewat or his family members. About the admission of appellant Sadhu Kewat u/s 313 Cr. P.C. that dead body of deceased was found in his house learned counsel of appellants has submitted that appellant Sadhu Kewat is a villager and he has fairly admitted that dead body of deceased was in his house and because he was not present in his house, therefore, he has not stated in his examination u/s 313 Cr. P.C. how dead body of deceased was found in his house and for this reason, it cannot be said that he is responsible for the murder of deceased because this solitary circumstance does not irresistibly lead to only conclusion of his being guilty for the murder of deceased. So far other appellants are concerned, as stated above, there is no evidence against them.

9. Considering the entire evidence on record I find that prosecution has not been able to prove its case beyond all reasonable doubts. In the result, this appeal is allowed and the judgment and order of the court below are set aside. As the appellants are in custody, issue release order for their release from custody immediately if not required in any other case.

Sadanand Mukherjee, J.

10. I agree.