

**AFR**

**Court No. - 40**

**Case :- CRIMINAL APPEAL No. - 305 of 1990**

**Appellant :- Hasibuddin & another**

**Respondent :- State Of U.P.**

**Counsel for Appellant :- Amit Kumar, Ramesh Kumar  
Shukla, Renu Rajat**

**Counsel for Respondent :- A.G.A.**

**Hon'ble Bala Krishna Narayana, J.**

**Hon'ble Arvind Kumar Mishra-I, J.**

List has been revised. None appears on behalf of the appellant to press this appeal, although, name of Amit Kumar, Ramesh Kumar Shukla, Renu Rajat are printed in the cause list, as counsel for the appellants.

Record reflects that appellants- Hasibuddin and Smt. Sakura Begum @ Maskure Begum- were enlarged on bail by this Court on 16.04.1991. However, when this appeal came up for hearing on 09.02.2017, case was called out in the revised list, but none appeared on behalf of the appellants to press this appeal. The following order was passed by us on 09.02.2017:-

*"Case called out in the revised list. No one is present on behalf of the appellants to press this appeal. Sri Saghir Ahmed, Sri J.K. Upadhyay, Smt. Manju Thakur and Kumari Meena, learned AGAs are present.*

*Perused the order sheet. This appeal is of the year 1990.*

*Record shows that the appellants are on bail. In view of above, issue non-bailable warrant against accused-appellants- Hasibuddin and Sakura Begum through Chief Judicial Magistrate, Varanasi returnable*

*at an early date. In case the appellants surrender and/or are arrested, they shall be released on bail on their furnishing a personal bond and two sureties each in the like amount to the satisfaction of the court concerned subject to the undertaking that they shall appear before this Court on the next date fixed.*

*Chief Judicial Magistrate, Varanasi shall submit his report along with copy of bail bonds and sureties furnished by the appellant.*

*List this case on 9th March, 2017."*

Record shows that the non-bailable warrant issued against the appellants, pursuant to our order dated 09.02.2017, could not be executed against them on account of non-availability of the house number in which they are residing.

Left with no other option, we were compelled to pass an order on 10.04.2017 directing the Chief Judicial Magistrate, Varanasi to proceed against the sureties of the appellants and submit compliance report within three weeks and we ordered this appeal to be listed on 03.05.2017.

Report of Chief Judicial Magistrate, Varanasi dated 17.05.2017 further indicates that sureties of the appellants are not available in the office of C.J.M., Varanasi. Report further indicates that C.J.M. Varanasi had made a request to the office of this Court to send particulars of the sureties of the appellants. Therefore, office of this Court was directed to trace out the bail bonds of the sureties of the appellants and place the same on the record of this appeal and ordered this appeal to be listed in the next cause list.

Consequent thereupon, report of office of this Court dated 25.05.2017 reveals, pursuant to order passed by this Court dated 18.5.2017, that details of the sureties of the appellants are not found available in the Lower Court Record.

To cut a long story short we do not find any prospect of the accused-appellants, who are absconding, being traced out and produced before this Court. It is apparent that they are not interested in the disposal of this appeal and have abused the liberty of bail by failing to appear before this Court despite non-bailable warrants issued against them. The question which arises before us is that whether we are bound to wait till the accused-appellants are searched, if at all, and produced before us and keep on adjourning the hearing of this appeal perenially.

Faced with the aforesaid contingency, the question, which arises before us is that whether we are bound to adjourn the matter in the absence of both the appellants and their counsels. Under identical circumstances the Apex Court after a comprehensive analysis of previous decisions on the issue has distilled the legal position into six propositions in paragraph 19 of its judgment delivered in the case of **K.S. Panduranga v. State of Karnataka(2013) 3 SCC 721 :**

*19.1. That the High Court cannot dismiss an appeal for non-prosecution simpliciter without examining the merits;*

*19.2. That the Court is not bound to adjourn the matter if both the appellant or his counsel/lawyer are absent;*

19.3. *That the court may, as a matter of prudence or indulgence, adjourn the matter but it is not bound to do so;"*

19.4. *That it can dispose of the appeal after perusing the record and judgement of the trial court;*

19.5. *That if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the appellant-accused if his lawyer is not present, and if the lawyer is absent and the court deems it appropriate to appoint a lawyer at the State expense to assist it, nothing in law would preclude the court from doing so; and*

19.6. *That if the case is decided on merits in the absence of the appellant, the higher court can remedy the situation.*

Thus, in view of the legal position propounded by the Apex Court in the case of **K.S. Panduranga (Supra)**, we proceed to examine this appeal on merits with the help of Sri A.N. Mulla assisted by Sri Saghir Ahmad, Sri J.K. Upadhyay, learned A.G.As. and Smt. Manju Thakur, learned brief holders for the State.

By way of instant criminal appeal, challenge has been made to the validity and sustainability of the judgment and order of conviction dated 30.01.1990 passed by Special Judge, Varanasi, in Sessions Trial No.273 of 1988 (State Vs. Hasibuddin & another), arising out of case crime no.86 of 1988, under Sections

364, 302 and 201 IPC, Police Station- Sarnath, District- Varanasi, whereby accused appellants- Hasibuddin and Smt. Sakura Begum @ Maskara Begum- have been sentenced to life imprisonment and one year R.I. under Sections 302 and 201 IPC, respectively. Both the sentences were directed to run concurrently.

The facts of this case are very shocking and very distressing. Murder of an infant, the only son of his parents was being committed in very gruesome and ghastly manner. The person in the dock, who is the accused of the crime was neighbour of the informant. Brief relevant facts leading to the registration of the first information report and giving rise to the present appeal are being set out herein under:

Accused- Hasibuddin and his wife Smt. Sakura Begum @ Maskara Begum were living in the Ahata of Hazi Hanif, Mohalla Puranapul- Pulkohana, Police Station- Sarnath, District- Varanasi much before 29.8.1988. About 15 days before the occurrence, informant- Inawal Sekh S/o Kadir Sekh arrived with his son- Badasu and wife Rajani Bibi and started living there. His presence in the campus was disliked by the wife of Hasibuddin (Smt. Sakura Begum @ Maskara Begum). The accused side quarreled with the informant side several times and asked them to move away from the Ahata. A quarrel had taken place between informant's side and the accused side in the noon of 29.08.1988. At the time of the quarrel, accused Hasibuddin and his wife Smt. Sakura Begum @ Maskara Begum had threatened the informant's side that they would teach them such a lesson, which they would remember for whole life. Later on, informant- Inawal Sekh- went away to ply rickshaw. In the evening at about 8.00 P.M., when he arrived at his house, he was told by his wife Rajani Begum, that at about 7.30 P.M.

she had gone out to ease. She had left her child sleeping in the '*kholi*' (slum). When after about 10 minutes Rajani Begum returned, she found that Badasu-her infant- was missing. For the whole night, informant and his wife searched for the child, but could not trace him out. On the next morning i.e. 30.8.1988, one Soharab S/o Samsuddin Sekh told informant Inawal Sekh, that on 29.8.1988 at about 7.30 P.M., he saw Hasibuddin and his wife Smt. Sakura Begum @ Maskara Begum moving towards 'Narokhar Nala'. Hassibuddin's wife Smt. Sakura Begum @ Maskara Begum was carrying a child on her shoulder. Thereafter, Inawal Sekh approached Hasibuddin at his 'Kholi'. When he started inquiring about his child, Hasibuddin started quarrelling. This behaviour of him convinced Inawal Sekh that Hasibuddin and his wife Smt. Sakura Begum @ Maskara Begum had kidnapped his child- Badasu- with the intention to kill him.

Thereafter, informant- Inawal Sekh got a written report (Exhibit Ka-1) scribed by one Shyam Sundar Prasad of Dindayalpur and lodged it as Exhibit Ka-1 on 30.8.1988 at about 7.30 A.M. at Police Station- Sarnath, located at a distance of 7 kilometers south from the place of occurrence.

Initially, contents of the written report were taken down in the concerned Check FIR at Case Crime No.86 of 1988, under Section 364 IPC on 30.08.1988, but later on after the dead body of infant child was recovered, case was registered for offence under Sections 302, 201 IPC, Police Station- Sarnath, District- Varanasi. Check FIR is Exhibit Ka-12. On the basis of entry made in the Check FIR, a case was registered against the accused- appellants in the concerned General Diary of aforesaid date and time at

aforesaid case crime number. Copy of the concerned General Diary is Exhibit Ka-14.

The investigation of the case was handed over to Sri Ram Chandra Yadav P.W.9. Investigating Officer- Sri Ram Chandra Yadav P.W.9, after completing necessary formalities, proceeded to the spot and interrogated the accused-appellants- Hasibuddin and Smt. Sakura Begum @ Maskure Begum. Thereafter, he recorded statements of informant- Inawal Sekh and Sohrab S/o Shamsuddin Sekh and on tip of information of *mukhbir*, he along with other companions reached old bridge from where he saw both accused- Hasibuddin and Smt. Sakura Begum @ Maskure Begum- tried to escape away from the scene. On being pointed out by the *mukhbir* and others, he (P.W.9) arrested the accused and recorded the statement of both the accused. Accused confessed their guilt before him and on their pointing out, he recovered the corpse of child. Thereafter, in his writing recovery- memo was prepared, which is Exhibit Ka-2. He prepared site plan of the spot, which is Exhibit Ka-4.

On the same day, the dead body was sent for post-mortem after 'Panchayatnama' written by Sub-Inspector Vibhuti Prasad Gupta P.W.7. Inquest report of the deceased is on record as Exhibits Ka-5. In the opinion of inquest witnesses and the Investigating Officer, it was thought proper to send the body for postmortem examination so as to ascertain real cause of death. Therefore, relevant papers were prepared and the dead body of the deceased was sealed and sent for postmortem examination. The autopsy of dead body was conducted by Govind Lal P.W.8 on 31.08.1988 at 05.00 P.M., who noted following injuries on his body:-

**Ante-mortem injury :-**

- (1) Abrasion .3 cm x .3 cm on right under surface (mandible region) 5 cm below right ear.

In the opinion of the doctor, cause of death of the deceased was asphyxia as a result of drowning. He mentioned in his deposition that it was not a case of throttling. He also mentioned that if a child is caught held by neck and pressed for sufficient time in the water then such death can occur. He fixed the time of death of the child between 7 and 8 P.M. on 29.08.1988. This postmortem report is Exhibit Ka-3.

During the course of investigation, Sri Ram Chandra Yadav, P.W.9 recorded statements of the witnesses and after completing the investigation, filed charge-sheet against the accused-appellants- Hasibuddin and Smt. Sakura Begum @ Maskure Begum, which is Exhibit Ka-11.

Proceeding of the case was committed to the court of Sessions. As a sequel to that, this case was made over for trial and disposal to the court of Special Judge, Varanasi. Appellants were heard on point of charge and the trial court was, prima facie, satisfied with the case against the accused-appellants. Therefore, it framed charges against the accused-appellants under Sections 302 and 201 IPC. Charges were read over and explained to the accused, who abjured charges and opted for trial.

The prosecution in order to prove guilt of the accused examined as many as ten prosecution witnesses; Mohd. Sharav P.W.1, Mohd. Hanif P.W.2, Aziz Shekh P.W.3, Inawal Sekh P.W.4, Rajani Bibi P.W.5, Ram Deo Yadav P.W.6, Vibhuti Prasad Gupta P.W.7, Dr. Govind Lal



P.W.8, Ram Chandra Yadav P.W.9 and Ram Ikabal Singh P.W.10.

Except as above, no other testimony was adduced, therefore, evidence of the prosecution was closed and statement of the accused was recorded under Section 313 Cr.P.C., wherein, he claimed to have been falsely implicated in this case due to previous dispute of water with informant- Inawal Sekh.

The defence did not led any evidence whatsoever.

Thereafter, the matter was posted for argument pros and cons between the parties and after considering the entire matter on its merit and on marshaling of facts and appraisal of evidence so adduced, the learned trial court recorded aforesaid finding of conviction and imposed aforesaid sentences against the appellants.

Consequently, this appeal.

Learned AGA has stated that all the links of the chain of circumstances including motive, last seen, recovery of dead body have been consistently proved and the chain is complete in itself, leaving aside every hypothesis of innocence of the accused. He further stressed that there is a strong circumstance against the accused, as it was the accused alone who knew the place where the dead- body of the child lies under the water. No other persons knew it. He further adds that there are three circumstances connected with each other which prove the guilt of the accused that it were the accused and his wife, who committed the crime. Firstly, there was quarrel between the two families; the accused had threatened to teach the informant such a lesson that he will not forgot the same whole life. Secondly,

a child was seen carried away by the accused persons at the same time towards Nala, the place where the dead-body was recovered, and thirdly, a child like the present one will not move 10 steps inside the Nala, after falling himself in it.

Lastly, learned AGA submitted that evidence, which was collected during investigation, proves and establishes fact that the accused themselves have committed the offence, and the learned trial court has taken correct view of the evidence on record.

After weighing the entire factual and evidenciary material available on record and contemplating its nature and offshoots, the core consideration that arises for adjudication of this appeal, is confined to fact, as to whether, the prosecution has successfully established the chain of various circumstances, so complete in itself as to brush aside, every hypothesis of innocence of the accused persons, but pointing to only one and only one conclusion that it were the accused and the accused persons alone, who committed the crime?

We have very carefully considered the submissions advanced before us by the learned AGA and perused the record of this appeal.

It is admitted fact that the present case is one based on circumstantial evidence.

In this view of the matter, we have to scrutinize carefully the vital facts and links of chain of circumstances leading to final determination of the case. Crux of written report lodged by Inawal Sekh P.W.4, Exhibit Ka-1, reflects that accused- Hasibuddin and his wife Smt. Sakura Begum @ Maskara Begum were

living in same vicinity, as that of informant- Inawal Sekh, his wife Rajani and his son- Badasu- Ahata of Hazi Hanif, Mohalla Puranapul- Pulkohana, Police Station- Sarnath, District- Varanasi). Presence of informant in the same campus was disliked by the wife of Hasibuddin (Smt. Sakura Begum @ Maskara Begum) because informant's wife Rajani doubted Smt. Sakura Begum @ Maskara Begum as a woman of easy virtues.

Because of this grudge, quarrel between both of them had taken place in the noon of 29.08.1988. During the quarrel, accused Hasibuddin and his wife- Smt. Sakura Begum @ Maskara Begum- had threatened to teach them such a lesson, which they would remember for their whole life. Later on, informant went away to ply rickshaw. In the evening at 8.00 P.M., when he reached in his house, he was told by his wife Rajani Begum, that at about 7.30 P.M., she had gone out in response to nature's call and left her child sleeping in the 'kholi' (slum). When after about 10 minutes, Rajani returned, she found that Badasu- her infant child- was missing. For the whole night, informant and his wife searched for the child, but could not trace him out. On the next morning i.e. 30.8.1988, one **Soharab S/o Samsuddin Sekh** told Inawal Sekh, that on 29.8.1988 at about 7.30 P.M., he saw Hasibuddin and his wife Smt. Sakura Begum @ Maskara Begum with a child moving towards 'Narokhar Nala'. Hassibuddin's wife- Smt. Sakura Begum @ Maskara Begum- was carrying a child on her shoulder. Thereafter, Inawal Sekh approached Hasibuddin at his 'Kholi'. When he started inquiring about his child, Hasibuddin began to quarrel. This convinced Inawal Sekh that Hasibuddin and his wife Smt. Sakura Begum @ Maskara Begum had kidnapped his child-

Badasu- with intention to kill him. Hasibuddin was trying to escape.

In the present case, in the chain of events, the first point which arises for our consideration is the point of 'motive' behind the alleged crime committed by the accused.

The prosecution has alleged that informant's wife Rajani Begum doubted accused Sakura Begum @ Maskura Begum, as a woman of easy virtue. Because of this, accused gathered ill-will against the informant's family and they disliked presence of informant's family in campus. That was the motive for which the accused killed the infant of the informant. For the purpose of proving the aforesaid motive of the accused, the prosecution has placed reliance upon the evidence of Inawal Sekh P.W.4 and Rajani Begum P.W.5.

In the chain of events, the second point which arises for our consideration is the last seen evidence of deceased (infant) with the accused. For proving the said fact that the deceased was last seen with the accused, the prosecution has placed reliance upon the evidence of Mohd. Soharab P.W.1. He stated in his evidence that at about 7.30 P.M. when he reached at Tiraha while going to market, he saw accused coming towards Nala. Accused Maskura @ Sakura Begum had a child in her lap. He also stated that it was moon-lit-night. From the evidence of Mohd. Soharab, it is clear that the deceased was last seen alive with the accused on the date of occurrence. Moreover, the prosecution has alleged that statement of the accused under Section 313 Cr.P.C. he (accused) has no courage to say that the child in question was not of the informant, but that of

their own.

So far as testimony of Mohd. Hanif P.W.2 is concerned, he is a witness of recovery- memo. He stated that on the next day i.e. 7.30 A.M., the dead body of the child was recovered from 'Narokhar Nala' by Hasibuddin before them. Dead body of Badasu was identified by informant- Inawal Sekh and his wife. Dead boy was sealed. It was brought to the police- chauki. He does not remember whether he had appended his signature on the recovery memo or not.

Here testimony of Aziz Sekh P.W.3 is very relevant. He stated in his testimony that Hasibuddin and his wife were trying to escape from the scene, but he apprehended them with the help of Chaudhari Sekh. Before them accused- Hasibuddin and his wife had confessed the guilt that they had killed the child and thrown it in the nala. He stated that in the presence of police, Hasibuddin went to 'nala' and brought out the dead body of child. He also plies rickshaw. He admitted that throughout the whole night it was not known as to who had killed the child or who had taken away the child.

Inawal Sekh P.W.4, who is father of the deceased child has stated that on the day of occurrence, a quarrel had taken place between both the families. In the quarrel the wife of accused Hasibuddin had threatened that they will teach them such a lesson, which will render the informant and his wife weeping for their whole life. At 8 P.M. he returned with rickshaw and was told by his wife, that at about 7.30 P.M., when she had gone out to ease, she left behind the child- Badasu sleeping in Kholi. When she returned,

the child was found missing. For the whole night, he along with the people of the locality searched for the child but the child could not be traced. In the morning, he met Mohd. Sohrab, who told that he had seen Hasibuddin and his wife carrying a child at about 7.30 P.M. on 29.8.1988 towards Narokhar Nala. The child was being carried on the shoulder of Sakura Begum. Thereafter, he approached Hasibuddin and inquired about the child, on which accused Hasibuddin lost his temper. Thereafter, he lodged a report- Exhibit Ka-1-. After report was lodged, the dead body of his son was recovered from the nala. Hasibuddin had taken out the dead-body out of 'Nala'. He had identified the dead body of his child. Daroga ji had prepared 'panchnama' then and there. In cross-examination, he admitted that he arrived at Varanasi 15 days before the occurrence from Bihar. Mohd. Soharab resides in the same locality. He denied the suggestion that his wife had taken the child near the nala while easing and the child had fallen in the nala and drowned.

Rajani Bibi P.W.5, who is the mother of child has stated that before the occurrence, a quarrel had taken place between the family of complainant and the accused thrice. Her husband had returned at 8 P.M. in the night. She denied that at the time of occurrence, she had taken the child while going out towards 'nala' to ease and she also denied that the child had fallen in the nala. She stated that her husband had gone to police station to lodge the report in the morning. The report was got written at the police station. She further stated that while going to ease at 7.30 P.M she had left her son sleeping in the kholi and when she returned after 10 minutes, found the child missing.

When her husband came back, she told about the missing of the child. In the morning Mohd. Sohrab had told her husband, that in the evening at about 7-8 P.M., he had seen the accused persons taking a child towards the nala. When her husband approached to accused to know about the child, he started quarrelling and escaped from there. Then her husband went to the police station to lodge a report. The dead body was recovered from nala by accused Hasibuddin in the presence of police. At that time she was also present.

On an overall scrutiny of the evidence of the prosecution, we completely agree with the finding entered by the learned Sessions Judge that the appellants are guilty of the murder of the infant child in a most ghastly and barbaric manner and finding of the trial court is perfectly correct and sound. There is strong circumstance against the accused. It was accused- Hasibuddin and Hasibuddin alone, who knew the place where the corpse of the child was. No other person knew it. There are strong circumstances connected to each other raising finger towards the accused that it was the accused and his wife, who committed the murder of child in a barbaric manner. Firstly, there was quarrel between two families and the accused threatened to teach the informant such a lesson that they will be weeping for the whole life. Secondly, a child was seen carried by the accused persons at the same time towards Nala (it was the place where the dead-body was recovered) and it is important to note that accused anywhere do not claim that they were carrying their own child. Thirdly, deposition before the trial court of Aziz Sekh P.W.3, who plies rickshaw, is relevant in this case, which reflected that

Hasibuddin and his wife were trying to escape from the scene, but he had apprehended them with the help of Chaudhari Sekh. Before them accused- Hasibuddin and his wife had confessed the guilt that they had killed the child and thrown him in the nala. He stated that in the presence of police, Hasibuddin went to nala and brought out the dead body of child.

Now, we switch over to the testimony of doctor witness- Dr. Govind Lal P.W.8, whose testimony for reaching the final outcome of this appeal is important one. He conducted the postmortem of the deceased child, wherein, he has noted, as aforesaid, only one ante-mortem injury, in shape of *abrasion .3cm x.3cm on right under surface 5cm below right ear*. It is noticeable that he (doctor) has testified to the ambit that such injury can be inflicted with any hard substance on the ground. The dead body was covered with wet- mud, so it cannot be ruled out that any other substance may have caused such scratch. He also gave an opinion that for sufficient time, if a child is kept inside water by catching him by neck, then such death can occur. Since the last seen has been satisfactorily proved by the prosecution witness Mohd. Sohrab (P.W.1), it is now upto the appellants to explain as to how the infant met with death because after the 'last seen' deposition there is no circumstance when the child (deceased) was seen else where or in company of any other person. Moreover, the accused were proceeding towards Narokhar Nala around 7.30 P.M. on 29.8.1988 and recovery of dead body was made on 30.8.1988 from Narokher Nala on the pointing out of accused. This recovery by itself is indicative of fact that the death of child was caused by none other than the



accused- appellants. Suggestion that the police implicated the accused because he refused to do 'begari' for the police or that another person got him implicated through Inawal Sekh to satisfy his own grudge, is improbable. The result is that by chain of circumstances, prosecution proves the story.

In the backdrop of aforesaid discussion, we are fully convinced that the prosecution has established all links in the chain of circumstances. Learned trial court while evaluating evidence and marshaling facts on record rightly read the evidence resulting into conviction upon both the accused, with the guiding principles to be applied in cases based on circumstantial evidence.

Consequently, the learned Sessions Judge held that the total evidence in the case unerringly points to the commission of the crime charged and every reasonable hypothesis compatible to the innocence of the accused has been successfully repelled by the prosecution. Of course, the criminal trial is not an enquiry into the conduct of the accused for any purpose other than to determine whether he is guilty of the offence charged. In this connection, that piece of conduct can be held to be incriminatory which has no reasonable explanation except on the hypothesis that he is guilty. Conduct which destroys the presumption of innocence can alone be considered as material .

Thus on a reappraisal of the evidence of the prosecution coupled with the statement of the accused, we are fully satisfied that the conclusion recorded by the learned Sessions Judge that the accused are guilty of the murder of deceased, are perfectly justified

taking into consideration various circumstantial links, which establish strong nexus between the accused and the crime in question.

In the result, the appeal is dismissed. Accordingly, the conviction and sentence passed against the accused-appellants by the learned Sessions Judge are confirmed.

This appeal lacks merit and is accordingly **dismissed.**

Accused-appellants- Hasibuddin and Smt. Sakura Begum @ Maskure Begum are absconding. Chief Judicial Magistrate, Varanasi is directed to trace out the accused-appellants and send them to jail so that they may serve out the remaining part of their sentences.

Let a copy of this order be forwarded to the lower court for its intimation and follow-up action.

**Order Date :- 19.07.2017**

Raj

