

(2023) 05 PAT CK 0062

In the Patna High Court

Case No : Criminal Appeal (DB) No. 736 Of 2022

Md. Guddu Sah @ Guddu Sah @ Guddu Shah

APPELLANT

Vs

State Of Bihar

RESPONDENT

Date of Decision : 19-05-2023

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302
Code Of Criminal Procedure, 1973 — Section 313
Evidence Act, 1872 — Section 106, 114

Citation : (2023) 05 PAT CK 0062

Hon'ble Judges : A. M. Badar, J;Chandra Shekhar Jha, J

Bench : Division Bench

Advocate : Tabish Sharfuddin, Satya Narayan Prasad

Final Decision : Allowed

Judgement

1. The present appeal is preferred challenging the judgment dated 22.08.2022 and order of sentence dated 26.08.2022 passed by the learned Additional District and Sessions Judge-III, Gaya in Sessions Trial No.4 of 2020 arising out of Belaganj P.S. Case No.292 of 2019 convicting the appellant under Section 302 read with 34 of the Indian Penal Code (for short 'IPC'), where appellant/convict was sentenced for life imprisonment and to pay a fine of Rs.5,000/- and in default, to undergo further imprisonment of one year.

2. The factual matrix of this case, as it springs from the written report of informant (P.W.-1), Safina Khatoon that marriage of her daughter Soni Khatoon (deceased) was solemnized with Guddu Shah (appellant/convict), S/o Khalil Sah of village-Laxmipur, P.S.-Belaganj, District-Gaya before nine years as of now as per Muslim Customary Rites and Rituals. It is alleged thereof that appellant/convict, who is the husband of deceased along with other family members, i.e. father-in-law, namely, Khalil Shah, mother-in-law, namely, Maimun Khatoon, brother-in-law, namely, Saddam Shah and sister-in-law, namely, Juhi Khatoon collectively tortured her daughter and also alleged for physical assault. They also

threatened her to kill. She came to know on 16.08.2019 at about 2:00 p.m. through villagers that her daughter was killed by her in-laws. On said information, she arrived at village-Laxmipur, where she found her daughter dead as a result of collective assault caused by above-named accused persons.

3. On the basis of aforesaid written information of P.W.-1, Belaganj P.S. Case No.292 of 2019 was instituted on 16.08.2019 under Section 302 read with 34 of the IPC against appellant/convict along with other co-accused persons, where police after investigation submitted charge-sheet vide Charge-sheet No.270 of 2019 dated 12.11.2019 under Section 302 read with 34 of the IPC.

4. The learned Jurisdictional Judicial Magistrate after taking note of materials collected during course of investigation, took cognizance under Section 302 read with 34 of the IPC against the appellant/convict and committed the case to the court of sessions for trial.

5. Upon commitment, the learned trial Court taking note of the materials available on record, framed charge against the appellant/convict along with other co-accused persons facing trial, (who are not appellant before this Court) under Section 302 read with 34 of the IPC, which was duly explained to them where appellant/convict plead "not guilty" and claimed for trial.

6. After conclusion of trial, the learned trial court found the appellant/convict guilty of the offence punishable under Section 302 read with 34 of the IPC, where he was sentenced to undergo imprisonment for life along with fine of Rs.5,000/- and in default, to undergo further imprisonment of one year.

7. Aggrieved thereof, the appellant/convict preferred present appeal. Hence, the present appeal.

8. The prosecution in support of its case examined altogether six witnesses. They are P.W.-1, namely, Safina Khatoon, who is the informant of this case, P.W.-2, namely, Izrael Shah, who is the maternal uncle of deceased Soni Khatoon, P.W.-3, namely, Md. Shagir Shah, P.W.-4 is Md. Danish, P.W.-5 is Dr. Purnendu Shekhar and P.W.-6 is Arun Kumar Singh, who is the Investigating Officer of this case.

9. The prosecution has also relied upon following exhibits to substantiate its case:-

(1) Exhibit No.-1 Postmortem report of the deceased.

(2) Exhibit No.-2 Written information of the informant (P.W.-1)

(3) Exhibit No.-3 Inquest report.

(4) Exhibit No.-4 Charge-sheet

(5) Exhibit No.-5 FSL report

10. By taking note of the evidences available on record, the statement of the

appellant/convict was recorded under Section 313 of the Code of Criminal Procedure (for short 'CrPC') by stating him about all the incriminating circumstances where he stated about false implication and shows his complete innocence.

11. No witness was examined in defence by the appellant/convict during the trial.

ARGUMENT ON BEHALF OF LEARNED COUNSEL APPEARING ON BEHALF OF THE APPELLANT/CONVICT :

12. It is submitted by learned counsel appearing on behalf of the appellant/convict that out of six prosecution witnesses, P.W.-1, who is the informant and mother of the deceased, namely, Safina Khatoon declared hostile during the trial. Similarly, P.W.-2, who is the maternal uncle of the deceased and P.W.-3, who is not the relative but, known to the family of the deceased also turn hostile during trial. It is submitted that though P.W.-4 was not declared hostile but, he failed to disclose anything regarding complicity of the appellant/convict qua crime in question. It is also submitted that mere on the basis of surmises and conjectures and by taking note of Section 114 and provision of 106 of the Indian Evidence Act as regard to special knowledge, appellant was convicted in the present case for the simple reason that as occurrence took place in his home and he is the husband of the deceased, namely, Soni Khatoon. It is submitted that as per deposition of P.W.-5, who is the doctor, cause of death not appears ascertained for which viscera etc. of deceased were preserved and sent for FSL report. It is also submitted that FSL report, which is Exhibit No.-5 is not supporting the presence of any poisonous substance. While concluding argument, it is also submitted that nothing appears from the deposition of Investigating Officer of this case, who is P.W.-6 that the dead body of the deceased was recovered from the house of the appellant/convict and moreover any presumption can be imported only after establishment of the case by the prosecution prima facie. Law of presumption which is the basis of conviction in this case is not to secure the conviction by diluting the basic burden of prosecution to prove its case beyond reasonable doubt.

ARGUMENT ON BEHALF OF LEARNED COUNSEL APPEARING ON BEHALF OF THE RESPONDENT-STATE:

13. Learned APP while supporting the conviction of the appellant submitted that in this type of occurrence, the eye-witness is rare as offence generally committed within four-corners of secured house. It is submitted that appellant is the husband and he is bound to explain that how his wife died. It is submitted that from the deposition of P.W.-5 and also taking note of postmortem report (Exhibit No.-1) of the deceased, namely, Soni Khatoon, it appears that death not appears in normal course. There is no history of previous illness also.

14. We have perused the records carefully and gone through the evidences available thereof. We have also heard arguments carefully so advanced by learned counsel appearing on behalf of the parties.

15. From bare perusal of the deposition of P.W.-1, who is the informant of this case and mother of the deceased, it appears that she denied the occurrence in totality and declared hostile during the trial. Nothing substantial surfaced in her cross-examination by learned APP, which may be taken note as a corroborative piece of evidence qua crime in question rather on cross-examination on behalf of the accused persons including appellant, she deposed before the trial court that appellant/convict never assaulted or tortured her deceased daughter. She deposed subsequently, that she is an illiterate person and she came to know about the death of her daughter as she was told over telephone by villagers.

16. P.W.-2 is the maternal uncle of the deceased and he also turned hostile. Nothing substantial surfaced in his cross-examination by learned APP, which may be taken note as a corroborative piece of evidence rather on his cross-examination by accused persons he deposed that the deceased was in good relation with all family members of her matrimonial home and she never complained about anyone. It was deposed by him that the illness of deceased was informed by her in-laws but, they failed to reach there. He categorically deposed that accused persons including appellant/convict have no role in crime in question.

17. P.W.-3 is Md. Shageer Shah, who also turned hostile by denying the case of the prosecution in totality where on cross-examination by learned APP, nothing appears substantial in his deposition which may be used as a corroborative piece of evidence qua crime in question regarding involvement of appellant/convict rather on cross-examination on behalf of the appellant, he deposed that deceased was very happy with her husband (appellant/convict) and in-laws. It is stated further that deceased never complained about any one. It also deposed that they were informed about the illness of the deceased by her in-laws, who also provided medical treatment to her. He denied any suspicion against appellant/convict.

18. P.W.-4 is Md. Danish, who was not declared hostile during the trial, deposed in his examination-in-chief, in Para-1, that it is not in his knowledge that how the wife of the appellant Guddu Shah was died. Though, he deposed in Para-2 that as it was love marriage, the parents of the appellant/convict usually tortured the deceased. In para 3 of his examination-in-chief, he categorically stated that he knows nothing about occurrence. In cross-examination on behalf of the accused persons, he deposed that the appellant/convict was a caring husband. He never heard any complaint about him. He categorically deposed that he came to know that cause of death of wife of appellant was her illness. It is also deposed by him that in-laws of deceased were participated in last customary rites of the deceased. From perusal of deposition of P.W.-5, Dr. Purnendu Shekhar, it appears that death of deceased was caused due to shock and asphyxia, which appears to be as a result of mechanical obstruction by soft object to external air passages viz. mouth and nostrils i.e. smothering. P.W.-6, Arun Kumar Singh, who is the Investigating Officer of the case. Though, he described the place of occurrence

but, he failed to depose that dead body was found inside the house of appellant/convict. He identified endorsement on FIR of S.H.O. Avinash Kumar, which was exhibited as Exhibit No.-2 and also A.S.I. Jyotindra Kumar on inquest report of the deceased, which on identification before the trial court exhibited as Exhibit No.-3. He identified his signature and handwriting on Charge-sheet No.270 of 2019 dated 12.11.2019, which on his identification before the trial court exhibited as Exhibit No.-4. On his cross-examination, he deposed that no weapons were recovered from place of occurrence and no mark was found upon neck of deceased as per inquest report.

19. It would be appropriate to discuss Para-13 of legal report as reported in the matter of *Tunu Urang v. State of Assam* [2019 SCC online GAU 5528] as follows:-

"13. In a criminal trial burden is always on the prosecution to prove the guilt of the accused beyond reasonable doubt and section 106 of the Evidence Act is not intended to relieve the prosecution of its burden. Only when prosecution proves certain fact from which reasonable inference can be drawn regarding certain other facts, which unless explained by the accused by virtue of his special knowledge, tend to inculpet the accused, in such circumstance the accused owe an explanation, otherwise section 106 of the Evidence Act does not put any burden on the accused to prove his innocence. In the present case evidently prosecution has not been able to prove any fact, from which an adverse inference could be drawn to attribute culpability to the appellant, in absence of any explanation. As already indicated above, the findings of the learned trial court, that the deceased was found with the appellant in his house was perverse. Once, this findings is discarded, there is no other materials on record to attribute any special knowledge to the appellant in respect of the death of the deceased".

20. It is well-settled in law that Section 106 of the Indian Evidence Act is not a substitute for the burden of proof that rest upon the prosecution as discussed in the matter of *Shambhu Nath Mehra v. State of Ajmer* [AIR 1956 SC404].

21. As far circumstantial evidence is concerned, as there is no eye witness in this case, the settled law is that the circumstances must be of such nature from which the conclusion of guilt is drawn should be fully proved and circumstances taken into consideration must be conclusive in nature suggesting that none else than accused committed the crime, as held in *C. Chenga Reddy and Others v. State of Andhra Pradesh* [AIR 1996 SC 3390].

22. It is well settled law as reported in the matter of *Raj Kumar Singh vs. State of Rajasthan* [(2013) 5 SCC 722] that no accused should be convicted on the evidences which "may prove his guilt" without having evidence which "must prove the guilt" of the accused.

23. By importing the above discussed legal ratio in present facts and circumstances, it appears that the informant is not the eye-witness of the occurrence, who turned hostile, who was none but the mother of the deceased. P.W.-2 and 3 have also turned hostile. P.W.-4 though not declared hostile but, he

specifically deposed in his cross-examination that he nothing knows about crime in question and, as such, implication which is based upon circumstantial evidence for the reason that as death is appearing prima facie homicidal in nature and as dead body of deceased was recovered from the house of the appellant, who is husband is not appearing convincing under exclusive note of Section 106 of the Indian Evidence Act.

24. Accordingly, the present appeal is allowed.

25. The impugned judgment of conviction dated 22.08.2022 and order of sentence dated 26.08.2022 passed by the learned Additional District and Sessions Judge-III, Gaya in Sessions Trial No.4 of 2020 arising out of Belaganj P.S. Case No.292 of 2019 is set aside.

26. Appellant Md. Guddu Sah @ Guddu Sah @ Guddu Shah, who is in custody, is acquitted of the charges levelled against him. He is directed to be released from custody forthwith, if not required in any other case.

27. It is further directed that fine, if any, paid in terms of order of sentence be returned to the appellant immediately.