

(2023) 10 PAT CK 0056

In the Patna High Court

Case No : Criminal Appeal (DB) No. 489 Of 2014

Nagendra Pd. @ Nagendra Pd. Yadav @ Munna Yadav

APPELLANT

Vs

State Of Bihar

RESPONDENT

Date of Decision : 18-10-2023

Acts Referred:

Indian Penal Code, 1860 — Section 302, 304B

Evidence Act, 1872 — Section 106

Code of Criminal Procedure, 1973 — Section 209, 313, 374(2)

Citation : (2023) 10 PAT CK 0056

Hon'ble Judges : Vipul M. Pancholi, J;Chandra Shekhar Jha, J

Bench : Division Bench

Advocate : Kamlesh Prasad Yadav, Sujit Kumar Singh

Final Decision : Allowed

Judgement

1. The present appeal has been filed under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Code') by the appellant/convict against impugned judgment and order of conviction dated 25.03.2014 and order of sentence dated 28.03.2014 passed by learned Adhoc Additional Sessions Judge-I, Bhojpur, Ara in Sessions Trial No. 194 of 2013 arising out of Sandesh P.S. Case No.107 of 2012, whereby the concerned Trial Court has convicted the present appellant for the offences punishable under Section 302 of the I.P.C and has sentenced him to undergo imprisonment for life and fine of Rs. 50,000/- and in default of payment of fine to undergo S.I. for six months.

2. The factual matrix of the present case is as under:-

"The informant Gupteshwar Singh, S/o Kesho Singh of Village-Ajamnagar, P.S. Garhani, District-Bhojpur, had married his sister Babita Devi, aged about 24 years, to Nagendra Pd. Yadav R/o Village-Fulari, P.S. Sandesh, District-Bhojpur, Ara. On 28.09.2012, one person of village Fulari, informed him on mobile phone that his sister Babita Devi is no more and regarding the death of Babita Devi, he was told that Sheodayal Yadav instigated to assault Babita Devi, upon which

Hamendra Yadav, son of Sheodayal Yadav, Sunita Devi wife of Sheodayal Yadav, assaulted Babita Devi due to which Babita Devi died. He has further suspected that his sister had been forcibly given poison. Since four years, the members of her in-laws' family were demanding motorcycle and gold chain which could not be provided by her parents. Whenever his sister used to come to his house, she narrated about the demand of motorcycle and gold chain by the family members of her in-laws and for that, they used to assault her and threatened to kill her. He has further suspected that her sister had been given poison due to which his sister died."

2.1. The informant Gupteshwar Singh had given names of five accused in the fardbeyan, i.e. the present appellant, his father, brother, mother and sister-in-law. However, it is pertinent to note that the Investigating Officer who had carried out the investigation, after the registration of the F.I.R., filed final form in favour of original accused No. 3 Hamendra Yadav (brother of the appellant) and original accused No. 4 Lal Pato Devi (sister-in-law of the appellant) and Sunita Devi (mother of the appellant). However, the Investigating Officer filed the charge-sheet against the appellant and original accused No. 2 Sheodayal Yadav (father of the appellant).

2.2. As the Investigating Officer filed the charge-sheet against two accused before the concerned Magistrate Court, as the case was exclusively triable by the Court of Sessions, the learned Magistrate committed the case to the Sessions Court under Section 209 of the Code.

2.3. During the course of trial, the original accused No. 2 Sheo dayal Yadav (father of the appellant) died and, therefore, the trial was proceeded against the present appellant. During the course of trial, the prosecution had examined three witnesses and also produced documentary evidence before the Trial Court. Thereafter, further statement of the appellant/accused was recorded under Section 313 of the Code. After conclusion of the trial, the Trial Court passed the impugned order whereby the appellant has been convicted, as observed hereinabove. The appellant has, therefore, preferred the present appeal.

3. Heard learned counsel Mr. Kamlesh Pd. Yadav for the appellant/accused and Mr. Sujit Kumar Singh, learned A.P.P. for the Respondent-State.

4. Learned counsel for the appellant would mainly submit that the informant has not made any allegation against the present appellant in the fardbeyan given by him before the concerned Police Officer that the appellant had given physical and mental torture to the deceased who was the wife of the appellant. Such type of allegations were levelled against the four other accused. The informant has also raised doubt that the said other four accused must have given/administered the poison to the deceased who was the sister of the informant. Learned counsel, therefore, urged that when the informant has not alleged anything against the appellant herein that he has killed the sister of the informant, the Trial Court has committed grave error while passing the impugned order of conviction against

the present appellant.

5. It is further submitted that the prosecution did not examine the independent witnesses before the Trial Court and only the informant was examined as PW-1. It is also submitted that the Trial Court has not believed the story of the prosecution with regard to the demand of dowry and, therefore, acquitted the appellant for the offence punishable under Section 304(B) of the I.P.C. However, only because of the fact that the appellant has failed to prove the defence of alibi, he has been convicted for the offence punishable under Section 302 of I.P.C. At this stage, it is also submitted that the Investigating Officer did not find any material to support the allegations made by the informant in the fardbeyan against three other accused, i.e. brother, sister-in-law and mother of the appellant/accused. The said Investigating Officer did not file charge-sheet against the three other accused and submitted final form. Thus, it is submitted that the Investigating Officer and the Trial Court have not believed the story of demand of dowry and giving physical torture to the deceased by all the accused despite which only the appellant has been convicted by the Trial Court for the offence punishable under Section 302 of I.P.C.

6. It is submitted that the prosecution has failed to prove the case against the appellant/accused beyond reasonable doubt despite which, the Trial Court has recorded the order of conviction against the appellant. At this stage, it is submitted that the appellant is in custody since last more than 11 years and 10 months. Learned counsel, therefore, urged that the impugned order be quashed and set aside.

7. On the other hand, learned A.P.P opposed this appeal and mainly submitted that PW-3 Dr. Ashutosh Kumar, who had conducted the post mortem on the dead body of the deceased, has given the opinion that the cause of death was strangulation and, therefore, the deceased who was the wife of the appellant died in the house in which only the appellant and the deceased were residing and, therefore, it was for the appellant to prove before the Court by leading cogent evidence that the death of his wife has occurred in a particular manner. When the appellant/accused has failed to discharge the said burden, the Trial Court has rightly passed the impugned order and, therefore, no interference is required in the present appeal.

8. Having heard the learned counsel appearing for the parties and having gone through the material placed on record, it would emerge that during the course of the trial, the prosecution had examined only three witnesses i.e. PW-1 Gupteshwar Singh, who is the informant, PW-2 Ganauri, the Investigating Officer who had carried out the investigation and PW-3 Dr. Ashutosh Kumar who had conducted the post mortem on the dead body of the deceased. It is not in dispute that the prosecution had not examined the independent witnesses though the Investigating Officer had recorded the statement of the independent as well as the other witnesses.

9. At this stage, if the deposition given by PW-1, the informant, is examined, it is revealed that the said witness in his examination-in-chief had stated that his maternal uncle Wakil Singh has witnessed the payment of dowry to the family of accused at the time of marriage. He also stated that he had lodged a complaint of assault committed to his sister for demand of dowry. In the fardbeyan, he had stated that his sister was abused and beaten by her in-laws. However, the Police officials did not lodge the complaint. He also states that it was the second marriage of the accused after the death of his first wife. He further stated that he does not know as to which son her father-in-law lived with in that home. He also denies any allegation that his sister was of bad character and had affair with other people in the society which resulted in her death.

10. PW-2 Ganauri, the Investigating Officer who had carried out the investigation, in his examination-in-chief has stated that on 29.09.2012, he was posted as S.I. of Sandesh Police Station, District-Ara, and on the same day he was given the charge of the investigation of the Case No. 107/2012. He inspected the house of the deceased Babita Devi and found her dead body in the middle of the room lying on the bed. He received the post mortem report on 10.11.2012 and submitted the charge-sheet against the accused Nagendra Prasad Yadav and Sheodayal Yadav, after finding the incident to be true.

10.1. In his cross-examination, the Investigation Officer (PW-2), has stated that the informant initially had not said anything against the accused Nagendra Prasad Yadav and Sheodayal Yadav. The informant had only lodged F.I.R. against the four accused for killing his sister by administering poison. He states that the deceased (sister of the informant) lived with her husband only and her in-laws used to live in separate house but occasionally used to come to that house. The Investigating Officer further stated that nobody from the informant's family appeared for their statement and, hence, he could not take their statements. He also states that he did not find any objectionable object at the place of occurrence. He further stated that no one except the informant has given statement about the demand of dowry and assault in lieu of not fulfilling the demand.

11. PW-3 Dr. Ashutosh Kumar is the Doctor who had conducted the post mortem of the dead body of the deceased and he has stated as under:-

"1. On 30.09.2012, I was posted in Sadar Hospital, Ara as Medical Officer. On that day, I conducted post mortem of the dead body of Babita Devi, aged about 30 years wife of Nagendra Prasad Yadav of Village-Fulari, P.S.-Sandesh, District-Bhojpur, dead body identified by Chowkidar Raj Ballabh Singh and Chowkidar Shatrughan Yadav

On post mortem examination-

External Examination-

(I) Rigor Mortis was present but was in process of disappearing.

(II) Both eyes and tongue was protruding outside. There was clear cut mark on the neck.

On Dissection-

(I) There was extravasation of blood into subcutaneous tissue of the neck. The muscle of the neck were lacerated. There was fracture of thyroid-cartilage. Both lungs were congested. Right side of the heart was full of blood and left side was empty. Other vesaras were also congested.

In my opinion, the cause of death was strangulation and time elapsed since death – 36 hrs. to 48 hrs.

This post mortem report is in my pen and signature to which I am identifying mark in Exhibit-4.”

11.1. In his cross-examination, he has stated as under:-

“5. In winter season, the usual duration of remaining of rigor mortis is 24 to 36 hrs. and in summer 18 to 30 hrs. Rigor Mortis starts in winter 4 to 6 hrs. and in summer 3 to 4 hrs.

6. After staying of Rigor Mortis, its disappearance starts.

7. Specifically, I have not mentioned that the death was either homicidal or accidental or suicidal but strangulation means homicidal.

8. In respect of strangulation, I have read the bood of Modi and Reddi.

9. Strangulation may contain ligature mark but not always strangulation may be by compressing neck by hand. Strangulation may be caused by compressing with forearm, foot, wrist which is known as mugging. Strangulation may be caused by wooden stick and known basdola.

10. I did not find any mark of compression by means mentioned above.

11. I did not find any visible mark of injury on the whole body.”

12. From the aforesaid evidence led by the prosecution before the Trial Court, it would emerge that PW-1, who is the brother of the deceased and the informant of the case, has made allegation against the appellant for demand of dowry. However, it is pertinent to note at this stage that the Investigating Officer during the course of his cross-examination has specifically admitted in Para-28 that except the informant, none of the other witnesses have stated in their statement with regard to the demand of motorcycle and chain by way of dowry from the deceased. Thus, the Trial Court has rightly not believed the theory of the prosecution with regard to the demand of dowry and thereby, the appellant herein has been acquitted of the charge punishable under Section 304(B) of the I.P.C. If the cross-examination of the Investigating Officer is further examined, it emerges that the said witness has admitted that in the fardbeyan, the informant has only raised doubt that all the accused have killed his sister. The Investigating

Officer has further stated that the informant did not allege anything against the appellant Nagendra Prasad Yadav that he had killed the sister of the informant. Thus, from the aforesaid deposition of the Investigating Officer, it can be said that the informant did not allege anything against the appellant that he had killed the deceased in fardbeyan or in his further statement recorded by the Investigating Officer. However, for the first time before the Court, PW-1 has alleged against the appellant while giving his deposition. It is not in dispute, as observed hereinabove, that the prosecution did not examine any independent witness or any other witness except informant with a view to prove the allegation levelled against the appellant. It is true that the Doctor (PW-3), who had conducted the post mortem of the dead body of the deceased has observed in the post mortem report that the cause of death was due to strangulation. However, it is pertinent to note at this stage that PW-2 (Investigating Officer) has specifically stated in his cross-examination in Para-13 that there is no eye-witness to the occurrence in question. Thus, the case of the prosecution rests on the circumstantial evidence. In the present case, the prosecution has failed to prove the complete chain of circumstances from which it can be established that only the appellant herein has killed his wife. Merely because the deceased died because of the strangulation, it cannot be presumed that the appellant, who was the husband of the deceased, has killed her.

13. Learned A.P.P. has contended that the appellant and the deceased only were residing in the house of the appellant and, therefore, when the wife of the appellant has died an unnatural death or because of strangulation, the burden was on the appellant/accused to prove the manner in which the death of his wife has occurred. However, we are of the view that the learned Trial Court has not referred or discussed anything with regard to the same nor there is any reference with regard to the provisions contained in Section 106 of the Evidence Act. Even otherwise, it is well settled that, first of all, it is the duty of the prosecution to prove its case against the accused and thereafter, in certain circumstances, it is the duty of the accused to discharge the burden under Section 106 of the Evidence Act.

13.1. In the case of Reena Hazarika Vs. State of Assam, reported in (2019) 3 SCC 289, the Hon'ble Supreme Court has observed in Para-9 as under:-

"9. The essentials of circumstantial evidence stand well established by precedents and we do not consider it necessary to reiterate the same and burden the order unnecessarily. Suffice it to observe that in a case of circumstantial evidence the prosecution is required to establish the continuity in the links of the chain of circumstances, so as to lead to the only and inescapable conclusion of the accused being the assailant, inconsistent or incompatible with the possibility of any other hypothesis compatible with the innocence of the accused. Mere invocation of the last-seen theory, sans the facts and evidence in a case, will not suffice to shift the onus upon the accused under Section 106 of the Evidence Act, 1872 unless the prosecution first establishes a prima facie case. If the links in

the chain of circumstances itself are not complete, and the prosecution is unable to establish a prima facie case, leaving open the possibility that the occurrence may have taken place in some other manner, the onus will not shift to the accused, and the benefit of doubt will have to be given.”

14. The defence has also examined two witnesses as DW-1 and DW-2.

15. The defence has examined DW-1 Sonu Kumar, who is the son of the appellant, aged about 10 yrs. The said witness has specifically stated that his father, i.e. the appellant herein, was in Bengaluru at the time of occurrence. DW-2 has also stated about the said aspect in his examination-in-chief. Even in the statement given by the appellant under Section- 313 of the Code, he has specifically stated before the Court that at the time of occurrence, he was in Bengaluru. Thus, the specific plea of alibi has been taken by the appellant before the Trial Court. However, the same was not believed by the Trial Court. We are of the view that the appellant has, by examining the two witnesses, proved that he was not at the place of occurrence and, therefore also, it cannot be said that the appellant has killed his wife.

16. In view of the aforesaid discussion, we are of the view that the prosecution has failed to prove the case against the appellant beyond reasonable doubt, despite which the Trial Court has passed the impugned order of conviction against the appellant. Hence, the impugned order is required to be quashed and set aside.

17. Accordingly, the impugned judgment of conviction dated 25.03.2014 and order of sentence dated 28.03.2014 passed by learned Adhoc Additional Sessions Judge-I, Bhojpur, Ara in Sessions Trial No. 194 of 2013 arising out of Sandesh P.S. Case No.107 of 2012 is quashed and set aside. The appellant, namely, Nagendra Pd. @ Nagendra Pd. Yadav @ Munna Yadav is acquitted of the charges levelled against him by the learned Trial Court. He is directed to be released forthwith, if not required in any other case.

18. The appeal is, accordingly, allowed.