

(1998) 03 PAT CK 0026

In the Patna High Court

Case No : Death Reference No. 1 of 1997 (R) and Criminal Appeal No. 83 of 1997 (R)

State of Bihar

APPELLANT

Vs

Anil Yadav and Another
 Ram Jiwan Yadav and Another
Vs State of Bihar

RESPONDENT

Date of Decision : 16-03-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 366
Penal Code, 1860 (IPC) — Section 201, 302, 323, 342, 376

Citation : (1998) 2 BLJR 1548

Hon'ble Judges : R.A. Sharma, J;A.K. Prasad, J

Bench : Division Bench

Final Decision : Allowed

Judgement

A.K. Prasad, J.—Death Reference No. 1 of 1997 (R) and Cr Appeal No. 83 of 1997 (R), arising out of common judgment and order of conviction dated 4.4.1997 in S.T. No. 463 of 1994 passed by Sri B.N.P. Singh, Sessions Judge, Palamu at Daltonganj, have been heard together and are to be governed by this common judgment.

2. Accused-Anil Yadav and Sanjay Yadav were tried and convicted under Sections 342 323 376 302 and 201 of the Indian Penal Code by the Sessions Court on the charge that on 5.3.1994 they had wrongfully confined Uspati Devi and Savita Devi, the deceased, and had assaulted Dukhan Mahto (P.W. 2), when he had protested to it and that they raped and eventually murdered victims Uspati Devi and Savita Devi and for causing disappearance of the evidence of double murder by throwing their dead bodies into a well. Both the accused have been sentenced to death u/s 302 I.P.C. Further they have been sentenced to suffer rigorous imprisonment for seven years, one year and six months under Sections 376 342 and 323 I.P.C. respectively. It appears that the learned Sessions Judge has passed no separate sentence u/s 201 of the Indian Penal Code against them perhaps because they have been sentenced to death u/s 302 of the Indian Penal

Code. Learned Sessions Judge made a reference to this Court for confirmation of the death sentence awarded to them u/s 366(1) of the Criminal Procedure Code, which gave rise to Death Reference No. 1 of 1997 (R).

Criminal Appeal No. 83 of 1997 (R) is by co-accused (Ramjiwan Yadav and Vishwanath Yadav alias Bishwanath Yadav) against their convictions under Sections 302 and 201 of the Indian Penal Code and sentence of rigorous imprisonment for life and seven years respectively, thereunder. Both the sentences have been directed to run concurrently.

3. The prosecution case, briefly stated, as made out in the fardbeyan (Exhibit 3), in as under:

On 5.3.1994, around 8 p.m., on the occasion of marriage of Sudeshwar Yadav, the uncle of the informant (Hriday Yadav), Uspati Devi (aged 15 years), the married sister of the informant, and Savita Devi, the 16 year old married aunt of the informant, followed by the informant, had gone to the house of accused Sanjay Yadav to invite his mother and sister to participate in "Jhumar". Accused Sanjay Yadav and Anil Yadav allowed Uspati Devi and Savita Devi to enter the house and bolted the door. When the informant protested to it, the accused-Sanjay Yadav took out a Bhala and ran to assault him, whereupon the informant fled in fear and narrated the incident to Dukhan Mahto (P.W. 2), his neighbour, whereafter Dukhan Mahto went to the house of the accused-Sanjay Yadav along with the informant and enquired from them as to why the girls had been closed inside the room. The accused, namely, Sanjay Yadav and Anil Yadav, and appellants, Ramjiwan Yadav and Vishwanath Yadav alias Bishwanath Yadav took out Lathies and accused Sanjay Yadav dealt Lathi blow to Dukhan Mahto on the leg. There was a Ho-Hulla (alarm), whereupon the villagers assembled. The villagers were not allowed to go inside the house. Thereafter the informant and the villagers searched for Uspati Devi and Savita Devi that night-in vain-and the next morning a pair of Chappals (Footwears) of victim Savita Devi were found near the well of Khaknu Mahto and the dead bodies of Uspati Devi and Savita Devi were recovered by the villagers from the well around 6 a.m. The informant has alleged that the accused persons had wrongfully confined the victims/deceased in their house with evil intention and after committing rape and murder they had thrown their dead bodies into the well.

The sad incident in which the two married women in their teens lost their lives took place at village-Dhawadih, P.S. Lasliganj, within district Palamu.

4. Madan Prasad (P.W. 14), the then officer-in-charge of Lesliganj Police Station, on some rumor, visited village Dhawadih and he recorded the fardheyan of the informant on 6.3.1994 at noon in the field of Johari Mahto situated close to the well of Khaknu Mahto, from where the dead bodies had been recovered. On the basis of the fardbeyan, the instant case was instituted, a formal, first information report (Exhibit 4) was drawn up, the police officer (P.W. 14) held inquest over the dead bodies of the deceased on the spot (Exhibit 5 is the inquest report of

deceased Uspati Devi), be seized a pair of Hawaii Chappals from near the well of Khakhanu Mahto, vide seizure list (Exhibit 6), sent the dead bodies for post-mortem examination and after completion of investigation charge-sheet was laid in Court against the accused persons.

The case, was, ultimately, committed to the Court of Sessions on 26.11.1994.

5. The main defence is of innocence, false implication and total denial of the involvement of the accused persons in the alleged incident. The further defence, as gathered from the suggestion given to the informant (P.W. 9), is that the death of the deceased might have been accidental.

6. At the trial, the prosecution examined 14 witnesses in support of its case. Out of them, P. W. 4 (Damodar Singh), P. W. 6 (Lilehswar Yadav) and P. W. 13 (Dr. (Mrs) Urmila Srivastava) are tendered witnesses; whereas P. W. 1 (Sudesh Yadav), P. W. 2 (Dukhan Mahto), P. W. 3 (Jhirangi Singh alias Rohit Singh) and P. W. 8 (Mahendra Manjhi) have been declared hostile by the prosecution. P. W. 11 (Dr. Rajeshwar Singh) and P. W. 12 (Dr. Tarak Bakhla) held autopsy on the dead bodies of deceased, Savita Devi and Uspati Devi, respectively. The other P. Ws. are : P. W. 5 (Yogendra Singh) who had taken out the dead bodies of the deceased from the well, P. W. 7 (Sarda Devi), mother of the informant and deceased Savita Devi, P. W. 9 (Hriday Yadav), the informant, P. W. 10 (Dukhni Devi), mother of the deceased Uspati Devi, and P. W. 14 (Madan Prasad) the Investigating Officer.

The defence, on the other hand, did not examine any witness.

7. It is a case depending entirely on circumstantial evidence. There is no direct evidence on the point of alleged rape, murder or throwing of the dead bodies of the deceased into the well by the accused persons.

8. The trial Court mainly relied on the testimony of P. Ws. 7, 9 and 10 the following circumstances in recording the convictions and sentences against the accused persons, on different counts, as stated above:

(1) Last seen theory-that the accused and the deceased were last seen together inasmuch as accused Sanjay Yadav and Anil Yadav had closed them inside their house on the fateful night.

(2) Conduct of the accused-that all the accused had assaulted Dukhan Mahto (P.W. 2), when went to their house to enquire about wrongful confinement of the victims by them.

(3) There was possibility that Sanjay Yadav and Anil Yadav had raped the deceased.

(4) There was motive for murder of the deceased by the accused persons to eliminate their evidence on rape.

(5) There was no ostensible reasons that the deceased would commit suicide,

particularly when there was jubilation in the family on occasion of marriage of Sudeshwar Yadav.

9. Mr. T.R. Bajaj, learned Counsel for the accused/appellants has vehemently contended that the circumstantial evidence relied upon by the prosecution is wholly in-sufficient to bring home the guilt to the accused/appellants.

Mr. I.N. Gupta, learned A.P.P. appearing for the State, on the other hand, has supported the impugned judgment, order conviction and sentence recorded by the trial Court.

10. At the out-set, it may be mentioned that it is well settled that the circumstantial evidence is order to sustain the conviction must satisfy three conditions:

(i) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(ii) Those circumstances should be of a definite tendency and unerringly pointing towards the guilt of the accused;

(iii) The circumstances taken cumulatively, should form a chain so complete that there is no escape from the conclusion that in all human probability the crime was committed by the accused and none-else, and it should also be in-capable of explanation on any other hypothesis than that of the guilt of the accused.

In a case resting on circumstantial evidence, the Court has to be watchful and to ensure that conjectures and suspicions do not take place of legal proof. No doubt it is shocking that two teenaged women died, but the gravity of the matter cannot by itself over-weigh as far as the legal proof is concerned for fastening the accused persons with criminal liability. In other words one is not to be swayed away by emotion while making appraisal of the evidence led by the prosecution. Bearing these principles in mind, one may now proceed to consider the reasoning of the Court below for holding the accused persons guilty of the respective charges.

11. The evidence of P. Ws. 7, 9 and 10 are relied upon in support of the circumstances that the deceased were last seen in the company of the accused persons and the conduct of the accused that they had assaulted Dukhan Mahto (P. W. 2), when he had gone to their house to enquire about the wrongful confinement of the victims by them. There is sworn testimony of P. Ws. 7, 9 and 10 that on the day of occurrence there was marriage ceremony of Sudeshwar Yadav, the uncle of P. W. 9. This factum has not been challenged by the defence during their cross-examination. Thus, it is established from their evidence that on 5.3.1994 there was marriage ceremony of Sudeshwar Yadav. P. Ws. 7 and 10 have deposed that on the day of occurrence, around evening, they had sent the deceased-Savita Devi an Uspati Devi as well as Hriday Yadav (P. W. 9) to invite the female members of the family of accused-Sanjay Yadav and Anil Yadav, for singing on the occasion of marriage ceremony. Hriday Yadav has stated in his

chief-examination that on 5.3.1994 at about 7 p.m. he had accompanied the deceased-Savita Devi and Uspati Devi to the house of the accused-Sanjay Yadav and Anil Yadav for inviting their female members and met the two accused at their door and when he was entering their house, they pushed him out of the house by neck, but they allowed the deceased (Uspati Devi and Savita Devi) to enter the house and bolted the door.

P. Ws. 7 and 10 have stated that P. W. 9 returned and narrated to them the deceased had been closed inside the house by the accused persons. Admittedly, P. Ws. 7 and 10 did not accompany the deceased or P. W. 9 to the house of the accused. No other P. W. has claimed that he had seen P. W. 9 or the deceased going to the house of the accused on the day of the occurrence. There is solitary testimony of P. W. 9 (Hriday Yadav) on the point of wrongful confinement of the deceased by the accused. P. W. 9 has further stated in his chief-examination that he immediately ran to the house of Dukhan Mahto (P. W. 2), his neighbour, awakened him and narrated the incident to him" and returned home and, thereafter, he disclosed about it to his mother (P. W. 7) and his Fua (Radha Devi) and in their company he proceeded towards the house of the accused and on the way he witnessed all the four accused assaulting Dukhan Yadav (Mahto) and they were armed with Lathi, Bhala and Gadasa. But in the cross-examination he has made conflicting statement that all the four accused were armed with Lathi and accused-Sanjay Yadav and Anil Yadav had assaulted Dukhan Mahto with Lathi. He has given a go-by to his earlier version in the fardbeyan that accused-Sanjay Yadav armed with Bhala had ran to assault him and instead he has made an exaggerated statement that he had been pushed by neck by the accused persons.

In the fardbeyan (Exhibit 3) P. W. 9 alleged that Dukhan Mahto (P. W. 2) had gone along with him to the house of the accused and protested to the wrongful confinement of the deceased, whereupon accused Sanjay Yadav had assaulted him (Dukhan Mahto) with Lathi. But in his cross-examination he has made categorical statement that he did not visit the house of the accused for the second time on the day of occurrence. Thus, he departs from the earlier version that soon after the alleged confinement of the deceased he had gone to the house of the accused in the company of Dukhan Mahto.

12. P. W. 7 has stated that when she learnt about the wrongful confinement of the deceased by the accused from P. W. 9, She along with others went towards the house of the accused and witnessed the accused Sanjay Yadav, Anil Yadav and Ramjiwan Yadav assaulting Dukhan with Lathi in the open space in front of their house and out of fear she returned. P. Ws. 7 and 9 have made discrepant statement about the assailants of Dukhan Mahto. P. W. 10 claims to have witnessed the assault on Dukhan Mahto, but she does not came his assailants.

13. P. W. 2 (Dukhan Mahto) has not supported the prosecution case on the point. He has simply stated that the dead bodies of the deceased were recovered from the well and that he has no knowledge about the cause of their death. The I.O. (P. W. 14) does not whisper in his evidence that he had found injury on the

person of P. W. 2 (Dukhan Mahto). There is no medical evidence on record to show that Dukhan Mahto had suffered any injury, as alleged by the prosecution.

14. P. W. 3 (Jhirangi Singh @ Rohit Singh) has simply stated that there was some quarrel near the house of Dukhan Mahto, but he cannot say as to who were involved in it. He is hearsay witness on the point of assault on P. W. 2. His evidence is of no assistance to the prosecution.

15. P. W. 9 has improved his version from stage to stage. His evidence is inconsistent on the point. As noticed above, P. W. 2 does not corroborate the testimony of P. W. 9 that the latter had narrated to him regarding wrongful confinement of the deceased by the accused persons.

16. It has come in the evidence of P. W. 7 that 60 to 65 villagers had witnessed the assault on Dukhan Mahto. According to P. Ws. 9, 10 to 12 persons were then present on the spot. It has further come in the evidence of P. W. 7 that there are about 100 houses in her Basti and the houses of Khaknu Mahto, Dukhan Mahto and Kanhai intervene between her house and that of the accused within a short distance. P. W. 10 has stated that the houses of her Gotias are adjacent to her house. According to P. Ws. 7 and 9, they had searched for the deceased in the village or had kept on waiting for their return at their Darwaja, alongwith their family members, the whole night. When it was within the knowledge of P. Ws. 7, 9 and 10 that the deceased were at the house of the accused there could be no occasion to search for them in the village. Further, had it been known before hand that the deceased had been confined by the accused in their house, the Gotias of P. W. 9 and the villagers residing in the vicinity were expected to surround the house of the accused for rescuing the deceased. Further, it has come in the evidence of P. Ws. 7, 8 and 9 that there was a police out-post in the P.O. village at the relevant point of time, but no information about the disappearance or wrongful confinement of the deceased was given that night to the police out-post by any one. This creates a doubt that the informant or his family members had knowledge at the very beginning that the deceased had been wrongfully confined by the accused.

17. In the facts and circumstances discussed above, it follows that the prosecution has failed to establish beyond shadow of reasonable doubt that the accused (Sanjay Yadav and Anil Yadav) had wrongfully confined the deceased in their house or that the accused had assaulted Dukhan Mahto (P. W. 2), when he went to their house of enquire about the wrongful confinement of the victims by them.

Even if it is assumed that the deceased were last seen in the company of the accused persons inasmuch as they had visited the house of the accused in the evening on 5.3.1994 that by itself is not sufficient to found the conviction of the accused persons under Sections 376 302 or 201 of the Indian Penal Code. It is well settled that the evidence of last seen alone is not conclusive evidence of proof of guilt.

18. It is now to be examined whether there are other facts and circumstances to connect the accused persons with the crime in question.

19. In the present case, it is not disputed that the dead bodies of the deceased were recovered from the well of Khaknu Mahto in the morning on 6.3.1994. This is a Kutcha well. P. W. 11 Dr. Rajeshwar. Singh and P. W. 12 Dr. Tarak Bakhla, who performed post-mortem examination on the dead bodies of deceased Savita Devi and Uspati Devi, respectively, on 7.3.1994, have stated that their death was due to asphyxia caused by drowning. Exhibits 2 and 2/1 are the post-mortem reports of deceased Savita Devi and Uspati Devi, respectively. The post-mortem reports reveal that there was mark of external or internal injury on their dead bodies, on compression of chest there was flow of forth through mouth and nostril lungs were found voluminous and its pieces sank in water, mucous membrane of trachea was red and oedematous and stomach was full of water. It is recorded in Exhibits 2 and 2/1 that vulva was swollen and oedematous and no spermetozoa was found on microscopic examination of their vaginal swabs. It is specifically recorded in Exhibit 2 that no injury or foreign body was found on private part of deceased-Savita Devi. P. Ws. 11 and 12 have stated that they had recorded the opinion of Dr. (Mrs.) Urmila Srivastava (P. W. 13) in the respective post-mortem reports prepared by them (Exhibits 2 and 2/1) that the possibility of rape could not be ruled out because the dead bodies had remained in water for a long time. P. W. 13, Dr. (Mrs.) Urmila Srivastava has admitted in her cross-examination that she did not find evidence of rape on the dead body of Uspati Devi.

20. The medical evidence does not support the fact that the death of deceased (Savita Devi and Uspati Devi) was homicidal or that they had been raped.

21. P. W. 14, Madan Prasad, who held inquest on the dead bodies of Savita Devi and Uspati Devi does not state in his evidence that he had found any injury on their private parts. In the inquest report (Exhibit 5) there is no mention of presence of any mark of injury on the private parts of Savita Devi. It is significant to notice from the inquest report (Exhibit 5) that bangles and the dresses worn by deceased-Savita Devi were intact. The evidence on record does not establish that the deceased had been ravished. One cannot be convicted u/s 376 I.P.C. on mere surmise and conjecture that there was possibility that the deceased might have been raped, in such a situation the inference regarding motive for murder of the deceased by the accused/appellants drawn and relied on by the learned Sessions Judges for convicting them u/s 302 I.P.C. does not appeal to reason.

22. The exact distance between the well of Khaknu Mahto from where the dead bodies were recovered and the house of the accused/appellants has not come on record. According to P. W. 6 it is 2 chains; whereas P. W. 7 estimates it at 500 yards approximately and P. W. 9 puts it at about 01 Km. But the fact remains that the well is at some distance from the house of the accused/appellants. There is no evidence on record to show that the accused/appellants were seen going

along with the deceased upto the well. Further, there is no evidence to show that any one had seen the deceased coming out of the house of the accused persons on that night. No neighbour has come forward to say that he or she had heard the cries or alarm raised by the deceased at that time either from the house of the accused or on the way to the well. It is not a case where the dead bodies of the deceased were recovered from the house of the accused persons. It is not alleged that any incriminating article was recovered from the house of the accused. The chain of circumstances is not complete in the present case to warrant the conviction of accused/appellants of the charge under Sections 302/201 I.P.C. The isolated circumstance that there was no ostensible reason for the deceased to commit suicide pales into insignificance.

23. In the instant case there may be suspicion against the accused/appellants, but suspicion howsoever strong cannot take place of proof. The least that can be said in this case is that at least there is reasonable doubt about the guilt of the accused/appellant and they are entitled to and given the benefit of doubt.

24. Accused Sanjay Yadav and Anil Yadav are acquitted of the charge under Sections 342 323 376 302 and 201 of the I.P.C. and their conviction and sentence thereunder are set aside. Further the appellants-Ramjiwan Yadav and Vishwanath Yadav alias Bishwanath Yadav are acquitted of the charge under Sections 302/201 of the I.P.C. and their conviction and sentence thereunder are set aside.

25. In the result, the Death Reference is discharged and the Criminal Appeal is allowed. Accused Anil Yadav and Sanjay Yadav as well as the appellants (Ramjiwan Yadav and Vishwanath Yadav alias Bishwanath Yadav) are directed to be set at liberty forthwith unless they are liable to be detained in connection with any other case.