
(2002) 05 PAT CK 0081

In the Patna High Court

Case No : Govt. Appeal (DB) No. 11 of 1987

State of Bihar

APPELLANT

Vs

Dilip Kumar Srivastava and Others

RESPONDENT

Date of Decision : 22-05-2002

Acts Referred:

Citation : (2002) 05 PAT CK 0081

Final Decision : Dismissed

Judgement

S.N. Jha, J.—This Government Appeal by the State of Bihar arises from a judgment and order of acquittal. The Respondents were put on trial for committing the murder of Asha Devi on or about 6.7.1983 at Quarter No. 5 Khagaul Road, Patna Town within Gardanibagh Police Station. They had also been charged for committing the offence under Sections 3 and 4 of the Dowry Prohibition Act.

2. The prosecution of the Respondents was set in motion after a Judicial Magistrate, Sri Vijay Narayan Jha, recorded the statement of victim, Smt. Asha Devi, treated as her dying declaration, at the Emergency Ward of the Patna Medical College and Hospital (PMCH) on 16.7.83 at 9.45 A.M. She said that on 6th July at 11 O'clock in the day, she was abused by her mother-in-law Lilawati Devi and Nanad for scooter. In the month of February, in the divorce case the husband had been directed to pay her Rs. 1000/- or, else, keep her. In the month of March he took her to his house on the promise that he will properly keep her. However demand for scooter was again made. Upon this, her Bhabhi (elder brother's wife) promised to give scooter within six months. On 6th July after she took meal and went to bathroom to wash her hands, her both Nanads and mother-in-law together sprinkled kerosene on her and set her on fire by match stick. Her Gotni (wife of husband's elder brother) Meena Devi poured water on her body at which she said as to why she was pouring water, if they wanted to kill her why not do that. Thereafter she became unconscious. Who brought her to hospital was not known to her. The victim stated that both her father-in-law and

Bhaisur (husband's elder brother) Anjani Srivastava used to demand scooter and money. She wrote letters to her Naihar about her plight but they were made to disappear by her Bhaisur. Her husband also did not take notice of her complaints. She did not want to meet her husband.

3. On the basis of the above statement Gardanibagh P.S. Case No. 258/83 was instituted and investigation followed. The Investigating Officer, Anjani Kumar Sinha (P.W. 8), went to the PMCH to record the statement of the victim. He found her on Bed No. 6 of C.D. Ward in the unit of Dr. S.N. Verma in burnt condition. He was told by the Nurse that sedative had been administered to her and it was not proper to record her statement. He returned to the Police Station and again went to the hospital with the Deputy Superintendent of Police. On his asking, Asha Devi admitted in presence of the Dy. S.R. that whatever she had stated before the Magistrate was correct. He recorded the statements of other witnesses. While investigation was continuing, on 23.7.83 Asha Devi died. At the end of the investigation chargesheet was submitted against the Respondents who include, besides the mother-in-law, two sisters-in-law (Nanads) and the Gotni (wife of husband's elder brother), the husband himself, his elder brother and the father-in-law.

4. The Respondents do not deny that the deceased sustained burn injuries in their house on 6.7.83. According to them, it was an accidental fire. The deceased got burnt when she went to lit the fireplace for cooking. With respect to Respondent Anjani Kumar Srivastava, the husband's elder brother, specific and additional defence of alibi has been taken. The Respondents rely heavily on a statement allegedly made by the deceased to a Sub Inspector of Police of Pirbahore P.S., Sri P.K. Sinha, on 6.7.83 at 10.45 P.M. As per the said statement at about 10-11 A.M., in course of cooking meal she put the flakes of cowdung (Goitha) in the fireplace, soaked with kerosene oil and tried to lit it when suddenly fire erupted catching portion of her Sari. She tried to extinguish the fire, her mother-in-law and sisters-in-law raised hulla. They also poured water. Thereafter they took her to the hospital where she was being treated.

5. On behalf of the State in support of the appeal it was submitted that considering the pain and agony the deceased must be suffering from, it is unlikely that she would have made any such statement on 5.7.83 in the night. The statement, according to the counsel, has been concocted to create defence and is a reflection of the guilty mind of the Respondents. It is a circumstance which goes against them. Counsel submitted that no case was instituted on the basis of said statement even though, as per evidence of the Investigating Officer, it was forwarded by the Pirbahore Police Station to Gardanibagh Police Station vide Memo No. 690 dated 7.7.83 i.e. on the following day. Apparently thus no investigation was done. The investigation commenced only after the Magistrate recorded the statement of the victim on 14.7.83. It was submitted that as the Victim admittedly died in her in-laws' house the Respondents are required to satisfactorily explain the circumstances of death.

6. Counsel for the Appellant-State further submitted that apart from the fact that the victim died in her in-laws" house some more facts are admitted in this case such is the marriage took place on 1.7.79. The deceased victim died of burn injuries. The relationship between the husband and wife was strained because the husband had (sic)ed a divorce case while the wife had filed maintenance case u/s 125 Code of Criminal Procedure which were pending. In the latter case, an order for payment of Rs. 1000/-and further Rs. 75/- per month had been passed. Attempt had been made for reconciliation pursuant to which the victim was taken to the in-laws" house in March. The victim died in the in-laws" house. Though the death took place in their house the Respondents did not file an un-natural death (U.D) case.

7. It is obvious that the case has all the trappings of a dowry death case. But for the fact that when the occurrence took place, the offence of "dowry death" punishable u/s 304B IPC did not exist as an offence, as per the prosecution case all the ingredients of the said offence are otherwise made out because the death took place within seven years of the marriage, there had been demand for dowry, the deceased had been subjected to cruelty soon before her death for dowry and she died of burn injuries. However all said and done, the case is one u/s 302 of the Penal Code and therefore the prosecution was required to prove its case beyond all reasonable doubts.

8. To prove its case the prosecution examined 11 witnesses in all. Out of them, P.W. 4 Radha Mohan Prasad (a brother of the deceased), P.W. 5 Ganesh Prasad and P.W. 9 Shashi Bhushan Prasad were tendered. P.W. 6 Sharwan Kumar was examined on the point of reconciliation, P.W. 7 Dr. R.P. Srivastava had held postmortem on the body of the deceased. P.W. 8 Anjani Kumar Sinha is the Investigating Officer. P.W. 10 Vijay Narayan Jha, a Judicial Officer then posted at Patna as Judicial Magistrate had recorded the statement of the victim on 14.7.83 as mentioned above. P.W. 11 Basudeo Singh is another police officer who had taken over investigation from P.W. 8 Anjani Kumar Sinha and submitted chargesheet on receipt of sanction from the District Magistrate for prosecution under the Dowry Prohibition Act. The material witnesses are P.W. 1 Kalyan Prasad, brother of the deceased, P.W. 3 Shyam Murari Prasad, another brother of the deceased and P.W. 2 Reeta Srivastava, wife of P.W. 3 and Bhabhi of the deceased.

9. P.W. 1 in his evidence said that on receipt of information about the occurrence, he came to Patna on 12.7.83. His sister Asha Devi was being treated at the PMCH. On 13.7.83 she told him that her mother-in-law and Nanads had sprinkled kerosene and set her on fire. Her Gotni thereafter started pouring water. She also told him that she had been burnt because scooter was not given in dowry. The witness said that on 14.7.83 he met the Superintendent of Police, Patna and thereafter the Magistrate came to the hospital and took the statement of Asha Devi. Asha Devi died in the hospital on 23.7.83. P.W. 2 Reeta Shrivastava stated that Asha Devi, her Nanad, was married on 1.7.79 with Dilip Kumar. After

marriage Bidai was performed. She went to her Sasural and returned after ten days. Dilip used to come when Asha lived at her Naihar but after a month he stopped coming. It was learnt that he will take Asha only after getting scooter and movie camera. Thereafter Dilip filed divorce case. Asha also filed maintenance case in which order was passed for payment of Rs. 1000 and Rs. 75 per month or, else, to keep her. After the order was passed Dilip along with Balaji and Shrawan Kumar (P.W. 6) came on 13.3.83 and suggested compromise. On 18.3.83 the two families met at the Hardinge Park. On 20.3.83 she (witness) along with her husband (P.W. 3) went to the house of Dilip where demand was made for scooter. They did not take the demand seriously but assured them to give scooter after one year if in the meantime they keep Asha properly. On 23.3.83 Dilip took Asha to his house. On 6.7.83 at 6 P.M. Balaji came and informed that Asha was burnt. On hearing this she along with her husband went to PMCH and found Asha Devi badly burnt. She was in great agony. On 13.7.83 when Dilip had gone out to take tea Asha told her that she had been burnt by the mother-in-law and two Nanads while the Gotni had poured a bucketful of water on her whereafter she became unconscious. She also told if only scooter had been given, this would not have happened. P.W. 3 said that on 6.7.83 at 6 A.M. after he came to learn from Balaji that Asha was burnt and hospitalised at the PMCH he along with his wife Reeta Shrivastava (P.W. 2) went there and found Asha badly burnt and unconscious. On 13.7.83 in the evening Asha told them that if only they had given scooter she would not have met the situation. She also told them that she was burnt by her two Nanads and mother-in-law by throwing kerosene on her. Her Gotni had poured water. On 14.7.83 the Magistrate came to the hospital and took the statement of Asha. In the same evening at 7 PM he met the Sub Inspector i.e. the I.O. in the hospital. On 23.7.83 Asha died.

10. Counsel for the Respondents submitted that the entire case of the prosecution is based on dying declaration of the deceased. But there is no evidence to suggest that she was in proper sense at the time of her alleged statement. It was pointed out that in two recent decisions in Arvind Singh Vs. State of Bihar, and Panchdev Singh Vs. State of Bihar, the Apex Court has held that in the absence of certificate of the doctor about the mental condition of the deceased at the time of making the statement no implicit reliance can be placed on the dying declaration of the deceased and the Court in such cases ought to look for corroboration Counsel referred to the evidence of the Investigating Officer, vide para 3, wherein he stated that when he went to record the statement of the deceased after receiving copy of the statement recorded by the Magistrate, he found Asha Devi in burnt condition on Bed No. 6 in the unit of Dr. S.N. Verma but could not record the statement as he was told by the nurse that sedative had been given to her and it was not proper to record her statement. Counsel urged that if this was the condition of the deceased after she had allegedly made the statement before the Magistrate, there is no guarantee that while making statement she was in proper sense. It was submitted that neither

the nurse on duty nor any doctor was examined by the prosecution on the point of mental condition of the deceased.

11. The above submissions of the counsel for the Respondents appear to be well founded. It is true that the dying declaration was made to an independent person, in fact, a Judicial Magistrate and therefore there is no reason to believe that the deceased did not make the statement. Unfortunately the Magistrate did not take care to satisfy even himself that at that time the deceased was in proper sense. In para 2 of his evidence rather he admitted that he did not ask the doctor or any body else about the mental condition of the deceased. The statement seems to have been recorded in a mechanical manner. It is also not clear from the statement if he tried to satisfy himself that it was a free and voluntary statement. It has to be kept in mind -that she had been ill treated by her in-laws. The husband had filed divorce case and She must have been in a frustrated and disturbed state of mind. If for all this she or her family members had grievance against the Respondents, the incident provided an occasion to implicate them.

12. In *Panchdeo Singh v. State of Bihar* (supra) too, the dying declaration was recorded by a Judicial Magistrate. In his evidence in Court he claimed to have satisfied himself about the fitness of the person to make the statement. The Supreme Court held that this was not enough. Though the doctor was available, neither his certificate nor even a signature was taken on the statement. The Court noticed an earlier decision in the case of *Paparambaka Rosamna v. State of Andhra Pradesh* (1997) 7 SCC 695, in which the doctor had appended his certificate at the end of the Declaration that "the patient is conscious" while recording the statement, he was also examined in the case. The Court observed that what needs to be considered is whether the injured was "in a fit state of mind" to make a declaration. That the person was conscious was not enough. In view of the law laid down by the Apex Court it is a difficult to place total and implicit reliance on the so called dying declaration of Asha Devi.

13. Counsel for the Respondents submitted that if the crime had been committed by them they would not have taken the victim to the hospital, sent information about the incident to the members of the deceased's family and after her hospitalization taken steps for her treatment. I find substance in this argument too. It is admitted fact that the prosecution party came to learn about the incident from Balaji, a cousin of Dilip, at the instance of the Respondents. From the evidence of P.W. 2 it is evident that Asha was being treated in the hospital by the in-laws. The evidence of P.W. 2 that the deceased narrated the incident to her on 13.7.83 when Dilip had gone out to take tea suggests that Dilip was attending on her throughout. If the deceased was taken to hospital by the in-laws and it is they who were meeting the cost of treatment, the husband being all along present in the hospital, by the side of the deceased, a doubt naturally arises as to whether they had intentionally burnt the deceased. If it was a fact that the in-laws had burnt the deceased there was no reason why she would not

narrate the incident to her Bhabhi or brother in presence of Dilip and would do so only after he went out to take tea. It is relevant to mention here that in her statement to the Investigating Officer on 14.7.83 P.W. 2 did not say that the deceased had told her about her being burnt by her mother-in-law and two Nanads or her Gotni pouring water on her thereafter which is evident from para 8 of the evidence of Investigating Officer, attention to which was drawn to P.W. 2 vide para 11 of her evidence.

14. It has to be kept in mind that all the material witnesses are interested witness being brothers or sister-in-law (Bhabhi) of the deceased. While there is no bar to accept the statements of persons who are otherwise interested as true, as indicated above, in view of the fact that the deceased had been ill treated and harassed by the in-laws for long time there was enough reason for the witnesses to be hostile to them. In *Dhanna etc. v. State of Madhya Pradesh* AIR 1966 SC 2478, the Court observed that where two views are possible the view that favours the accused should be accepted. The observation was made in the context of appeal against order of acquittal.

15. It is an unfortunate case of death of a young woman in the prime of her life. No doubt there are circumstances which creates serious doubt about the complicity of the in-laws in the commission of the crime, as briefly indicated above: The demand for scooter accompanied by acts of ill-treatment for non-fulfilment of demand, filing of divorce case by the husband and above all, extent of injuries and portions (of the body) on which injuries were found do raise strong suspicion. But as observed above, though all the ingredients of dowry death u/s 304B of the Penal Code are made out as per the prosecution case, the case is one u/s 302 IPC and therefore the prosecution is required to prove its case beyond all reasonable doubt.

16. The dying declaration which is the sheet anchor of the prosecution case not being wholly reliable the prosecution was required to bring on record corroborating evidence. Though the substance what the deceased stated to the Magistrate in her so called dying declaration was also stated by her to P.Ws. 1, 2 and 3, the circumstances in which those statements were allegedly made are not beyond doubt. There is evidence that the deceased had already made some kind of statement to the witnesses in the evening of 13.7.83-curiously, at a time when her husband had gone out to take tea. The same statement was allegedly made by her to the Magistrate. The victim is said to have made some statement to a Dy. S.P. earlier in the day. There is no record of that statement. The possibility of a tutored statement to the Magistrate cannot be absolutely ruled out. If dying declaration is not treated as sufficient for conviction of the Respondents, it would appear that the prosecution case is based on circumstantial evidence. Unless the evidence is wholly consistent with the guilt of the accused and inconsistent with their innocence, they cannot be convicted. In the above premises the Respondents are entitled to benefit of doubt and the order of acquittal therefore cannot be said to. be erroneous.

17. It has also to be kept in mind that the occurrence took place 19 years ago and with the passage of time mother-in-law would be more than 80 years old, the two Nanads must have been married and leading conjugal life in their respective sasural. They are the alleged prime movers and the real villains. It is doubtful if they should be convicted for the offence they are alleged to have committed 19 years ago at this point of time.

18. In the result, this Government Appeal is dismissed.

T.P. Singh, J.

19. I agree.