
(2003) 03 PAT CK 0019

In the Patna High Court

Case No : Death Reference No. 1 of 2002 with Criminal Appeal No. 69 of 2002

The State of Bihar

APPELLANT

Vs

Kamal Prasad Singh @ Kamal Dev Singh
 Kamal
Prasad Singh @ Kamal Dev Singh Vs The State of Bihar

RESPONDENT

Date of Decision : 31-03-2003

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 273, 299, 313
Penal Code, 1860 (IPC) — Section 302, 34, 376

Citation : (2003) 2 PLJR 634

Hon'ble Judges : S.N. Jha, J;P.N. Yadav, J

Bench : Division Bench

Advocate : Suraj Narayan Prasad Sinha, Jitendra Narain Sinha, Ranjan Kumar Sinha, Manish Kumar, Deepak Kumar, Mukesh Kumar, Sanjay Kumar and Ram Shanker Prasad, for the Appellant; Lala Kailash Bihari Prasad, for the Respondent

Judgement

S.N. Jha and P.N. Yadav, JJ.—The sole appellant has been convicted under Sections 376/34 and 302/34 of the Indian Penal Code and sentenced to death. The appellant was put on trial in connection with an occurrence of 1.4.1985. At about 9 A.M. on that day Manju Kumari, a 16 year old minor girl, went to the outskirts of the village, namely Sangar within Tajpur Police Station of Samastipur district for scraping grass as cattle feed as usual. When she did not return even after two hours members of the family became anxious and started looking for her. In course of search they found her dead body in the maize field of one Motilal Sao. She was lying in a pool of blood with .her neck, mouth and nose cut. The father of Manju Kumari, Sone Lal, on receiving the information immediately rushed to the place. SI S.P. Singh of Tajpur PS too arrived there. The fardbeyan of Sone Lal was recorded and a case u/s 302/34 of the Penal Code was registered against unknown and the investigation commenced.

2. SI S.P. Singh held inquest and sent the dead body to Samastipur Sadar Hospital for postmortem. He also recorded the statements of witnesses. After completing the formalities he submitted chargesheet against four persons

including the appellant herein. The appellant later absconded and in the circumstances, the trial was split up on 1.3.90 and the other three alone faced the trial. In course of time they were acquitted on 13.11.1992. The appellant was apprehended on or about 3.3.2001 and produced in court for trial. On 19.3.2001 charge was framed against him under Sections 376/34 and 302/34 of the Indian Penal Code and 21.3.2001 was fixed for evidence. On 21.3.2001 the trial was postponed to 26.3.2001 as the witnesses were not present. On 26.3.2001 the trial was again adjourned to 28.3.2001. On 28.3.2001 the application filed on behalf of the appellant on 19.3.2001 to the effect that the appellant was ready to adopt the evidence of witnesses recorded earlier was put up for consideration. It may be mentioned that at the trial against the three accused in attendance, the examination of the prosecution witnesses commenced on 4.6.1990. On subsequent dates further witnesses were examined and in this manner eight witnesses were examined on behalf of the prosecution upto 14.7.1992.

3. Dealing with the said application of the appellant dated 19.3.2001, the Court noted that the occurrence had taken place in 1985 and the case was committed to the court of Session in 1986. It would not be proper to grant time (to the prosecution) particularly when the appellant was ready to adopt the evidence recorded earlier. Accordingly the Court directed that the evidence of PWs. 1 to 8 who were examined in the original sessions case between 4.6.1990 and 14.7.92 be adopted as evidence against the appellant too. On 29.3.2001, thus, the case of the prosecution was closed and the statement of the appellant u/s 313 Cr. P.C. was recorded and the case was fixed for defence evidence. At this stage, it may be stated, on 12.4.2001 an application was filed on behalf of the prosecution for summons to the doctor who had held postmortem on the deceased and the Investigating Officer of the case for their examination as witness. The prayer was opposed by the appellant. The trial court however on 26.4.2001 issued summons to the doctor and the investigating Officer but they did not appear. The case was finally closed on 17.1.2002. Arguments were thereafter heard and the judgment was delivered on 25.1.2002 holding the appellant guilty for offences under Sections 376 and 302 of the Indian Penal Code and sentencing him to death as indicated at the outset.

4. Shri Suraj Narayan Prasad Sinha, learned counsel for the appellant, submitted that the conviction of the appellant is fit to be set aside on the solitary ground that the appellant has been convicted on the basis of evidence recorded behind his back. Shri Sinha submitted that though the general rule laid down u/s 273 Cr. P.C. that evidence should be recorded in presence of the accused or in presence of his advocate where his personal attendance is dispensed with, is circumscribed by Section 299 Cr. P.C. which permits recording of evidence in absence of accused, it would appear that recourse to Section 299 can be taken on fulfilment of certain conditions which in the instant case were not fulfilled and accordingly the evidence of the aforesaid eight prosecution witnesses could not be used against the appellant.

5. It would be useful to straightaway refer to Sections 273 and 299 of the Code of Criminal Procedure as under :-

273. Evidence to be taken in presence of accused? Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his pleader, (explanation omitted)

299. Record of evidence in absence of accused? (1) If it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try such person for the offence complained of, may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution, and record their depositions and any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or Incapable of giving evidence or cannot be found or his presence cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

(2) If it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court or the Sessions Judge may direct that any Magistrate of the first class shall hold an inquiry and examine any witness who can give evidence concerning the offence and any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of India.

6. From a plain reading of Section 299 it is manifest that the evidence of witnesses can be recorded in absence of the accused where it is proved (and the court is so satisfied) that the accused has absconded and that there is no immediate prospect of arresting him but in such case provided the deponent was dead or incapable of giving evidence or his presence cannot be found without delay, expense or inconvenience, which would be unreasonable. In other words only on fulfilment of said two conditions the evidence of witnesses can be recorded in the absence of accused.

7. Shri Suraj Narayan Prasad Sinha fairly agreed after some arguments that the first condition that the accused has absconded and there is no immediate prospect of his arrest in the facts and circumstances, may be held to be fulfilled. In the order dated 1.3.1990 (by which the trial was separated) the Court had noted that the appellant was absconding from his house for about two years and there was no possibility of his appearance in near future (in fact the appellant was apprehended after 11 years). He urged, however, that so far as the second condition is concerned, the court made no effort to procure attendance of the witnesses nor there is anything on record to suggest that the witnesses were dead or incapable of giving evidence and in the circumstances, on account of non-

fulfilment of the second condition, the evidence of witnesses could not be used against the appellant in terms of Section 299 of the Code.

8. On behalf of the State it was submitted that order was passed on the petition of no less than the appellant himself and therefore question of non-compliance of the condition u/s 299 of the Code does not arise. Counsel urged that where evidence on record, recorded behind the back of accused, is adopted by him, on his own, he cannot complain of any prejudice at later stage and cannot assail the finding of guilt. Counsel submitted that the ultimate test in all such cases is whether the accused has suffered prejudice.

9. In reply, Counsel for the appellant submitted that where the statute prescribes the manner of doing certain thing, the act has to be done in that manner or not at all. He submitted that the fact that the order was passed on the application of the appellant and with his consent is of no significance. In this regard he placed reliance on a Bench decision of this Court in *On Reference From Sri Arun Kumar Singh, Judicial Magistrate, 1st Class, Patnacity vs. Tribhuwan Prasad Barnwal*, 2001 (1) PLJR 799.

10. The decision seems to support the contention of the Counsel for the appellant. After dwelling upon the scope of Section 299 of the Code the Court held that;

"So far as the second point of reference is concerned, it is clarified that as section 299 has provided procedure for taking evidence in absence of accused, the condition or procedure mentioned therein has to be followed before relying upon the evidence. The requirement of the statutory provision cannot be dispensed with as a result of agreement between the parties."

In view of the above decision of this Court the fact that the appellant filed application for adopting the evidence already on record, recorded behind his back, is of little consequence. The trial court was required to make endeavours to procure the presence of the witnesses. The Court framed charge on 19.3.2001 and fixed 21.3.2002 for evidence. We are at a loss as to how within two days the presence of witnesses could be procured. Two adjournments granted thereafter on 21.3.2001 and 26.3.2001 does not salvage the case of the prosecution, for, only 11 days time all told was allowed to the prosecution to produce the witnesses. There is nothing to show that the summons were even issued during the period. There is nothing in the ordersheet that the prosecutor had undertaken to produce the witnesses. There is also nothing to suggest that the witnesses were either dead or incapable of giving evidence. In the circumstances it is evident that the Court closed the case of the prosecution merely on the application of the appellant dated 19.3.2001 and not on being satisfied that the presence of the witnesses cannot be procured without delay, expense or inconvenience which is a mandatory requirement of the Section. In the circumstances, we are satisfied that there has been breach of provisions of Section 299 of the Code of Criminal Procedure. If that is so, the evidence of

prosecution witnesses which was recorded between 4.6.90 and 14.7.92?behind the back of the appellant?could not be used against him. Sinch the appellant has been convicted on the basis of evidence of those witnesses the impugned conviction cannot be sustained.

11. In the facts and circumstances of the case though the conviction of the appellant cannot be sustained we are of the view that there should be retrial. We are conscious of the fact that the occurrence took place on 1.4.1985 i.e. about 18 years ago but the delay is primarily of the making of the appellant himself. The appellant absconded from the case since 1988 and remained so for 13 years until he was apprehended and produced in the Court on or about 3.3.2001. Allowing the matter to rest after setting aside the conviction would be virtually giving premium to the conduct of the appellant. It is to be kept in mind that the appellant is accused of committing heinous offences-committing rape on a minor girl and thereafter committing her murder. The interest of justice requires that opportunity should be given to the prosecution to prove its case, ft goes without saying that it would still be open to the trial court to take recourse to Section 299 of the Code of Criminal Procedure in the event it comes to the conclusion that the witnesses are dead or incapable of giving evidence or otherwise fails to procure the presence of the witness within reasonable period, and to use the evidence of the witnesses already on record. Any observation made by us should not be construed to mean that the trial should be indefinitely kept pending, and the court will be free to come to conclusion on the basis of circumstances as may develop. In the result, the conviction and sentence awarded to the appellant are set aside and the case is sent back to the trial court for retrial in accordance with law. The appeal is allowed in part to this extent. The reference is answered accordingly.