

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.339 of 1993

Against the judgment of conviction and order of sentence dated 25.05.1993 passed by Shri B.N. Singh "Neelam", Sessions Judge, Vaishali, in Sessions Trial No. 63 of 1990 arising out of Rajapakar P.S. Case No. 20 of 1989

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Dinesh Rai, son of Ram Saran Rai, resident of village Baranti, P.S. Bidupur (Now Rajapakar), district Vaishali

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant : M/S Suraj Narain Yadav, Pooja Shree & Anu Shree, Advs.

For the Respondent : Ms Shashi Bala Verma, APP

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CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA

and

HONOURABLE SHRI JUSTICE GOPAL PRASAD

ORAL JUDGMENT

(Per: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA)

Date: 18-08-2015

Deceased, Nanhee Devi, mother of P.Ws. 1 and 6 was strangled to death as appears from the evidence of P.W. 9 Dr. Rajiv Ranjan Singh by using a rope. The prosecution came out with the story that it was this appellant Dinesh Rai and his brother Suresh Rai who had killed her and had hanged her dead body up with the help of a rope to a beam of the house of the deceased. The occurrence was witnessed by her two little sons P.W. 1 Raj Kumar aged about 9 years on the day of occurrence and P.W. 6 Vakeel Kumar, aged about 7 years on the day of occurrence. The two little children were forced to keep silent on the threat of being killed as appears from the evidence of P.W. 6 as also from that of P.W. 1. It further appears from their evidence that Suresh Rai the brother of this appellant Dinesh Rai had re-appeared in the room where the dead body had been hanged by the two accused to cut the rope by which the dead body of Nanhee Devi had been hanged to bring the dead body down so as to leaving it in lying-position. Suresh Rai, who was subsequently acquitted in another trial, as per information given to us, went away after bringing down the dead body.

2. P.Ws. 1 and 6 both stated that early in the morning on 31.03.1989, they came to the informant Nagendra Rai, their uncle and

narrated to him as to how their mother had been killed.

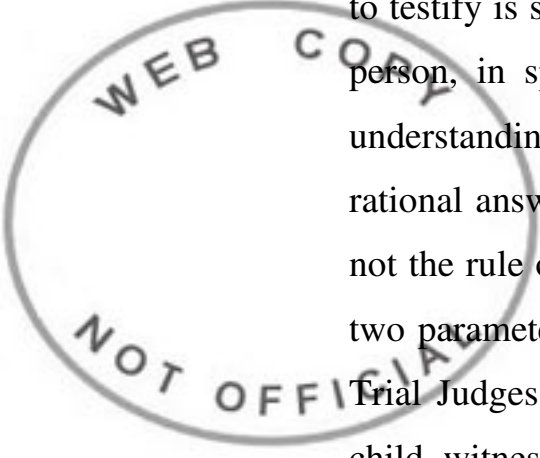
3. P.W. 7 Nagendra Rai gave his fardbeyan (Exhibit 1) to the police on the basis of which the first information report of the case was drawn up and the investigation was taken up by P.W. 8 Sub Inspector of Police, Ramanand Singh who came to the place of occurrence to prepare the inquest report (Exhibit 4) and then sent the dead body for post mortem examination which was held by P.W. 9 Dr. Rajiv Ranjan Singh. P.W. 8 inspected the place of occurrence, recorded the statements of the witnesses under Section 161 of the Criminal Procedure Code and after completing the investigation sent up this appellant who, as per the informant had been caught by the villagers in the very morning when P.W. 7 had got the information about the incident and had been handed over to the police.

4. The appellant was charged with committing offence under Section 302/34 of the Indian Penal Code for being put on trial in Sessions Trial No. 63 of 1990 and by judgment of conviction dated 25.05.1993 and order of sentence passed on the same day, was held guilty of committing the offence and was directed to suffer rigorous imprisonment for life.

5. This is how the present appeal is before us.

6. We have heard Shri Suraj Narain Yadav, learned counsel appearing on behalf of the appellant who has taken us through the evidence of P.Ws. 1 and 6 the two child witnesses who are the eye witnesses to the occurrence and also to the evidence of other witnesses, including the informant.

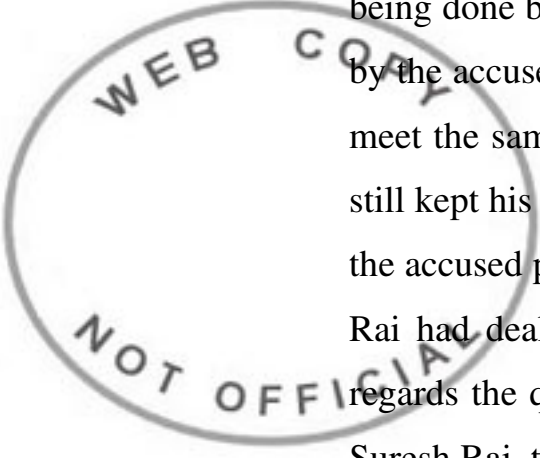
7. While perusing the evidence of the child witnesses what we came across was that the learned trial Judge was straightaway recording the evidence of those witnesses without verifying whether the two witnesses had the capabilities of understanding the questions which were to be put to them and whether they were capable of giving rational answers to those questions. Section 118 of the Indian Evidence Act declares all persons competent to testify, unless the Court had considered their understanding of questions and capability of giving rational



answers to the questions such as to prevent recording their evidence on account of tender years, extreme old age disease, whether or body or mind or any other case of the same kind. The competence of a witness to testify is so elaborately indicated by the provision that even an insane person, in spite of insanity if prevent by reason of his lunacy from understanding the questions to be put to him and further from giving rational answers to those questions coned by a competent witness. It is not the rule of law that the Judge has to firstly test the capability on the two parameters pointed out by Section 118 of the Indian Evidence Act. Trial Judges who have the occasions of recording the evidence of the child witnesses, do take up an exercise of putting certain questions themselves to the witness so as to judging as to what was the degree of understanding of the child and whether he had achieved such level of rationality as to understand the question so as to rationally answering them. This is a rule of caution and prudence which has taken the form of some sort of rule of law and practice. While perusing the evidence of P.Ws. 1 and 6 what we came across was that the learned Judge did not attempt to find out as to what was the level of maturity as regards the understanding of the witnesses, the questions which might be put to them to test their capability rationality wise to answer those questions. P.W. 1 was aged about 9 years on the day of occurrence as we have just pointed out and P.W. 6 should have been somewhere in between 6-7 years on the day of occurrence. They were coming from a very remote rural background and they could not be treated to be of such matured level of understanding as to understand the implication of questions put to him specially in cross examination so as to replying rationally to them.

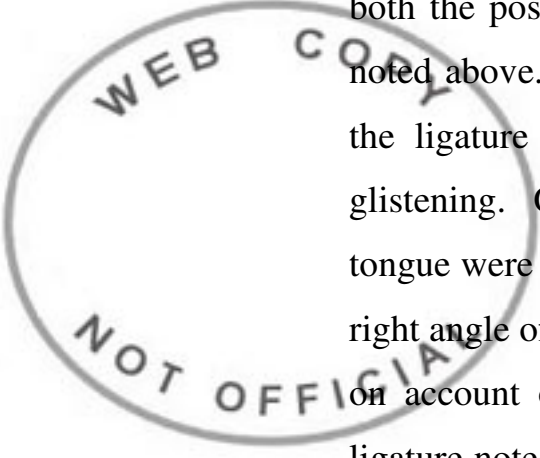
8. This is one aspect of the trial proceedings which has come into our view and we found it necessary to point out so that we could appreciate the evidence of the witnesses in a more pragmatic manner.

9. P.W. 1 the son of the deceased, Nanhee Devi, and P.W. 6 the other son of the deceased appear stating one natural fact that on account of being little children, they should be sleeping with their



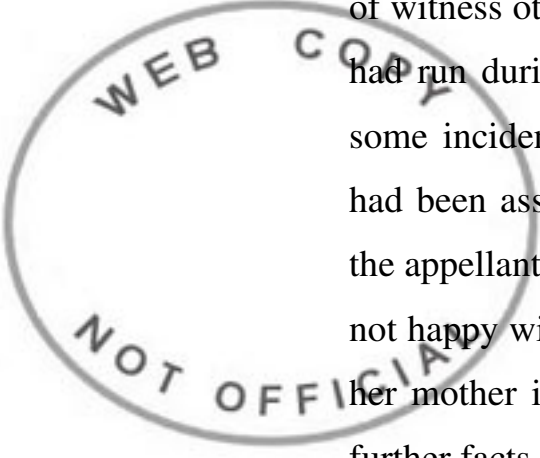
mother in the same room. But while P.W. 6 states that he as soon as the accused persons started beating up his mother cried out, P.W. 1 stated that he did not and further that he kept lying and looking as to what was being done by the accused persons to his mother. P.W. 6 was frightened by the accused persons and was asked to keep silence else he would also meet the same fate. P.W. 6 stated that he lied down but was afraid and still kept his eyes open to see as to what was being done to his mother by the accused persons. One fact is stated by both the witnesses that Suresh Rai had dealt blows with his leg on the chest of the deceased and as regards the quantum of the blows which were given to the deceased by Suresh Rai, the evidence of P.W. 6 is more telling. P.W. 6 stated that the blows were given so much so that the deceased had died of it and thereafter Dinesh Rai lifting the lady by bringing her up by catching her by her waist when his companions Suresh Rai put the ligature around her neck for hanging her with the help of a rope to a beam of the house of the deceased. There is no story told by P.W. 6 that his mother's mouth had been stuffed with some clothes or she had been strangled to death before being hanged and that fact appears running contrary to the evidence of P.W. 1 who stated that the deceased in addition to being given blows with leg by Suresh Rai was also strangled by this appellant Dinesh Rai which fact has not been stated by P.W. 6. Both P.Ws. 1 and 6 stated a common fact that after being killed the lady was lifted by using a ligature which was put around her neck so as to be hanged up with the beam which had been put-in to the ceiling of the house. Thus, what appears is that the evidence of two witnesses indicated the manner of occurrence which could produce injuries perceptible on the chest part of the dead body and it should also be a possibility that some ligature mark indicating the hanging of the dead body ought to be present on the dead body.

10. However, when we were considering the evidence of the Doctor, i.e., P.W. 9, we found him telling the trial Court that a ligature mark, 1" on the neck in the upper most part on its front above the thyroid cartilage directed backward and upward around the upper part of



the neck following the line of mandible on the right side and extending up to the upper part of the center of neck and further extending on the left side up to just behind the mastoid process, was found. The marks on both the posterior ends slowly faded and then appeared at the sides as noted above. The neck was tilted towards right side. On dissection of the ligature mark, underlying tissues were found dried, whitish and glistening. On further dissection the epiglottis, trachea and larynx and tongue were found swollen and black at places, saliva had trickled out of right angle of mouth. In the opinion of P.W. 9 the death had been caused on account of asphyxia by compressing the neck with the help of a ligature noted above. Thus, what appears from the above injuries is that it was a ligature which was only extending from the right side of mandible to the left side of the mastoid process and the back side of the neck did not appear bearing any mark or injury which could be indicative of the fact that the ligature was complete, encircling the whole thickness of neck. The other important feature of the evidence of P.W. 9 is that he did not find any other injuries than just been described us. The third feature of the evidence of P.W. 9 is that he did not find any post mortem injury on the dead body which has to be supposed to be available on the dead body especially on its neck. As per the evidence of P.W. 1 and P.W. 6 after being killed had been hanged to the beam of the house by using a rope which as per the evidences of two witnesses, i.e., P.Ws. 1 and 6 was cut subsequently in the morning by accused Suresh Rai to bring the dead body down to keep it in a lying position. Thus, what appears from the evidence of P.W. 9 is that the very manner of occurrence which was stated by both, P.Ws. 1 and 6, is not borne out from his evidence. We have already noted that the witnesses P.Ws. 1 and 6 the star witnesses of the prosecution case were only the eye witnesses to the occurrence and they were children in the age group of 9 and 6 years on the date of occurrence.

11. The motive which was stated by the prosecution was that the lady who was the aunt of the present appellant Dinesh Rai had developed intimate relationship with the appellant and that was known to



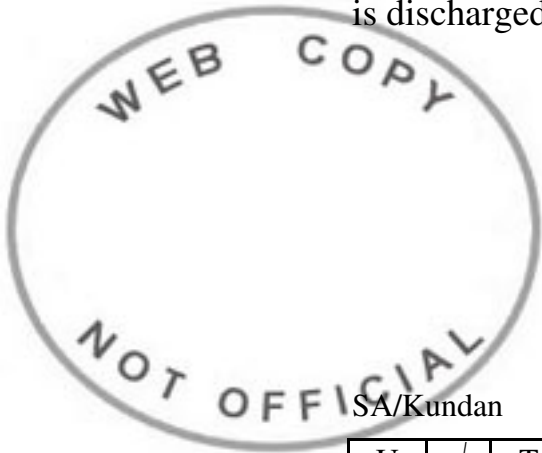
her husband and other family members, like, the informant who happened to be the younger brother of the husband of the deceased. There had been some Panchayati also and as appears from the evidence of witness other than P.Ws. 1 and 6, there had been frayed tamper which had run during the Panchayati and subsequent thereto so much so that some incidence of maar-peet had also occurred in which the appellant had been assaulted as stated by the witnesses. They further stated that the appellant had snapped her relationship with the lady and the lady was not happy with it. Her sons do not say that the appellant had ever visited her mother in their house. But the witnesses do say without speaking further facts as appear from the evidence of P.Ws. 2 and 3 who happened to be the gotnis of the deceased. If the appellant was carrying on an illicit relationship with the lady, who was non-else than his own aunt then firstly we can not accept because as per his mores of social norms, if at all one could be depraved to have a relationship with the lady who could be motherly to him, then why should he kill the lady and thereby permanently ending the source of his pleasure and enjoyment. These are some of the circumstances which do not convince us that the motive which was stated by P.Ws. 2 and 3 and others could be fit to be upheld. On the other hand, what we find is that the very motive which was stated and alleged as the reason for committing the murder of the lady by the present appellant and his brother Suresh Rai would very well be the reason that some one had killed the lady at some other place in some other manner than what was stated by P.Ws. 1 and 6 and then had brought the dead body into the house to weave out a story so as to implicating the present appellant after putting up a story which could not be real only with the purpose of getting rid of the appellant permanently.

12. The above circumstances which we have culled out from the evidence of the witnesses we find that charge had not been proved as the evidences were not inspiring our confidence and we are of the opinion that indeed no one had seen as to how the lady was murdered and at what place and the prosecution had foisted a false story upon the appellant.

13. In the result, the appeal is allowed by setting aside the judgment of conviction and order of sentence. The solitary appellant, who is on bail, is acquitted of the charge he had been held guilty of. He is discharged from the liabilities of bail bond.

(Dharnidhar Jha, J)

(Gopal Prasad, J)



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