

IN THE HIGH COURT OF JUDICATURE AT PATNA

Govt. Appeal (DB) No.7 of 2016

Arising Out of PS.Case No. -null Year- null Thana -null District- MUZAFFARPUR

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The State Of Bihar Appellant

Versus

1. Deepak Kumar, Son of Suresh Choudhary, resident of Village & P.S.-Hathauri,
District- Muzaffarpur.

2. Sanjay Kumar Choudhary, Son of Ram Chandra Choudhary, resident of Village-
Sahila Rampur, P.S.- Hathauri, District- Muzaffarpur.

..... Respondents

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Appearance :

For the Appellant : Mr. Dilip Kumar Sinha, A.P.P.

For the Respondents : Mr.

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CORAM: HONOURABLE THE ACTING CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH

JUDGMENT AND ORDER

ORAL

(Per: HONOURABLE THE ACTING CHIEF JUSTICE)

Date: 05-05-2016

The appellant herein, State of Bihar, has filed this application, under Sections 378 (1) and 378 (3) of the Code of Criminal Procedure, against the acquittal of the respondents herein, under Sections 376 (2) (g) and 201 read with Section 34 of the Indian Penal Code, by the judgment of conviction, dated 23.03.2012 and the order of sentence, dated 26.03.2012, passed, in Sessions Trial No. 71 of 2009, by the learned Additional Sessions Judge V, Muzaffarpur.

2. The case of the prosecution is, in brief, as follows:

(i) The informant's daughter, **RK**, aged about 16 years, went, on 11.08.2008, at about 6.30 PM, towards



Hathauri. As she (**RK**) did not return home till about 8 PM, the informant, Bhubneshwar Sharma, along with Ramashray Rai, went looking for **RK**. When they were so looking for **RK**, they found one person, accompanied by three more persons, standing on the northern side of Pakhi Ghat bridge. The persons, who were present on the bridge, threw something into the water of the river from the bridge. As the informant and others raised *halla*, many people rushed to the bridge and caught hold of one of the said four persons, who turned out to be the accused Balram Sah. On being so caught, Balram Sah disclosed that he, along with accused Deepak Kumar, Sanjay Kumar Choudhary and Amit Kumar, had committed rape on **RK** and, thereafter, in order to screen themselves from punishment, threw **RK** into the river. The police were informed and on their arrival, *fardbeyan*, lodged by deceased **RK**'s father, which has been treated as First Information Report, was recorded, which led to registration of Hathauri Police Station Case No. 106 of 2008 under Sections 376/302/201/34 of the Indian Penal Code against accused Balram Sah, Deepak Kumar, Sanjay Kumar Choudhary and Amit Kumar.

(ii) During investigation, *inquest* was held on the dead body of **RK**, which was also subjected to *post mortem* examination. On completion of investigation, a *charge sheet* was laid, under Sections 376 (2)(g)/302/201/34 of the Indian

Penal Code, against accused, Balram Sah, Deepak Kumar and Sanjay Choudhary.

3. At the trial, when charges, under Sections 376 (2)(g), 302 and 201 read with Section 34 of the Indian Penal Code, were framed against the accused aforementioned, they pleaded not guilty thereto.

4. In support of their case, prosecution examined as many as 11 (eleven) witnesses. The accused were, then, examined under Section 313 (1) (b) of the Code of Criminal Procedure and, in their examinations aforementioned, the accused denied that they had committed the offences, which were alleged to have been committed by them, the case of the defence being that they have been falsely implicated in this case due to enmity.

5. The learned trial Court, though has convicted accused Balram Sah, under Sections 376, 302 and 201 of the Indian Penal Code, and passed sentences against him as mentioned above, it has, having reached the conclusion that the case, as against the remaining accused-respondents, namely, Deepak Kumar and Sanjay Kumar Choudhary, under Section 376, 302 and 201 of the Indian Penal Code, had not been proved beyond reasonable doubt, acquitted them accordingly.

6. Being aggrieved by the acquittal of the accused-

respondents herein, the State of Bihar has, as indicated above, preferred this appeal.

7. We have heard Mr. Dilip Kumar Sinha, learned Additional Public Prosecutor, appearing for the State of Bihar. We have also perused the judgment and order, under challenge, and have also scrutinized the materials available on record.

8. Appearing on behalf of the appellant, Mr. Dilip Kumar Sinha, learned Additional Public Prosecutor, submits that the learned trial Court has committed serious error in acquitting the two co-accused, namely, respondent Nos. 1 and 2, inasmuch as the evidence on record clearly revealed, according to the learned Additional Public Prosecutor, that accused Balram Sah had named Sanjay Kumar Choudhary and Deepak Kumar, as persons, who had accompanied him, while committing rape on **RK** and, then, throwing her into the river and killed her.

9. Though there is evidence of PW 9, mother of deceased, who has claimed that on the day of the occurrence, she had seen the accused persons talking to her daughter, **RK**, and seeing her (PW 9) coming, the accused had fled away, there is nothing in the evidence of PW 9 showing that the said three accused had tried to kidnap or abduct **RK**. The evidence, so given, against the remaining co-accused, namely, Sanjay Kumar Choudhary and accused Deepak Kumar does not lead to



the one and the only conclusion that they were also involved in the kidnapping or abduction, rape and/or murder of **RK**. Apart from this, the evidence of PW 9 is that her daughter, **RK**, went out for a walk, and when as she did not return till 7 PM, she (PW 9) asked her husband, who went, accompanied by Ramasray Rai, in search her daughter and, at about 11 PM, she came to know that her daughter had been killed and her dead body had been thrown into the river. The evidence, so given by PW 9, also do not prove that said two accused, namely, respondent Nos. 1 and 2, were involved in the offences charged with.

10. We have closely examined the materials on record including the impugned judgment and order. There is no dispute before us that there is no direct evidence showing anyone having witnessed commission of rape on **RK** and/or the act of her being thrown away into the river from the bridge by the co-accused, namely, respondent Nos. 1 and 2 herein. The only evidence, which has surfaced against the co-accused, is the extra-judicial confession alleged to have been made by accused Balram Sah.

11. It is trite that a confession made by a co-accused is not a substantive piece of evidence. The law with regard to the probative value and use of the confession of co-accused is fairly well settled.

12. The law with regard to the use of confession of a co-accused is fairly well settled.

13. The present one is one of those very few cases, wherein the prosecution's case rests entirely on the confession of a co-accused. As regards the acquitted accused, we need to bear in mind that it is Section 30 of the Evidence Act, which makes the confession of a co-accused relevant. There is a marked difference between the probative value of the confession of an accused *vis-à-vis* the confession of a co-accused and this difference appears to have, quite often, created confusion and incorrect approach, though the law on the use of the two kinds of judicial confession is very well settled.

14. The confession made by an accused, if found voluntary and true, can be made basis for his own conviction. Though corroboration of such a confession is not a condition precedent for making use of the confession as basis for conviction, prudence requires that some corroboration of the material particulars of the confession is received from the evidence on record. As against such use of confession against the maker of the confession, the confession of a co-accused is no evidence at all and it cannot be used as a foundation for conviction of the accused, who is not maker thereof, though the same can, indeed, be used as a supporting piece of evidence

against the accused, who is not the maker thereof.

15. The reasons for not treating the confession of a co-accused as evidence are, broadly speaking, that the confession of a co-accused is not given on oath, it is neither given in the presence of the accused against whom the confession is sought to be relied upon nor is the maker's version is tested by cross-examination by his co-accused. In fact, such a confession is a weaker type of evidence than the evidence of an approver, for, the approver is cross-examined by the accused; whereas the confession of a co-accused is not subjected to cross-examination and brought on record without allowing the accused, against whom such a confession is sought to be proved, any opportunity of cross-examining the co-accused and testing the veracity or otherwise of the confession of the co-accused.

16. A confession is relevant against the maker, because the maker implicates himself in a crime, but the confession of the co-accused differs in this regard inasmuch as it is some one else's confession, which is sought to be used against a person, who never owned up the guilt or the truth of the confession of his co-accused. [See ***Bhuboni Sahu v. The King*** reported in **76 Ind. App. 147** and ***Emperor v. Lalit Mohan*** reported in **12 CRI LJ 2 (Cal)**].

17. A co-accused, who confesses his guilt, stands



on no better footing than an accomplice. The law insists that the accomplice's evidence be not used without corroboration. Prudence demands that when such an accomplice implicates another, then, the person, who is so implicated, has a right to test the confession given against him by his co-accused; but no such opportunity is available in law to the person so implicated by his co-accused. The resultant effect is that the confession of a co-accused is used against another accused without giving him any opportunity of testing the veracity of the confession by cross-examining the maker thereof.

18. No wonder, therefore, that the Supreme Court has laid down that the confession of the co-accused is not really 'evidence' in its strict sense and cannot be made foundation for conviction of the person, who did not make the confession, though such confession can be used as an additional reason for believing the evidence on record provided that the evidence on record, *independent of the confession of the co-accused*, convinces the Court of the guilt of the accused against whom such a confession is relied upon. A reference, in this regard, may be made to ***Kashmira Singh v. The State of Madhya Pradesh* (AIR 1952 SC 159)**, wherein the Supreme Court observed as follows:

"The confession of an accused person is not evidence in the ordinary sense of the term as defined in Section 8. It cannot be made the



foundation of a conviction and can only be used in support of other evidence. The proper way is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed a conviction could safely be based on it. If it is capable of belief independently of the confession, then, of course it is not necessary to call the confession in aid. But cases may arise, where the Judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction. In such an event, the Judge may call in aid the confession and use it to lend assurance to the other evidence and, thus, fortify himself in believing what without the aid of the confession he would not be prepared to accept."

19. Thus, the above observations, made in ***Kashmira Singh*** (supra), were in respect of Section 30 of the Evidence Act, that is, for using the confession of a co-accused and, hence, the decision in ***Kashmira Singh*** (supra) becomes relevant, when the confession of a co-accused is sought to be used as basis for conviction. In short, ***Kashmira Singh*** (supra) lays down the law with regard to use of the confession of a co-accused.

20. Drawing the distinction between the use of confession against its maker under Section 24 of the Evidence Act and the use of the confession against a co-accused under

Section 30 of the Evidence Act, the Supreme Court, in ***K.I. Pavunny v. Asstt. Collector (HQ), Central Excise collectors, Cochin***, reported in **(1997) 3 SCC 721**, observed as follows:

"21. In Kashmira Singh case the co-accused, Gurcharan Singh made a confession. The question arose whether the confession could be relied upon to prove the prosecution case against the Appellant Kashmira Singh. In that context, Bose, J. Speaking for a Bench of three Judges laid down the law that the court requires to marshal the evidence against the accused excluding the confession altogether from consideration. If the evidence dehors the confession proves the guilt of the Appellant, the confession of the co-accused could be used to corroborate the prosecution case to lend assurance to the Court to convict the Appellant. The Court considered the evidence led by the prosecution, dehors the confession of co-accused and held that the evidence was not sufficient to bring home the guilt of Appellant Kashmira Singh of the charge of murder. The Appellant was acquitted of an offence under Section 302 IPC but was convicted for the offence under Section 201 IPC for destroying the evidence of murder and sentenced him to seven years' rigorous imprisonment.

22. xxx xxx xxx

23. In ***Haricharan Kurmi v. State of Bihar***, a Constitution Bench was to consider as to when the confession of co-accused would be used



as evidence under Section 3 of the Evidence Act. It was held that the confession of a co-accused can not be treated as substantive evidence. If the court believed other evidence and felt the necessity of seeking an assurance in support of its conclusion deductible from the said evidence, the confession of the co-accused would be used. It was, therefore, held that the court would consider other evidence adduced by the prosecution. If the court on confirmation thereof forms an opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of the guilt of the accused. It is, thus, seen that the distinction has been made by this Court between the confession of an accused and uses of a confession of the co-accused at the trial."

21. Thus, what emerges from the above discussion is that before using the confession of a co-accused, the Court has to, first, marshal the evidence against the accused, who is sought to be roped in with the help of the confession of the co-accused, and if, on such marshalling of evidence, the Court finds that independent of the confession of the co-accused, the evidence on record reveals sufficient incriminating materials for believing the complicity of the accused in the offence, then, in such an event, the confession of the co-accused can be used as a supporting piece of evidence for lending assurance to the other evidence on record and it can also be used in order to

fortify the Court in believing that the conclusion that it had reached that the accused is guilty is correct.

22. In short, the confession of a co-accused is not such substantive piece of evidence on which can rest the entire foundation for conviction of the accused, who is not the maker of the confession. Far from this, confession of a co-accused can be used merely for the purpose of lending assurance to the conclusion already reached by the Court that the accused, against whom the confession of a co-accused is sought to be used, already stands proved to have committed the offence. It is in this context that the decisions in **Kashmira Singh** (supra) and **K.I. Pavunny** (supra) need to be read. There is no impediment, we feel impelled to clarify, in basing the conviction of an accused on his own confession if the confession is found to be voluntary and true, though, generally, corroboration of such a confession is desirable.

23. In the present case if the evidence of the confession of the co-accused, namely, Balsam Sah, is kept excluded from the purview of this Court's consideration, it becomes transparent and there is no evidence, either direct or circumstantial, showing, far less proving, that accused-respondent Nos. 1 and 2 had committed rape on **RK** and/or killed her by throwing her into the river.

24. When there is no substantive piece of evidence

against accused-respondent Nos. 1 and 2 having committed rape and killed **RK**, the confession of the co-accused, which is merely corroborative in nature, could not have been used for the purposes of convicting the accused-respondent Nos. 1 and 2.

25. For the reasons, which we have recorded above, we are clearly of the view that the finding, reached by the learned trial Court, as regards the fact that the prosecution could not prove its case beyond reasonable doubt against accused-respondent Nos. 1 and 2 suffers from **no** infirmity, legal or factual.

26. Coupled with the above, it is settled principle of law that the judgment and order, recording acquittal of an accused by a trial Court, can be interfered with only when it is shown that the findings of the trial Court are perverse and/or the view taken by the learned trial Court could not be reasonably possible view.

27. We hasten to point out that since the convict, Balram Sah, has not yet preferred appeal, we make no comment on the correctness, legality or validity of his conviction and the sentences passed against him.

28. In the result and for the foregoing reasons, we are of the considered view that the impugned judgment and order do not suffer from any such infirmity, legal or factual,

requiring interference by this Court as far as acquittals of the accused respondent Nos. 1 and 2 are concerned.

29. This appeal is, therefore, not admitted and stands accordingly dismissed.

(I. A. Ansari, ACJ)

(Navaniti Prasad Singh, J)

Pawan/-

AFR/NAFR	NAFR
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