

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.496 of 1993

Against the judgment of conviction dated 13th September, 1993 and order of sentence dated 15.09.1993 passed in Sessions Trial No.311 of 1990 (204 of 1990) by 5th Addl. Sessions Judge, Nalanda at Biharsharif.

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1. Mahesh Prasad, son of Vishundeo Mahto.
 2. Vishundeo Mahto, son of Late Bhatu Mahto.
 3. Uma Devi, W/o Vishundeo Mahto
- All residents of village Sultanpur, Police Station Rahuai, District-Nalanda.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mrs. Nutan Sahay, Advocate

For the Respondent/s : Mr. Abhimanyu Sharma, A.P.P.

CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 12-10-2017

Appellants herein, namely Mahesh Prasad, Bishundeo Mahto and Uma Devi are related to each other, being the son, father and mother respectively. They were charged for having committed offence under Section 302 read with Section 498A of the Indian Penal Code (for short, 'the Code') in the Court of 5th Additional Sessions Judge, Nalanda at Biharsharif in Sessions Trial No.311 of 1990 (204 of 1990) and vide judgment dated 13.09.1993, appellant No.1 Mahesh Prasad has been convicted to undergo rigorous imprisonment for life and all the three appellants to undergo two years rigorous imprisonment for offence under Section 498A of the



Code. Accordingly, it is clear that appellant no.1 stands convicted for offence under Section 302 and 498A of the Code and appellant Nos. 2 and 3 under Section 498A of the Code for two years rigorous imprisonment.

It is the case of prosecution that on 15.11.1989 at about 8.45 A.M. the prosecutrix, the informant herself, wife of appellant no.1 Mahesh Prasad, made a statement to the effect that she had come to her father's place at the village on the occasion of Dipawali and in the night of 14.11.1989, appellant no.1, her husband, came to her father's place at village Farida around 8 P.M. After meal, she was sleeping with him at about 10 P.M. It is said that after some time, he took out a tablet from plastic cover and inserted it on her private part (vagina). In the morning, she got up, she felt drowsiness and was unconscious, when, she came out of the room, fell down and told the fact to her family members, who took her to Rajpiya Hospital, Rahui, but she was directed to go to Biharsharif Hospital, but she died on the way. It is said that in the hospital, a dying declaration was recorded and based on the same, the prosecution was made and the appellants convicted.

Challenging the conviction, this appeal has been filed by the appellants.



Learned counsel for the appellants, who has been appointed as *amicus curiae* by us, pointed out that in this case, the entire prosecution and the conviction is based on the so called FIR and the subsequent dying declaration said to have been recorded in the Hospital where the prosecutrix died. She argues that in the FIR, Ext.-6, and in the so called dying declaration, Ext.-2, the entire story of the prosecutrix is that appellant No.1 inserted a tablet on her vagina. She took us through the statement of Dr. Sridhar Narain Singh, P.W.13, who had conducted the postmortem examination of the deceased and the postmortem report brought on record which goes to show that the deceased died because of poisoning and the poisonous substance was found in the stomach as narrated by the doctor. It is surprising that if death occurred due to poisoning and the stomach was found to be the place where poisonous substance was found, then the story of the prosecution becomes doubtful. Learned counsel for the appellants invites our attention to para 10 of the statement of the doctor in cross-examination to point out that poison is taken orally and in this case also, according to the opinion of the doctor, poison has been taken or administered orally. That apart, she points out that the doctor specifically admits that there is no direct link between the vagina



and the stomach and argues that the entire story of the prosecution is falsified from the medical evidence that has come on record.

As far as dying declaration is concerned, learned counsel argues that the dying declaration, Ext.-2, has been recorded by the Police Officer, even though the medical officer and the doctor were present in the hospital when the dying declaration was recorded. The statement of the doctor to the effect that the prosecutrix was in a fit state of mind to give her dying declaration is not endorsed and it is not known as to why after requisition was sent to the Executive Magistrate to be present at the time of recording the dying declaration, namely the C.O. of Rahui Block, why the dying declaration has not been recorded in accordance to the requirement of law, but has been recorded without taking note of the opinion of the doctor. Learned counsel for the appellants argues that the entire of the prosecution is unsustainable.

Even though learned counsel for the State tried to argue that the case has been properly proved with regard to commission of offence by the appellant, we find that there are various lacunas and defects in the case of the prosecution.

In the present case, even if we assume that the statement given by prosecutrix and the FIR lodged by her and the dying declaration, Ext.-2, are correct and trustworthy, then it is the case



of the prosecution that appellant no.1, who is the husband of the prosecutrix, is said to have inserted a medicine on her private part which resulted in her suffering consequence and ultimately succumbing to the same. There is nothing either in the FIR or in the dying declaration that she was administered poisonous substance orally by inserting it on her mouth. If the medical evidence that has come on record is taken note of, P.W.13 Dr. Sridhar Narain Singh, who had examined the body of the prosecutrix, speaks about finding mucous of the stomach congested with pungent odour sticky substance present. He does not find any defect or injury on the private part. He gives an opinion that death occurred due to poisoning. Viscera is said to have preserved and sent for chemical examination, but no such report of medical expert or chemical analyst as opined by the doctor was obtained. In cross-examination, the doctor speaks about death due to poisoning and he also admits that poison is generally taken orally or it can be administered orally by somebody. He also speaks about there being no connection between a vagina and stomach. The doctor does not say about death occurring due to insertion of tablet or medicine on the private part of the prosecutrix. That being so, it is a case where the evidence does not



support the case of the prosecution which is based on the dying declaration or the FIR.

In the case of **Khushal Rao Vs. State of Bombay**, AIR 1958 SC 22, after analysing the provision of Section 32 of the Evidence Act it has been observed by the Hon'ble Supreme Court that a dying declaration has to be subjected to a very close scrutiny and the dying declaration has to be to have a corroboration from other evidences.

If the case in hand is analyzed in the backdrop of the corroborative evidence that has come on record, it is clear that the only corroborative evidence is the medical evidence available on record and the same does not support the story as put forth by the prosecution. That apart, the dying declaration, Ext.-2, also becomes a suspicious document as it does not reflect the medical, mental and physical condition of the prosecutrix before its recording. It is surprising that the dying declaration was recorded in a Hospital where the doctor and other medical experts were present and in spite thereof there is no statement by the Medical officer to show that the prosecutrix was in a fit state of mind to record her dying declaration. Even if for a moment, it is assumed from the statement of some of the witnesses that the private part of the deceased was washed before taking her to the hospital, then the



poisonous substance coming to the stomach is not explained by the prosecution. The benefit of these circumstances have to go to the appellants and once the recording of the dying declaration itself becomes suspicious and when the witnesses, who have testified it, which include P.W.4 father of the prosecutrix, P.W.3 Baleshwar Mahto, uncle of the prosecutrix, speak about the prosecutrix being in an unconscious condition not able to speak properly. There has to be enough evidence available on record to show that the prosecutrix was in a fit state of mind to record the dying declaration.

That apart, we find from the record that with regard to conviction of the appellant under Section 498A of the Indian Penal Code, except for some vague and bald statement of P.W.4, the father of the prosecutrix, and other relatives of the deceased to say that she was harassed for demand of dowry about two years back. There is no cogent evidence, complaint or material to show that there was demand of harassment for dowry.

Taking note of the totality of the circumstances, it is a case where we find that the prosecution has not proved its case beyond reasonable doubt and, therefore, as far as appellant no.1 is concerned, his conviction under Section 302 of the Indian Penal Code becomes unsustainable. As far as conviction of appellant



nos.1, 2 and 3 under Section 498A of the Code is concerned, there is no evidence of making out a conviction under Section 498A of the Code and, therefore, they are acquitted of the aforesaid allegation and charge also.

Accordingly, the appeal is allowed. The appellants are acquitted of the charges levelled against them. They be set free after discharge of their bail bonds.

(Rajendra Menon, CJ)

(Anil Kumar Upadhyay, J)

Sunil/-

AFR/NAFR	NAFR
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