

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.746 of 2015

Arising Out of PS.Case No. -56 Year- 2012 Thana -MAHILA PS District- JEHANABAD

Abhash Kumar Son of Umesh Sharma resident of Village - Ghejan, Police Station -
Shakurabad in the district of Jehanabad. Appellant.

Versus

The State of Bihar.

.... Respondent.

WITH

Criminal Appeal (SJ) No. 174 of 2015

Arising Out of PS.Case No. -56 Year- 2012 Thana -MAHILA PS District- JEHANABAD

1. Umesh Sharma Son of Kamdeo Sharma.
2. Indresh Devi, Wife of Umesh Sharma, Both are resident of Village- Ghejan,
P.S.- Shakurabad in the district of Jehanabad.

.... Appellants.

Versus

The State of Bihar.

.... Respondent.

Appearance :

(In CR. APP (SJ) No.746 of 2015)

For the Appellant/s : Mr. Ajay Kumar Thakur, Adv.
Mr. Jitendra Kumar Roy, Adv.

For the Respondent/s : Mr. Abhay Kumar, A.P.P.

(In CR. APP (SJ) No.174 of 2015)

For the Appellant/s : Mr. Ajay Kumar Thakur, Adv.
Mr. Jitendra Kumar Roy, Adv.

For the Respondent/s : Mrs. Abha Singh, A.P.P.

CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL

ORAL JUDGMENT

Date: 12-10-2017

As the aforesaid two criminal appeals have cropped up from the common judgment, hence both these two appeals are taken up together for hearing and disposed of by this common judgment.

2. Criminal Appeal (SJ) No.746 of 2015 has been preferred by Abhash Kumar and Criminal Appeal (SJ) No.174 of 2015 has been preferred by Umesh Sharma and Indresh Devi against



the common judgment and order of conviction dated 19.03.2015 and order of sentence dated 20.03.2015 passed by the Sessions Judge, Jehanabad in Sessions Trial No.376 of 2014, arising out of Jehanabad (M) P.S. Case No.56 of 2012, whereby the learned trial Court convicted the accused Abhash Kumar, Umesh Sharma and Indresh Devi for the offence punishable under Section 304 B/34 of the Indian Penal Code and sentenced them to undergo rigorous imprisonment for 10 years each for the offence punishable under Section 304 B/34 of the Indian Penal Code.

3. The factual matrix of the case is that Jehanabad (M) P.S. Case No.56 of 2012 was instituted under Section 498 A/ 307/326/34 of the Indian Penal Code against the accused Abhash Kumar, Amod Kumar, Ankit Kumar, Umesh Sharma father of Abhas Kumar and mother of Abhash Kumar, on the basis of written report of Nutan Devi, wife of Kapildeo Sharma, resident of village Bhadseri, P.S. Kako Distric Jehanabad with the allegation in succinct that the marriage of her daughter, namely, Khusboo Kumari was performed with Abhash Kumar on 13th March, 2012 but since couple of days later to the marriage the accused persons, namely, Abhash Kumar, Amod Kumar, Ankit Kumar, Umesh Sharma father of Abhas Kumar and mother of Abhash Kumar started demanding Rs.2 lakhs and a motorcycle and subjecting her to torture. On 10.11.2012 at about 7:30



AM there was a missed call of Abhash Kumar on the mobile phone of her son Ashutosh Kumar. Then she called back to him whereupon Abhash Kumar asked to him to send Rs.2 lakhs and a motorcycle extending the threatening of dire consequences to her daughter. But, she vented her inability to cough up the aforesaid demand. Scaring with the aforesaid episode, when she along with her son, Ashutosh Kumar arrived at the rented house of Abhash Kumar, she found the people flocked there and her daughter lying in a room in badly burnt condition and unconscious. Then they rushed her daughter to Jehanabad Sadar Hospital from where she was referred to Patna Medical College & Hospital, Patna (hereinafter referred as PMCH). Further allegation is that one week back while in-laws of her daughter assaulted her by means of belt and danda, her daughter has complained her about the aforesaid thrashing. Further allegation is that the accused persons also used to subject her daughter to harassment as she failed in the matriculation examination uttering to perform marriage of her husband with some literate lady. The informant has claimed that due to the aforesaid reasons all the accused persons set her daughter ablaze and absconded after locking the room.

4. Aforesaid case was investigated by the police and on conclusion of the investigation, the Investigating Officer submitted the chargesheet against the accused Abhash Kumar under Sections



498 A/307/326/304 B/34 of the Indian Penal Code and Section 34 of the Dowry Prohibition Act, keeping the investigation pending against accused Amod Kumar, Ankit Kumar, Umesh Sharma and Indresh Devi showing them absconder. Subsequently, the I.O. submitted chargesheet under Section 498 A/307/326/304 B/34 of the Indian Penal Code and Section 34 of the Dowry Prohibition Act against the aforesaid accused persons.

5. After receiving the chargesheet and case diary and perusing the same, the learned Magistrate took cognizance of the offence and committed the case to the Court of Sessions. After transfer, the case finally came in the seisin of the learned Sessions Judge, Jehanabad.

6. The charge against the accused persons was framed under Sections 304 B and 302/34 of the Indian Penal Code. Charges were read over and explained to the accused persons, to which they pleaded not guilty and claimed to be tried.

7. To substantiate its case in ocular evidence, the prosecution has examined altogether 8 prosecution witnesses, namely, Nutan Devi (informant) as P.W.1, Kapildeo Sharma, the father of the deceased as P.W.2, Renu Devi, cousin sister of the deceased as P.W.3, Ashutosh Kumar, brother of the deceased as P.W.4, Nand Kishore Pandey, landlord of the accused Abhas Kumar, as P.W.5, Pankaj



Kumar, doctor, who conducted the autopsy on the dead body of the deceased, as P.W.6, Ravi Ranjan, the then Judicial Magistrate, Patna as P.W.7 and Pritee Kumari, I.O. of the case, as P.W.8. Out of the aforesaid witnesses P.Ws.1, 2, 3 & 5 turned hostile. In documentary evidence, the prosecution has filed and proved several documents.

8. The statements of the accused persons were recorded under Section 313 Cr.P.C. The case of the defence is complete denial of the occurrence. The accused persons have neither adduced any ocular nor documentary evidence in buttress of their case.

9. After hearing the parties and perusing the record, the learned trial Court passed the impugned judgment and order of conviction and sentence as stated in earlier paragraph.

10. Being aggrieved and dissatisfied with the aforesaid judgment and order of conviction and sentence, the convicts have preferred aforesaid two appeals.

11. The point for consideration in this case is, as to whether the prosecution has been able to bring home the charges levelled against the appellants beyond all reasonable doubt or not.

12. It is submitted by learned counsel for the appellants that all the material witnesses who happens to be informant, father of the deceased, cousin sister of the deceased,



landlord of the accused appellant-Abhas Kumar have turned hostile. Though the brother of the deceased, namely, Ashutosh Kumar, P.W.4 has not turned hostile but he has not supported the prosecution case. Thus, the only material left to be considered against the appellants is the so called dying declaration of the deceased Khusboo Kumari recorded by the Magistrate in the PMCH, Patna, marked as Ext.5 but the said document is not admissible in evidence as the original document has not been brought on record and the prosecution has also not proved that the original is destroyed or lost. It has also not proved that the photostat copy has been prepared from the original document by mechanical process and it is true photostat copy of the same. It also does not bears any certificate regarding comparing of the Ext.5 with its original and finding the same true. It is further submitted by learned counsel for the appellants that the Magistrate, who has recorded the aforesaid statement of the deceased, has given certificate to the effect that the deceased was mentally fit at the time of recording her statement on the basis of questions put to her and her reply given responding the same but the said conversation in question and answer between the Magistrate and the deceased has not been brought on record and it is also not mentioned in Ext.5. So the basis of the satisfaction of the Magistrate regarding the mental state of the deceased has not been proved by the prosecution. The statement of



the victim was recorded in the PMCH where round the clock doctors and nurses are present but no doctor or nurse has given any certificate regarding mental health of the deceased to the effect that she was mentally fit to give the statement. Moreover, the Magistrate, while recording the statement of the deceased, has himself stated that the victim was feeling hardship in giving statement and was not in a position to give the details of the incident. The said aspect of the case itself indicates that the deceased was not mentally fit to give such statement. Hence, the aforesaid statement of the deceased recorded by the Magistrate cannot be based for holding conviction of the appellants. Thus, the case in hand is actually a case of no evidence and the prosecution has utterly and miserably failed to substantiate the charges levelled against the appellants beyond all reasonable doubt by adducing consistent, reliable and trustworthy ocular and documentary evidence. Hence, the appellants are entitled to be acquitted.

13. On the other hand, learned A.P.P. advocating the correctness and validity of the impugned judgment and order of conviction and sentence has submitted that though the material witnesses turned hostile and one material witness, who happens to be the brother of the deceased, has also not supported the prosecution case. But P.W.7-Ravi Ranjan, the Judicial Magistrate, who has recorded the dying declaration of the deceased, has proved the factum



of recording the dying declaration of the deceased at PMCH, Patna stating that the deceased was mentally fit to give the statement as she was responding the queries made by him promptly and the victim in her dying declaration has supported the allegations levelled against the appellants. Considering the facts and circumstances of the case and the aforesaid dying declaration and other evidence available on record, the learned trial Court has rightly passed the impugned judgment and order of conviction and sentence which is liable to be upheld and these appeals have no substance and are liable to be dismissed.

14. From perusal of the record, it appears that there are five material witnesses of the case, namely, P.W.1- Nutan Devi (informant), P.W.2-Kapil Deo Sharma, who happens to be the father of the deceased, P.W.3-Renu Devi, who happens to be the cousin sister of the deceased, P.W.4-Ashutosh Kumar, brother of the deceased and P.W.5-Nand Kishore Pandey, who happens to be the landlord of the appellant Abhash Kumar. All the aforesaid material witnesses, barring P.W.4, turned hostile and in their respective examination-in-chief not supported the prosecution case. Though P.W.4-Ashutosh Kumar has not turned hostile. But from perusal of his testimony, it appears that P.W.4 has also not supported the prosecution case albeit in his examination-in-chief he has stated that



on getting information on phone about burning of his sister he rushed to her marital house and rushed the victim to the Sadar Hospital, Jehanabad to accord her medical aid but he has denied the entire allegations levelled against the appellants by the informant in her written report. In his cross-examination, he has stated that accused Abhash Kumar had informed him on mobile phone about burning of his sister and he had accompanied him to Jehanabad Sadar Hospital and thereafter to PMCH, Patna to rush the victim there. Abhash Kumar and his family members never demanded any dowry from him. His sister has never made any complain with him against her husband and in-laws about making of dowry demand and subjecting her to cruelty for the same by them. Thus, from perusal of the aforesaid ocular evidence of the prosecution, it appears that none of the material witnesses, examined by the prosecution has supported the prosecution case.

15. Now, the only material left to be considered against the appellants is the statement of the victim recorded by the Magistrate, Ravi Ranjan under Section 164 Cr.P.C. marked as Ext.5 as dying declaration of the deceased. On perusal of said statement it appears that it is not the original statement of the victim under Section 164 Cr.P.C. rather the photostat copy of the same. The prosecution has not established that the original of the said document is either lost



or destroyed. Moreover, from perusal of the statement of the Magistrate, Ravi Ranjan (P.W.7), it appears that he had recorded the statement of the victim in compliance of the order of the Chief Judicial Magistrate, Patna and after recording the statement he has deposited in the Court of C.J.M., Patna. Meaning thereby that the original statement of the victim must be in the office of the C.J.M., Patna. But from perusal of the record, it appears that the original statement of the deceased was called for by the Sessions Judge, Jehanabad from the GR Clerk of the office of the C.J.M., Jehanabad and the said clerk had reported to the Court that the original copy of the statement under Section 164 Cr.P.C. was searched out by him but it could not be detected and available in this office as evident from the order-sheet dated 13.01.2015 and 29.01.2015 of the aforesaid case. As per the statement of P.W.7 as the original statement of the deceased was deposited by him in the office of the C.J.M., Patna the said document was not summoned from the said office rather from the GR office of the C.J.M., Jehanabad. Thus, it appears that the prosecution has not made any diligent and earnest effort to summon the original document from the place where it was kept. As per Section 65 of the Indian Evidence Act secondary evidence may be given of the existence, condition or contents of the document, inter alia, when the original has been destroyed or lost, or when the party offering



evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time. But, in the case under hand, the prosecution has not taken any diligent effort to bring the original document from the proper place and has also failed to prove that the original document is either destroyed or lost. Hence, the photostat copy of the said statement filed by the prosecution cannot be considered as secondary evidence. Moreover, the prosecution has failed to substantiate as to from where he has procured the photostat copy of the statement and as to whether the said photostat copy was prepared from the original one by mechanical process and it was found to be true after comparing the same from its original as the said document does not contain any certificate in this regard and the prosecution has also not adduced any evidence thereon. In view of the aforesaid facts, aforesaid document though exhibited as Ext.5, is not admissible in the evidence as merely marking the document as exhibit by itself does not make it admissible in the evidence rather the admissibility of the document is considered considering the facts and circumstances of the case & its relevancy etc.

16. From perusal of the statement of Ravi Ranjan (P.W.7), the then Judicial Magistrate, Patna, it appears that he has stated in his examination-in-chief that the victim was badly injured but she was competent to give reply to the questions put to her by



him. He has also recorded a certificate in this regard before recording her statement but in paragraph-4 of his cross-examination he has stated that the questions put by him is not mentioned in Ext.5. From perusal of the photostat copy of the statement of the victim recorded under Section 164 Cr.P.C. marked as Ext.5, it appears that the question put by the Magistrate and the reply given by the victim which is the basis of forming opinion by the Magistrate that the victim was mentally fit to give the statement is not mentioned in Ext.5 rather the Magistrate has simply given the certificate that she is able to answer the queries with little hardship. The aforesaid statement of the victim was recorded in PMCH, Patna, which is a premier hospital of Patna where doctors are available round the clock. Moreover, the victim was admitted in burn ward which happens to be the emergency ward. Doctors are always available in the said ward to meet the emergency but the Magistrate has not taken any pain to summon any doctor to take his certificate regarding the mental condition of the victim before recording the statement of the victim rather he has mentioned in the said statement that no medical officer was available, which appears to be a lame excuse of the Magistrate. Thus, there is no certificate of the doctor that the deceased was mentally fit to give the statement.

17. From perusal of statement of informant (P.W.1),



it appears that she and his son Ashutosh Kumar were with the victim in the PMCH but the signature of the aforesaid persons had not been taken on the said statement and the said witnesses have not corroborated recording of aforesaid statement of the victim. Moreover, from perusal of the records, it appears that the statement of the victim was recorded on 18.12.2012 but she has died on 15.01.2013 i.e. after long span of time of around one month and the Magistrate in Ext.5 has stated that the victim was feeling hardship in giving statement and was not in a condition to furnish all details of the incident, which means that the victim was not in such a mental condition to give the entire details of the incident. In such a situation, the Magistrate ought to have avoided recording the statement of the victim at that moment and waited for her recovery from ailment. The aforesaid certificate of the Magistrate also indicates that the victim was not mentally fit to give the statement. From perusal of Ext.4, postmortem report of the deceased and evidence of the doctor, P.W.6, who has conducted the autopsy of the dead body of the deceased, it appears that the doctor has stated that he has found epidermal to deep burn injury all over the body except both hands, lower pelvis, back of chest, abdomen and both side buttock. The said aspect of the case indicates that the entire frontal portion of the deceased right from waist to head was burnt. The Magistrate has stated in his statement



that the victim was badly burnt. The aforesaid aspect of the case candidly indicates that the victim was badly burnt and must have been in such a state of trauma and mental agony and pain that she could not give her statement in fit mental condition. The said dying declaration also does not stand corroborated by any other evidence. In my considered opinion, the appellants cannot be convicted relying solely on such an inadmissible and uncorroborated dying declaration.

18. The Hon'ble Apex Court in the case of **Ramilaben Hasmukhbhai Khristi Vs. State of Gujrat with two other analogous cases** reported in (2002) 7 Supreme Court Cases 56 has been pleased to rule that the Doctor's certificate merely stating that the patient was conscious not enough, the dying declarations of the deceased who had sustained 90% burn injuries were not trustworthy and reliable and in absence of any other corroboration accused cannot be convicted under Section 302/120-B of the Indian Penal Code solely on the basis of those dying declarations. The conviction solely on basis of dying declaration is possible if it is free from doubt, inspires confidence and has been recorded as per the law. The Hon'ble Apex Court in the case of **Paparambaka Rosamma and others Vs. State of A.P.** reported in (1999) 7 Supreme Court Cases 695 has been pleased to rule that where conviction is solely based on the dying declaration, Court has to consider carefully the



dying declaration and the evidence of the witnesses supporting it viz. the Magistrate who recorded the statement of the deceased and the doctor who examined the deceased in the hospital. Doctor's certification not only about consciousness but also about fit state of mind of the deceased that existed before recording of dying declaration is essential instead, note made by the Magistrate who recorded the dying declaration that deceased was fit to make the statement and certificate given by the doctor at the end of dying declaration by merely stating that the patient was conscious while recording the statement is not in compliance with the requirement and in view of these serious infirmities as also some other infirmities, it was unsafe to base the conviction of the accused solely on such dying declaration.

19. Considering the aforesaid facts and circumstances, I find and hold that the prosecution has utterly and miserably failed to substantiate the charges levelled against the appellants beyond all reasonable doubt by adducing consistent, trustworthy and reliable ocular and documentary evidence. Hence, the impugned judgment & order of conviction and sentence passed by the learned lower Court is set aside and the appellants are acquitted from all the charges levelled against them. As the appellants, Umesh Sharma and Indresh Devi are on bail, they are discharged from the



liabilities of bail bonds and as the appellant-Abhash Kumar is in custody, he is directed to be released forthwith, if not wanted in any other case.

20. Accordingly, both these appeals are allowed.

(Prakash Chandra Jaiswal, J.)

Trivedi/-

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