

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.355 of 2012

Arising Out of PS. Case No.-71 Year-2007 Thana- JAGDISHPUR District- Bhagalpur

Md. Pappu @ Kalim, S/O Md. Salim @ Sujan Tailor, R/O Habibpur, P.S.-
Habibpur, Distt-Bhagalpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Sanjeev Kumar, Advocate Mr. Manoj Vatsal, Advocate
For the Respondent/s	:	Mr. D.K.SINHA (APP)

CORAM: HONOURABLE DR. JUSTICE RAVI RANJAN
and
HONOURABLE MR. JUSTICE S. KUMAR
ORAL JUDGMENT
(Per: HONOURABLE DR. JUSTICE RAVI RANJAN)

Date : 02-11-2017

We have heard parties and perused the records of this case.

The appellant has filed this appeal assailing the judgment of conviction dated 17.03.2012 and order of sentence dated 19.03.2012 passed by the Additional Sessions Judge, F.T.C.-3, Bhagalpur in Sessions Trial No. 833 of 2009/Trial No.65 of 2010 arising out of Jagdishpur (Habibpur) P.S. Case No.71 of 2007 by which he has been convicted for the offences punishable under Sections 302, 498 A, 452 and 326 of the Indian Penal Code and he has been sentenced to undergo imprisonment for life under Section 302 IPC and also a fine of



Rs.5000/- and in default to pay fine, to undergo further imprisonment for one year. He has been further sentenced to undergo imprisonment for three years under Section 498A of the Indian Penal Code with a fine of Rs.1000/- and in default to pay fine, to further undergo imprisonment for three months. He has further been sentenced to undergo imprisonment for seven years under Section 452 of the Indian Penal Code with a fine of Rs.1000/- and in default to pay a fine, to further undergo three months imprisonment. He has also been sentenced to undergo rigorous imprisonment for seven years under Section 326 of the Indian Penal Code with a fine of Rs.1000/- and in default to pay fine, to further undergo imprisonment for three months.

It is alleged in the fardbeyan of informant (deceased) that since last three years, she was living in her 'Naihar' in Shahjangi and used to make 'Bidi'. The husband (appellant) of the deceased used to regularly come to her house from Habibpur with some persons and used to drink in her house. It is further alleged that on 14.04.2007 also 6-7 persons and her husband came to her house and started abusing on road and threatened that he would see her. It is further alleged that her husband married to another lady 6-7 months back. On 15/16.04.2007 at about 3.00 A.M. in the morning, he entered into her house by



crossing the boundary wall with the help of bamboo and poured kerosene oil and set her on fire and after that he fled away with the help of same bamboo. On raising alarm, her mother saw that the appellant fled away from the house of the deceased by using bamboo. Due to fire, she sustained multiple burn injuries. She was taken to Mayaganj Hospital by her mother where after regaining consciousness, she gave statement before Sri B.N. Singh, S.I of Barari Police Station which he recorded and was read before her mother and she put her L.T.I. on it.

On the basis of aforesaid fardbeyan of the informant, the police registered a case under Sections 498A, 452, 326 and 307 of the Indian Penal Code vide Jagdishpur P.S. Case No. 71/2007. Thereafter, the deceased had died, as such, Section 302 of the Indian Penal Code was also added. The police took up the investigation of the case. After investigation, the police submitted charge sheet against the appellant under the aforesaid sections of the Penal Code showing the appellant absconder. Thereafter, the Chief Judicial Magistrate, Bhagalpur took cognizance under Sections 452, 326, 307 and 302 of the Penal Code. The case has been committed to the court of sessions, where charges were framed under Sections 498A, 452, 326, 307



and 302 of the Indian Penal Code, to which, the accused person pleaded not guilty. Thereafter, trial started against the appellant.

During trial, the prosecution has examined altogether ten witnesses in support of its case. P.W.1 is Bibi Nasreen, P.W. 2 is Md. Idrish, P.W.3 is Bibi Basima, P.W. 4 is Bibi Julekha, P.W. 5 is Bibi Tajo, P.W. 6 is Nathuni Singh Yadav, P.W. 7 is Rukshar, P.W. 8 is Ganesh Prasad Thakur, P.W. 9 is Shyam Bihari Singh and P.W. 10 is Dr. Arun Kumar Singh.

The defence has also examined Md. Riyaz, Md. Nishar, Md. Sajjad Warishi and Sharfullaq on his behalf.

The trial court after hearing learned counsel for the parties and considering the evidence on record came to the conclusion that the prosecution has been able to prove the charges against the appellant and, accordingly, the aforesaid judgment of conviction and order of sentence has been passed.

Now this Court is required to reappraise the prosecution evidence to see as to whether the prosecution has been able to substantiate its case beyond shadow of all reasonable doubts or not?

A question arises in this case for consideration as to whether the concerned statement under Section 161 of the



Cr.P.C recorded by the police of the deceased before her death at P.M.C.H can be considered as dying declaration?

It has been stated on behalf of the appellant that no dying declaration is actually exhibited or even there is no dying declaration on record. What has been recorded under Section 161 of the Cr.P.C is merely an information of the police officer, who had stated that in his presence the deceased had given such statement when the mother and others were present besides her bed. That Statement could have been reduced to writing after signature of the persons having been obtained but there is no such document on record. In such a situation, statement recorded by police under Section 161 of the Cr.P.C, whether could be considered as dying declaration? Question would be whether the fardbeyan of the deceased recorded by A.S.I Bishwanath Prasad Singh at Mayaganj Hospital upon which the FIR was registered on the alleged statement given by the deceased Munni Devi, can be considered as dying declaration? The unfortunate part is that this FIR has not been exhibited. That apart, the police officer, who had recorded the statement of Bibi Munni (deceased), has not been examined as witness. Though the mother of the deceased, namely, Bibi Tajo appears to have signed the fardbeyan as witness but, in her examination, she has



nowhere stated that in her presence the statement of the deceased was recorded by A.S.I. Bishwanath Prasad Singh. The trial court while dealing with the issue, specially in paragraph no. 27 of the impugned judgment, has referred the decision of the Apex Court rendered in ***MukeshBhai GopalBhai Barot vs State of Gujarat reported in (2010) 12 SCC 224***, wherein it has been held that the statement recorded under Section 161 of the Cr.P.C can be treated as dying declaration after the death of the concerned person, however, in that case such dying declaration was exhibited as Exhibit-48. Reference has also been made on the judgment of the Apex Court in the case of ***Ram Bihari Yadav vs State of Bihar reported in AIR 1998 SC 1850***.

In the present case, neither the dying declaration has been separately recorded by the police nor is the same available on record save and except statement in this regard recorded by the police under Section 161 of the Cr.P.C, which has not been exhibited. That apart, case diary has also not been exhibited.

In such situation, it would be very difficult for this Court to accept the concerned statement as dying declaration. Apart from above, the Investigating Officer has stated in his evidence while being examined as PW-9, that he had recorded the statement of the deceased in the presence of the witnesses, such as, her



mother Bibi Tajo and Md. Asif at hospital, whereas, Bibi Tajo, while being examined as PW-5 has categorically stated during cross-examination that police had recorded her statement only once and that was recorded at the place of occurrence. This statement gives rise to another contradiction as PW-9, i.e., the Investigating Officer had stated that at the place of occurrence he recorded statement of Bibi Wasima, Bibi Julekha, Rukhsar, Bibi Nasrim, Md. Idrish and Md. Jamal only. He has not stated that he had recorded the statement of Bibi Tazo also. He has only referred that the statement of Bibi Tazo has been recorded in paragraph no. 37 of the case diary, whereas, case diary reflects that her statement had already been recorded at para 24 after the alleged statement of deceased in para 23. This gives rise to so many contradictions. Even the statement of the deceased allegedly recorded under Section 161 of the Cr.P.C in presence of the witnesses, as has been stated by the investigating officer (PW-9), is not available on record. In absence of such, in our view, the statement allegedly recorded by the police under Section 161 of the Cr.P.C, which has not been exhibited or the FIR; cannot be considered as dying declaration in the present case.



Almost all the witnesses have become hostile. From the various statements made by the mother of the deceased also, it appears that she was also not present at the place of occurrence. She has stated in her deposition while being examined as PW-5 that her house was three house away from the place of occurrence and on alarm being raised by the deceased, she reached there. The only thing, she says that she had seen the appellant fleeing away from the place of occurrence. She has nowhere stated that she had seen the occurrence. In the fardbeyan the deceased had not stated that her mother was present at the time of occurrence in the concerned house. She has also not stated that on alarm being raised her mother came to the place of occurrence and she had seen the appellant fleeing away from the place of occurrence. It is also apparent from the records that the relationship between the husband and wife was not good and the wife had already lodged a case under Section 498A of the Indian Penal Code, in which compromise has been reached between the parties. The husband had married another woman also. Therefore, there can be a case of false implication also. If an accused is to be convicted for the occurrence, a cogent and full proof evidence would be required. If such cogent evidence is not available then a doubt is created in the mind that



the case may be are of false implication. At the same time, the case may be the outcome of the strained relationship also.

In our considered view, unfortunately no positive and concrete evidence is available on record so that the appellant could have been convicted under Sections 302, 498A, 452 and 326 of the Indian Penal Code. Thus, the conviction by the trial court cannot be sustained and upheld.

In the result, this appeal succeeds. Judgment of conviction dated 17.03.2012 and order of sentence dated 19.03.2012 is set aside. The appellant, who is admitted in jail custody, would be required to be released forthwith, if not wanted in any other case.

(Dr. Ravi Ranjan, J)

(S. Kumar, J)

V.K.Pandey/-

AFR/NAFR	N.A.F.R.
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