

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.848 of 2015

Arising Out of PS. Case No.-202 Year-2006 Thana- ALOULI District- Khagaria

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Dilip Yadav Son of Late Lagan Yadav, Resident of Village - Barisimraha,
P.S. - Alauli, District - Khagaria.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Ram Sumiran Rai, Advocate
For the Respondent/s : Mr. S.N.Prasad, APP

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CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL
and
HONOURABLE MR. JUSTICE MADHURESH PRASAD
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL)

Date : 01-09-2017

The appeal is filed by the sole appellant to challenge the correctness of the judgment of conviction dated 19.08.2015, passed by learned Additional Sessions Judge III, Khagaria in Sessions Trial No. 7 of 2008 whereby the appellant was held guilty under Sections 302 and 457 of the Indian Penal Code and was directed to suffer R.I. for life under Section 302 of the IPC whereas no separate sentence was inflicted for the charge under Section 457 of the IPC.

2. The prosecution case as adumbrated in the written report submitted by PW-3 on 20.12.2006 before the Station House Officer, Allauli (PW9) giving rise to a formal FIR (Ext. 2), in brief, is that on the night of 17.12.2006 the



informant was sleeping with his wife Lukhia Khatoon (deceased) and five other small children . The door of the room was shut by a makeshift door (tatty/Dhadi). At about mid night the appellant along with other co-accused(s) entered into the room and attempted to commit rape on the victim. A protest was offered by her. A frustrated appellant thereafter fired hitting her near the right eye. The sound of gun fire attracted witnesses. The appellant and other accused(s) thereafter fled away. The injured was first carried to local Primary Health Centre at Bakhari. After giving some first aid she was referred to the District Hospital at Begusarai where she was treated for few days and again referred to PMCH. She remained under treatment at PMCH and thereafter returned home and within few days thereof she died.

3. On presentation of the written report, a formal FIR was drawn. The endorsement made to this effect by the SHO is Ext.3. The PW9 himself took up investigation and inspected the place of occurrence which is a one room house. The walls were made of 'Tatti' . The roof was thatched with straws and polythene . A Tatti was used to block the door. He could notice blood inside the room where the deceased was sleeping on the relevant night. The statement of



the witnesses including the daughter of the victim (PW1), son of the victim (PW5) and the informant was recorded. On hearing that the victim after her return was putting up with her 'Mama', the I.O. went to record her statement on 24.1.2007. Three days thereafter the injured/victim died of the injuries. The dead body was brought to the Allauli Police Station on a Cart where the death inquest proceeding was carried out and the dead body was dispatched for post mortem examination. PW-8 was then posted as the Medical Officer, Sadar Hospital, Khagaria. With the assistance of other doctors the autopsy on the cadaver was conducted on 28.01.2007 at 3.40 PM. The post mortem report (Ext.1) was made available to the I.O. As the appellant was found absconding, the I.O. laid the charge sheet on 28.6.2007 showing him an absconder. Later, the appellant surrendered. The case was committed to the Court of Sessions which ultimately came on the file of the learned Trial Judge where charges were framed and read over to the appellant to which he pleaded not guilty and claimed a trial. The defence of the appellant is complete denial of the occurrence and his false implication.

4. To prove the guilt of the appellant, the prosecution examined 09 prosecution witnesses. PW1 Khushboo Khantoon



is the daughter of the victim who was sleeping with her mother when the appellant attempted to commit rape on her and ultimately fired at her. She has narrated the prosecution case as an eye-witness. PW-2 Ismail Safi is a neighbour/gotiya of the informant. He claimed to have reached the place of occurrence upon hearing the sound of firing. The prosecution did not rely on his evidence and was declared hostile. PW3 is the informant himself. As per his evidence, during the relevant night he was sleeping on the verandah of the house when the accused persons entered into the room and committed the offence. He was first captivated and taken to some distance. After assaulting his wife with pistol, the appellant escaped from the place of occurrence. Noticeably, PW-3 was not cross examined by the defence. PW-4 Jaan Mohammad Safi gave out a hearsay account of the incident. His name did not figure in the written report. The counsel for the appellant has not referred to his evidence. On scrutiny, his evidence is found not much relevant. PW-5 is the son of the informant and the victim. He, too, was sleeping on the floor of the room with the victim/deceased when the appellant forced himself into the room and tried to commit rape on his mother and thereafter shot at her with the pistol he was carrying with. His ocular



evidence explicitly incriminate the appellant in the crime . PW 6 Akbar Ali was not present in the village. He reached the village around 08 days after the occurrence. The prosecution got him declared hostile. PW7 Gaffar Safi is the cousin of the informant. In his examination-in-chief, he stated that on hearing the sound of firing from the house of the informant he rushed there to find the victim lying in an injured condition having received gun shot injury on her face. He could see the small children of the victim present in the room. The prosecution got him declared hostile and cross-examined him with reference to his previous statement made during investigation before the I.O. PW-8 is the Autopsy Surgeon who was heading the team of doctors in conducting the post mortem examination on the cadaver. The report submitted by the Medical Board has been proved by him (Ext.1). For better appreciation, it is apposite to extract hereinbelow the relevant findings in the post mortem report:-

“External on examination-

(i) Multiple minute blackish spots (gun powder) on right side face.

(ii) One healed wounds $\frac{1}{4}$ cm in diameter on medial canthus of right eye cornea of right eye intact.

Internal on dissection-

(i) Brain and meninges were lacerated in right side orbital region of pineal cavity part of brain matter in temporal parietal region were



lacerated with haematoma and pus. There was fracture of temporal bone on right side.

(ii) A bullet (metallic) recovered from the right temporal partial region of pineal cavity. The recovered bullet was properly sealed in a glass vial levelled and handed over to the custodian sadar Hospital, Khagaria after signature of all the Board Members.

(iii) All the viscera, lung, liver, spleen and kidney were congested. Left side of the heart was empty and right contained blood.

Cause of death- Shock and septicemia due to above mentioned ante mortem infected brain injury caused by fire arms. Time elapsed since death approximately within 24 hrs of PM examination.”

5. PW-9 is the Station House Officer (SHO) of Allauli P.S. before whom the written report was submitted by the informant on 20.12.2006. He himself conducted the investigation and laid the charge sheet. In appreciation of the evidence of the prosecution adduced at the trial the learned Trial Court held the charges against the appellant proved under Sections 302 and 457 of the IPC. He was, however, acquitted of the charge punishable under Sections 376/511 of the IPC.

6. Heard Mr. Ram Sumiran Rai for the appellant and Mr. S.N.Prasad APP for the State.

7. It has been submitted by the defence that the FIR has been lodged after a delay of three days i.e. on 20.12.2006. The evidence on record manifest that the informant was not



present at home. He had arrived at the hospital. PWs 2,4,6 and 7 have been declared hostile. They have not supported the prosecution case. The remaining evidence suffers from serious discrepancies. He also contended that there is sharp discrepancy with regard to the means of identification.

8. The counsel for the State, on the other hand, supported the impugned judgment and submits that the delay is reasonably explained as the informant and the witnesses first made hectic efforts to provide medical aid to the victim. The ocular account given by PW-1 Khushboo and PW-5 Mannan Safi who were present with the deceased give full credence to the prosecution case as disclosed by the informant (PW3).

9. PW-3 is the informant. In his examination-in-chief, he has fully supported the prosecution case. After the escape of the accused he took his wife to the Sakarpura Govt. hospital in the night where some first aid was given to her and she was referred to Begusarai. The victim was then shifted to Begusarai hospital where again treatment was given and then he was advised to take her to PMCH, Patna for better treatment. He took her to Patna where she was treated for few days. When the SHO, Allauli visited his house, the written report was submitted bearing his thumb impression. He



identified the appellant in dock. Surprisingly, this witness was not cross-examined by the appellant. Whatever the informant deposed against the appellant remain unchallenged. Besides the above, the evidence of PW-1 Khushboo and PW-5 Mannan Safi prove the time, place and manner of occurrence as well as the involvement of the appellant in the crime. PW-1 has stated that the accused first captivated her father and took him away whereafter the appellant tried to molest her mother which was protested. She claimed to have identified him whereafter the appellant fired which hit in her face. In her cross-examination, she has specifically stated that her father and others took the victim to the Sakarpura hospital and from there to Begusarai and thereafter to Patna where she was treated. She came back home but few days thereafter died. We have also carefully gone through her cross-examination. She is a child witness. It has not been shown to us that she was tutored. Although cross examined at length but nothing substantial was elicited to discredit her evidence. Being a minor daughter her presence with the deceased in the night was natural.

10. PW-5 was similarly present inside the room and sleeping on the mat. He states that at the dead of night when



the mother was sleeping with her children, the appellant and other accused(s), at the dead of night, intruded into the room and tried to molest his mother. On protest and disclosure that she had identified him the appellant fired at her mother which hit in her face. Other co-accused(s) at that time were standing at the door of the house. He claimed to have identified the appellant. The witness was cross-examined by the defence.

11. In a bid to discredit him, it has been urged by the defence that the witness stated about his father (PW3) working in Delhi whereas the other witnesses including PW-1 have stated about the presence of PW3 (Informant) at the house during the relevant night. PW-5 being the child witness has, however, corrected himself and said that his father had arrived home only a day before the occurrence. Turning to the evidence of Informant (PW3), it is found that he too has clearly stated about his presence at the place of occurrence during the relevant time when some of the accused(s) picked him up and took him to some distance before entering the room. PW-3 was not cross-examined by the defence. Seen thus, we do not find any material to debilitate the evidence of PW-5. He narrated what he saw.



12. The counsel for the defence has further contended that there is no reliable evidence on record to prove the means of identification. The occurrence had taken place at the dead of night. Such submission is grounded on the statement of the witnesses made at variance about presence of source of identification. PW-3 had stated about presence of lantern in the room in the FIR but in Court he changed it to Dibri. PW-1, however, stated about the presence of Dibri light in the room which was shown to the I.O. when he inspected the place of occurrence. The Court is mindful that these witnesses are rustic and belonged to very lower strata of the society. They had only a thatched room covered with polythene to live in which too had no door fixed to it. They were deposing after a considerable long period. These errors in describing the source of light by different names, which appear to us to be interchangeable, in our view, do not improbabilize the prosecution case. PW-9, while making inspection of the place of occurrence, had seen profuse blood present in the room. In natural course, it was expected of him to collect the samples of the blood found at the place of occurrence which he failed to do. A lapse on the part of the I.O. in making proper and scientific investigation



would not shatter the prosecution case undermining the unblemished evidence of the ocular witness. The Court refrains from citing judgment as the legal position on this point is well- settled. The prosecution case on the point of place of occurrence, manner of occurrence and identification of the appellant is well proved by the evidence of PWs 1, 3,7 and 5. The medical evidence of the doctor (PW8) fully supports the prosecution case. His opinion on the estimated time of death fully aligns with the case projected by the prosecution at the trial.

13. The discussions of the relevant evidence made above, convince us to find no legal flaw in the findings of the learned Trial Court to record the guilt of the appellant.

14. In the result, the appeal is dismissed.

I agree **(Kishore Kumar Mandal, J)**

(Madhuresh Prasad, J)

shyambihari/-

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