

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.2089 of 2017

Arising Out of PS. Case No. -115 Year- 2012 Thana -BAUNSI District- ARRARIA

- =====
1. Shivalal Tuddu, Son of Munshi Tuddu,
 2. Munshi Tuddu @ Munshi Tiddu, Son of late Barka Tuddu.
- Both are Resident of Village-Karela, Kamat Tola, P.S.-Bausi, Dist-Araria.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance:

For the Appellant/s : Mr. Ramesh Kumar Singh, Adv.
For the Respondent/s : Mr. Sujit Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

CAV JUDGMENT

Date: 04-01-2018

At the time of consideration of prayer for bail after suspending the sentence till pendency of instant appeal, as provided under Section 389(1) Cr.P.C, it has been found prudent to hear the appeal on its merit considering the nature of the judgment whereupon, this appeal has been heard out of turn and is being disposed off, accordingly.

2. Appellants, Shivalal Tuddu and Munshi Tuddu have been found guilty for an offence punishable under Section 306/34 of the IPC and each one has been sentenced to undergo R.I. for five years as well as to pay fine appertaining to Rs.500/- in default thereof, to undergo S.I. for six months, additionally by the Second Additional Sessions Judge, Araria vide judgment of conviction dated 14.06.2017 and order of sentence dated 19.06.2017 passed in connection with Sessions Trial No. 246 of 2016 /124 of 2016.

3. Phool Devi (PW.5) gave her fardbeyan on 09.09.2012 at about 05:30 PM at village-Karaila Kamat Tola at the Sasural of



her Bhagini Phool Kumari Devi (since deceased) near her dead body alleging inter alia that her Bhagini Phool Kumari Devi was residing along with her since before her marriage. At about four years ago she was married with Shivalal Tuddu, son of Munshi Tuddu. Even after consuming such long period after marriage she has not begotten a child and on account thereof, her husband Shivalal Tuddu, mother-in-law Nilmuni Devi, father-in-law Munshi Tuddu used to assault as well as torture her as, they were inclined to remarry Shivalal Tuddu. For the last one month, Phool Kumari Devi was severely tortured on the aforesaid score. Today i.e. 09-09-2012 at about 02:30 PM she received an information that her Bhagini Phool Kumari Devi has been murdered by her Sasurawala in the preceding night and the dead body is lying in the house. All the family members fled away after commission of the occurrence. After coming to know about the same, she along with her family members rushed and after reaching at village- Karaila Kamat Tola, she found dead body of her Bhagini Phool Kumari Devi in a room having over a cot. Her tongue is protruded. There happens to be ligature mark around her neck having blackening sign. There happens to be swelling on her right eye. On query she came to know that she has been done to death by strangulation with the string.

4. On the basis of the aforesaid fardbeyan, Baunsi P.S. Case No.115/2012 was registered followed with an investigation and after concluding the same, charge sheet was submitted. It is further evident that some of the accused appeared at an earlier occasion on account thereof first charge sheet was submitted



against them and on that very basis, Sessions Trial No.392/2013 is going on having all the original documents. The case of the appellants have been separated due to their non-appearance and, after having their appearance they have been prosecuted under the present Sessions Trial (separated record) meeting with ultimate result, subject matter of instant appeal.

5. Defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. It has further been suggested that on account of being issueless, deceased was suffering from depression as a result of which she committed suicide. However, neither ocular nor documentary evidence has been adduced.

6. In order to substantiate its case, prosecution had examined altogether eleven PWs who are PW.1-Md. Mosim, PW.2-Md. Yusuf, PW.3-Bhagwan Hembram, PW.4-Dr. Md. Umar Akbar, PW.5-Phool Devi, PW.6-Rajesh Tuddu, PW.7-Neelam Devi, PW.8-Meena Devi, PW.9-Borka Soren, PW.10-Vinod Hembram and PW.11-Pramod Mandal. Side-by-side had also exhibited Ext.1- Photocopy of signature of informant over photocopy of fardbeyan, Ext.2-Signature of S.I. over photocopy of formal FIR.

7. Learned counsel for the appellants have submitted that the judgment impugned happens to be contrary to the material available on the record and on account thereof, same is fit to be set aside. In order to substantiate the same, it has been submitted that Investigating Officer has not been examined. The



doctor, who conducted postmortem has not been examined. PW.4 is the doctor who, at the time of conduction of postmortem had acted as an observer on account thereof, postmortem could not be legally accepted. Furthermore, his testimony has not been laid down in accordance with law. That being so, there happens to be series of infirmities persisting in the prosecution case whereupon, the judgment of conviction and sentence could not survive.

8. Apart from this, it has also been submitted that PW.1 to PW.3 and PW.5 to PW.10, the so-called material witnesses have not supported the case of the prosecution and on account thereof, there was no occasion for conviction of the appellants under Section 306/34 of the IPC. Apart from this, when the evidence of the informant PW.5 as well as her husband PW.3 is gone through, it is apparent that during course of cross-examination they have in clear tone stated that victim had herself committed suicide out of frustration being issueless without having proper identification of the appellants as an abettor and that being so, there was no legal material before the learned lower court to convict the appellants for an offence punishable under Section 306/34 of the IPC. Hence, the judgment of conviction and sentence recorded by the learned lower court is fit to be set aside.

9. On the other hand, the learned Additional Public Prosecutor submitted that from the judgment impugned, it is evident that learned lower court had in cryptic manner proceeded with the trial and in similar fashion, recorded the judgment of conviction and sentence whereupon, is fit to be set aside and the



matter be remitted to proceed afresh in accordance with law.

10. Reason is the soul, heart of a judgment. That means to say the finding of a court is to be supported by a cogent, plausible, legal reasoning. The concept of reasoned judgment has become an indispensable part of the basic rule of law and in fact is a mandatory requirement of the procedural law.

11. In **CCT v. Shukla & Bros.** reported in **(2010) 4 SCC 785**, it has been held:

“12. In exercise of the power of judicial review, the concept of reasoned orders/actions has been enforced equally by the foreign courts as by the courts in India. The administrative authority and tribunals are obliged to give reasons, absence whereof could render the order liable to judicial chastisement. Thus, it will not be far from an absolute principle of law that the courts should record reasons for their conclusions to enable the appellate or higher courts to exercise their jurisdiction appropriately and in accordance with law. It is the reasoning alone, that can enable a higher or an appellate court to appreciate the controversy in issue in its correct perspective and to hold whether the reasoning recorded by the court whose order is impugned, is sustainable in law and whether it has adopted the correct legal approach. To subserve the purpose of justice delivery system, therefore, it is essential that the courts should record reasons for their conclusions, whether disposing of the case at admission stage or after regular hearing.”

12. From the judgment impugned, it is evident that the learned lower court completely ignored the aforesaid basic rule of the law while recording conviction under Section 306/34 of the IPC. In likewise manner, as is evident from the record of the lower court that learned lower court completely missed to follow and adopt the settle principle of law while recording the evidence of the



PW.4, the doctor who was observer during course of conduction of the postmortem by the doctor Yogendra Pd.. Although, from his evidence it is evident that the postmortem report having scribed by Dr. Yogendra Pd. Singh has been made as an Ext.3, but from perusal of the judgment impugned it is evident that the learned lower court had not taken into consideration. The most surprising feature happens to be though the postmortem report has been made an exhibit (Ext.3), but the same was not available on the record. In the aforesaid circumstance, how evidence of PW.4 was recorded and in what manner postmortem report has been exhibited is a matter of surprise. However, during course of hearing of the appeal, the postmortem report was called for whereupon it has been reported by the I/c Addl. Sessions Judge, IInd that original postmortem report is tagged with Sessions Trial No.392/2013. Without calling the original postmortem report, how evidence of PW.4 was recorded as well as it has been exhibited, is a matter of concerned. In likewise manner, the original fardbeyan as well as original formal FIR have not been called for from the Sessions Trial No.392/2013 even then, the learned lower court while examining PW.5 got the photocopy of the fardbeyan as well as FIR exhibited that too when the same is not in accordance with law more particularly, Section 63 of the Evidence Act. Apart from this, it is also evident from the relevant order sheet that although PW.4 has been examined on 17.08.2016 but there is no execution report on the record relating to Dr. Yogendra Prasad who had conducted postmortem. In likewise manner, there happens to be also no execution report relating to the Investigating Officer.



Furthermore, from the order sheet dated 16.03.2017, it is evident that the case was fixed for evidence on 27.03.2017 but subsequent order sheet shows the date as 24.06.2016 on which date, the prosecution case was closed and next date was fixed on 29.03.2017 on which date statement under Section 313 Cr.P.C. was recorded, defence case was closed and then 03.04.2017 was date fixed for argument on which date, argument was heard and 11.04.2017 was fixed for judgment. On 11.04.2017 instead of passing judgment, the learned lower court invoked the extraordinary power as provided under Section 311 of the Cr.P.C. and summoned the Investigating Officer however, no summon was issued rather D.O. letter to S.P. was issued later on. Again, without awaiting for execution report, the case was closed then, the matter was fixed for statement under Section 313 of the Cr.P.C. but same was not recorded as is evident from the order dated 31.05.2017 and further, after passing through the relevant stages, in haphazard manner passed the judgment speedy, trial should not be at the cost of justice.

13. In ***Vinod Kumar Vs. State of Punjab*** reported in **(2015) 3 SCC 220**, it has been held:

“3. The narration of the sad chronology shocks the judicial conscience and gravitates the mind to pose a question: Is it justified for any conscientious trial Judge to ignore the statutory command, not recognise “the felt necessities of time” and remain impervious to the cry of the collective asking for justice or give an indecent and uncalled for burial to the conception of trial, totally ostracising the concept that a civilised and orderly society thrives on the rule of law which includes “fair trial” for the accused as well as the prosecution?”



14. Now coming to oral evidence, it is evident that PW.1, PW.2, PW.3, PW.6, PW.7, PW.8, PW.9 and PW.10 save and except substantiating the death of Phool Kumari Devi had not supported the case of the prosecution under what circumstances, in what manner the deceased met with her death and so, majority of them were declared hostile.

15. So far PW.5, informant is concerned, she during course of examination-in-chief had deposed that her Bhagini Phool Kumari Devi, who was residing along with her, before her marriage, was married with Shivrul Tuddu about four years ago. As she had not begotten any issue on account thereof, she was severely tortured at the end of her Sasurawala and for that, she was even physically assaulted. She came to know regarding her murder whereupon she along with other family members had gone there. Her dead body was found in a courtyard of her house. There was ligature mark around her neck. Police came before whom, she gave her fardbeyan whereupon she had put her signature. During cross-examination she had stated that husband, wife were residing in cordial atmosphere. Accused persons had not maltreated her. On account of being issueless, deceased herself committed suicide. However, it is apparent from the evidences of all the PWs that none of them were an eye witness to occurrence.

16. PW.4 is the doctor who was an observer during course of conduction of postmortem over dead body of Phool Kumari Devi by Dr. Yogendra Pd. Singh whereupon averred as follows:



Swelling around right eye. Swelling and abrasion on right side of neck and left ear. Ligature mark around the neck. On dissection underneath of ligature mark tissues were found congested. On Opening the cranial, abetominal, thoraces cavity corresponding viscera were found intact.

Time elapsed since death within 48 hours.

Death due to asphyxia as a result of strangulation.

17. During cross-examination nothing substantial elicited from his mouth and that being so, cause of death due to strangulation is found duly substantiated. However, the same is found not properly tallied with P.M. report.

18. From the statement recorded under Section 313 of the Cr.P.C. it is apparent that appellants have not explained the death of deceased. In likewise manner, during course of cross-examination of PW.4 neither he was suggested nor there happens to be any sort of cross-examination suggesting it a case of suicide. Though, during course of argument learned counsel for the appellant has referred 'The Essential of Forensic Medicine and Toxicology by Dr. K.S. Narayan Reddy 25th Edition page-306' wherefrom also it is evident that "suicide by strangulation is rare" and that being so, the appellants being inmate of the house enjoying company of the deceased would have explained as it was within their exclusive knowledge. Furthermore, as is evident they had not claimed that during course of occurrence they were not at all present at his house.

19. From the evidence available on the record, it is crystal clear that the appellants have not claimed their absence



whereupon the appellants being the husband as well as father-in-law, occupants of the house, happen to be under obligation to explain regarding cause of death as required, in terms of Section 106 of the Evidence Act and having failed on that very score, would given an adverse impact as per Section 114 of the Evidence Act.

20. In ***Chaman & Anr. Vs. State of Uttarakhand*** reported in ***AIR 2016 SC 1912***, it has been held:

“30. The following observations by this Court in the context of above legal provision in *Shambhu Nath Mehra v. State of Ajmer AIR 1956 SC 404* were adverted to with approval: (AIR p. 406, para 11)

“11. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are “especially” within the knowledge of the accused and which he could prove without difficulty or inconvenience.

The word “especially” stresses that it means facts that are pre-eminently or exceptionally within his knowledge.”

31. Proof beyond reasonable doubt, as has been held in a plethora of decisions of this Court, is only a guideline and not a fetish and that someone, who is guilty, cannot get away with impunity only because truth may suffer some infirmity when projected through human processes as has been observed in *Inder Singh v. State (Delhi Admn.) (1978) 4 SCC 161 : (AIR 1978 SC 1091)*. A caveat against exaggerated devotion to the rule of benefit of doubt to nurture fanciful doubts or lingering suspicion so as to destroy social defence has been sounded by this Court in *Gurbachan Singh v. Satpal Singh(1990) 1 SCC 445 : (AIR 1990 SC 209)*. It has been propounded that reasonable doubt is simply that degree of doubt which would permit a reasonable and a just man to come to a conclusion. It has been underlined therein that reasonableness of doubt must be commensurate to the nature of the offence to be investigated.”



21. In *Trimukh Maroti Kirkan Vs. State of Maharashtra* reported in (2006) 10 SCC 681 it has been held:

“14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland v. Director of Public Prosecutions* (1944) 2 All ER 13 (HL) quoted with approval by Arijit Pasayat, J. in *State of Punjab v. Karnail Singh* (2003) 11 SCC 271. The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

“(b) A is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him.”

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

16. A somewhat similar question was examined by this Court in connection with Sections 167 and



178-A of the Sea Customs Act in *Collector of Customs v. D. Bhoormall* (1974) 2 SCC 544 and it will be apt to reproduce paras 30 to 32 of the reports which are as under: (SCC pp. 553-54)

“30. It cannot be disputed that in proceedings for imposing penalties under clause (8) of Section 167, to which Section 178-A does not apply, the burden of proving that the goods are smuggled goods, is on the Department. This is a fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary. But, in appreciating its scope and the nature of the onus cast by it, we must pay due regard to other kindred principles, no less fundamental, of universal application. One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth, and — as Prof. Brett felicitously puts it—‘all exactness is a fake’. El Dorado of absolute proof being unattainable, the law accepts for it probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus, legal proof is not necessarily perfect proof; often it is nothing more than a prudent man’s estimate as to the probabilities of the case.

31. The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered—to use the words of Lord Mansfield in *Blatch v. Archer* (1774) 1 Cowp 63, Cowp at p. 65—‘according to the proof which it was in the power of one side to prove, and in the power of the other to have contradicted’. *Since it is exceedingly difficult, if not absolutely impossible, for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden.*

32. Smuggling is clandestine conveying of goods to avoid legal duties. Secrecy and stealth being its covering guards, it is impossible for the Preventive Department to unravel every link of the process. Many facts relating to this illicit business remain in the special or peculiar knowledge of the persons concerned in it. *On the principle underlying Section 106, Evidence Act, the burden to establish those facts is cast on the person concerned; and if he fails to establish or explain those facts, an adverse inference of fact may arise against him, which coupled with the presumptive evidence adduced by*



the prosecution or the Department would rebut the initial presumption of innocence in favour of that person, and in the result, prove him guilty. As pointed out by Best (in Law of Evidence, 12th Edn., Article 320, p. 291), the 'presumption of innocence is, no doubt, presumptio juris; but every day's practice shows that it may be successfully encountered by the presumption of guilt arising from the recent (unexplained) possession of stolen property', though the latter is only a presumption of fact. Thus the burden on the prosecution or the Department may be considerably lightened even by such presumptions of fact arising in their favour. However, this does not mean that the special or peculiar knowledge of the person proceeded against will relieve the prosecution or the Department altogether of the burden of producing some evidence in respect of that fact in issue. It will only alleviate that burden, to discharge which, very slight evidence may suffice."

(emphasis supplied)

17. The aforesaid principle has been approved and followed in *Balram Prasad Agrawal v. State of Bihar* (1997) 9 SCC 338 where a married woman had committed suicide on account of ill-treatment meted out to her by her husband and in-laws on account of demand of dowry and being issueless.

18. The question of burden of proof where some facts are within the personal knowledge of the accused was examined in *State of W.B. v. Mir Mohd. Omar* (2000) 8 SCC 382. In this case the assailants forcibly dragged the deceased, Mahesh from the house where he was taking shelter on account of the fear of the accused and took him away at about 2.30 in the night. Next day in the morning his mangled body was found lying in the hospital. The trial court convicted the accused under Section 364 read with Section 34 IPC and sentenced them to 10 years' RI. The accused preferred an appeal against their conviction before the High Court and the State also filed an appeal challenging the acquittal of the accused for murder charge. The accused had not given any explanation as to what happened to Mahesh after he was abducted by them. The learned Sessions Judge after referring to the law on circumstantial evidence had observed that there was a missing link in the chain of evidence after the deceased was last seen together with the accused persons and the discovery of the dead body in the hospital and had concluded that the prosecution had failed to establish the charge of murder against the accused persons beyond any reasonable doubt. This Court took note of the provisions of Section 106 of the Evidence Act and laid down the following principle in paras 31 to 34 of the reports: (SCC p.



392)

“31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as a fossilised doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof on the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.

32. In this case, when the prosecution succeeded in establishing the afore-narrated circumstances, the court has to presume the existence of certain facts. Presumption is a course recognized by the law for the court to rely on in conditions such as this.

33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct, etc. in relation to the facts of the case.

34. When it is proved to the satisfaction of the Court that Mahesh was abducted by the accused and they took him out of that area, the accused alone knew what happened to him until he was with them. If he was found murdered within a short time after the abduction the permitted reasoning process would enable the Court to draw the presumption that the accused have murdered him. Such inference can be disrupted if the accused would tell the Court what else happened to Mahesh at least until he was in their custody.”

19. Applying the aforesaid principle, this Court while maintaining the conviction under Section 364 read with Section 34 IPC reversed the order of acquittal under Section 302 read with Section 34 IPC and convicted the accused under the said provision and sentenced them to imprisonment for life.

20. In *Ram Gulam Chaudhary v. State of Bihar*



(2001) 8 SCC 311 the accused after brutally assaulting a boy carried him away and thereafter the boy was not seen alive nor his body was found. The accused, however, offered no explanation as to what they did after they took away the boy. It was held that for the absence of any explanation from the side of the accused about the boy, there was every justification for drawing an inference that they had murdered the boy. It was further observed that even though Section 106 of the Evidence Act may not be intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases like the present, where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding death. The accused by virtue of their special knowledge must offer an explanation which might lead the court to draw a different inference.

21. In a case based on circumstantial evidence where no eyewitness account is available, there is another principle of law which must be kept in mind. The principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. This view has been taken in a catena of decisions of this Court. [See *State of T.N. v. Rajendran*(1999) 8 SCC 679 (SCC para 6); *State of U.P. v. Dr. Ravindra Prakash Mittal*(1992) 3 SCC 300 (SCC para 39 : AIR para 40); *State of Maharashtra v. Suresh*(2000) 1 SCC 471 (SCC para 27); *Ganesh Lal v. State of Rajasthan*(2002) 1 SCC 731 (SCC para 15) and *Gulab Chand v. State of M.P.* (1995) 3 SCC 574 (SCC para 4).]”

22. In ***State of Rajasthan Vs. Thakur Singh*** reported in **2014 Cr.L.J. 4047**, it has been held:

“**22.** The law, therefore, is quite well settled that the burden of proving the guilt of an accused is on the prosecution, but there may be certain facts pertaining to a crime that can be known only to the accused, or are virtually impossible for the prosecution to prove. These facts need to be explained by the accused and if he does not do so, then it is a strong circumstance pointing to his guilt based on those facts.”

23. The Apex Court reiterated the same view in ***State of***



West Bengal Vs. Mir Mohammad Omar reported in **AIR 2000 SC 2988**, **Narendra Vs. State of Karnataka** reported in **AIR 2009 SC 1881**, **Dnyaneshwar Vs. State of Maharashtra** reported in **(2007) 10 SCC 445**.

24. Conduct of the witnesses during course of trial by turning hostile has been matter of concern to the courts and that happens to be reason behind whereunder a principle has been propagated by the Apex Court that evidence of hostile witnesses to the extent of supporting case of the prosecution is to be accepted. Moreover, in **Ramesh Vs. State of Haryana** reported in **(2017) 1 SCC 529** it has been held:

“39. We find that it is becoming a common phenomenon, almost a regular feature, that in criminal cases witnesses turn hostile. There could be various reasons for this behaviour or attitude of the witnesses. It is possible that when the statements of such witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 by the police during investigation, the investigating officer forced them to make such statements and, therefore, they resiled therefrom while deposing in the court and justifiably so. However, this is no longer the reason in most of the cases. This trend of witnesses turning hostile is due to various other factors. It may be fear of deposing against the accused/delinquent or political pressure or pressure of other family members or other such sociological factors. It is also possible that witnesses are corrupted with monetary considerations.

40. In some of the judgments in past few years, this Court has commented upon such peculiar behaviour of witnesses turning hostile and we would like to quote from few such judgments. In *Krishna Mochi v. State of Bihar* (2002) 6 SCC 81, this Court observed as under: (SCC p. 104, para 31)

“31. It is a matter of common experience that in recent times there has been a sharp decline of ethical values in public life even in developed countries much less developing one, like ours, where the ratio of decline is higher. Even in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be



credible by courts for manifold reasons. One of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high-ups in the Government or close to powers, which may be political, economic or other powers including muscle power.”

41. Likewise, in *Zahira Habibullah Sheikh (5) v. State of Gujarat* (2006) 3 SCC 374, this Court highlighted the problem with the following observations: (SCC pp. 396-98, paras 40-41)

“40. “Witnesses” as Bentham said: “are the eyes and ears of justice”. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors, like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by the court on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface.... Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of the State represented by their prosecuting agencies do not suffer.... There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that the ultimate truth presented before the court and justice triumphs and that the trial is not reduced to a mockery. ...

41. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in court the witness could safely depose the truth without any fear of being haunted by those against whom he had deposed. Every State has a constitutional obligation and duty to protect the life and liberty of its citizens.



That is the fundamental requirement for observance of the rule of law. There cannot be any deviation from this requirement because of any extraneous factors like caste, creed, religion, political belief or ideology. Every State is supposed to know these fundamental requirements and this needs no retaliation (sic repetition). We can only say this with regard to the criticism levelled against the State of Gujarat. Some legislative enactments like the Terrorist and ⁵⁴⁹Disruptive Activities (Prevention) Act, 1987 (in short “the TADA Act”) have taken note of the reluctance shown by witnesses to depose against people with muscle power, money power or political power which has become the order of the day. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings before the courts mere mock trials as are usually seen in movies.”

42. Likewise, in *Sakshi v. Union of India*(2004) 5 SCC 518, the menace of witnesses turning hostile was again described in the following words: (SCC pp. 544-45, para 32)

“32. The mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in miscarriage of justice. Therefore, a screen or some such arrangement can be made where the victim or witnesses do not have to undergo the trauma of seeing the body or the face of the accused. Often the questions put in cross-examination are purposely designed to embarrass or confuse the victims of rape and child abuse. The object is that out of the feeling of shame or embarrassment, the victim may not speak out or give details of certain acts committed by the accused. It will, therefore, be better if the questions to be put by the accused in cross-examination are given in writing to the presiding officer of the court, who may put the same to the victim or witnesses in a language which is not embarrassing. There can hardly be any objection to the other suggestion given by the petitioner that whenever a child or victim of rape is required to give testimony, sufficient breaks should be given as and when required. The provisions of sub-section (2) of Section 327 CrPC should also apply in inquiry or trial of offences under Sections 354 and 377 IPC.”

43. In *State v. Sanjeev Nanda*(2012) 8 SCC 450,



the Court felt constrained in reiterating the growing disturbing trend: (SCC pp. 486-87, paras 99-101)

“99. Witness turning hostile is a major disturbing factor faced by the criminal courts in India. Reasons are many for the witnesses turning hostile, but of late, we see, especially in high profile cases, there is a regularity in the witnesses turning hostile, either due to monetary consideration or by other tempting offers which undermine the entire criminal justice system and people carry the impression that the mighty and powerful can always get away from the clutches of law, thereby eroding people’s faith in the system.

100. This Court in *State of U.P. v. Ramesh Prasad Misra*(1996) 10 SCC 360 held that it is equally settled law that the evidence of a hostile witness could not be totally rejected, if spoken in favour of the prosecution or the accused, but it can be subjected to closest scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted. In *K. Anbazhagan v. Supt. of Police*(2004) 3 SCC 767, this Court held that if a court finds that in the process the credit of the witness has not been completely shaken, he may after reading and considering the evidence of the witness as a whole, with due caution, accept, in the light of the evidence on the record that part of his testimony which it finds to be creditworthy and act upon it. This is exactly what was done in the instant case by both the trial court and the High Court (2009) 160 DLT 775 and they found the accused guilty.

101. We cannot, however, close our eyes to the disturbing fact in the instant case where even the injured witness, who was present on the spot, turned hostile. This Court in *Manu Sharma v. State (NCT of Delhi)* (2010) 6 SCC 1 and in *Zahira Habibullah Sheikh (5) v. State of Gujarat*(2006) 3 SCC 374 had highlighted the glaring defects in the system like non-recording of the statements correctly by the police and the retraction of the statements by the prosecution witness due to intimidation, inducement and other methods of manipulation. Courts, however, cannot shut their eyes to the reality. If a witness becomes hostile to subvert the judicial process, the court shall not stand as a mute spectator and every effort should be made to bring home the truth. Criminal judicial system cannot be overturned by those gullible witnesses who act under pressure, inducement or intimidation. Further, Section 193 IPC imposes punishment for giving false evidence but is seldom invoked.”



44. On the analysis of various cases, the following reasons can be discerned which make witnesses retracting their statements before the court and turning hostile:

- (i) Threat/Intimidation.
- (ii) Inducement by various means.
- (iii) Use of muscle and money power by the accused.
- (iv) Use of stock witnesses.
- (v) Protracted trials.
- (vi) Hassles faced by the witnesses during investigation and trial.
- (vii) Non-existence of any clear-cut legislation to check hostility of witness.

45. Threat and intimidation has been one of the major causes for the hostility of witnesses. Bentham said: "*witnesses are the eyes and ears of justice*". When the witnesses are not able to depose correctly in the court of law, it results in low rate of conviction and many times even hardened criminals escape the conviction. It shakes public confidence in the criminal justice delivery system. It is for this reason there has been a lot of discussion on witness protection and from various quarters demand is made for the State to play a definite role in coming out with witness protection programme, at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. A stern and emphatic message to this effect was given in *Zahira Habibullah case*(2006) 3 SCC 374 as well.

46. Justifying the measures to be taken for witness protection to enable the witnesses to depose truthfully and without fear, Justice Malimath Committee Report on Reforms of Criminal Justice System, 2003 has remarked as under:

"11.3. Another major problem is about safety of witnesses and their family members who face danger at different stages. They are often threatened and the seriousness of the threat depends upon the type of the case and the background of the accused and his family. Many times crucial witnesses are threatened or injured prior to their testifying in the court. If the witness is still not amenable he may even be murdered. In such situations the witness will not come forward to give evidence unless he is assured of protection or is guaranteed anonymity of some form of physical disguise. ... Time has come for a comprehensive law being enacted for protection of the witness and members of his family."

47. Almost to similar effect are the observations



of the Law Commission of India in its 198th Report (*Report on “witness identity protection and witness protection programmes*), as can be seen from the following discussion therein:

“The reason is not far to seek. In the case of victims of terrorism and sexual offences against women and juveniles, we are dealing with a section of society consisting of very vulnerable people, be they victims or witnesses. The victims and witnesses are under fear of or danger to their lives or lives of their relations or to their property. It is obvious that in the case of serious offences under the Indian Penal Code, 1860 and other special enactments, some of which we have referred to above, there are bound to be absolutely similar situations for victims and witnesses. While in the case of certain offences under special statutes such fear or danger to victims and witnesses may be more common and pronounced, in the case of victims and witnesses involved or concerned with some serious offences, fear may be no less important. Obviously, if the trial in the case of special offences is to be fair both to the accused as well as to the victims/witnesses, then there is no reason as to why it should not be equally fair in the case of other general offences of serious nature falling under the Indian Penal Code, 1860. It is the fear or danger or rather the likelihood thereof that is common to both cases. That is why several general statutes in other countries provide for victim and witness protection.”

48. Apart from the above, another significant reason for witnesses turning hostile may be what is described as “culture of compromise”. Commenting upon such culture in rape trials, *Pratiksha Bakshi “Justice is a Secret: Compromise in Rape Trials” (2010) 44* ”has highlighted this problem in the following manner:

“During the trial, compromise acts as a tool in the hands of defence lawyers and the accused to pressurise complainants and victims to change their testimonies in a courtroom. Let us turn to a recent case from Agra wherein a young Dalit woman was gang-raped and the rapist let off on bail. The accused threatened to rape the victim again if she did not compromise. Nearly a year after she was raped, she committed suicide. While we find that the judgment records that the victim committed suicide following the pressure to compromise, the judgment does not criminalise the pressure to compromise as criminal intimidation of the victim and her family. The normalising function of the socio-



legal category of compromise converts terror into a bargain in a context where there is no witness protection programme. This often accounts for why prosecution witnesses routinely turn hostile by the time the case comes on trial, if the victim does not lose the will to live.

In other words, I have shown how legality is actually perceived as disruptive of sociality; in this instance, a sociality that is marked by caste based patriarchies, such that compromise is actively perceived, to put it in the words of a woman Judge of a District Court, as a mechanism for 'restoring social relations in society'."

49. In this regard, two articles by Daniela Berti delve into a sociological analysis of hostile witnesses, noting how village compromises (and possibly peer pressure) are a reason for witnesses turning hostile. In one of his articles, he writes:

"For reasons that cannot be explained here, even the people who initiate a legal case may change their minds later on and pursue non-official forms of compromise or adjustment. Ethnographic observations of the cases that do make it to the criminal courtroom thus provide insight into the kinds of tensions that arise between local society and the State judicial administration. These tensions are particularly palpable when witnesses deny before the Judge what they allegedly said to the police during preliminary investigations. At this very moment they often become hostile. Here I must point out that the problem of what in common law terminology is called "hostile witnesses" is, in fact, general in India and has provoked many a reaction from Judges and politicians, as well as countless debates in newspaper editorials. Although this problem assumes particular relevance at high-profile, well-publicised trials, where witnesses may be politically pressured or bribed, it is a recurring everyday situation with which Judges and prosecutors of any small district town are routinely faced. In many such cases, the hostile behaviour results from various dynamics that interfere with the trial's outcome—village or family solidarity, the sharing of the same illegal activity for which the accused has been incriminated (as in case of cannabis cultivation), political interests, family pressures, various forms of economic compensation, and so forth. Sometimes the witness becomes "hostile" simply because police records of his or her earlier testimony are plainly wrong. Judges themselves are well aware that the police do write false statements for the purpose of strengthening their



cases. Though well known in judicial milieus, the dynamics just described have not yet been studied as they unfold over the course of a trial. My research suggests, however, that the witness's withdrawal from his or her previous statement is a crucial moment in the trial, one that clearly encapsulates the tensions arising between those involved in a trial and the court machinery itself."

"In my fieldwork experiences, witnesses become "hostile" not only when they are directly implicated in a case filed by the police, but also when they are on the side of the plaintiff's party. During the often rather long period that elapses between the police investigation and the trial itself, I often observed, the party who has lodged the complaint (and who becomes the main witness) can irreparably compromise the case with the other party by means of compensation, threat or blackmail."

50. The present case appears to have been stung by "culture of compromise". Fortunately, statement of PW 4 in attempting to shield the accused Ramesh has been proved to be false in view of the records of PGIMS, Rohtak and, therefore, we held that the High Court was right in discarding his testimony."

25. In Bablu Kumar & Ors. Vs. State of Bihar & Anr.

reported in **(2015) 8 SCC 787**, it has been held:

"22. Keeping in view the concept of fair trial, the obligation of the prosecution, the interest of the community and the duty of the court, it can irrefragably be stated that the court cannot be a silent spectator or a mute observer when it presides over a trial. It is the duty of the court to see that neither the prosecution nor the accused play truancy with the criminal trial or corrode the sanctity of the proceeding. They cannot expropriate or hijack the community interest by conducting themselves in such a manner as a consequence of which the trial becomes a farcical one. The law does not countenance a "mock trial". It is a serious concern of society. Every member of the collective has an inherent interest in such a trial. No one can be allowed to create a dent in the same. The court is duty-bound to see that neither the prosecution nor the defence takes unnecessary adjournments and take the trial under their control. The court is under the legal obligation to see that the witnesses who have been cited by the prosecution are produced by it or if summons are issued, they are actually served on the witnesses. If the court is of



the opinion that the material witnesses have not been examined, it should not allow the prosecution to close the evidence. There can be no doubt that the prosecution may not examine all the material witnesses but that does not necessarily mean that the prosecution can choose not to examine any witness and convey to the court that it does not intend to cite the witnesses. The Public Prosecutor who conducts the trial has a statutory duty to perform. He cannot afford to take things in a light manner. The court also is not expected to accept the version of the prosecution as if it is sacred. It has to apply its mind on every occasion. Non-application of mind by the trial court has the potentiality to lead to the paralysis of the conception of fair trial.”

26. That being so, the judgment impugned is found non-sustainable in the eye of law and is accordingly set aside. Appeal is allowed. Matter is remitted back to the learned lower court to proceed afresh from the stage of evidence in accordance with law. Appellants are under custody, and are accordingly directed to be produced before the learned lower court.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

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