

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.440 of 2015

Arising Out of PS.Case No. -18 Year- 2010 Thana -BACHWARA District- BEGUSARAI

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1. Ramchandra Yadav Son of lila Yadav
2. Sunaina devi wife of Ramchandra Yadav
3. Jitendra kumar Son of Ramchandra Yadav
4. Rakesh kumar Son of Ramchandra Yadav All resident of Village- Narepur
Paschim, P.s Bachhwara, District Begusarai.

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Yogesh Chandra Verma, Sr. Adv.
Mrs. Priyanka Singh, Adv.
For informant : Mr. Subhash Pandey, Adv.
For the State : Mr. Sujit Kumar Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 29-03-2018

Appellants, Ramchandra Yadav, Sunaina Devi,

Jitendra Kumar and Rakesh Kumar have been found guilty for an offence punishable under Section 304(Part-II)/34 IPC, and each one has been sentenced to undergo RI for 5 years as well as to pay a fine of Rs. 5,000/- in default thereof, to undergo SI for 15 days additionally vide judgment of conviction dated 02.07.2015 and order of sentence dated 07.07.2015 passed by the Adhoc Additional Sessions Judge-II, Begusarai in Sessions Trial No. 1085/2010.

2. PW-6, Shivchandra Yadav, husband of deceased, Punam Devi filed a written report on 11.02.2010 alleging inter alia that on 09.02.2010 at about 7.00 AM, his son Gyani Kumar Yadav, while coming to his house on a bicycle crushed leaves of tobacco plant belonging to Ramchandra Yadav whereupon Ramchandra



Yadav began to abuse which was protested and in the aforesaid background Ramchandra, his wife, Sunaina Devi and sons, Jitendra Kumar and Rakesh Kumar came at his Darwaza, abused and then assaulted his wife by iron rod with an intention to kill. On hue and cry, neighbours intervened, got his wife victim rescued. He as was at Sahdai where he was working as a labour was informed, returned back and then tried to settle the score at village level but as the accused persons declined to obey the dictum of the Panchayati, on account thereof, written report is being filed.

3. After Registration of Bachhwara PS Case No. 18/2010, investigation commenced and during course thereof, statement of victim was recorded, statements of other witnesses were recorded, the victim died while was undergoing treatment at PHC, Bachhwara whereupon, her dead body was sent to mortuary, procured postmortem report and then thereafter, completing investigation, charge-sheet was submitted, facilitating the trial, meeting with the ultimate result, subject matter of instant appeal.

4. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is that of complete denial. It has also been pleaded that accused persons happen to be own Pattidars and in the background of land dispute, they have been falsely implicated. Though no ocular has been adduced but para-2 of the case diary has been made as Ext-A.



5. Manifold arguments have been raised on behalf of learned counsel for the appellants while challenging the judgment impugned. The first and foremost argument is that it happens to be a case of negligence at the end of prosecution itself. Had there been proper medical treatment provided to the deceased at an appropriate time, she would not have died. It has also been submitted that actually, deceased had sustained injuries on fall which the doctor PW-12 also probalilized and so, it was incumbent upon the prosecution party to have the deceased properly treated. Being deficient one, ultimately resulting death of the deceased could not attract the appellants under any of the penal provision what to talk about Section 304 of the IPC whereunder they have been convicted and sentenced for.

6. Furthermore, it has also been submitted that when the evidence of the witnesses are gone through, it is evident that none of the witnesses happen to be an eyewitness to the occurrence nor they corroborated each other and so, instant case happens to be of no offence. In its continuity, It has also been submitted that because of the fact that the motive has purposely been introduced. Therefore, background, there happens to be deficiency at the end of the Investigating Officer, PW-11 who during course of investigation had not visited the place where the prosecution had alleged that leaf of tobacco plant belonging to the appellant, Ramchandra Yadav got



crushed while Gyani, son of deceased was coming over bicycle. In likewise manner, the objective finding regarding place of occurrence is also not found duly substantiated the occurrence and consequent thereupon, the judgment impugned is fit to be set aside.

7. On the other hand, learned APP as well as learned counsel representing informant, have submitted that the evidence of the witnesses has to be read in totality. It should not be accepted in a piecemeal manner. When the evidences are acceptable in aforesaid manner, it is apparent that all the witnesses have substantiated the genesis of the occurrence as well as manner of occurrence including that of PW-12, doctor and so, finding recorded by the learned lower court happens to be just, legal and proper.

8. With the assistance of learned counsel for the appellants as well as learned APP along with learned counsel for the informant, evidence of respective witnesses have been gone through, it is apparent that there happens to be drossiness on the part of the prosecution as well as on the part of the court while recording the evidence of Investigating Officer, PW-11. As from the evidence of PW-11, Investigating Officer, it is manifest that he had deposed to the effect that when he reached at the place of occurrence after having been entrusted with the investigation, he had recorded the statement of the victim, Punam Devi who was admitted at the PHC, Bachhwara and on that very score, there happens to be in depth cross-examination



at the end of the accused but, neither the prosecution had taken care to get the statement of the deceased exhibited which is found admissible in the eye of law as provided under Section 32(1) of the Evidence Act read with Section 162 CrPC, which could be held as during declaration, so held by the Hon'ble Apex Court in the case of **State of Rajasthan v. Wakteng** as reported in **AIR 2007 SC 2020**.

9. The most surprising feature is that at the end of the defence (para-2) of the case diary has been made Ext-A which contains disclosure that the injured of this case namely, Punam Devi wife of Shivchandra Yadav (informant) has been sent to PHC, Bachhwara for treatment after issuing the injury report. In para-4 of the case diary, it has been incorporated that the Investigating Officer had gone to PHC, Bachhwara and recorded statement of injured, Punam Devi and the same is available on the case diary. That means to say, out of ignorance or negligence or slackness whichever may be either on the part of prosecuting agency or on the part of the court, in spite of having evidences on that very score disclosing the fact that victim was examined by PW-11 and further having duly cross-examined on that very score, the same had not been made an exhibit of the record which ought to be.

10. The aforesaid event could not be found a step to fill up the lacuna persisting in the prosecution case because of the fact that PW-11, in his examination-in-chief had stated that he had gone to



PHC, Bachhwara and recorded statement of victim and on that very score, he was duly cross-examined even to the extent that at the time of recording of statement of the victim, he had not got opinion of the doctor with regard to her mental state and so, the aforesaid document which is existing since before and a copy thereof, had already been served upon the accused while complying with the mandatory provision so enumerated under Section 207 CrPC, was matter of surprise

11. The power of the appellate court is duly explained under Section 386 of the CrPC. For better appreciation, the same is quoted hereinbelow:-

386. Power of the Appellate Court. After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a) in an appeal from an order or acquittal, reverse such order and direct that further inquiry be made, or that the accused be re- tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re- tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the Same;

(c) in an appeal for enhancement of sentence-

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re- tried by a Court



competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper; Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement: Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal.

12. Remanding the matter ordinarily should be avoided unless and until there happens to be serious flaw persisting on the record causing miscarriage of justice. In *Ajay Kumar Ghoshal v. State of Bihar* as reported in *PLJR 2017(1) 458(SC)*, after discussion the previous judgments on the score, it has been held as follows:-

17. After considering the question a “speedy trial” and “fair trial” to a person accused of a crime and after referring to a catena of decisions and observing that guiding factor for retrial must always be demand of justice, in [Mohd. Hussain @ Julfikar Ali vs. State \(Govt. of NCT of Delhi\)](#) (2012) 9 SCC 408, this Court held as under:-

“41. ‘Speedy trial’ and ‘fair trial’ to a person accused of a crime are integral part of [Article 21](#). There is, however, qualitative difference between the right to speedy trial and the accused’s right of fair trial. Unlike the accused’s right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment.



The factors concerning the accused's right to speedy trial have to be weighed vis-à-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of an accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end. These principles must apply as well when the appeal court is confronted with the question whether or not retrial of an accused should be ordered.

42. The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under [Section 386](#) of the Code. That is clear from the bare language of [Section 386\(b\)](#). Though such power exists, it should not be exercised in a routine manner. A 'de novo trial' or retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under [Section 386\(b\)](#) of the Code, will depend on the facts and circumstances of each case for which no strait jacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked."

13. In spite of having presence of document on the record of which reference has been made by the PW-11, Investigating Officer, during his evidence and further the status of the document happens to be legally acknowledgeable in the eye of law having severe impact upon the prospect of the trial being kept at bay causing miscarriage of justice appears to be cogent reason whereupon, not



only the judgment impugned could be held illegal rather, on that very score it needs to be remanded to the learned lower court to get the aforesaid statement (para-4 of the case diary) to be exhibited in accordance with law and then thereafter, if the defence so desires may take an opportunity and then thereafter, after hearing both the parties will pass the judgment in accordance with law.

14. Accordingly, the judgment impugned is set aside. Appeal is allowed. The matter is remanded back to the learned lower court with a direction to get para-4 of the case diary duly exhibited on the record, will give an opportunity to the appellant to enter into defence and then, after hearing both the parties will pass the judgment in accordance with law.

15. The bail bonds of the appellants are hereby, cancelled. They are directed to surrender before the learned lower court with a prayer for bail which the learned lower court will entertain in accordance with law within a fortnight, failing which the learned lower court will be at liberty to proceed against the appellants in accordance with law.

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(Aditya Kumar Trivedi, J)

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