

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.2202 of 2018

Arising Out of PS. Case No.-91 Year-2014 Thana- KUDHNI District- Muzaffarpur

Deepak Chaudhary @ Deepak Kumar Chaudhari son of Ram Pratap Choudhary, resident of Shital Mandir, Police Station- Kotwali, District- Munger.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr.Sanjeev Ranjan, Adv.

For the Respondent/s : Mr. Binod Bihari Singh, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

24-07-2019

Appellant, Deepak Chaudhary @ Deepak Kumar

Chaudhari has been found guilty for an offence punishable under Section 366 IPC and sentenced to undergo RI for seven years as well as to pay fine of Rs. 5000/- in default thereof, to undergo RI for six months, additionally under Section 3 of Immoral Traffic Prevention Act and sentenced to undergo RI for two years and to pay fine of Rs. 1000/- in default thereof, to undergo RI for three months, additionally, under Section 4 of Immoral Traffic Prevention Act and sentenced to undergo RI for one and half years, under Section 5 of Immoral Traffic Prevention Act and sentenced to undergo RI for seven years as well as to pay fine of Rs. 1000/- in default thereof, to undergo RI for three months, under Section 6 of Immoral Traffic



Prevention Act and sentenced to undergo RI for seven years and to pay fine of Rs. 5000/- in default thereof, to undergo RI for six months with a further direction to run the sentences concurrently by Additional Sessions Judge-6th, Muzaffarpur in Sessions Trial No.175/2017 vide judgment of conviction dated 09.04.2018 and order of sentence dated 13.04.2018.

2. Informant, Ashok Kumar Singh (PW 3) filed a written report on 22.03.2014 disclosing therein that in the night of 10.03.2014 while his major daughter, Rupa was sleeping with his mother, slipped which, his mother had disclosed on the following morning. They made hectic search and during course thereof, his son had disclosed that Amar Chacha has said that your sister is at the place of Baldeo Singh of Village-Balaurdih but his wife scolded her and then ousted her. Thinking that his daughter is at the place of his relative, he had not taken any steps. However, when he dialed, found the mobile of his daughter switched off. After visiting Hajipur, when he returned back at the night, then his mother disclosed regarding the aforesaid event. In the morning of 15.03.2014, his brother-in-law (Sala) Amod Kumar who is resident of village-Maudah asked him about Rupa whereupon, he disclosed that Rupa is not present. She might be at the place of his Bhagni over which,



Amod Kumar disclosed that one Birju had informed to his Chachi that he has seen Rupa at Bettiah Railway Station along with elderly man. He has also disclosed the mobile number of the caller. Then his brother-in-law requested the caller to apprehend Rupa as they are coming but, as the train steamed off, on account thereof, he could not.

3. After registration of Kurhni PS Case No. 91/2014, investigation commenced and during course of investigation as is evident the victim was traced out, her statements under Section 164 CrPC as well as 161 CrPC were recorded, other ancillary events were also done and after completing investigation, charge-sheet was submitted only against the appellant facilitating the trial meeting with ultimate result, subject matter of the instant appeal.

4. The case of the defence as is evident from cross-examination as well as statement under Section 313 of the Cr.P.C. is that of complete denial. However, nothing has been adduced on behalf of the defence.

5. In order to substantiate its case prosecution has examined altogether six PWs, who are PW-1 Shanti Devi, PW-2, Chandan Kumar, PW-3, Ashok Kumar Singh, PW-4 Anchala Devi, PW-5 Brajesh Nandan Pathak and PW-6, Kalpana



Srivastav, as well as also exhibited Ext-1, Written report, Ext-1/1, initial on each page of written report, Ext-2, Formal FIR , Ext-3, written statement of victim, Ext-4, Statement of victim under Section 164 CrPC, Ext-5, Certified Copy of Mushahri PS Case No. 26/2016.

6. Heard learned counsel for the appellant as well as learned APP.

7. From perusal of the evidence available on the record, it is evident that none is an eyewitness to occurrence. Whatsoever they have stated, happens to be on the basis of disclosure made by the so alleged victim, Rupa Kumari. Unfortunately, Rupa has not been examined and to explain her non examination, Ext-5, the FIR of Mushahri PS Case No. 26/2016 has been made an exhibit. From perusal of Ext-5, it is evident that it happens to be relating to an offence punishable under Section 304B along with other penal provision against husband and others. Furthermore, from the lower court record, it is evident that prosecution evidence is found deficient one on each and every aspect. Irrespective of inadmissible piece of evidence having on the record, the learned lower court has convicted and sentenced the appellant on the basis of the reasoning so assigned under para-17 of the judgment. But before



setting aside the judgment impugned, it is found desirable to explain the circumstances, the legal proposition having on this score, as the learned lower court scholastically dealt the same, and the decisions so referred did not fit in according to facts of the case, and in likewise manner, reference of certain principle.

8. Section 164 CrPC is an intermediary event. It is equally applicable against a witness and in likewise manner, an accused. Basic feature of Section 164 CrPC is to have some sort of safeguard during course of trial with regard to a witness regarding whose status the prosecution is not sure and in likewise manner, so far accused is concerned, it would be a judicial confession and in certain circumstances may be a basis of pardon/approver during course of investigation.

9. Be that as it may, if it relates with the activity of a witness, then in that event, it has got relevancy with regard to corroboration or contradiction only. It is not a substantive piece of evidence in the background of the fact that the substantive piece of evidence happens to be only those evidence given by a witness during course of conduction of trial before the court of justice as during course thereof, the opponent has an opportunity to cross-examine or in certain circumstances, may be in accordance with Section 244 CrPC, apart from the fact that trial



has been conducted in presence of accused as per Section 273 CrPC and that happens to be reason behind acceptance of evidence given during course of trial to be substantive evidence. Times without number, the Supreme Court has considered its authenticity and propagated that it should not be treated as a substantive piece of evidence and on account thereof, it could not form the basis for conviction. In ***Ram Kishan Singh vs. Harmit Kaur and Ors.*** reported in ***AIR 1972 SC 468***, the Apex Court has held as follows:-

“8. A statement under Section 164 of the CrPC is not substantive evidence. It can be used to corroborate the statement of a witness. It can be used to contradict a witness. The first information report was considered by the Sessions Judge. Any special consideration of the statement of Hazura Singh under Section 164 of the CrPC could not have produced a different result by reason of the conclusions of the Sessions Judge as to rejecting the oral evidence of Nihal Knur, Harmit Kaur and Hazura Singh as unreliable, untruthful and unworth of credence.

10. Mere examination of a Magistrate who has recorded statement of witnesses under Section 164 CrPC will be only for the purpose of exhibiting the deposition and nothing else. The contents of the deposition would not be, as Magistrate was not the maker of the document, and further, the relevancy thereof, is confined to the extent of corroboration or



contradiction. Observation by way of directing the evidence to be for the purpose of corroboration or contradiction, is not a mere judicial interpretation rather Section 157 of the Evidence Act prescribes so.

11. With regard to points involved in this case is concerned, even admitting that the victim died, even in that circumstance, the statement recorded under Section 164 CrPC would not be taken into consideration as, it did not fulfill the criteria so enumerated therein. Hence, in any view of the matter, the statement recorded under Section 164 CrPC would not be admissible in the eye of law, and then only, the aforesaid statement could be admitted in evidence, otherwise, not. Section 164 CrPC does not fall under the aforesaid category on account thereof, could not be. That being so, the contents of the document irrespective of examination of the Magistrate and accepting the deposition of the witness so recorded during course of recording of statement under Section 164 CrPC, could not be read into the evidence and that being so, being a deficient on that very score could not be treated as substantive piece of evidence.

12. So far applicability of Section 6 of the Evidence Act is concerned, it is under the banner of “res gestae”



recognized under English Law, allowing the facts which not in issue, is so connected with fact in issue as to form part of the same transaction whereupon became relevant by itself. In ***Gentela Vijayavardhan Rao and Ors. v. State of Andhra Pradesh*** reported in ***(1996) 6 SCC 241***, it has been observed :-

“15. The principle or law embodied in Section 6 of the Evidence Act is usually known as the rule of res gestae recognised in English Law. The essence of the doctrine is that fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or atleast immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of res gestae.

13. Furthermore, the learned lower court was manifestly in error by observing that the statement recorded under Section 164 CrPC happens to be admissible under illustration I of Section 8 of the Evidence Act. After going through Section 8 more particularly, illustration I, may cover the



circumstances so illustrated, but it could not be applied in the present case, as the same did not satisfy any of the criteria so laid down under Section 32 of the Evidence Act. However, applicability of Section 157 of the Evidence Act is concerned, there happens to be no dispute but that could be only during course of examination of that particular witness.

14. As stated above, there happens to be no legal evidence available on the record which the learned lower court had itself admitted coupled with the fact that the appellant has not been identified in the dock by the respective witnesses which rightly so, as they have got no occasion to have any kind of opportunity with regard to proper identity.

15. Consequent thereupon, the judgment of conviction and sentence recorded by the learned lower court is set aside. Appeal is allowed.

16. Since appellant is under custody, he is directed to be set at liberty forthwith, if not wanted in any other case.

(Aditya Kumar Trivedi, J)

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