

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No. 25924 of 2015

Arising Out of PS. Case No.-200 Year-2011 Thana- KADAMKUAN District- Patna

1. Ritu Choudhary, wife of Vidyapati Choudhary
2. Vidyapati Choudhary, son of Late Motilal Choudhary, Both resident of “2” M.O. Flat, Patna Medical College and Hospital, P.S. Pirbahore, District Patna.

... .. Petitioner/s

Versus

The State of Bihar

... .. Opposite Party/s

Appearance :

For the Petitioner/s	:	Mr. Ajay Kumar Thakur, Advocate
		Mr. Nilesh Kumar, Advocate
		Mr. Pravin Kumar, Advocate
For the Opposite Party/s	:	Mr. Shyam Kumar Singh, APP

CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
ORAL JUDGMENT

Date : 10-07-2019

Heard learned counsel for the petitioner and learned counsel for the State.

2. The petitioners have challenged the order of refusal of discharge passed by the learned 7th Additional Sessions Judge, Patna in Sessions Trial No. 376 of 2014 on 15.04.2015. The trial arises out of Kadamkuan P.S. Case No. 200 of 2011.

3. According to First Information Report lodged by the father of the victim-girl, the victim, aged about 20 years, was attending a coaching class in Mohalla Kadamkuan in the town of Patna. The informant was telephonically informed by a friend of



the victim, namely, Tanya that the victim is lying unconscious by the road side. When the informant reached there, he found that two females were putting the victim on a rickshaw to take her for treatment in the hospital. However, in the hospital, the victim died. On query made from co-accused Tanya, it revealed that the victim had developed physical relationship with co-accused Rohit Raj and she was pregnant from Rohit Raj. To ensure abortion, she was carried by the accused persons in Budha Burn Hospital of the petitioners for abortion where abortion was done. However, the victim developed complications which resulted in her unconscious and subsequent death. Petitioners Ritu Choudhary and Vidyapati Choudhary are husband/wife and were Directors of the said Nursing Home. Other named accused were nurses and compounders involved in illegal abortion done to the victim-girls.

4. Learned counsel for the petitioners submits that after investigation, the police had not sent up the petitioners for trial. However, the learned Magistrate differed with the police report and for disagreement, only material is confessional statement of the co-accused persons before the police while in police custody whereunder they disclosed that they had carried the victim to the Nursing Home of the petitioners where she was illegally aborted.



5. The impugned order refers to the material in the case diary vide paras 28, 29, 30, 31 and 41 for disagreement with the police report.

6. I have gone through the referred paragraphs which mostly contains confessional statement of co-accused. In para 28 of the case diary, there is confessional statement of co-accused Tanya Kumari while she was in police custody. The statement was given to the police wherein she stated that when she came to know that Priyanka Kumari is pregnant, in collusion with other co-accused, she induced Priyanka against her desire to undergo abortion and abortion was forcefully performed in the Nursing Home of the petitioners. Likewise, para 29 of the case diary contains confessional statement of co-accused Rohit Raj before the police while in police custody. Rohit Raj has also stated that when Priyanka came to know that she is pregnant from Rohit, she was insisting for marriage for which Rohit Raj was not agreeable. Thereafter, under a planning with other friends, who are co-accused, they induced Priyanka and thereafter forcefully got her aborted in the Nursing Home of the petitioners. Para 30 of the case diary contains confessional statement of co-accused Deepak Kumar. The statement was made before the police while in police custody. He stated that the petitioners are Directors of the said



Nursing Home, where Deepak was a compounder. Abortion of Priyanka was done against her desire and without her consent. Para 31 of the case diary does not contain confessional statement, rather co-accused Kiran Devi and Renu Devi stated to the police that, in fact, some wrong has been done on their part, however, whatever they want to state they would say before the Court. Para 41 of the case diary is postmortem report performed on the dead body of Priyanka Verma.

7. Section 25 of the Indian Evidence Act, 1872 says that no confession made to a police officer, shall be proved as against a person accused of any offence. Section 26 of the Evidence Act says that no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

Thus, it is evident that all the confessions were made by the co-accused while they were in police custody and to the police. Therefore, the confessions cannot be proved during the trial. As such, those are no evidence at the stage of framing of charge. There is no other material against the petitioners brought on the record during investigation of the case.

8. Learned counsel for the State submits that confession of the co-accused is evidence against another co-accused if they



are being jointly tried for the same offence in view of the provisions of Section 30 of the Indian Evidence Act. On the basis of aforesaid confessional statement, there is strong suspicion against the petitioners to be indulged in illegal abortion without consent of the victim. As such the same is sufficient to frame charge against the petitioners.

9. Submission of learned counsel for the petitioners is that the evidentiary value of statement of co-accused before the police vis-a-vis absence of any other material to substantiate the allegation, at the stage of framing of charges, was considered by the Hon'ble Supreme Court in ***Dipakbhai Jagdishchandra Patel Versus State of Gujarat And Another (Criminal Appeal No. 714 of 2019)*** decided on 24th April, 2019. The Hon'ble Supreme Court quashed the order of the trial court directing framing of the charges against the appellant before the Supreme Court in absence of any other material to suggest involvement of the appellant in the crime alleged except the confessional statements of co-accused before the police. The Hon'ble Supreme Court observed as follows:-

“21. At the stage of framing the charge in accordance with the principles which have been laid down by this Court, what the Court is expected to do is, it does not act as a mere post office. The Court must indeed sift the material before it. The material to be sifted would be the material which is produced and relied upon by



the prosecution. The sifting is not to be meticulous in the sense that the Court dons the mantle of the Trial Judge hearing arguments after the entire evidence has been adduced after a full-fledged trial and the question is not whether the prosecution has made out the case for the conviction of the accused. All that is required is, the Court must be satisfied that with the materials available, a case is made out for the accused to stand trial. A strong suspicion suffices. However, a strong suspicion must be founded on some material. The material must be such as can be translated into evidence at the stage of trial. The strong suspicion cannot be the pure subjective satisfaction based on the moral notions of the Judge that here is a case where it is possible that accused has committed the offence. Strong suspicion must be the suspicion which is premised on some material which commends itself to the court as sufficient to entertain the prima facie view that the accused has committed the offence.”

10. In **Suresh Budharmal Kalani Alias Pappu Kalani v. State of Maharashtra** reported in **1998(7) SCC 337**, the Hon’ble Supreme Court had taken the view that confession by a co-accused containing incriminating matter against a person would not by itself suffice to frame charge against it.

11. The evidentiary value of confession of a co-accused was considered in **Haricharan Kurmi v. State of Bihar** also



reported in AIR 1964 SC 1184 and the Hon'ble Supreme Court observed as follows:

“49 As a result of the provisions contained in S. 30, Evidence Act, the confession of a co-accused has to be regarded as amounting to evidence in a general way, because whatever is considered by the Court is evidence; circumstances which are considered by the Court as well as probabilities do amount to evidence in that generic sense. Thus, though confession may be regarded as evidence in that generic sense because of the provisions of S. 30, the fact remains that it is not evidence as defined by S. 3 of the Act. The result, therefore, is that in dealing with a case against an accused person, the Court cannot start with the confession of a co-accused person; it must begin with other evidence adduced by the prosecution and after it has formed its opinion with regard to the quality and effect of the said evidence, then it is permissible to turn to the confession in order to receive assurance to the conclusion of guilt which the judicial mind is about to reach on the said other evidence.

Thus, the confession of a co-accused person cannot be treated as substantive evidence and can be pressed into service only when the Court is inclined to accept other evidence and feels the necessity of seeking for an assurance in support of its conclusions deducible from the said evidence. In criminal cases where the other evidence adduced against an accused person is wholly unsatisfactory and the prosecution seeks to rely



on the confession of a co-accused person, the presumption of innocence which is the basis of criminal jurisprudence assists the accused person and compels the Court to render the verdict that the charge is not proved against him, and so, he is entitled to the benefit of doubt.”

12. The broader principles governing consideration of the issue whether charges should be framed or the accused should be discharged was elaborately considered by the Hon’ble Supreme Court in **State of Bihar v. Ramesh Singh** reported in **AIR 1977 SC 2018** and in **Union of India v. Prafulla Kumar Samal and another** reported in **AIR 1979 SC 366**. The principle applicable in this case and narrated in the cases above are as follows:

“(i) Where the materials placed before the Court discloses grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing a charge and proceeding with the trial.

(ii) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large, however, if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.



(iii) In exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This, however, does not mean that the Judge should make a roving inquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.”

13. In the case, in hand, there is no other material against the petitioners, save and except, confessional statement of the co-accused before the police while they were in police custody. In view of the specific bar under Section 25 and 26 of the Indian Evidence Act, the confessional statements cannot be proved during trial. If those statement cannot be proved during trial that cannot be the basis to ask the petitioners to face the trial. As has been held in ***Dipakbhai Jagdishchandra Patel’s*** case (supra), the strong suspicion must be founded on some material. The material must be such as can be translated into evidence at the stage of trial. In this case, the confessional statement of co-accused cannot be translated into evidence at the stage of trial as the law of evidence specifically bars proof of such confessional statement.



14. In the result, I am of the considered view that there is no material on the record to compel the petitioners to face trial. As such, the impugned order and criminal proceeding against the petitioners arising thereof are not sustainable. Accordingly, the same stands quashed and this application is allowed.

(Birendra Kumar, J)

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