

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.559 of 2015

Arising Out of PS. Case No.-68 Year-2008 Thana- RAJAON District- Banka

Kanhai Sharma Son of Suresh Sharma Resident of Village - Dhayharna, P.S.
Rajoun, District Banka Bihar.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Saghir Ahmad, Advocate Mr. Sanjay Kumar Jha, Advocate
For the Respondent/s	:	Ms. Shashi Bala Verma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE KHATIM REZA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 20-10-2022

Heard Mr. Saghir Ahmad, learned counsel appearing on behalf of the appellant and Ms. Shashi Bala Verma, learned Additional Public Prosecution appearing on behalf of the State.

2. This is an appeal under Section 374(2) of the Code of Criminal Procedure, 1973 (Cr.P.C. for brevity). By the impugned judgment and order dated 02.06.2015/04.06.2015 under appeal passed by the learned 6th Additional District and Sessions Judge, Banka, in Sessions Trial No. 1343 of 2008(G.R. No. 620/08), Tr. No. 250/15, arising out of Rajoun P.S. Case No. 68 of 2008, the appellant has been convicted and sentenced as under:



Convicted under Section	Sentence		
	Imprisonment	Fine (Rs.)	In default of fine
302 of the I.P.C.	Imprisonment for life	-	-
328 of the I.P.C.	R.I. for 10 years	-	-

3. The Rajoun P.S. Case No. 68 of 2008 came to be registered, based on the *fardbeyan* of the informant (PW-5), on 27.04.2008 recorded by the Sub Inspector of Police, Rajoun Police Station.

4. The informant (PW-5) is the brother of the deceased and the appellant is the husband of the deceased.

5. The prosecution's case, as disclosed in the *fardbeyan*, is that the informant's sister (the deceased) was married to the appellant nearly four years before the date of occurrence. The behaviour of the appellant, according to informant, was not good from the very beginning with the deceased because of protrusion of her upper front teeth (malocclusion). The appellant used to insist upon the family members of the deceased to get corrected the misalignment of the upper front teeth of deceased, but because of financial constraints, they were not in a position to get that corrected. A female child was born out of the said marriage. At about 11:00 am., in the morning of 27.04.2002, the appellant informed the informant that the deceased had died after falling from the



stairs. The informant reached the matrimonial home of the deceased, where he learnt that his sister had been killed by administering her poison. Based on the information to the aforesaid effect, the F.I.R. came to be registered.

6. The police upon completion of investigation submitted charge-sheet against this appellant for commission of the offences punishable under Sections 302 and 328 of the Indian Penal Code based on which cognizance was taken and the case was committed to the Court of Sessions by the learned Chief Judicial Magistrate, Banka. Subsequently, charge came to be framed by the trial court against the appellant for having committed the offences punishable under Sections 302 and 328 of the Indian Penal Code. As the appellant pleaded not guilty, he has been put to trial.

7. At the trial, six prosecution's witnesses came to examined as under:-

- (i) PW-1 Sikandar Sharma (father of the deceased)
- (ii) PW-2 Pinki Devi (mother of the deceased)
- (iii) PW-3 Sangeeta Devi (sister of the deceased)
- (iv) PW-4 Dilip Sharma (brother of the deceased)



(v) PW-5 Rupesh Sharma (informant/brother of the deceased)

(vi) PW-6 Madan Kumar Pathak (Doctor who proved the signature of the Doctor, who had conducted the *post mortem* examination)

8. The Investigating Officer was not examined. The Doctor who had conducted *post mortem* examination was also not examined, though, the *post mortem* was formally proved by PW-6 by proving the signature of the Doctor, who had conducted the *postmortem* examination.

9. Learned counsel appearing on behalf of the appellant has submitted that all the prosecution's witnesses, except the formal witness i.e. the Doctor are highly interested witnesses, inasmuch as, they are father, mother, brother and sister of the deceased. He has submitted that as the *post mortem* report could not be duly proved at the trial, cause of death by administering poison could not have been the only conclusion, as has been recorded by the trial court. It is to be noted that the *viscera* was sent during the course of investigation to the Forensic Science Laboratory, Patna, report of which has been exhibited as Exhibit-3. Following is the result of the examination:-

"Aluminium Phosphide was detected in the dark brown fluid contained in the glass jar as described



above. Aluminium Phosphide commercially known as 'CELPHOS' is a severe gastro intestinal irritant. It is used as a grain preservative and highly poisonous."

10. Learned counsel for the appellant has submitted that in any event, the prosecution has miserably failed to establish that the appellant had administered poison. He has contended that even if, for the sake of argument, the report of Forensic Science Laboratory is treated to be correct to the extent that 'celphos' was found in the *viscera* sent for forensic examination, the prosecution's case that it was the appellant who had administered poison has not been established beyond all reasonable doubts. He has also submitted that the conduct of the appellant that he had informed the informant about the death of the deceased immediately after her death demonstrates his *bonafide*. He has contended that minimum essential ingredients to establish commission of an offence punishable under Section 328 of the Indian Penal Code, could not be established by the prosecution at the trial. Accordingly, he contends, the appellant's conviction under Section 302 of the I.P.C. is unsustainable. He has submitted that though the contents of the *post mortem* report have not been proved by the prosecution at the trial, it can be seen from the said report that there was marks



of blisters in both upper limbs, which were apparently caused by her accidental fall from the stairs. He has submitted that non-examination of Investigating Officer has seriously prejudiced appellant's case as he was denied the opportunity of drawing his attention to the contradictions in the evidence of the witnesses and facts in relation to the place of occurrence. As the Doctor, who had conducted the *post mortem* examination was not examined at the trial, the *ante mortem* injuries cannot be said to have been proved at the trial.

11. Learned Additional Public Prosecutor representing the State has submitted that the *ante mortem* injury found in the *post mortem* report is indicative of the fact that the deceased was physically assaulted before her death. Such injuries could not have been caused by mere fall from the stairs. She has further submitted that it is the consistent evidence of the prosecution's witnesses that the deceased was being regularly castigated by this appellant for her ugly looks, particularly, in relation to the misalignment of her upper front teeth and in that background, the trial court taking into account all attending circumstances including the FSL report has rightly convicted the appellant for the commission of the offences punishable under Sections 302 and 328 of the Indian Penal Code.



12. We have perused the impugned judgment and order of the trial court. We have also perused the evidence of the prosecution's witnesses and other materials available on record. We have given our thoughtful consideration to the rival submissions made on behalf of the parties.

13. Before we proceed to refer to the relevant evidence of the witnesses and deal with the submissions advanced on behalf of the parties, we consider it apt to reproduce Section 328 of the Indian Penal Code in order to appreciate as to what are the basic ingredients to establish the offence punishable under the said Act. Section 328 of the I.P.C. reads as under:-

“328. Causing hurt by means of poison, etc., with intent to commit and offence.—Whoever administers to or causes to be taken by any person any poison or any stupefying, intoxicating or unwholesome drug, or other thing with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

14. The language of Section 328 of the I.P.C. is amply clear. It requires the prosecution to prove that the person charged of the offence has administered to, or causes to be taken



by any person any poison or any stupefying, intoxicating or unwholesome drug, or other thing with an intent to cause hurt to such person or with intent to commit or to facilitate the commission of offence or knowing it to be likely that he will thereby cause hurt.

15. In the present case, except for the fact that as per the FSL report, in the *viscera* sent to the Forensic Science Laboratory 'celphos', was found, which is highly poisonous in nature, there is no other evidence to prove that it was the appellant, who had administered the poison and he was in possession of such poison. None of the witnesses, who deposed at the trial, are eye-witness to any occurrence. Conviction recorded by the trial court is apparently based on circumstantial evidence.

16. The law on the point of proof of an offence relating to administering poison has been lucidly dealt with by the Supreme Court in case of ***Sharad Birdhichand Sarda v. State of Maharashtra*** reported in (1984) 4 SCC 116, which decision has subsequently been followed subsequently in various decisions of Supreme Court and this Court.

17. In case of ***Sharad Birdhichand Sarda*** (supra) the Supreme Court laid down in paragraph 165, which reads as



under:-

“165. So far as this matter is concerned, in such cases the court must carefully scan the evidence and determine the four important circumstances which alone can justify a conviction:

(1) there is a clear motive for an accused to administer poison to the deceased,

(2) that the deceased died of poison said to have been administered,

(3) that the accused had the poison in his possession,

(4) that he had an opportunity to administer the poison to the deceased.”

18. It may be noted that in case of ***Sharad Birdhichand Sarda*** (supra) the Supreme Court was faced with a situation where the prosecution had proved that the deceased had died of poisoning and it was also proved that there was an opportunity for the accused to have administered poison. Noticing absence of any proof that the appellant of that case was in possession of poison, upon reversing the High Court's decision which was under challenge before the Supreme Court made following observations in paragraph 167, which reads as under:-

“167. The comment made by the High Court appears to be frightfully vague and absolutely unintelligible. While holding in the clearest possible terms that there is no evidence in this



case to show that the appellant was in possession of poison, the High Court observes that this fact may be proved either by direct or indirect (circumstantial) evidence. But it fails to indicate the nature of the circumstantial or indirect evidence to show that the appellant was in possession of poison. If the Court seems to suggest that merely because the appellant had the opportunity to administer poison and the same was found in the body of the deceased, it should be presumed that the appellant was in possession of poison, then it has committed a serious and gross error of law and has blatantly violated the principles laid down by this Court. The High Court has not indicated as to what was the basis for coming to a finding that the accused could have procured the cyanide. On the other hand, in view of the decision in Ramgopal case (1972) 4 SCC 625 : AIR 1972 SC 656] failure to prove possession of the cyanide poison with the accused by itself would result in failure of the prosecution to prove its case. We are constrained to observe that the High Court has completely misread and misconstrued the decision in Ramgopal case [(1972) 4 SCC 625 : AIR 1972 SC 656] . Even prior to Ramgopal case [(1972) 4 SCC 625 : AIR 1972 SC 656] there are two decisions of this Court which have taken the same view. In Chandrakant Nyalchand Seth case [Criminal Appeal No 120 of 1957, decided on February 19, 1958] this Court observed thus:

“Before a person can be convicted of murder by poisoning, it is necessary to prove that the death of the deceased was caused by poison, that the poison in question was in possession of the accused and that poison was administered by the accused to the



deceased. There is no direct evidence in this case that the accused was in possession of potassium cyanide or that he administered the same to the deceased.”

19. Taking into account the principle laid down in case of ***Sharad Birdhichand Sarda*** (supra) as noted above for proof of a charge of commission of an offence punishable under Section 328 of the I.P.C., in background of prosecution's evidence adduced at the trial, we are of the considered opinion that the prosecution has not been able to prove that the appellant was in possession of poison, which is an essential ingredients for establishing an offence punishable under Section 328 of the I.P.C..

20. Further from the prosecution's case, as set up in the First Information Report as well as at the stage of trial, the deceased was killed by the appellant by administering her poison. No fact has been proved against the appellant based on the given circumstantial evidence from which it can be discerned that he had caused to the deceased any such bodily injury as would have caused death so as to treat the act of the appellant falling within the meaning of culpable homicide under Section 299 of the I.P.C. or murder under Section 300 of the I.P.C.. The prosecution, based on the evidence adduced at the trial thus, in our considered opinion, failed to establish



commission of offence punishable under Section 302 of the Indian Penal Code, beyond all reasonable doubts.

21. We are, therefore, constrained to reverse the finding of conviction recorded by the trial court against the appellant of commission of the offences punishable under Sections 302 and 328 of the Indian Penal Code. The impugned judgment of conviction dated 02.06.2015 and order of sentence dated 04.06.2015 passed by the learned 6th Additional District and Sessions Judge, Banka, in Sessions Trial No. 1343 of 2008(G.R. No. 620/08), Tr. No. 250/15, arising out of Rajoun P.S. Case No. 68 of 2008, is unsustainable and is accordingly set aside.

22. This appeal is accordingly allowed.

23. The appellant is in jail serving sentence. Let him be released forthwith, if not required in any other case.

(Chakradhari Sharan Singh, J)

(Khatim Reza, J)

Anand/Shanu/-

AFR/NAFR	NAFR
CAV DATE	NA
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