Nagendra Sah vs The State Of Bihar on 14 September, 2021

Author: Ajay Rastogi

Bench: Abhay S. Oka, Ajay Rastogi

1

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 1903 OF 2019

NAGENDRA SAH ..... APPELLANT

v.

THE STATE OF BIHAR ..... RESPONDENT

JUDGEMENT

ABHAY S. OKA, J.

1. The appellant is the accused. The appellant was prosecuted for the offences punishable under Sections 302 and 201 of the Indian Penal Code, 1860 (for short 'I.P.C.'). The learned Ad hoc Additional Sessions Judge-III, Bagah, West Champaran by his Judgement and Order dated 29th August 2013 convicted the appellant for both the offences. The appellant was sentenced to undergo imprisonment for life and to pay a fine of Rs.5,000/- for the offence punishable under Section 302 of IPC. In default of payment of fine, he was directed to undergo rigorous imprisonment for three months. For the offences punishable under Section 201 of I.P.C, he was directed to undergo rigorous imprisonment for three years and to pay a fine of Rs 5,000/-. In default of payment of fine, he was directed to undergo rigorous imprisonment for three months. The learned Sessions Judge directed that both the sentences shall run concurrently.

2. Being aggrieved by the verdict of the learned Adhoc Additional Sessions Judge, the appellant preferred an appeal before the High Court of Judicature at Patna. A Division Bench of Patna High Court by the impugned Judgment and Order dated 22nd April 2019 dismissed the appeal preferred by the appellant and upheld the judgment of the learned Sessions Judge.

3. Being aggrieved by the aforesaid two verdicts, the appellant has preferred the present appeal.

THE PROSECUTION CASE

4. Briefly stated, the prosecution case is that on 18 th November 2011, it was reported that the appellant's wife died due to burn injuries. On the basis of the information furnished by one Shri Mahesh Sah, Unnatural Death Case (for short "U.D. case") was registered on the same day. On 18th November 2011, autopsy was done by PW No.9 Dr. Ashok Kumar Tiwari. According to the post-mortem report, the cause of death was 'asphyxia due to pressure around neck by hand and blunt substance'. On the basis of the directions of a senior police officer, P.W.No.10 Shri Rajan Kumar Pandey registered First Information Report on 25 th August 2012. At that time, he was posted as the Officer-in-Charge of Gobardhana Police Station, District West Champaran. The First Information Report was registered for the offence punishable under section 302 of IPC. After the case was committed to the Court of Sessions, a charge under Section 201 of IPC was added. Charges for the offences punishable under Sections 302 and 201 of IPC were framed against the appellant.

SUBMISSIONS OF THE LEARNED COUNSEL

5. The learned counsel appearing for the appellant-accused submitted that none of the witnesses except the official witnesses have supported the prosecution case and that the conviction of the appellant is based solely on the cause of death mentioned in the post-mortem report. He pointed out that the testimony of PW Nos.1 to 5 has been already discarded by the learned Sessions Judge. He submitted that except for the post-mortem report, no other material has been relied upon by the Trial Court as well as High Court for convicting the appellant. He placed reliance on a decision of this Court in the case of Balaji Gunthu Dhule v. State of Maharashtra1 in support of his submissions.

6. He submitted that the evidence of prosecution witnesses brings on record an important fact that when the incident constituting the alleged offence occurred, there were other members of the family of the appellant- accused present in the house. He submitted that the prosecution witnesses have deposed that the appellant and the deceased were leading 1 (2012) 11 SCC 685 a normal matrimonial life. He submitted that PW No.5, Smt. Chandrakali Devi, who is the mother of the deceased, has not supported prosecution. She stated in the deposition that the incident of fire took place when the deceased was boiling milk for her child. He pointed out that even PW No.5-a, Shri Mahesh Sah who gave a report of unnatural death on 18 th November 2011 did not support the prosecution. He submitted that a complete chain of events establishing the guilt of the appellant-accused has not been established. He urged that though post-mortem report was available on 18th November 2011, First Information Report was registered belatedly on 25th August 2012. He would, therefore, submit that the conviction of the appellant cannot be sustained and deserves to be set aside.

7. The learned counsel appearing for the respondent – the State of Bihar submitted that the defence of the appellant that the deceased died to burn injuries sustained by an accidental fire was proved to be completely false as can be seen from the post-mortem report and the deposition of PW No.9, Dr. Ashok Kumar Tiwari, who conducted the autopsy. He pointed out that PW No.9 categorically stated that the death was due to asphyxia. He submitted that admittedly the appellant and the deceased were staying together under the same roof and therefore, Section 106 of the Indian Evidence Act, 1872 (for short 'the Evidence Act') will apply. He submitted that the burden was on the appellant-accused to explain how the death has occurred. He submitted that according to the accused, the death occurred due to accidental burn injuries. He submitted that the said plea is found

to be false as burn injuries have not caused the death. He urged that the evidence of PW No.9 shows that the burn injuries on the person of the deceased were not ante-mortem. He submitted that a chain of circumstances was established by the prosecution against the accused which supports only one hypothesis of the guilt of the appellant. He submitted that the failure of the appellant to discharge the burden on him under Section 106 of the Evidence Act is very crucial as the case is based on circumstantial evidence.

CONSIDERATION OF SUBMISSIONS AND CONCLUSIONS

8. We have given careful consideration to the submissions. The prosecution case is based on circumstantial evidence. The learned Sessions Judge, in paragraph 12 of his judgment, has set out various facts which according to him constituted a complete chain of circumstances against the accused. The following circumstances were set out by the learned Trial Judge: -

a) It is an admitted position that the deceased-wife and the appellant-

accused were residing together at the time of her death and requisite privacy was available to the appellant to perpetrate the crime;

b) the post-mortem report and the evidence of PW No.9 has established that the deceased died on account of throttling of her neck;

c) The burn injuries are undoubtedly ante post-mortem injuries;

d) The accused tried to mislead the Court by taking a false plea that the death of the deceased was due to burn injuries; and

e) The prosecution showed fairness by implicating only the appellant and not his family members.

The learned Sessions Judge held that the aforesaid chain of circumstances is consistent only with one hypothesis. The said hypothesis is of the guilt of the accused. The High Court concurred with the said finding.

9. It is necessary to refer to the evidence adduced by the prosecution. There were total 11 witnesses examined by the prosecution. PW Nos. 1 to 4 are the neighbours of the accused. None of them are eye witnesses to the actual incident. PW No.1, Shri Chandradeo Mahto stated that while the deceased was boiling milk for her child, the leaves lying nearby caught fire due to which her saree caught fire. He stated that one Shri Chandrika Prasad, the father-in-law of the deceased attempted to put out the fire and he sustained burn injuries while doing so. In the cross-examination, he stated the deceased has good relations with the family of her in-laws. PW No.2, Shri Jaggu Yadav deposed on the lines of PW No.1. In addition, he stated that a tempo was called and the appellant, his father and brother took the deceased to a hospital at Ram Nagar by putting her in the tempo. The witness deposed that he learnt later on that the deceased died on the way. In the cross-examination, he accepted that there was never any dispute between the appellant and his deceased wife.

10. PW No.3, Shri Kisarmas Mahto stated that when he reached the house of the appellant, he saw that all the members of the family of the appellant were putting out the fire. He stated that thereafter the appellant took the deceased to a hospital at Ram Nagar and on the way, the deceased died. PW No.4 is Shri Prem Yadav who also stated that on alarm, he also rushed to the house of the deceased when he saw Chandrika Prasad, the father of the appellant extinguishing the fire. In the cross-examination, he deposed that the married life of the appellant and the deceased was very happy and prosperous and that they have three children from the wedlock.

11. PW No.5 is Smt. Chandrakali Devi, the mother of the deceased. She also came out with the version that while her daughter was boiling milk for her child, her saree caught fire from the lamp due to which she suffered burn injuries which resulted in her death. In the cross-examination, she stated that there was no complaint made by her daughter against the appellant. PW No.5-a is Shri Mahesh Sah. He is the real brother of the deceased. He accepted in the cross examination that marital life of his sister was happy and prosperous.

12. PW No.6 Shri Vijay Kumar Gupta, is a formal witness who signed the death inquest report. PW No.7 Shri Prem Sah is also a signatory to the death inquest report. In the cross-examination, he admitted that his house is towards the west side behind the house of the appellant. He stated that when alarm was raised about the fire, he noticed that in-laws of the deceased were extinguishing the fire.

13. PW No.8 is one Shri Devendra Prasad who produced post-mortem register before the Sessions Court. PW No.9 is Dr. Ashok Kumar Tiwari who conducted autopsy on the dead body of the deceased on 18 th November 2011. Apart from proving the post-mortem report in his evidence, he deposed that the cause of death was “asphyxia due to pressure around neck by hand and blunt substance”.

14. PW No.10 is Shri Rajan Kumar Pandey who was the Officer-in- Charge of the police station at Gobardhana at the relevant time. On 25 th August 2012, the First Information Report was registered by him. PW No.11 is Shri Deokant Tripathi who was holding the post of Sub- Inspector at the said police station on 25th August 2012. He carried out investigation into the offence.

15. As can be seen from the evidence of the prosecution witnesses, the in-laws of the deceased were very much staying in the same premises where the appellant and deceased were staying. PW No.1 stated that he saw the father-in-law of the deceased extinguishing the fire. The learned Trial Judge has specifically discarded the testimony of PW Nos.1 to 5. But PW No.6 Shri Vijay Kumar Gupta stated that he noticed that family members of the accused were extinguishing the fire. The evidence adduced by the prosecution shows that at the time of the alleged incident, there were other members of the family of the accused with the accused in his house. However, it is not even the case of the prosecution that the relationship between the appellant and his deceased wife was strained or that the relationship between the deceased wife and the appellant’s parents was strained. On the contrary, some of the prosecution witnesses have stated that their relationship was cordial.

16. As the entire case is based on circumstantial evidence, we may make a useful reference to a leading decision of this Court on the subject. In the case of Sharad Birdhichand Sarda v. State of Maharashtra2, in paragraph 153, this Court has laid down five golden principles (Panchsheel) which govern a case based only on circumstantial evidence.

Paragraph 153 reads thus : -

> "153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:
>
> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra where the following observations were made:

> Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can 2 (1984) 4 SCC 116.

convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty, (3) the circumstances should be of a conclusive nature and tendency, (4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused." (emphasis added) Paragraphs 158 to 160 of the said decision are also relevant which read thus :

> "158. It may be necessary here to notice a very forceful argument submitted by the Additional Solicitor-General relying on a decision of this Court in Deonandan Mishra v. State of Bihar, to supplement his argument that if the defence case is false it would constitute an additional link so as to fortify the prosecution case. With due respect to the learned Additional Solicitor-General we are unable to agree with the interpretation given by him of the aforesaid case, the relevant portion of which may be extracted thus:
>
> But in a case like this where the various links as started above have been satisfactorily made out and the circumstances point to the appellant as the probable assailant, with reasonable definiteness and in proximity to the deceased as regards time and

> situation, . . . such absence of explanation or false explanation would itself be an additional link which completes the chain."
>
> 159. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier, viz., before a false explanation can be used as additional link, the following essential conditions must be satisfied :
>
> (1) various links in the chain of evidence led by the prosecution have been satisfactorily proved, (2) the said circumstance points to the guilt of the accused with reasonable definiteness, and (3) the circumstance is in proximity to the time and situation.

160. If these conditions are fulfilled only then a court can use a false explanation or a false defence as an additional link to lend an assurance to the court and not otherwise. On the facts and circumstances of the present case, this does not appear to be such a case. This aspect of the matter was examined in Shankarlal case where this Court observed thus:

> Besides, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstance, if other circumstances point unfailingly to the guilt of the accused."
>
> (emphasis added)
>
> 17. In this case, as mentioned above, neither the prosecution witnesses have deposed to that effect nor any other material has been placed on record to show that the relationship between the appellant and the deceased was strained in any manner. Moreover, the appellant was not the only person residing in the house where the incident took place and it is brought on record that the parents of the appellant were also present on the date of the incident in the house. The fact that other members of the family of the appellant were present shows that there could be another hypothesis which cannot be altogether excluded. Therefore, it can be said that the facts established do not rule out the existence of any other hypothesis. The facts established cannot be said to be consistent only with one hypothesis of the guilt of the appellant.
>
> 18. Now we come to the argument of the prosecution based on Section 106 of the Evidence Act. Section 106 reads thus :-
>
> “106. Burden of proving fact especially within knowledge. – When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

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

19. Under Section 101 of the Evidence Act, whoever desires any Court to give a judgment as to a liability dependent on the existence of facts, he must prove that those facts exist. Therefore, the burden is always on the prosecution to bring home the guilt of the accused beyond a reasonable doubt. Thus, Section 106 constitutes an exception to Section 101. On the issue of applicability of Section 106 of the Evidence Act, there is a classic decision of this Court in the case of Shambu Nath Mehra v. The State of Ajmer3 which has stood the test of time. The relevant part of the said decision reads thus :-

"Section 106 is an exception to section 101. Section 101 lays down the general rule about the burden of proof.

"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist".

Illustration (a) says-

"A desires a Court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime".

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. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are Attygalle v. Emperor and Seneviratne v. R. Illustration (b) to section 106 has

obvious reference to a very special type of case, namely to offences under sections 112 and 113 of the Indian Railways Act for travelling or attempting to travel without a pass or ticket or with an insufficient pass, etc. Now if a passenger is seen in 3 (1956) SCR page 199 a railway carriage, or at the ticket barrier, and is unable to produce a ticket or explain his presence, it would obviously be impossible in most cases for the railway to prove, or even with due diligence to find out, where he came from and where he is going and whether or not he purchased a ticket. On the other hand, it would be comparatively simple for the passenger either to produce his pass or ticket or, in the case of loss or of some other valid explanation, to set it out; and so far as proof is concerned, it would be easier for him to prove the substance of his explanation than for the State to establish its falsity.

We recognise that an illustration does not exhaust the full content of the section which it illustrates but equally it can neither curtail nor expand its ambit; and if knowledge of certain facts is as much available to the prosecution, should it choose to exercise due diligence, as to the accused, the facts cannot be said to be "especially" within the knowledge of the accused. This is a section which must be considered in a commonsense way; and the balance of convenience and the disproportion of the labour that would be involved in finding out and proving certain facts balanced against the triviality of the issue at stake and the ease with which the accused could prove them, are all matters that must be taken into consideration. The section cannot be used to undermine the well established rule of law that, save in a very exceptional class of case, the burden is on the prosecution and never shifts." (emphasis added)

20. Thus, Section 106 of the Evidence Act will apply to those cases where the prosecution has succeeded in establishing the facts from which a reasonable inference can be drawn regarding the existence of certain other facts which are within the special knowledge of the accused. When the accused fails to offer proper explanation about the existence of said other facts, the Court can always draw an appropriate inference.

21. When a case is resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the accused to discharge the burden under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the accused.

22. As we have already held in this case, the circumstances established by the prosecution do not lead to only one possible inference regarding the guilt of the appellant-accused.

23. Therefore, what survives for consideration is only an opinion of the medical practitioner who conducted autopsy and gave a report on the cause of death. As held in the case of Balaji Gunthu Dhule (supra), only on the basis of post-mortem report, the appellant could not have been convicted of the offence punishable under Section 302 of IPC and consequently for the offence punishable under Section 201 of IPC.

24. Moreover, There is no explanation brought on record by the prosecution for the delay in registering First Information Report. Though the post-mortem report was available on 18th November 2011, First Information Report was belatedly registered on 25th August 2012.

25. Therefore, we are of the considered view that the guilt of the accused has not been established beyond a reasonable doubt. Therefore, the appeal must succeed and we pass the following order :

(i) The impugned judgment dated 22nd April 2019 of the High Court is hereby quashed and set aside;

(ii) The appellant stands acquitted from the charges framed against him for the offences punishable under Sections 302 and 201 of the IPC in case bearing ST No.23/13;

(iii)The appellant shall be forthwith set at liberty and Bail bonds stand discharged, unless he is required in connection with any other case.

(iv)Appeal is allowed accordingly with no order as to costs.

.....J (AJAY RASTOGI) .....J (ABHAY S. OKA) New Delhi;

September 14, 2021.