

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 259 OF 2009

Joshinder Yadav

...Appellant

Versus

State of Bihar

...Respondent

J U D G M E N T

(SMT.) RANJANA PRAKASH DESAI, J.

1. The appellant who was arraigned as Accused 2 was tried along with five other accused for offences punishable under Sections 498A and 302 read with Sections 149 and 201 of the IPC by the 1st Additional Sessions Judge, Madhepura. The allegations against the accused, inter alia, were that they subjected one Bindula Devi to cruelty and harassment with a view to coercing her and her other relatives to meet their unlawful demand of property and that on her failure to fulfill their unlawful demand, in furtherance of their common object, they committed her murder and that

they caused disappearance of her dead body with an intention to screen themselves from legal punishment.

2. Bindula Devi was married to Accused 1 Jaiprakash Yadav. The appellant and Accused 3 Shakun Devo Yadav are the brothers of Accused 1 Jaiprakash Yadav. Accused 4 Dani Dutta Yadav is their father and Accused 5 Satya Bhama Devi is their mother. Accused 6 Fudai Yadav is brother-in-law of Accused 1 Jaiprakash Yadav.

3. The prosecution story is reflected in the evidence of Complainant PW-9 Debu Yadav, the father of Bindula Devi. He stated that his daughter Bindula Devi was married to Accused 1 Jaiprakash Yadav. He further stated that in the marriage one buffalo, one cow and one bullock were given as dowry to the accused as per their demand. However, the accused were not satisfied with that. They demanded a wrist watch and a cycle which were given to them. Even then they continued to harass and assault Bindula Devi. She gave birth to a male child. The accused kept Bindula Devi in their

house and sent the child to his house so that he would rear the child. PW-9 Debu Yadav further stated that when in Ashwin month he brought Bindula Devi to his house she told him about the ill-treatment meted out to her at her matrimonial home. She did not want to go back. He tried to pacify her. He transferred two kathas of land in her name. She then went to her matrimonial home. The accused insisted that she should sell the land. As she did not agree to selling of the land, they subjected her to further torture. PW-9 Debu Yadav further stated that on a Monday at about 4.00 p.m. Accused 6 Fudai Yadav came to his house and enquired whether Bindula Devi had come there and told him that she had run away from the house. He told Accused 6 Fudai Yadav that Bindula Devi would not run away from her house. He then proceeded to the house of the accused situated in village Kolhua along with his son Sachindra Yadav and his brother-in-law. Accused 6 Fudai Yadav accompanied them for some distance and then left for some other place. They reached Kolhua village and found the house of the accused to be empty. All the accused had left the house

with their belongings. Bindula Devi was also not present. On enquiry the neighbours told him that because Bindula Devi had refused to transfer the land in the accused's name they had administered poison to her and murdered her. He met Sub-Inspector of Police by the river side who recorded his statement. A search was conducted. The dead body of Bindula Devi was recovered from the river bed. Formal FIR of PW-9 Debu Yadav was registered on 31/1/1989 and the investigation was started. The appellant, Accused 1 Jaiprakash Yadav and Accused 3 Shakun Devo Yadav surrendered before the court on 6/3/1989. Accused 4 Dani Dutta Yadav surrendered before the court on 26/8/1989.

4. At the trial, though, the prosecution examined 13 witnesses, it's case rested on the evidence of PW-9 Debu Yadav, father of the deceased and PW-10 Sachindra Yadav, brother of the deceased. PWs-2 to 7 turned hostile. The accused pleaded not guilty to the charge. They contended that when Bindula Devi went to take bath, she slipped in the water, got drowned and died.

5. The trial court convicted the accused under Section 302 read with Section 149 of the IPC and sentenced each of them to suffer life imprisonment. They were also convicted under Section 498A of the IPC and sentenced to undergo rigorous imprisonment for three years each. They were further convicted and sentenced to undergo rigorous imprisonment for seven years each under Section 201 of the IPC. All the substantive sentences were ordered to run concurrently. The High Court dismissed their appeal. Hence, this appeal, by special leave, by Accused 2.

6. Mr. Gaurav Agrawal, learned counsel for the appellant submitted that the instant case rests on circumstantial evidence. Counsel pointed out that the appellant is the brother of Accused 1 Jaiprakash Yadav, the husband of Bindula Devi. PW-10 Sachindra Yadav stated in his evidence that Accused 1 had separated from his other brothers. There is no evidence on record to establish that the appellant was party to any dowry demand or to any ill-treatment meted out

to Bindula Devi. Counsel submitted that in cases where apart from husband other members of his family are charged with offences under Sections 304B, 302 and 498A of the IPC and the case rests on circumstantial evidence, unless the circumstantial evidence is of required standard conviction cannot be based on it. In this connection he relied on **Vithal Tukaram More & Ors. v. State of Maharashtra**¹. Counsel submitted that allegations about motive are vague. Medical evidence is inconclusive. The prosecution has, therefore, failed to establish its case. In any case, since the appellant was residing separately, in the absence of any clinching evidence establishing his complicity he cannot be convicted.

JUDGMENT

7. Mr. Gopal Singh, learned counsel for the State of Bihar on the other hand submitted that the evidence on record establishes that all the accused were staying in houses situated in the same courtyard. Counsel submitted that evidence of PW-9 Debu Yadav and PW-10 Sachindra Yadav

¹ (2002) 7 SCC 20

establishes the prosecution case. Pertinently, the accused did not lodge any complaint to the police. The fact that they left the house with all their belongings suggests their complicity. Counsel submitted that Bindula Devi disappeared from the house of the accused. As to how she died in suspicious circumstances was within the knowledge of the accused. The burden was shifted to the accused which they have not discharged. Adverse inference must be drawn against the accused. In this connection, counsel relied on **Balaram Prasad Agrawal v. State of Bihar & Ors**². Counsel submitted that appeal be, therefore, dismissed.

8. We have already referred to the evidence of father of Bindula Devi PW-9 Debu Yadav. He has given a graphic account of the harassment and ill-treatment meted out to the deceased by the accused. They were not happy with a bullock, a cow and a buffalo which were given as dowry. They asked for a watch and a cycle. That was also given.

² (1997) 9 SCC 338

They asked for more. PW-9 Debu Yadav transferred 2 kathas of land to Bindula Devi. The accused wanted to sell it or wanted it to be transferred in their names and since Bindula Devi did not agree to that they continued to torture her. Her son was sent to her father so that he would be brought up by him, but she was kept in the matrimonial house obviously to work. PW-10 Sachindra Yadav the brother of Bindula Devi has corroborated his father. It is distressing to note that all the other witnesses, that is PW-2 to PW-7 turned hostile. In the facts of this case, it is indeed a pointer to the guilt of the accused. They won over the prosecution witnesses. We note with some anguish the following sentences uttered by PW-9 Debu Yadav in his cross-examination probably as an answer to the usual question about there being no independent witness to depose about cruelty. He stated *"whenever my daughter visited my house, she used to complain that she is being tortured and assaulted there. Who else can be a witness to this fact?"* Having perused the evidence of PWs-9 and 10 we have no manner of doubt that Bindula Devi was subjected to cruelty and harassment for

dowry by the accused. Evidence of these witnesses is straightforward and honest. There is no exaggeration. In the cross-examination their evidence has not suffered any dent. Implicit reliance can be placed on them.

9. It is submitted that the appellant had separated from Accused 1 Jaiprakash Yadav and, hence, he cannot be a party to the alleged acts of cruelty of the other accused. We find no substance in this submission. Though, PW-10 Sachindra Yadav stated that Accused 1 Jaiprakash Yadav had separated from his brothers after marriage, he has clarified that all the brothers have their houses in a common courtyard. PW-9 Debu Yadav has specifically named the appellant as a person who demanded cattle. He has stated that the accused were not satisfied with the cattle given by him. They demanded more dowry. They used to harass and assault Bindula Devi. He stated that when he went to the house of the accused after receiving information that she had left their house, he found the house to be empty. All the accused had absconded. They had taken their belongings

with them. This is confirmed by PW-13 Surendra Rai the Investigating Officer. He stated that when he went to the house of the accused after receiving information about disappearance of Bindula Devi he found the house completely empty. Even the household articles and food grains were missing. The accused were not present. No member of their family was present. Bindula Devi was also not present. These circumstances persuade us to reject the submission that the appellant did not join the other accused in treating Bindula Devi with cruelty. The conviction and sentence of the appellant under Section 498A of the IPC is therefore perfectly justified.

10. We now come to the death of Bindula Devi. PW-9 Debu Yadav and PW-10 Schindra Yadav stated that dead body of Bindula Devi was recovered from the river bed. The Investigating Officer PW-13 Surendra Rai stated that after recording the FIR of PW-9 Debu Yadav, he inspected the house of Accused 1 Jaiprakash Yadav. The dead body of Bindula Devi was found lying 600 yards away from the house

of the accused. It was lying in one foot deep water, close to the southern bank of the river, near a ferry. The ferry was situated adjacent to the maize field of Hazari Mandal. He took it out and prepared inquest report. He further stated that one Vinod stated that on 29/1/1989, the accused had a meeting. On 30/1/1989, they left for some other place and in the evening it was revealed that they had killed Bindula Devi by poisoning her and had thrown her dead body at the ferry. The Investigating Officer further stated that Vinod, Parmeshvari Yadav, Brij Bihari Yadav also confirmed this fact. All these persons turned hostile in the court.

11. PW-12 Dr. Arun Kumar Mandal did the post-mortem on the dead body of Bindula Devi. Following are his observations:

- “1. (1) *Epistaxis from both nostrils.*
- (2) *Blood mixed with froth from mouth.*
- (3) *Both eye balls congested, cornea hazy.*
- (4) *Face congested and cyanosed.*
- (5) *Skin of both hands and feet were corrugated.*

2. *On opening of skull all the blood vessels were congested in the maninges and brain matter.*
3. *In the chest both the lungs were found congested, frothy and spongy and on cutting blood stains froth found in segments.*
4. *In the heart both chambers were found full.*
5. *In the stomach semi-digested food about 4 ounces with blood mixed.*
6. *In the small intestine-gas and solid facees.*
7. *In the large intestine-gas and solid facees.*
8. *In the case of kidneys both were found congested.*
9. *Liver an spleen were also found congested.*
10. *Uterus contained about full term dead male baby."*

PW-12 Dr. Arun Kumar Mandal opined that the cause of death was asphaxia due to drowning. He stated that in cases of drowning, if immediate death is caused, then, there will be negligible quantum of water in the stomach. He further stated that death may be caused even in one foot deep water if the victim is kept in water with his neck pressed in sleeping position. It may be stated here that

report of the viscera examination is not on record. Dr. Mandal has admitted that he did not know the result of viscera examination. He added that there were no injuries on the person of the deceased.

12. In our opinion, the evidence of the father and the brother of Bindula Devi and other attendant circumstances such as strong motive; the fact that the accused did not lodge any complaint about missing of Bindula Devi; that Accused 6 Fudai Yadav went to the house of PW-9 Debu Yadav to enquire about Bindula Devi and then suddenly deserted PWs 9 and 10 when they were going to the house of the accused, that all the accused absconded from their house with their belongings and that the house was completely empty, lead to an irresistible conclusion that the accused were responsible for the death of Bindula Devi.

13. It is submitted that since there were no injuries on the dead body of Bindula Devi, it would be wrong to conclude that Bindula Devi was kept in water in a sleeping position

with her neck pressed as suggested by the doctor. The prosecution story that the accused caused her death must therefore be rejected. Medical evidence, it is argued, does not support the prosecution case.

14. In our opinion, the prosecution having established that the accused treated the deceased with cruelty and that they subjected her to harassment for dowry, the accused ought to have disclosed the facts which were in their personal and special knowledge to disprove the prosecution case that they murdered Bindula Devi. Section 106 of the Evidence Act covers such a situation. The burden which had shifted to the accused was not discharged by them. In this connection, we may usefully refer to the judgment of this Court in **Shambhu Nath Mehra v. State of Ajmer**³ where this Court explained how Section 101 and Section 106 of the Evidence Act operate. Relevant portion of the said judgment reads thus:

³ AIR 1956 SC 404

“(10) 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’.

(11) 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.”

15. In **Balram Prasad Agrawal v. State of Bihar**⁴, the prosecution had established the cruel conduct of the accused i.e. her husband and members of his family and the

⁴ (1997) 9 SCC 338

sufferings undergone by the deceased at their hands. The unbearable conduct of the accused ultimately resulted in her death by drowning in the well in the courtyard of the accused's house. This Court observed that what happened on the fateful night and what led to the deceased's falling in the well was wholly within the personal and special knowledge of the accused. But they kept mum on this aspect. This Court observed that it is true that the burden is on the prosecution to prove the case beyond reasonable doubt. But once the prosecution is found to have shown that the accused were guilty of persistent conduct of cruelty qua the deceased spread over years as was well established from the unshaken testimony of father of the deceased, the facts which were in the personal knowledge of the accused who were present in the house on that fateful night could have been revealed by them to disprove the prosecution case. This Court observed that the accused had not discharged the burden which had shifted to them under Section 106 of the Evidence Act. While coming to this conclusion, this Court relied on **Shambhu Nath Mehra**.

16. In the present case, the deceased was admittedly in the custody of the accused. She disappeared from their house. As to how her dead body was found in the river was within their special and personal knowledge. They could have revealed the facts to disprove the prosecution case that they had killed Bindula Devi. They failed to discharge the burden which had shifted to them under Section 106 of the Evidence Act. The prosecution is not expected to give the exact manner in which the deceased was killed. Adverse inference needs to be drawn against the accused as they failed to explain how the deceased was found dead in the river in one foot deep water.

JUDGMENT

17. Pertinently, the post-mortem notes do not indicate presence of huge amount of water in the dead body. According to PW-12 Dr. Mandal, in a case of drowning, if immediate death is caused, then, there will be negligible quantum of water in the stomach. From the evidence of PW-12 Dr. Mandal, it appears that the death of Bindula Devi

occurred immediately after she was drowned in the water because there was not much water in her stomach. It is also pertinent to note that Bindula Devi was pregnant. Her uterus contained full term dead male baby. She could not have, therefore, offered any resistance. It appears that, therefore, there were no injuries on the dead body. The whole operation appears to have been done swiftly and skillfully. But in any case, as stated hereinabove, it is not for the prosecution to explain in what manner Bindula Devi was done to death by the accused because Bindula Devi was staying in the house of the accused prior to the occurrence and she disappeared from that house. All the circumstances leading to her unnatural death were within the special and personal knowledge of the accused which they chose not to disclose. Instead, they gave a totally false explanation that when Bindula Devi had gone for bath, she slipped, got drowned in the water and died. This story is palpably false. The false explanation offered by the accused further strengthens the prosecution case as it becomes an additional link in the chain of circumstances.

18. It is true that in **Vithal Tukaram More** this Court has held that in a case where other members of the husband's family are charged with offences under Sections 304B, 302 and 498A of the IPC and the case rests on circumstantial evidence, the circumstantial evidence must be of required standard if conviction has to be based on it. We are of the considered opinion that the evidence adduced by the prosecution in this case is of required standard. No other inference, except that of the guilt of the accused, is possible on the basis of the evidence on record. The established facts are consistent only with the hypothesis of their guilt and inconsistent with their innocence. The appeal, therefore, deserves to be dismissed.

19. Before we part, we must refer to a very vital aspect of this case. PW-9 Debu Yadav, the father of Bindula Devi stated that the neighbours told him that Bindula Devi was poisoned by the accused. PW-10 Sachindra Yadav, brother of Bindula Devi has also stated so. PW-13 Surendra Rai, the

Investigating Officer went a step further. He stated that Vinod Yadav, Shiv Pujan Ram, Vinod Kumar Mehta, Parmeshwar Yadav and Braj Bihari Yadav told him that the accused had killed Bindula Devi by poisoning her; that they had concealed the dead body in the river and had run away. Unfortunately, these witnesses turned hostile. But the fact remains that the prosecution had come out with a case of poisoning. It was, therefore, necessary for the prosecution to get the viscera examined from Forensic Science Laboratory ("**the FSL**").

20. The trial court has observed that the Investigating Officer had filed a petition on 19/4/1988 requesting the doctor to send the viscera for chemical analysis to the FSL, Patna. Post-mortem notes mention that viscera was protected for future needs. This is also stated by PW-12 Dr. Mandal. Dr. Mandal has, however, added that he did not know the result of viscera examination. From the evidence of the Investigating Officer, PW-13 Surendra Rai, it appears that the doctor did not send the viscera to the FSL. When he

was questioned about the viscera report, the Investigating Officer stated in the cross-examination that a letter had been sent to the doctor about viscera examination. He further stated that he did not make any complaint against the doctor to the senior officers, but, informed his officer through diary. We are of the opinion that the doctor ought to have sent the viscera to the FSL when he was requested to do so. On his failure to do so, the Investigating Officer should have informed his superior officer and taken steps to ensure that viscera is sent to the FSL rather than just making a diary entry. Such a supine indifference has a disastrous effect on the criminal justice administration system.

21. We are aware that in some cases where there is other clinching evidence on record to establish the case of poisoning, this Court has proceeded to convict the accused even in the absence of viscera report. In **Bhupendra v. State of Madhya Pradesh**,⁵ this Court was concerned with a case where the viscera report was not on record, but, there

⁵ 2013 (13) SCALE 52

was enough evidence of poisoning. The accused was charged under Sections 304-B and 306 of the IPC. Drawing support from the presumptions under Sections 113B and 113A of the Evidence Act, 1872 and, after referring to relevant judgments on the point, this Court held that death of the deceased was caused by poisoning. The relevant observation of this Court could be quoted.

“26. These decisions clearly bring out that a chemical examination of the viscera is not mandatory in every case of a dowry death; even when a viscera report is sought for, its absence is not necessarily fatal to the case of the prosecution when an unnatural death punishable under Section 304-B of the IPC or under Section 306 of the IPC takes place; in a case of an unnatural death inviting Section 304-B of the IPC (read with the presumption under Section 113-B of the Evidence Act, 1872) or Section 306 of the IPC (read with the presumption under Section 113-A of the Evidence Act, 1872) as long as there is evidence of poisoning, identification of the poison may not be absolutely necessary.”

22. In **Chhotan Sao & Another v. State of Bihar**,⁶ this Court was dealing with a case involving Sections 304-B and 498A of the IPC. The allegations were that the deceased was

⁶ 2013 (15) SCALE 338

murdered by poisoning her. The viscera report was not on record. There was no other evidence on record to establish that the deceased was poisoned. This Court distinguished the case before it from the facts of **Bhupendra** and while acquitting the accused of the charge under Section 304-B of the IPC made the following pertinent observations:

“17. Before parting with the appeal, we wish to place on record our anguish regarding the inadequacy of investigation, the failure to discharge the responsibility on the part of the public prosecutor and the Magistrate who took cognizance of the offence under Section 304-B. The Investigating Officer who submitted the charge sheet ought not to have done it without securing the viscera report from the forensic lab and placing it before the Court. Having regard to the nature of the crime, it is a very vital document more particularly in the absence of any direct evidence regarding the consumption of poison by the deceased Babita Devi. Equally the public prosecutor failed in his responsibility to guide the investigating officer in that regard. Coming to the magistrate who committed the matter to the Sessions Court, he failed to apply his mind and mechanically committed the matter for trial. Public prosecutors and judicial officers owe a greater responsibility to ensure compliance with law in a criminal case. Any lapse on their part such as the one which occurred in the instant case is bound to jeopardize the prosecution case resulting in avoidable acquittals. Inefficiency and

callousness on their part is bound to shake the faith of the society in the system of administration of criminal justice in this country which, in our opinion, has reached considerably lower level than desirable."

23. We must note that this is the third case which this Court has noticed in a short span of two months where, in a case of suspected poisoning, viscera report is not brought on record. We express our extreme displeasure about the way in which such serious cases are dealt with. We wonder whether these lapses are the result of inadvertence or they are a calculated move to frustrate the prosecution. Though the FSL report is not mandatory in all cases, in cases where poisoning is suspected, it would be advisable and in the interest of justice to ensure that the viscera is sent to the FSL and the FSL report is obtained. This is because not in all cases there is adequate strong other evidence on record to prove that the deceased was administered poison by the accused. In a criminal trial the Investigating Officer, the Prosecutor and the Court play a very important role. The court's prime duty is to find out the truth. The Investigating

Officer, the Prosecutor and the Courts must work in sync and ensure that the guilty are punished by bringing on record adequate credible legal evidence. If the Investigating Officer stumbles, the Prosecutor must pull him up and take necessary steps to rectify the lacunae. The Criminal Court must be alert, it must oversee their actions and, in case, it suspects foul play, it must use its vast powers and frustrate any attempt to set at naught a genuine prosecution. Perhaps, the instant case would have been further strengthened had the viscera been sent to the FSL and the FSL report was on record. These scientific tests are of vital importance to a criminal case, particularly when the witnesses are increasingly showing a tendency to turn hostile. In the instant case all those witnesses who spoke about poisoning turned hostile. Had the viscera report been on record and the case of poisoning was true, the prosecution would have been on still firmer grounds.

24. Having noticed that, in several cases where poisoning is suspected, the prosecuting agencies are not taking steps to

obtain viscera report, we feel it necessary to issue certain directions in that behalf. We direct that in cases where poisoning is suspected, immediately after the post-mortem, the viscera should be sent to the FSL. The prosecuting agencies should ensure that the viscera is, in fact, sent to the FSL for examination and the FSL should ensure that the viscera is examined immediately and report is sent to the investigating agencies/courts post haste. If the viscera report is not received, the concerned court must ask for explanation and must summon the concerned officer of the FSL to give an explanation as to why the viscera report is not forwarded to the investigating agency/court. The criminal court must ensure that it is brought on record.

JUDGMENT

25. We have examined the merits of the case and held that the appeal deserves to be dismissed. In the circumstances, the appeal is dismissed.

26. A copy of this order be sent to the Registrar Generals of all the High Courts with a direction to circulate the same to all subordinate Criminal Courts; to the Director of Prosecution, to the Secretary, Ministry of Home Affairs, to the Secretary, Home Department and to the Director, Forensic Science Laboratory within the jurisdiction of the respective High Courts.

.....J.
(**Ranjana Prakash Desai**)

.....J.
(**J. Chelameswar**)

New Delhi;
January 20, 2014.

JUDGMENT