

In The High Court Of Judicature At Allahabad
Sitting At Lucknow

Neutral Citation No. - 2024:AHC-LKO:63452-DB

Judgment Reserved on: 04.09.2024

Judgment Delivered on: 13.09.2024

A.F.R.

Court No. - 1

Case :- CRIMINAL APPEAL No. - 878 of 2019

Appellant :- Hafeez Khan

Respondent :- State of U.P.

Counsel for Appellant :- Manoj Kumar Singh, Arvind Kumar, Indu Prakash Singh, Rakesh Kumar Tripathi, Vishwa Nath Singh

Counsel for Respondent :- Govt. Advocate

Hon'ble Attau Rahman Masoodi J.

Hon'ble Subhash Vidyarthi J.

(Per Hon'ble Subhash Vidyarthi J.)

1. Heard Shri Indu Prakash Singh, the learned counsel for the appellant and Shri R.S. Dwivedi, the learned Additional Government Advocate for the State.
2. By means of the instant appeal filed under Section 374 (2) of Cr.P.C., the appellant has challenged validity of the judgment and order dated 27.03.2019 passed by Sri Nand Pratap Ojha, the learned V Additional Sessions Judge, Bahraich in Sessions Trial No.110 of 2017, arising out of Case Crime No.215 of 2017 under Sections 498-A, 323, 304-B, 201, 504, 506, 302 I.P.C. and 3/4 Dowry Prohibition Act registered at Police Station- Risiya, District Bahraich, to the extent that it holds the appellant guilty of committing offences under Sections 302, 201 I.P.C. and sentences him to undergo simple imprisonment for life and pay Rs.50,000/- as fine and on failure to pay fine, to undergo simple imprisonment for a further period of 3 years for the offence under

Section 302 I.P.C. The appellant has been sentenced to undergo simple imprisonment for 5 years and pay Rs.10,000/- fine and in case of failure to pay fine, to undergo simple imprisonment for a further period of one year for the offence under Section 201 I.P.C.

3. Briefly stated, facts of the case are that on 15.01.2017, the informant Shabana, daughter of Azmat Khan, had given a written complaint to the Station House Officer, Risiya stating that her sister Sayra Bano had got married to the appellant - Hafeez Khan on 11.05.2016. Merely a few days after marriage, her sister informed her telephonically that the appellant, his mother - Zakrun Nisa, her maternal aunt Shahjahan and his grand-father Buddhu used to beat her for demanding dowry. Thereafter, the informant took her sister to her home. After some days, the appellant visited the informant's home, apologized for his fault and assured that such things would not recur. The informant sent her sister with the appellant on 12.12.2016. After a few days, the informant's sister informed her telephonically that all the aforesaid four persons had again started beating and harassing her for demanding dowry. The informant tried to contact her sister through phone, but her phone was switched off. On 15.01.2017, she went to her sister's home at Makoliya where all the aforesaid four accused persons abused and threatened her and they turned her out of their home. The informant expressed a suspicion that the aforesaid four persons had made her sister disappear for demanding dowry.
4. The Investigating Officer claims that some informer told him that the appellant had killed his wife and had buried the dead body in the grave of one Kennoo, whereupon the appellant was taken into custody. The grave of Kennoo was dug out and a dead body was exhumed after digging upto a depth of merely about two feet. The inquest proceedings conducted at the spot of recovery of the dead body was witnessed by (1) the informant Smt. Shabana, (2) the informant's sister Smt. Parveen, (3) Achhan son of Kennoo, (4) Abdul Naushad and (5) Pappu. It mentions that a red colour Kurta and salwar was there on the dead body and a *Duppatta* like sheet was wrapped

around its neck. It mentions that the informant Smt. Shabana and her sister Smt. Parveen had identified the dead body as belonging to Sayra.

5. The postmortem examination of the dead body was conducted on 19.01.2017 itself and the postmortem report also makes a mention of the clothes and a black thread with *Tabeez* present on the dead body. The report mentions that the face of the body was not recognizable. Skin had peeled off with grayish dis-colouration, ligaments were loosened, nails, hairs easily pulled out, teeth loosened from their sockets and soft parts were changing into black mass. Eyeballs were missing and eye-tor orbit was filled with mud. The postmortem examination report mentioned some injuries on the dead body, including an incised wound of 8x2 cm, cervical vertebra deep over front of neck, trachea and cervical vertebra out, hyoid bone and trachea partially missing. The cause of death was opined to be shock and hemorrhage due to anti-mortem injury. The time of death was opined to be about 8 weeks ago.
6. The police claim to have recovered a knife wrapped in an old cloth kept on a loft in the appellant's house on his voluntary pointing out. The recovery is said to have been witnessed by the informant Shabana, her sister Parveen and the appellant, besides some police personnel. The test report given by the Forensic Science Laboratory, U.P., Lucknow, mentions presence of blood on major parts of the knife, but the blood had been disintegrated and its group could not be ascertained.
7. On 10.04.2017, a charge-sheet was submitted against the applicant for offences under Sections 498-A, 323, 304-B, 201, 504, 506, 302 I.P.C. and 3/4 Dowry Prohibition Act and the Chief Judicial Magistrate took cognizance of the offences on 15.04.2017 and committed the matter to the Sessions Judge on the same date. The case was registered as Sessions Trial No.110 of 2017 and it was transferred to the Court of the learned Additional Sessions Judge/Fast track Court-I, Bahraich.

8. The record reveals that the appellant had filed an application for his release on bail, which was rejected by the trial Court by means of an order dated 02.05.2017 and he continued to remain in custody through the entire trial and he is in custody even at present.
9. The trial Court framed charges by means of an order dated 03.07.2017 regarding offences under Sections 498-A, 323, 304-B, 201, 504, 506 IPC and Sections 3/4 Dowry Prohibition Act and an alternative charge for commission of offence under Section 302 I.P.C. was also framed.
10. The prosecution examined nine witnesses.
11. PW-1 Smt. Shabana, who was the informant, reiterated the F.I.R. version. She further stated that she had got the complaint scribed by some unnamed person and had put her thumb impression thereon. This complaint was proved by PW-1 as exhibit-A1.
12. In her cross-examination, PW-1 stated that her sister Sayra Bano had got married about 3 – 3½ years ago to a person named Munna, who was resident of Bahraich City. Sayra stayed with him for about two years and thereafter one day Munna informed that Sayra had gone missing from her home. Munna had also told her that Hafeez Khan son of Subrati Khan resident of Makoliya (the appellant) was his friend and he used to visit Munna's place. Munna had expressed a suspicion that Hafeez was involved in Sayra Bano having gone missing. Thereafter, the informant had gone to the appellant's house along with Munna but the appellant had abused them and turned them away from his home stating that he did not know about the informant's sister. Thereafter, the informant's brother-in-law Munna had taken her to the police station and got the complaint scribed by a person by dictating it himself. He got the informant's thumb impression on the complaint and handed it over to the police.
13. PW-1 categorically stated that all the things written in the complaint were wrong and the same were got scribed by her brother-in-law Munna to save himself by getting a case registered against the

appellant whereas the truth is that her sister never got married to the appellant and the appellant never harassed her sister or demanded dowry. The Investigating Officer had detained the appellant at the police station since the day the FIR was lodged. The appellant had expressed ignorance about Sayra Bano. The Investigating Officer had asked Munna to search for Sayra Bano and after 3-4 days, Munna had given information about dead body of her sister having been found in the grave yard. Upon this, the informant, her elder sister Parveen, her younger sister Saher Bano, Pappu and Dilawar, who are also residents of the informant's village, had gone to Bahraich and thereafter, all of them went to Makoliya along with Munna. A dead body of a lady was lying in the Makoliya grave yard. The informant and her sisters saw the dead body and told that it did not belong to their sister Sayra Bano but her brother-in-law Munna said that the dead body was of Sayra Bano and believing his statement, the informant and her sister had put their thumb impressions on the inquest report. PW-1 categorically stated that the dead body was not of her sister; that the appellant had not confessed about killing Sayra Bano or hiding her dead body in the grave and that no dead body was recovered from the pointing out of the appellant. An unidentified dead body of a woman had been exhumed from a grave and was lying in the grave yard. She believed that her brother-in-law Munna had made her sister disappear and he had falsely implicated the appellant.

14. PW-2 Saher Bano was a cousin of the deceased and she stated that the deceased Sayra Bano had got married to Munna @ Hafeez. Sayra Bano used to live in her matrimonial home happily and she did not make any complaint regarding demand of dowry. She denied having given any statement given under Section 161 Cr.P.C. to the police. She was declared to be hostile. In her cross-examination, she stated that Sayra Bano had got married about 4-5 years ago to Munna resident of Bahraich and she did not ever get married to the appellant.
15. PW-3 Pappu stated that the informant was related to him. He had come to the matrimonial home of the deceased upon information

given by Munna. When he reached there, the dead body was lying there in the grave yard. In his cross-examination, PW-2 stated that the informant did not ever get married to the appellant and she was married to Munna, resident of Bahraich. He further stated that he and the other persons had reached the grave yard on an information given by Munna and after seeing the dead body, all of them had stated that the dead body was not of Sayra Bano but Munna had insisted that the dead body was of the Sayra Bano and the police acted as per the statement given by Munna and prepared the inquest report accordingly.

16. PW-4 Smt. Parveen was the elder sister of the deceased. She also stated in her cross-examination that the deceased had got married to Munna and she never got married to the appellant. Munna had told them about the dead body having been found in the grave yard and she and the other persons had stated that the dead body was not of her sister Sayra Bano but Munna insisted that the dead body was of Sayra Bano. She stated that she did not know whether her sister Sayra Bano was alive or not but the dead body recovered was not of her sister Sayra Bano.
17. PW-5 Dilawar was father-in-law of Parveen - sister of the informant Shabana and deceased Sayra Bano and he was also declared to be hostile.
18. PW-6 Constable Umesh Kumar Yadav proved some signatures of some police officers.
19. The statement of a Doctor has been recorded as PW-6. Apparently he has erroneously been marked as PW-6 when Constable Umesh Kumar was also marked as PW-6. The doctor stated that he was present at the time of postmortem examination of the deceased and he had signed the postmortem examination report of the deceased along with other Doctor, who had conducted the postmortem examination.

20. PW-7 was the Doctor who had conducted the postmortem examination of the dead body and he stated that the face of the dead body was not recognizable and the deceased had died about eight weeks ago due to shock and hemorrhage.
21. PW-8 was the Station House Officer, who stated that during the investigation of the case, information had been received from a Mukhbir that dead body of Sayra Bano had been hidden in an old grave of Kennoo Khan. He proved the memo of recovery of *knife* from the house of the appellant.
22. In his statement recorded under Section 313 Cr.P.C., the appellant denied that he ever got married to Sayra Bano. He denied that the dead body of Sayra Bano was recovered on 19.10.2017 from a grave yard in Village Makoliya and that a knife was recovered from his house on his pointing out. He denied that the deceased died in his home. He further stated that Sayra Bano had got married to Munna resident of Bahraich, she ran away from the house of Munna and he was falsely implicated at the behest of Munna. The dead body which was recovered, could not be recognized.
23. The trial Court proceeded on an assumption that the appellant was present with the deceased at the time of her death, which took place inside the appellant's house and, therefore, the burden to prove the circumstances in which Sayra Bano died, lied on the appellant. The trial Court has observed that the appellant had relied on prosecution witnesses, who stated that the deceased had got married to some person named Munna, on whose information the prosecution witnesses had come to Makoliya Village but the accused did not get this person Munna examined as a defense witness and he did not establish the existence of any person named Munna from any other oral or documentary evidence.
24. Relying on the decisions of the Hon'ble Supreme Court in the cases of **Ramnaresh v. State of Chandigarh**; AIR 2012 SC 1357 = (2012) 4 SCC 257 and **Phula Singh v. State of Himachal Pradesh**; (2014) 4

SCC 09, the trial Court held that the failure of the appellant in giving a clarification in his statement recorded under Section 313 Cr.P.C. regarding marriage of Sayra Bano with Munna and offence having been given effect to by Munna or any other person gives rise to a basis for drawing an adverse inference against an accused. The trial Court further held that as per the provisions contained in Section 106 of the Evidence Act, the burden to prove the circumstances in which Sayra Bano died, lied on the appellant. Although the appellant had stated in his statement under Section 313 Cr.P.C. that Sayra Bano had got married to Munna resident of Bahraich and she ran away from the house of Munna and thereafter he was falsely implicated at the behest of Munna, the appellant did not adduce any evidence to establish the reason of animosity between him and Munna and he did not disclose the parentage and address of Munna.

25. Relying on the decisions of the Hon'ble Supreme Court in the case of **Ramesh v. State of Haryana**; AIR 2016 SC 5554 = (2017) 1 SCC 529, **Khachar Dipu @ Dilipbhai Nakubhai v. State of Gujrat**; 2014 AIR SCW 466 = (2013) 4 SCC 322, **Koli Lakshmanbhai @ Chana Bhai v. State of Gujrat**; AIR 2000 SC 210 = (1999) 8 SCC 624 and **S.C. Goyal v. State of Haryana**; 2017 CRLJ SC 536 = (2016) 13 SCC 258, the trial Court held that the prosecution witnesses had turned hostile because of a 'hostile culture' to save the accused person and their testimony cannot be discarded entirely. Portion of their statements which support the prosecution case, can be read against the accused.
26. The trial Court concluded that the following facts were established by the prosecution evidence:-
 - i. The appellant got married to Sayra Bano regarding which a contract was executed on 11.05.2016,
 - ii. On the date and time of the incident, the deceased was present in the house of the appellant in village Makoliya,

- iii. The appellant killed Sayra Bano by assaulting her on her neck with *knife* and he had hidden the dead body in the grave of Kennoo Khan,
- iv. The dead body was recovered after digging a grave up to a depth of 2 feet,
- v. The weapon used in commission of the offence was recovered from the appellant's house on his pointing out and,
- vi. The appellant had stated that the deceased had got married to one Munna but he did not produce Munna in defense evidence and he did not disclose the father's name and address of Munna. He could not establish the existence of Munna from any oral or documentary evidence.

27. As per the trial Court, the aforesaid facts establish that the appellant had killed Sayra Bano and had hidden the dead body in the grave of Kennoo Khan. The other accused persons Zakrun Nisa and Shahjahan were acquitted and the appellant was convicted for offences under Sections 302 and 201 IPC while acquitting him for the offences under Sections 498-A, 323, 304-B, 504 & 506 I.P.C. and 3/4 Dowry Prohibition Act.
28. Now we proceed to examine the correctness of all the aforesaid conclusions drawn by the trial Court. The first point decided by the trial Court that the appellant got married to Sayra Bano regarding which a contract was executed on 11.05.2016, is based on a photocopy of a notarized marriage agreement dated 11.05.2016, the original whereof was not brought on record. Photocopy of the document being a secondary evidence, was not admissible in evidence unless any of the circumstances mentioned in Section 63 of the Evidence Act, 1872 justifying admissibility of secondary evidence were established, which has not been done in the present case. The photocopy of the marriage agreement dated 11.05.2016 was not admissible in evidence. No witness has made any statement to prove the marriage agreement dated 11.05.2016. No question was put to the

appellant regarding this document in his examination under Section 313 Cr.P.C. Therefore, we are of the considered view that the photocopy of the marriage agreement dated 11.05.2016 was not admissible in evidence and the trial Court has committed a patent error in relying upon the photocopy of the marriage agreement dated 11.05.2016.

29. PW-1 had stated that her sister Sayra Bano had got married to Munna and she did not get married to the appellant. The learned A.G.A. has drawn attention of the Court towards the examination-in-chief of PW-2 Saher Bano, who was a cousin of the deceased. PW-2 stated in her examination-in-chief that the deceased Sayra Bano had got married to Munna @ Hafeez. However, in her cross-examination, PW-2 stated that Sayra Bano had got married about 4-5 years ago to Munna resident of Bahraich City and she did not ever get married to the appellant.
30. PW-3 Pappu also categorically stated that Sayra Bano did not ever get married to the appellant. PW-4 Smt. Parveen was the elder sister of the deceased. She also stated that the deceased had got married to Munna and she never got married to the appellant. There was no evidence to prove that the deceased had got married to the appellant. Therefore, the first finding of the learned trial Court that the appellant got married to Sayra Bano regarding which a contract was executed on 11.05.2016, is perverse.
31. The trial Court has concluded that on the date and time of the incident, the deceased was present in the house of the appellant in village Makoliya. In this regard it is relevant to take note of the facts that PW-1 had stated that her sister Sayra Bano had got married to Munna, who was a resident of Bahraich City. She stayed with him for about two years and thereafter one day Munna informed that Sayra had gone missing from her home. Munna had also told her that the appellant was his friend and he used to visit Munna's place. Munna had expressed a suspicion that Hafeez was involved in Sayra Bano having gone missing. Munna had given information about dead body of her

sister having been found in the grave yard but she and the other witnesses had not identified the dead body as being of Sayra Bano. As per the post mortem examination, the dead body was not recognizable and the victim had died about 8 weeks ago.

32. There is absolutely no evidence to prove that the informant's sister Sayra Bano has been killed, nor has any date, time and place of the alleged killing been established. Except for the suspicion allegedly expressed by Munna, there is no evidence to prove that Sayra Bano was living with the appellant. Therefore, the conclusion drawn by the trial Court that on the date and time of the incident, the deceased was present in the house of the appellant in village Makoliya, is perverse.
33. Now we proceed to examine the correctness of the third conclusion drawn by the trial Court that the appellant killed Sayra Bano by assaulting her on her neck with a *knife* and he had hidden the dead body in the grave of Kennoo Khan. The informant - PW-1 stated that her sister Sayra Bano had got married to Munna, who was resident of Bahraich City. Sayra stayed with him for about two years and thereafter one day Munna informed that Sayra had gone missing from her home. Munna had also told her that the appellant was his friend and he used to visit Munna's place. Munna had expressed a suspicion that the appellant was involved in Sayra Bano having gone missing. The informant's brother-in-law Munna had taken her to the police station and got the complaint scribed by a person by dictating it himself. He had got the informant's thumb impression on the complaint and had handed it over to the police.
34. PW-1 categorically stated that all the things written in the complaint were wrong and the same were got scribed by her brother-in-law Munna to save himself by getting a case registered against the appellant whereas the truth is that her sister never got married to the appellant. The Investigating Officer had detained the appellant at the police station since the day the FIR was lodged and he had asked Munna to search for Sayra Bano. After 3-4 days, Munna had given information about dead body of her sister having been found in the

grave yard. When PW-1 and other persons had reached the grave-yard, a dead body of a lady was lying there. The informant and her sisters had told that it did not belong to their sister Sayra Bano but her brother-in-law Munna said that the dead body was of Sayra Bano and believing his statement, the informant and her sister had put their thumb impressions on the inquest report.

35. PW-1 further categorically stated that the dead body was not of her sister; that the appellant had not confessed about killing Sayra Bano or hiding her dead body in the grave and that no dead body was recovered from the pointing out of the appellant. An unidentified dead body of a woman had been exhumed from a grave and was lying in the grave yard. She believed that her brother-in-law Munna had made her sister disappear and he had falsely implicated the appellant.
36. PW-3 Pappu stated that he had gone to Makoliya grave-yard upon information given by Munna. When he reached there, a dead body was lying there in the grave yard. After seeing the dead body, all the persons had stated that the dead body was not of Sayra Bano but Munna had insisted that the dead body was of the Sayra Bano and the police acted as per the statement given by Munna and prepared the inquest report accordingly.
37. PW-4 Smt. Parveen was the elder sister of the deceased. She also stated that the deceased had got married to Munna and she never got married to the appellant. Munna had told them about the dead body having been found in the grave yard and she and the other persons had stated that the dead body was not of her sister Sayra Bano but Munna insisted that the dead body was of Sayra Bano. She stated that she did not know whether her sister Sayra Bano was alive or not but the dead body recovered was not of her sister Sayra Bano.
38. The post mortem examination report states that the face of the dead body was not recognizable, skin had peeled off with grayish discoloration, ligaments were loosened, nails, hairs easily pulled out, teeth loosened from their sockets, soft parts were changing into black

mass, eyeballs were missing and eye-tor orbit was filled with mud. PW-7, the Doctor who had conducted the postmortem examination, stated that the face of the dead body was not recognizable and the deceased had died about eight weeks ago.

39. The book titled “Modi – A Textbook of Medical Jurisprudence and Toxicology” is widely considered to be an authority on the subject. Chapter 14 of the 27th edition of the book deals with Exhumation. It is written therein that *“In case of bodies, which have been underground for a sufficiently long time and undergone putrefaction, an attempt should be made to determine the sex, stature and marks of identification. A photograph of the exhumed body may also help in identification. If necessary, an X-ray examination of the cadaver should be undertaken. Hair found on the body should be preserved in a dry, clean glass bottle for subsequent identification and chemical analysis. All these bottles or jars should then be closed with well-fitted glass stoppers and forwarded, duly labeled and sealed, to the Forensic Science Laboratory.”*
40. In the present case, the prosecution did not take any of the aforesaid steps to ascertain the identity of the dead body by any scientific evidence.
41. It is significant to note that as per the inquest report and also as per the post mortem examination report, some clothes, a thread and a tabeez were present on the dead-body, but the prosecution remained silent about those articles and no question was put to any witness about those articles so as to connect the same with the informant’s sister Sayra Bano so as to identify the dead body.
42. Thus there was no evidence to prove that Sayra Bano had been killed and the dead body was of Sayra Bano. In these circumstances, the only irresistible conclusion that we can draw is that the trial Court has concluded that the appellant killed Sayra Bano by assaulting her on her neck with *knife* and he had hidden the dead body in the grave of

Kennoo Khan, without there being any evidence to support this conclusion and, therefore, this conclusion is perverse.

43. The fourth conclusion drawn by the trial Court that the dead body was recovered after digging a grave up to a depth of 2 feet, whereas the prosecution witnesses have merely stated that when they had reached the grave-yard, a dead body was lying there and no witness has stated that the dead body was exhumed from any grave in her or his presence. The dead-body is said to have been recovered from the grave of Kennoo and the recovery memo mentions that the recovery had been witnessed by Achchhan son of Kennoo also, but Achchhan son of Kennoo has not been produced as a prosecution witness. Therefore, the finding that the dead body was recovered after digging a grave up to a depth of 2 feet, is also perverse.
44. Regarding the fifth conclusion of the trial Court, that the weapon used in commission of the offence was recovered from the appellant's house on his pointing out, suffice it to say that the alleged recovery is said to have been witnessed by the informant Shabana and her sister Parveen, besides some police personnel. Except for the S.H.O. – PW-8, no witness has given any evidence to prove the recovery of knife. The test report given by the Forensic Science Laboratory, U.P., Lucknow mentions presence of blood on major parts of the knife, but the blood had been disintegrated and its group could not be ascertained. In these circumstances, it cannot be said that the blood found on the knife was of Sayra Bano. The appellant had denied the alleged recovery of knife in his statement recorded under Section 313 Cr.P.C. Therefore, there was no evidence to prove that any knife had been recovered from the appellant's house on his pointing out and that the knife had been used in commission of the offence and this conclusion drawn by the trial Court is also perverse.
45. Lastly, the trial Court has held that the appellant had stated that the deceased had got married to Munna but he did not produce Munna in defense evidence and he did not disclose the father's name and address of Munna. He could not establish the existence of Munna

from any oral or documentary evidence. While recording the aforesaid statement, the trial Court has acted against the basic principle of dispensation of criminal justice that in a criminal trial, it is the prosecution which has to prove the guilt of the accused person and that too, beyond any reasonable doubt. The accused is not required to prove his innocence. In case the prosecution fails to discharge its burden to prove beyond any reasonable doubt that the accused is guilty, the accused has to be acquitted and he cannot be held guilty merely because he has not adduced any evidence to prove his innocence. It appears that the trial Court has proceeded to hold the appellant guilty under a patent misconception about the aforesaid basic principles of justice dispensation.

46. On the basis of the aforesaid conclusions, the trial Court has held that the appellant had killed Sayra Bano and had hidden the dead body in the grave of Kennoo Khan and has convicted the appellant for offences under Sections 302 and 201 IPC. As all the aforesaid conclusions have already been held to be perverse, the consequential finding of guilt of the appellant is also perverse.
47. As the trial Court has placed reliance on some judgments to hold that the accused can be held guilty even where the prosecution witnesses turn hostile, it is necessary to examine whether the principles laid down in those judgments warrant conviction of the appellant.
48. In **Ramesh v. State of Haryana**, (2017) 1 SCC 529, a dying declaration had been recorded in which the deceased had categorically stated that her husband had set her ablaze but the trial Court had acquitted the accused as the deceased's brother had stated that the accused was not involved in killing the deceased. The High Court had reversed the judgment of acquittal. In appeal, the Hon'ble Supreme Court held that: -

“20. The High Court, in the impugned judgment, has found fault with the aforesaid analysis, approach and the manner in which the dying declaration has been dealt with by the trial court. According to the High Court, the veracity of the dying

declaration could not be examined with reference to the other evidence. It has held that the approach of the trial court was blemished. According to the High Court, the trial court was required to appreciate as to whether the statement of the deceased was given in a fit state of mind; and whether it was voluntarily given without being influenced by any extraneous circumstances and without any tutoring. If that was so and the dying declaration of the deceased passed the muster of the aforesaid test and was to be believed, the conviction could be based solely on such a dying declaration. The High Court then examined the dying declaration in the aforesaid perspective and found that the doctor had declared her fit to make a statement on the basis of which the Judicial Magistrate recorded the statement and even after recording of the statement, the doctor again gave endorsement that the deceased remained fit during the period her statement was recorded. In such circumstances, statement of the Judicial Magistrate (PW 11) in the Court that he could not say whether the deceased was semi-conscious when her statement was recorded, was of no consequence as he had acted on the basis of the medical opinion.

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30. We have already noticed above, the reasons recorded by the trial court while discarding the dying declaration. Admittedly, no weightage is given by the trial court to the opinion of the doctor certifying that the deceased was in a fit state of mind. Likewise, no reasons were given by the trial court as to why the testimony of the Judicial Magistrate, who recorded the statement, be disbelieved.”

49. Thus it is clear that in **Ramesh** (Supra) there was sufficient evidence in the shape of dying declaration and statement of the doctor to establish the guilt of the accused, which is not the case here.
50. In **Khachar Dipu v. State of Gujarat**, (2013) 4 SCC 322, the Hon’ble Supreme Court relied upon some precedents which hold that “It is well settled in law that the evidence of the hostile witness can be relied upon by the prosecution as well as by the defence”. After examining the facts of that case, the Hon’ble Supreme Court found that: -

18. On a careful scrutiny of the testimonies of the said two witnesses PWs 20 and 21, it is seen that both of them have categorically deposed that the motor vehicle involved in the accident had dashed against the cycle of the deceased as a result of which he had fallen down. It is interesting to note that in

cross-examination by the accused, they have not paved the path of variance in this regard. In our opinion, their evidence supports the prosecution version that the motor vehicle had dashed against the cycle. We may note with profit that one of the witnesses has not identified the accused in the court but the other witness, PW 20 Shantibhai Lakhmanbhai has identified him. That apart, as far as the identification of the accused is concerned, there is ample evidence on record to support the same. The singular purpose of referring to the testimonies of these two witnesses is that the incident did occur and the accused had dashed the vehicle against the cycle.”

51. Thus in **Khachar Dipu** (Supra) the accused was convicted because there was ample evidence to prove his guilt.

52. In **Koli Lakhmanbhai Chanabhai v. State of Gujarat**, (1999) 8 SCC 624, the High Court had relied upon some part of the evidence of a hostile witness, PW 7 who had not supported the prosecution story in its entirety, but his evidence established the prosecution case with regard to the time, place and weapon of offence being the knife and also that the person having the knife was Accused 2. Some part of his evidence was corroborated by PWs 11 and 12. It has come on record that PW 7 had immediately informed PW 11 and PW 12 about the incident. PW 12 had also stated that PW 7 had informed that Laxman Chana had inflicted knife-blow. This witness was cross-examined in detail with regard to this aspect but nothing could be found out from the cross-examination. Extensively bloodstained bush shirt, banian and other clothes were seized from the accused. Bush shirt and banian contained human blood of ‘A’ group, which was the blood group of the deceased. The High Court had relied upon the discovery of a knife at the instance of the appellant, which was hidden beneath the ashes of the fireplace in the kitchen of the appellant. The said knife also contained blood having ‘A’ group. For that purpose the High Court had relied upon the panch witness PW 20. In the aforesaid peculiar factual background of the case, the Hon’ble Supreme Court held that:

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“5. From the aforesaid evidence on record, in our view, it cannot be said that the High Court erred in relying upon some portion of the evidence of PW 7 who was cross-examined by the

prosecution. It is settled law that evidence of a hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence (Bhagwan Singh v. State of Haryana [(1976) 1 SCC 389] and Sat Paul v. Delhi Admn. [(1976) 1 SCC 727]. In the present case, apart from the evidence of PW 7, the prosecution version that he saw that the appellant was having a knife in his hand and was quarrelling with the deceased gets corroboration from the evidence of PWs 11 and 12 to whom he disclosed the incident immediately. On the basis of the said information, within one hour, FIR was lodged disclosing the name of the appellant as the person who had inflicted the knife-blow. A number of incised wounds are found as per the post-mortem report. The prosecution version gets further corroboration from discovery of Muddamal knife containing human blood Group 'A'. Further the bush shirt and banian which were put on by the accused at the time of incident were having extensive bloodstains which were also found containing human blood Group 'A'. Learned counsel for the appellant, however, contended that the accused is also having Blood Group 'A' and that he was having injury on the thigh as per the evidence of the doctor. In our view, there is no substance in his contention because as per the medical evidence, the injuries caused to the accused were minor and that because of such injuries, there would not be extensive bloodstains on the bush shirt and banian put on by the accused. In his Section 313 statement also, the accused has not explained how he got bloodstains on his bush shirt and banian. He has also not denied the recovery of the said bush shirt and banian from his person at the time of his arrest."

53. Thus in **Koli Lakhmanbhai Chanabhai** (Supra) also, there was ample evidence to prove the guilt of the accused in spite of a witness having been declared to be hostile, whereas there is absolutely no evidence against the accused in the present case.
54. In **S.C. Goel v. State**: (2016) 13 SCC 258, the Hon'ble Supreme Court upheld the conviction of the appellant for offences under Section 7 and Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 recorded by the trial Court and affirmed by the High Court after recording a satisfaction that PW 5 had clearly and categorically stated that the demand of Rs. 10,000/-

was made. Merely because PW 5 was declared hostile with regard to certain other aspects of the evidence tendered by him, the entire evidence cannot be discarded. The evidence tendered by the said witness with regard to the demand in question can be accepted if the same is otherwise worthy of trust. Admittedly the marked currency notes were recovered from the accused. PW 9 (panch witness) had proved the aforesaid recovery and also the test conducted by dipping the fingers of the accused in chemical solution of sodium bicarbonate. In such circumstances and taking into account the totality of the facts of the case, the Hon'ble Supreme Court held that the prosecution had succeeded in proving the demand of bribe and the acceptance and recovery of the offending bank notes from the possessions of the accused. This case was also decided on the basis of the peculiar facts of the case, which are in no manner similar to the present case.

55. In **Ramnaresh v. State of Chhattisgarh**: (2012) 4 SCC 257, the Hon'ble Supreme Court found that PW-6 had clearly narrated how the offence was committed by the accused and there was nothing abnormal and inconsistent in his testimony. His statement was fully corroborated by medical evidence and the testimony of PW 12. The confirmation of blood on the piece of saree used for gagging the mouth of Rajkumari, the confirmation of presence of semen and human spermatozoa on the vaginal slides of the victim, the findings during autopsy duly proved by PW 7 and the corroboration of other witnesses including that of the investigating officer leave no room for any doubt that the appellants had committed house trespass in the house of the victim, raped and strangulated her. In these circumstances, the mere fact that some of the witnesses, who were not the eye-witnesses of the incident, had turned hostile, would not affect the prosecution case.
56. In **Phula Singh v. State of H.P.**: (2014) 4 SCC 9, it was an admitted fact that the appellant had no relationship or acquaintance, whatsoever, with the complainant and the appellant failed to furnish any explanation about his visit and staying in the house of the

complainant. The appellant had not denied visit to the house of the complainant. More so, he did not furnish any explanation in respect of the recovery of Rs. 1000/- from the pocket of his pants nor could he furnish any information as to how his fingers turned pink on being washed with sodium carbonate solution as the currency notes already found in the pocket of his pants had been treated with phenolphthalein. On being washed, part of his pants also turned pink. In light of these undisputed facts, the Hon'ble Supreme Court held that: -

“11. The accused has a duty to furnish an explanation in his statement under Section 313 CrPC regarding any incriminating material that has been produced against him. If the accused has been given the freedom to remain silent during the investigation as well as before the court, then the accused may choose to maintain silence or even remain in complete denial when his statement under Section 313 CrPC is being recorded. However, in such an event, the court would be entitled to draw an inference, including such adverse inference against the accused as may be permissible in accordance with law.”

57. In the present case, there was absolutely no incriminating material against the appellant and, therefore, in absence of any incriminating material, the aforesaid principles would not apply to the facts of the present case and no adverse inference of the appellant's guilt can be raised merely because the appellant did not establish the existence of Munna, regarding whom the Prosecution witnesses had stated that he was the husband of the victim and that he was instrumental in the victim having gone missing and in false implication of the appellant.
58. Since the trial Court has relied upon numerous precedents, none of which was based on facts which were in any manner similar to the facts of the present case where the prosecution has failed to produce any evidence to establish the guilt of the appellant, it would be appropriate to reiterate the basic principles to be observed while relying upon precedents, as explained in the following words by the Hon'ble Supreme Court in the case of **Parasa Raja Manikyala Rao v. State of A.P.**, (2003) 12 SCC 306 : 2003 SCC OnLine SC 1142: -

“9. Each case, more particularly a criminal case, depends on its own facts and a close similarity between one case and another is not enough to warrant like treatment because a significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.”

59. In none of the judgments relied upon by the learned trial Court the accused was held guilty in spite of the prosecution having failed to adduce any evidence to establish his guilt and all the matters, the Hon'ble Supreme Court came to conclusion that the accused person's guilt was proved by relevant and admissible evidence, which is not the case here. Therefore, the principles laid down in the judgments referred by the learned trial Court would not apply to the facts and circumstances of the present case, where the prosecution has failed to produce any evidence to prove the guilt of the accused – appellant.
60. In view of the foregoing discussion, we are of the considered view that the judgment and order passed by the learned trial Court is unsustainable in law and it is liable to be set aside.
61. Accordingly, the appeal is **allowed**. The judgment and order dated 27.03.2019 passed by Sri Nand Pratap Ojha, the learned V Additional Sessions Judge, Bahraich in Sessions Trial No.110 of 2017, arising out of Case Crime No.215 of 2017 under Sections 498-A, 323, 304-B, 201, 504, 506, 302 I.P.C. and 3/4 Dowry Prohibition Act registered at Police Station- Risiya, District Bahraich, to the extent that it holds the appellant guilty of committing offences under Sections 302, 201 I.P.C. and sentences him to undergo simple imprisonment for life and pay Rs.50,000/- as fine and on failure to pay fine, to undergo simple imprisonment for a further period of 3 years for the offence under Section 302 I.P.C. and to undergo simple imprisonment for and 5 years and pay Rs.10,000/- fine and in case of failure to pay fine, to undergo simple imprisonment for a further period of one year for the offence under Section 201 I.P.C., is set aside. The appellant is **acquitted** of all the charges.

62. The appellant is languishing in jail and he is directed to be released forthwith unless he is wanted in any other case, subject to the condition that he shall file a personal bond and two sureties within a period of three weeks from the date of his release from custody, to the satisfaction of the trial Court under Section 437-A Cr.P.C.
63. The appellant was taken into custody soon after lodging of the F.I.R. on 15.01.2017 and he continues to remain in custody till date. Now that this Court has found that there was absolutely no evidence against him, it is a fit case for awarding costs of litigation as also to order payment of compensation for the confinement of the appellant for a period exceeding 7½ years without any evidence to prove his guilt cannot be fully compensated in terms of money but as a token of compensation for the injustice done to the appellant, we order that the State shall pay Rs.1,00,000/- to the appellant towards compensation for the period spent by him in custody.
64. Let a copy of this judgment and order and the original record of the trial court be transmitted to the trial court concerned forthwith for necessary information and compliance as also to Sri Nand Pratap Ojha, the Presiding Officer who had passed the impugned judgment. The office is further directed to enter the judgment in compliance register maintained by the Court.

(Subhash Vidyarthi J.) (Attau Rahman Masoodi J.)

Order Date: 13.09.2024

-Amit K-