

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (SJ) No.1163 of 2010

(Against the judgment of conviction and order of sentence dated 17th of September, 2010 passed by the learned 3rd Additional Sessions Judge, Darbhanga in Sessions Trial No. 465 of 2008 arising out of Moro P. S. Case no.29 of 2006.)

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Jitendra Choudhary, son of Ram Niranjana Chowdhary, resident of Village-Patori, P.S. Moro, District-Darbhangha.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Md. Abdul Wadood-Amicus Curiae

For the Respondent/s : Mr. Bipin Kumar-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 11-08-2015

This appeal has been preferred by the sole appellant Jitendra Choudhary against the judgment of conviction and sentence dated 17.09.2010 passed by the 3rd Additional Sessions Judge, Darbhanga in Sessions Trial No.465 of 2008 convicting the appellant named above under Section 304 (B), 201 of the I.P.C. and directed to undergo rigorous imprisonment for seven years, three years respectively with a further direction to run the sentences concurrently.

2. The prosecution case in nut shell as is evident from Fard-beyan (Exhibit-1) filed by Rajesh Kumar Thakur (PW-5) on 11.10.2006, disclosing therein that his sister Nutan Devi was married with Jitendra Choudhary (appellant) on 29.06.2001 and on that very time, they have gifted the articles according to their means. His sister had gone to her Sasural where, after some interval, began to face with torture and cruelty. Having been informed at the end of his sister, he had gone and brought his sister back. While his sister was staying at her Naihar, his brother in-law came and asked for Bidai. He had also threatened, in case Bidai is not effected, he will divorce and accordingly, Bidai



was effected with heavy heart. After going to her Sasural, again his sister confronted with torture and cruelty in order to meet demand of dowry. His father time to time provided in order to prevent his sister from torture and cruelty, however, could not satisfy the greed. Again, they brought Nutan to their place. Subsequently thereof, as the conduct of his brother in-law was not cordial, an advocate notice was served whereupon his brother in-law came and then, Bidai was effected on 03.03.2005. During her stay, his sister begotten a daughter and on account thereof, they advanced demand of Rs.50,000/- failing which they became ruthless. In the month of August, 2006, his sister begotten a son. At that very time, he had gone to see his sister, but was not allowed. At the other hand, he was directed to bring Rs.50,000/- and thereafter only, he will be allowed to see his sister. Then, it has been alleged that in the night of 10.10.2006, he received telephonic information from an unknown that his sister has been murdered and her dead body has been disposed of. On 11.10.2006, he along with others came to place of his sister where they came to know that his sister has been murdered and her dead body has also been disposed of.

3. On the basis of the aforesaid written report, Moro P. S. Case no.29 of 2006 was registered under Sections 304(B), 201, 34 of the I.P.C. whereunder chargesheet also been submitted followed with order of cognizance. As the offences happen to be exclusively triable by the Court of Sessions, therefore, commitment was effected and after conclusion of the trial. Other co-accused got acquitted while the appellant has been convicted and sentenced, subject matter of instant appeal.

4. Defence case as is evident from mode of cross-examination as well as from the statement recorded under Section 313 of the Cr.P.C. is of complete denial of occurrence. It has also been suggested that so alleged deceased

was staying at her Naihar since before and the Naiharwala, in order to save their skin got this false case filed. In support thereof, also examined two DWs.

5. In order to substantiate its case, prosecution had examined altogether eight PWs, out of PW-1 is Raghuraj Prasad Thakur, PW-2 Raghvendra Thakur, PW-3 Chitranjan Thakur, PW-4 Lachandev Thakur, PW-5 Rajesh Kumar Thakur (informant), PW-6 Chandra Shekhar Choudhary, PW-7 Dinesh Choudhary and PW-8 Shiv Shanker Prasad as well as also exhibited the documents as Exhibit-1 written report, Exhibit-2 endorsement made over written report, Exhibit-3 formal F.I.R. Defence had also examined two DWs. DW-1 Darbeshwar Choudhary and DW-2 Ram Kinkar Choudhary. No documentary evidence has been adduced on behalf of defence.

6. The learned Amicus Curiae submitted that the judgment of conviction and sentence recorded by the learned lower Court is cryptic, perverse and is accordingly, fit to be set aside. The first and foremost argument happens to be during conduction of trial, the evidence against co-accused have been found unreliable and were acquitted, then in that event, there was no occasion for the learned lower Court to keep the case of the appellant on different pedestal on account of same and similar kind of allegation. Therefore, the appellant should have been acquitted by the learned lower Court itself.

7. It has further been submitted by the learned Amicus Curiae that from the evidence available on the record, it is apparent that none of the witnesses are consistent over demand of dowry as well as theme of torture and cruelty having meted out soon before the death of the deceased. On account thereof, there happens to be deficiency in the case of the prosecution on that very score. Being so, the major ingredients attracting Section 304 B of the I.P.C. is not at all found proved. Hence, the judgment impugned suffers from impropriety.



8. It has further been submitted that from the evidence having been adduced, it is apparent that so alleged deceased was staying at her Naihar. After serving an advocate notice, it has been alleged that appellant took her on Bidai and subsequently thereof, while she was staying at her Sasural, she was murdered. As the prosecution failed to exhibit the advocate notice on account thereof, Bidai having been effected in pursuant of advocate notice became falsified. Therefore, subsequent stay of deceased at the place of appellant is not at all found convincing rather the aforesaid deficiency probablises continuous stay of so alleged deceased at her Maika and on account thereof, the prosecution was accountable and not the appellant. It has also been submitted that apart from suggesting the witnesses, DW-2 has also been examined on that very score. So, submitted that the judgment of conviction and sentence recorded by the learned lower Court is not at all found to be based upon the material available on the record.

9. On the other hand, the learned Additional Public Prosecutor opposed the submission and submitted that there happens to be conclusive, consistent and categorical statement of the witnesses that deceased disappeared while staying at her Sasural. It has also been submitted that there happens to be concrete evidence that during intervening period, deceased was subjected to torture and cruelty for fulfilment of demand of dowry. It has also been submitted that in the aforesaid background, the presumption in terms of Section 113(B) of the Evidence Act will be attracted and the same has not been found properly discharged at the end of the appellant. Hence, conviction and sentence of the appellant did not attract interference.

10. Before coming to the scrutiny of the evidences adduced on behalf of respective parties during trial, it looks prudent to identify the essential

ingredients which are to be established for attracting conviction under Section 304B of the I.P.C.:-

a) The death of a woman should be caused by burns or bodily injury or otherwise than under a normal circumstance.

b) Such a death should have occurred within seven years of her marriage.

c) She must have been subjected to cruelty or harassment by her husband or any relative of her husband.

d) Such cruelty or harassment should be for or in connection with demand of dowry.

e) Such cruelty or harassment is shown to have been meted out to the woman soon before her death.

When the prosecution succeeds in proving its case by way of satisfying all the ingredients so detailed herein above, then the presumption under guise of Section 113B of the Evidence Act, as dowry death is to be interned subject to rebuttal at the end of accused.

11. Soon before "is a relative term and it would depend upon circumstances of each case. It has been explained in ***Hira Lal v. State (Govt. of NCT of Delhi)*** reported in (2003) 8 SCC 80:-

"9. A conjoint reading of Section 113-B of the Evidence Act and Section 304-B IPC shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. The prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of "death occurring otherwise than in normal circumstances". The expression "soon before" is very relevant where Section 113-B of the

Evidence Act and Section 304-B IPC are pressed into service. The prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by the prosecution. "Soon before" is a relative term and it would depend upon the circumstances of each case and no straitjacket formula can be laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Section 113-B of the Evidence Act. The expression "soon before her death" used in the substantive Section 304-B IPC and Section 113-B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression "soon before" is not defined. A reference to the expression "soon before" used in Section 114 Illustration (a) of the Evidence Act is relevant. It lays down that a court may presume that a man who is in the possession of goods "soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for their possession". The determination of the period which can come within the term "soon before" is left to be determined by the courts,



depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression "soon before" would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. There must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the death concerned. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence."

12. Now, the evidences has to be seen in order to ascertain whether the prosecution has been able to discharge its obligation side by side whether the appellant/ convict has been able to rebut the presumption in terms of Section 113B of the Evidence Act. At the present juncture, the status of the witnesses is to be taken note of. All the witnesses belonging to the village of appellant have been declared hostile and who are PW-6 Chandra Shekhar Choudhary and PW-7 Dinesh Choudhary. When the evidence of these two hostile witnesses have been gone through, it is evident that PW-6 had completely disowned to have information regarding wife of Jitendra Choudhary. However, during course of cross-examination at Paragraph-10, PW-6 had stated that wife of Jitendra Choudhary stayed at her Sasural after 2006. PW-7 again stated like so. However, during course of cross-examination, he had stated that wife of Jitendra Choudhary did not stay at her Sasural. Marriage was solemnized about 11-12 years ago. After one and half years, she left her Sasural.

13. The remaining witnesses happen to be father, brother and agnate of deceased. PW-1 (a Pattidar) had stated that deceased Nutan was his



grand daughter. He had further stated that Nutan Devi was murdered at her Sasural by her husband, brother of husband, father in-law and mother in-law as they failed to squeeze dowry. It has also been stated that a daughter had begotten in the year 2003 and since thereafter, accused persons were insisting over Rs.50,000/- as well as a motorcycle. He had further stated that motorcycle was provided. It has also been disclosed that continuous event of torture was going on to procure Rs.50,000/- and for that, she was kicked out. Thereafter, advocate notice was served whereupon Jitendra Choudhary effected Bidai. On 10.10.2006, Nutan was murdered and her dead body was disposed of, which was informed by one Sarju Prasad over which they rushed and found the allegation true, whereupon case was instituted. During cross-examination at Para-8, this witness had stated that he met with Nutan in the year 2003, which was three years after marriage of Nutan, at that very time, she had no issue. Then, there happens to be cross-examination relating to Saju Prasad Paragraphs-9 and 10. In Paragraph-11, he had stated that no occurrence taken place in his presence.

14. PW-2 (Pattidar) is Raghvendra Thakur, during his examination-in-chief, he had stated that he knew Nutan, who was married with Jitendra Choudhary, has been murdered on 10.10.2006 by husband, father in-law, mother in-law, and brother in-law. He had also stated that Jitendra Choudhary was insisting for Rs.50,000/- and a motorcycle as dowry and for that, deceased was subjected to torture. She was even threatened to her life. He had further stated that in the night of 10.10.2006, he was informed regarding the occurrence over which, they have gone to Patori on the following day found disappearance of Nutan, ultimately led institution of this case. He had further detailed that motorcycle was given on 28.02.2002 while insistence for Rs.50,000/- remained. He had further disclosed that Nutan begotten a daughter in the month of



December, 2003. He had further stated that after birth of girl child, Nutan was ousted from her Sasural on the pretext that she will be welcomed only after having Rs.50,000/-. Thereafter, on great pursuance, Bidai was effected. During cross-examination, this PW at Para-7 had stated that he happens to be agnate. He had further stated that he had gone to Sasural of deceased only once after her death. However, he had stated that whenever she used to remain at her Maika, he had talk with her. In Para-9, he had stated that he had deposed on the basis of information given by the deceased as well as father of deceased. In Paragraph-10, he had stated regarding institution of the case. In Paragraph-13, he had stated that save and except Jitendra Choudhary, he had got no talk with his family members. In Paragraph-15, he denied the suggestion that Nutan had not stayed at her Sasural.

15. PW-3 Chitranjan Thakur another agnate, who had reiterated the aforesaid version during his examination-in-chief. During cross-examination at Para-10, he had stated that he had gone to place of occurrence along with informant, cousin grand father of deceased (PW-1) and another witness, but did not find either the deceased or her family members. In Paragraph-11, he had stated that he had not seen the occurrence. Whatever he had deposed, is based upon an information conveyed by the father of the deceased. In Paragraph-15, he had stated that lastly, he had met with deceased one or two days earlier to 03.03.2005. In Paragraph-17, he had stated that he had gone through the first information report and has deposed accordingly.

16. PW-4 is Lachandev Thakur, father of deceased. He had stated that deceased Nutan was eldest daughter, who was married in the year 2001 with Jitendra Choudhary of Patori. During course of her stay at her Sasural, she was subjected to torture and cruelty over procurement of a motorcycle as well as cash



in lieu of dowry. He got superannuated on 31.01.2002. Thereafter, to prevent torture and cruelty, he had purchased motorcycle on 28.02.2002 and handed it over to Jitendra Choudhary. He had further stated that deceased had begotten a girl child in the year 2003. Thereafter, Jitendra Choudhary took her to Kishanpur Railway Station and left her on 17.02.2004. Nutan came to him and disclosed that she is being severally tortured for procurement of dowry. She also suggested to launch a case. Instead thereof, he had served an advocate notice upon Jitendra Choudhary whereupon he restored relationship. Panchayati took place and then, on 03.03.2005, Bidai was effected. A month thereafter, he had gone to the place of his daughter where he was not allowed to meet with his daughter. When he begged, his Samdhi had disclosed that he will not be allowed to meet his daughter. On 10.10.2006, his daughter has been murdered and her dead body has been disposed of. The aforesaid information was received by him in the night of 10.10.2006 whereupon his son had gone to Police Station and lodged a case. During cross-examination at Para-7, he had stated that after receiving an information regarding murder of his daughter, he became unconscious and on account thereof, his son Rajesh had gone to Police Station and registered a case. In Paragraph-8, he had stated that all the facts relating to the occurrence has been disclosed by his son before the police. In Paragraph-9, he had disclosed the time when he had gone to the place of his daughter. He had also disclosed that his son Rajesh and Sukesh were visiting at some interval. In Paragraph-10, he had stated that his daughter stayed at her Sasural two and half years. His son in-law used to come at his place, but subsequently, he came only in the year 2005 for Ruksat. In Paragraph-13, he had stated that advocate notice was served on 30.10.2004 and thereafter, Bidai was effected. His daughter begotten both children at her Sasural. He had further stated that his daughter was not murdered in his presence. He had

denied the suggestion that deceased was living along with him and he had deposed falsely.

17. PW-5 is the informant, who happens to be brother of the deceased. He had stated that she was married with Jitendra Choudhary on 29.06.2001 and had gone to her Sasural where she was tortured for procurement of Rs.50,000/- as well as motorcycle. After staying for sometime, his sister was ousted from her Sasural whereupon his father, had served advocate notice on 30.10.2004. On 03.03.2005, Bidai was effected. In August, 2006, his sister begotten a son. At that occasion, he had gone to see his sister, but was not allowed. In the night of 10.10.2006, he was informed regarding murder of his sister whereupon, they rushed to Patori. During course of inquiry, they were informed by the villagers that on account of non-fulfilment of dowry, she was murdered. During cross-examination at Para-16, he had stated that murder of Nutan was not committed in his presence. In Para-17, he has stated that on 30.09.2004, his sister was at his place. On 03.02.2005, his sister came to her sasural and since thereafter, his sister did not come to his place. On 1/2.8.2006, he met with deceased Nutan at Gayatri Guest House where she was admitted for delivery. At that very time, he also talked with his brother in-law. After that he had gone to place of Nutan on the eve of Chhathi. Since thereafter, he had not met with Nutan. He had denied the suggestion that his sister was not residing at her Sasural and she was not murdered.

18. PW-8 is the I.O., who after registration of the case, proceeded in investigation, visited the place of occurrence, inspected the place of occurrence, recorded the statement of witnesses and then, submitted chargesheet. During cross-examination, it is evident from Paragraph-8 that P.O. was shown to him by the informant. He had not found any sign relating to quarrel. He had not

found blood. In Paragraph-9, he had stated that he was not knowing the witnesses since before the occurrence. In Paragraph-11, he had disclosed that he had examined only two persons of Patori. He had further stated that he had not gone to the Naihar of deceased.

19. Now, the evidence of DW is also to be seen. DW-1 has been examined to contradict the evidence of PW-1, who had claimed to have received information from one Sarju Prasad of village-Patori, who was his relative. DW-1 had stated that Sarju Prasad died long long ago. So far his status is concerned, from Paragraph-4 of his cross-examination, it is apparent that he claimed to be agnate of Sarju Prasad.

20. DW-2 is Ram Kinkar Choudhary, who had come to depose that four years after marriage of Jitendra Choudhary, his wife deserted him. He did not return. First of all, she insisted for partition. When partition was effected then insisted for construction of a house. In Paragraph-4, he had stated that marriage of Jitendra Choudhary took place 14-15 years ago. He had further stated that in the year 2006, wife of Jitendra Choudhary was not in Patori rather she was at her Naihar. However, during course of cross-examination at Paragraph-10, he had stated that he was one of Barati on the eve of marriage of Jitendra Choudhary. He is not remembering the date, but it was not in the year 2001. In Paragraph-14, he had stated that 3-4 years after marriage of Jitendra Choudhary, there was partition in the family of Jitendra Choudhary.

21. The status of defence witness is at par with the status of the prosecution witnesses. When the DW has been examined, then in that event, disclosure made by the DWs is to be taken note of. So far evidence of DW-1 is concerned, that has got no impact with regard to merit of the case. However, so far status of PW-2 is concerned, he happens to be son of PW-6, who had already

been declared hostile by the prosecution. From the evidence of PW-6 at Paragraph-10, it is apparent that this witness had stated that since after 2006, wife of Jitendra Choudhary never stayed at her Sasural. DW-2 had admitted under Paragraph-9 that statement of his father was recorded by the police at the house of Jitendra Choudhary, at that very time, Dinesh was present there.

22. After having scrutiny of evidence of PW-6 and PW-7 along with DW-1 and DW-2, it is apparent that accused had not denied or controverted the allegation of the prosecution with regard to demand of dowry and further, the torture and cruelty having subjected to the deceased for procurement of the same.

23. It is also apparent from the evidence of PW-4, the father and PW-5, the informant, brother of deceased that defence had not, the reason best known to the defence itself, had not chosen to cross-examine the witnesses on the score of demand of dowry. Apart from this, the status of the defence in rebutting the allegation attributes by the prosecution regarding commission of murder of Nutan at his place on 10.10.2006 is not at all found to be exercised in due care and caution rather it has been suggested in usual phenomenon. During course of statement under Section 313 of the Cr.P.C., appellant has not controverted the allegation rather he admitted serving of advocate notice, but failed to disclose that deceased was not staying with him on the alleged date and time of occurrence.

24. In the aforesaid background and after finding that defence could not be able to erase presence of deceased at her Sasural on the alleged date of occurrence that means to say on 10.10.2006.

25. Although, in his statement, appellant had pleaded that he was married in the year 1995, but no reliable evidence has been placed on that very score contrary to it, the prosecution substantiated marriage of deceased with the appellant in the year 2001 and the most surprising feature is aforesaid disclosure

has not been challenged. In likewise manner, there happens to be no cross-examination at the end of defence with regard to demand of dowry and further, torture meted out to the deceased at their end for procurement of demand of dowry.

26. In *Gian Chand & Others v. State of Haryana reported in 2013 (4) P.L.J.R. Page-7 (SC)*, it has been held that the part of evidence which has not been challenged under cross-examination will be deemed to be an admission. It has been elaborated in following way:-

“11. The effect of not cross-examining a witness on a particular fact/circumstance has been dealt with and explained by this Court in Laxmibai (Dead) Thr. L.Rs. & Anr. v. Bhagwanthuva (Dead) Thr. L.Rs. & Ors., AIR 2013 SC 1204 observing as under: “31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination



in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.”

(Emphasis supplied)

(See also: Ravinder Kumar Sharma v. State of Assam & Ors., AIR 1999 SC 3571; Ghasita Sahu v. State of Madhya Pradesh, AIR 2008 SC 1425; and Rohtash Kumar v. State of Haryana, JT 2013 (8) SC 181)

27. Thus, after giving anxious thought to the materials available on the record, it is evident that prosecution succeeded in proving its case while the defence could not succeed in getting the allegation duly rebutted and as such presumption as required under Section 113(B) of the Evidence Act has to be inferred. Non-presence of dead body is not going to dent in the prosecution case

as in terms of Section 106 of the Evidence Act, it happens to be appellant, who has to explain, as the prosecution substantiated presence of deceased at her Sasural on the day of occurrence. Consequent thereupon, the judgment of conviction and sentence recorded by the learned lower Court is confirmed. Appeal is dismissed. Appellant is under custody, hence, will serve the remaining part of sentences.

28. First page and last page of the judgment should be given to the learned Amicus Curiae for the needful.

(Aditya Kumar Trivedi, J)

Patna High Court,
Dated-11.08.2015
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