

**IN THE HIGH COURT OF JUDICATURE AT PATNA
(CRIMINAL APPELLATE JURISDICTION)**

Criminal Appeal (SJ) No.170 of 2014

**Against the judgment of conviction dated 26.2.2014/07.03.2014 passed by the
Shri Binod Kumar, 1st Additional Sessions Judge, Bhagalpur in Sessions Trial
No.320 of 2012/TR. No.53 of 2013.**
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1. Akhilesh Mandal Son of Buddhu Mandal
2. Drupatia Devi, Wife of Buddhu Mandal, Both resident of village- Kali Prasad,
West Toal, P.S. Pirpanti, District Bhagalpur

.... Appellants

Versus

1. The State of Bihar
2. Kaleshwar Prasad Singh, Son of Late Hitu Prasad Singh, resident of village-
Murli, P.s. Gopalpur, District Bhagalpur (Navgachia)

.... Respondents

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Appearance :

For the Appellants : M/s. Abhay Kumar Singh No.1 and
Bharat Bhushan, Advocates

For the State : Mr. Bipin Kumar, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

Date: 03-11-2015

The appellants have been convicted under Section 304B/34 and Section 498A/34 of the Indian Penal Code and have been sentenced to undergo rigorous imprisonment for ten years. However, no sentence has been awarded for the offence under Section 498A/34 of the Indian Penal Code.

The prosecution case has alleged in the first information report by the informant Kamleshwar Prasad Singh (P.W.6) that while he was in his village Murli on 3.11.2011 at 8.00 a.m. then he got information from mobile that his daughter Dropadi Devi has been



burnt to death at her Sasooral village Kali Prasad. On the said information, the informant went to the Sasooral of his daughter at village- Kali-Prasad at about 1.00 p.m. and saw that his daughter is lying dead. His nephew (Bhagina) Hari Mandal also reached there and disclosed that Dropadi Devi has been burnt to death by Adkhilesh Mandal (husband), Dhurpatiya Devi (mother-in-law), Thithar Mandal, Arjun Mandal and Manager Mandal in furtherance of common intention by sprinkling k.oil. The motive of the occurrence alleged is that the accused persons were demanding Rs.50,000/- as dowry since last several months and since the informant was unable to pay the amount due to his poorness and so his daughter was subjected to cruelty by assaulting her and earlier also his daughter had informed several times on mobile about subjecting cruelty for non fulfillment of demand.

The ferdbeyan of the informant Kamleshwear Prasad Singh (P.W.6) recorded at 1.45 p.m. near the dead body of the victim Dropadi Devi at village- Kali Prasad at the house of Akhilesh Mandal.

On the basis of ferdbeyan, the F.I.R. drawn and investigation proceeded. During the investigation, the I.O. prepared the inquest report of the dead body of the victim Dropadi Devi send the dead body of the victim Dropadi Devi for postmortem examination, recorded the further statement of the informant and the



statement of the witnesses inspected the P.O. where he found the dead body of the victim on the Varandah of the house of victim obtained the postmortem report and after recording the statement of the witnesses submitted charge sheet for the offence under Sections 498A and 304B/34 of the I.P.C. on which the cognizance was taken and the case was committed to the Court of Sessions where charges were framed and trial proceeded.

During the trial, nine witnesses were examined by the prosecution. They are P.W.1, mantu Mandal has deposed to the effect about the marriage of the victim with Akhilesh about five years prior to the date of the death and Dropadi Devi died by burnt injury and found the dead body of the victim lying in courtyard of her Sasooral at village Kali Prasad. P.Ws.2 and 3 are Vikash Kumar Mandal @ Vikash Thakur and Mahendra Kapri respectively and they also have deposed to the effect that Akhilesh was married and his wife died after the burnt injury. P.W.4 is Hari Mandal. He has also deposed to the effect that marriage of Daropadi Devi with Akhilesh was solemnized five year back and Dropadi Devi died by burnt injury. P.W.5 is Anirudha Prasad Singh, the brother of the victim. However, he has come to depose that the marriage of the victim was solemnized with Akhilesh in the year 2005. The victim Dropadi Devi was done to death by setting her on fire by her husband and in-laws. He has further



deposed that there was demand of Rs.50,000/- of Tilak and since they were unable to satisfy the demand. The husband and in-laws were used to assault her and threatened to kill her. The victim used to disclose this fact on telephone as well as whenever she came to Naihar even then she used to tell the woes. P.W.6 is the father of the victim and the informant. However, he supported the prosecution case in his examination-in-chief that the victim was married with Akhilesh, resident of Kali Prasad about six years back and Akhilesh used to subject her to cruelty by assault for non-fulfillment of demand of money and they used to demand money from Dropadi Devi to kill her. However, this witness in his cross examination in paragraph-5 deposed that he cannot say the date of marriage of the victim. He has further deposed that Dropadi Devi was married about ten years back from the date of the deposition on 12.12.2012. He has however deposed that he used to visit Sasooral and talked with them and further his daughter and son used to live well and had a good relation and there was no quarrel between his daughter and his son. However, he has further deposed that the police has taken his thumb impression and his evidence in his examination-in-chief is quite contrary to the evidence in cross examination and it is sufficient to discredit as his evidence suffer from inconsisting. P.W.7 is Kalpana Devi. She has deposed about the marriage having been solemnized about 5-6 years

back and Dropadi Devi died at her Sasooral and was found burnt injury. P.W.8 is doctor who conducted the postmortem examination and found the smell of k. oil emerging the body and garments of the deceased with dermo epidermic burn was found extending over lower part of chest, both upper limb, whole of back and chest scalp and other area to the extent of 65 to 70 percent and has opined that the cause of death is burnt. P.W.9 is the I.O. investigated and submitted the report.

The trial court taking into consideration of the evidence of the witnesses both oral and documentary and taking into consideration the submission of the parties convicted the appellant on the fact that Dropadi Devi died due to burnt injury and otherwise then normal circumstance and her death occurred within seven years of marriage. P.W.5 has stated that Dropadi Devi was married in the year 2005 where the occurrence took place in 2011 and it is also established that soon before her death, Dropadi Devi was subjected to cruelty and harassment by harassment an accused in connection with demand of dowry of Rs.40,000/-.

Learned counsel for the appellant however challenged the order of conviction and sentence recorded by the trial court. It has been submitted that the father P.W.6 in his cross examination has stated that the marriage was solemnized about ten years before the



occurrence and further has deposed that both the husband and wife had a good relation and he used to visit the Sasooral of the victim and both used to serve him and behaved well and hence contended that taking into consideration in paragraph-5 of the cross examination it may be held that both were living well. It has further been contended that there is no documentary evidence regarding the dispute or demand of money and subjected to cruelty for non-fulfillment prior to the date of occurrence. It has further been contended that there is no evidence that soon before the death of subject to cruelty the evidence regarding the demand and subjecting cruelty are bald statement without any reference to time and hence unless the ingredients for offence under Section 304B of I.P.C. that soon before the death, victim was subjected to cruelty is not established presumption under Section 113B of the Evidence Act regarding the dowry death cannot be taken in view of Section 113B of the Act itself provides that the presumption can only be taken regarding the dowry death when it is established that soon before the death, the victim was subjected to cruelty.

Learned counsel for the State, however, contended that there is sufficient evidence that the marriage was solemnized within seven years as per evidence of the witnesses. From P.Ws.1 to 7, it has further been contended that from the evidence of the Doctor, it is



apparent that the victim was done to death by burnt injury is suspicious circumstance. It has further been contended that in the evidence of P.W.5, it has specifically been mentioned that the marriage solemnized within seven years and Akhilesh used to demand Tilak and since they were unable to pay the dowry they used to assault Dropadi Devi and used to threaten to kill her. It has further been contended that there is no challenge to this evidence in cross examination. It has further been contended that P.W.6 though have supported the prosecution case in examination-in-chief regarding the demand and subjecting cruelty and regarding the assault made on the person of the deceased but has given quite contradictory statement. In paragraph-5 of his cross examination which is contrary to the evidence in paragraph-1 i.e. the examination-in-chief and hence his evidence in paragraph-5 is not reliable to be considered and hence contend that since the marriage having been solemnized within seven years the death in suspicious circumstance and there are evidence regarding the demand and subjecting to cruelty and hence the conviction under Section 304B be sustained.

However, having regard to the respective circumstances, I proceed to consider the evidence in the light submission, however, prefer proceeding to consider the evidence. It is proper to go into the ingredients for offence under Section 304B of I.P.C. as well as the



presumption provided under Section 113B of the Evidence Act. However, going to the Section 304B of I.P.C., it is apparent that before taking a presumption of the dowry death it requires that prosecution must have established the ingredients for offence under Section 304B of I.P.C. The ingredients provided under Section 304B of I.P.C. are (a) that the marriage solemnized within seven years (b) that the death of the victim in suspicious circumstance or caused by burnt or balding injury (c) the victim was subjected to cruelty (d) that such cruelty was in connection with demand of dowry (e) that such harassment of the deceased should have been subjected soon before her death. Hence to take presumption under Sections 304B of I.P.C. or 113B of the Evidence Act these five ingredients for offence under Section 304B of I.P.C. must be established by the prosecution and unless the ingredients are proved the presumption of the dowry death cannot be taken.

Section 113b of the Evidence Act provides that the presumption to be drawn against accused in regard to dowry death subject to the fact that the prosecution established that “soon before the death the woman was subjected to cruelty”. The learned counsel for the appellants has relied upon several decisions in **Durga Prasad & Anr. v. State of M.P. [2010 Criminal Law Journal 3419]**, **Baljeet Singh and another v. State of Haryana [AIR 2004**

Supreme Court 1714] and G.V. Siddaramesh Vrs. State of Karnataka [2010(3) SCC 152] and all these decisions established and held and decided the ratio that there must be material to show that soon before the death woman was subjected to cruelty or harassment and then only the presumption can be drawn for the dowry. However, the ratio is well settled that presumption of dowry death can only be drawn when it is proved that soon before death victim was subjected to cruelty with other ingredients and hence I proceed to consider the evidence in the light of the submission as stated above.

The prosecution case that the marriage solemnized about 5-6 years back and the victim was died by burnt injury in suspicious circumstance and there is demand of Rs.50,000/- as dowry and subjecting to cruelty for non-fulfillment of demand.

However, going to the evidence, P.W.1 has stated that the marriage of the victim was solemnized about five years back and was done to death by setting her on fire. P.W.2 also stated about the marriage and death of the victim by burnt injury. P.W.3 has also stated that Akhilesh is married and his wife has been done to death by burnt injury. P.W.4 is the cousin of the victim and has also stated that the marriage solemnized five year prior to the occurrence and has died by burnt injury but had done to death as well as from the evidence of P.Ws.1 to 5 it is apparent that they have deposed regarding the fact



that the marriage solemnized within five year and the victim was done to death by burnt injury or by setting her on fire. It is further alleged that Akhilesh demanded Tilak worth Rs.50,000/-. It has further been stated that Dropadi Devi was subjected to cruelty and she used to disclose on telephone. However, there is no reference to point of time when the demand was made and when the Tilak was demanded. However, even assuming Tilak was demanded as the marriage solemnized about five years. However, subsequently, there is no mention that when she disclosed about the occurrence on telephone and when she came to the house to disclose about the occurrence or subject to cruelty. As per the evidence of P.Ws.1 to 5 though the evidence regarding the marriage having been solemnized within seven years and even there is evidence that the victim was done to death by burnt injury and further in view of the evidence of the doctor who conducted the postmortem examination of the victim P.W.8 with the smell of k. oil coming out of the body of the victim and the dermo was burnt and death.

P.W.6 though is the informant and has deposed regarding the demand and subjecting cruelty by assault and has also deposed that Dropadi Devi disclosed the fact to him and even he had paid money to Adkhilesh to the tune of Rs.7 lacs but still he continued to demand. However, in his cross examination in paragraph-5, he has



given in his evidence and examination-in-chief and has deposed that the marriage solemnized about ten years prior to the occurrence and he used to behave well and there was no quarrel between the parties. However, the evidence of the witness in examination-in-chief which come to the contrary. He has further stated in paragraph-10 that he signed of his thumb impression on a plain paper to this credit in the F.I.R. and has stated that the police has not read over and explain the ferdbeyan and hence the evidence is of no much consequence though supported the prosecution case regarding the demand and subjecting cruelty. P.W.7 is the sister of the victim and she has though supported the case having been solemnized 5-6 years back and the victim was done to death by burnt injury as well as except P.Ws.5 and 6 none has supported the prosecution case regarding the demand and subjecting cruelty though P.Ws.1, 2, 3, 4 and 7 have deposed that the marriage solemnized within five years and the victim was done to death by burnt injury but the evidence regarding the demand and subjecting cruelty is silent as they have not deposed with regard to the allegation of demand and subjecting cruelty. So far P.W.5 though has supported the prosecution case regarding the demand and subjecting cruelty but his evidence in cross examination in paragraph-5 is contradictory with regard to the marriage having been solemnized about ten years back and has taken the case out of the ambit of 304B of the I.P.C. by



deposing with the marriage solemnized ten years back and further his deposition that he used to go to the Sasooral of the victim and has talked with the daughter and the son only and both respected him and both had a good relation and they never used to file and hence from his evidence, the marriage was solemnized within seven years and subjecting cruelty for non fulfillment of dowry hence his evidence is not worthy of confidence in view of his contradictory evidence taken in examination-in-chief and cross examination. Now the only witness remained in regard to the ingredients for offence under Section 304B of the I.P.C. that the demand and subjecting cruelty is the evidence of P.W.5. Further P.W.5 has supported the prosecution case and that there is demand of Rs.50,000/- and the victim was subjecting to cruelty. However, there is no time mentioned in his evidence that when the demand was made, there is no reference time in the evidence regarding the demand and subjecting cruelty.

Hence, taking into consideration the entire evidence though there is evidence that their marriage solemnized within seven years and their evidence that the victim was done to death in suspicious circumstance as she died out of the burnt injury. The cause of death has been shown to be ex facie due to burn. However, merely because the prosecution has established that the death took place otherwise in normal circumstances within seven years of marriage is



not a sufficient to hold the dowry death. It is well settled that to prove the dowry death it would have to show that in addition to the fact that death took place otherwise than in normal circumstances within seven years of the marriage it is also required to be proved that soon before her death the victim was subjected to cruelty or harassment by her husband or relative to draw the presumption under Section 113B of the Evidence Act. It is well settled that to take presumption under Section 304B of the I.P.C. read with Section 113B of the Evidence Act, the presumption of the offence of dowry death is required to be drawn provided the prosecution is established the ingredients for offence under Section 304B of the I.P.C. which includes that soon before the death the victim (woman) was subjected to cruelty.

However, having discussed the entire evidence, the only witness supports the demand and subjecting cruelty of P.W.5. Further his evidence is general and omnibus. His statement appears to be bald without any reference to time to infer or logically come to a conclusion that soon before the death the victim was subjected to cruelty and hence having not established it is not proper to draw inference to take a presumption to be drawn against the accused in regard to dowry death and hence the order of conviction and sentence recorded by the trial court without going into the question is not sustainable in law and is hereby set aside.

Hence the prosecution has not been able to prove the charge beyond all reasonable doubts and hence the order of conviction and sentence recorded under Section 304B of I.P.C. is not sustained.

So far the evidence of subjecting cruelty is concerned, the only evidence of P.W.5 and hence, it is not proper to convict the appellant and the allegations are general and omnibus. In the facts and circumstances, the conviction under Section 304B of the I.P.C. is hereby set aside and the appeal is allowed. Appellants, namely, Akhilesh Mandal and Drupatia Devi, who are in custody, are hereby released forthwith if not wanted in any other case.

(Gopal Prasad, J)

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