

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No. 130 of 2015

Against the judgment of conviction dated 21.01.2015 and order of sentence dated 28.01.2015 passed by the learned Additional Sessions Judge-III, Purnea, District Purnea, Bihar, in Sessions Case No. 784 of 2008 (CIS No. 1584/2013)

Prabhas Mandal, S/o Late Basudeo Mandal, R/O - Tikkapatti, P.S. - Tikkapatti, District - Purnea

.... Appellant

Versus

The State of Bihar

.... Opposite Party

Appearance :

For the Appellant : Mr. Sanjeev Kumar Singh, Advocate

Mr. Mukesh Kumar Jha, Advocate

For the State : Mr. Sujit Kumar Singh, A.P.P.

CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

Date: 04-09-2015

Heard the learned counsel for the appellant and learned counsel for the State.

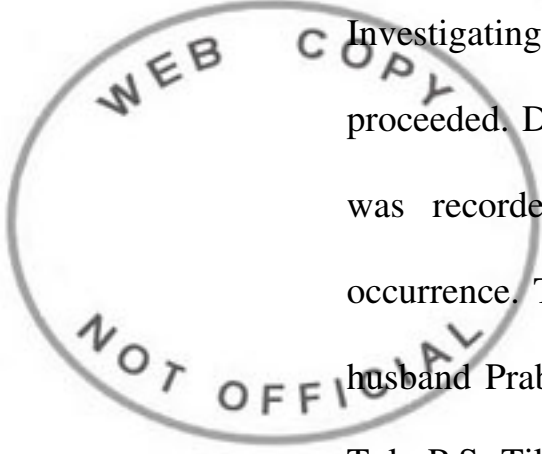
2. Appellant has been convicted under Section 304-B of the Indian Penal Code and has been sentenced to undergo rigorous imprisonment for ten years and also to pay a fine of Rs.30,000/- and in default of fine to undergo additional period of simple imprisonment for six months.

3. The prosecution case, as alleged in the written report by Amarendra Kumar Mandal, the brother of the victim, is that the victim, Mamta Devi was married with appellant Prabhash Mandal of village Tikapatti (Tirasitola), P.S. Tikapatti, District Purnea in the year 2005 according to Hindu rites and rituals. It is further alleged that after some days of the marriage, Prabhash Mandal, the husband of Mamta Devi

demanded motorcycle and used to subject the victim Mamta Devi to cruelty by assaulting her with threat that until and unless her brother gives the motorcycle he will make her life miserable. The further case is that with regard to demand and subjecting cruelty, information was given by the victim to the informant and his family member on telephone. On receiving the information the informant used to go to Sasural of his sister Mamta Devi (victim) at Tikapatti to mediate and make the brother-in-law Prabhash Mandal understand but informant and his sister Sobha Devi and Vijay Kumar Mandal husband of Sobha Devi tried to make the appellant understand not to press his demand. The further case is that on 22.04.2008 at 9:00 A.M. the second sister of the informant Sobha Devi intimated the informant that Mamta Devi has been killed by her husband Prabhash Mandal by administering poison. On this information the informant went to Tikapatti, the Sasural of Mamta Devi but no members of the family were present in the matrimonial home and found Mamta Devi lying dead in her matrimonial home. On inquiry from the neighbours they did not get any satisfactory reply. It is further alleged that smell of thymate, a poisonous substance, was coming out from the mouth of his sister and that Mamta Devi has been done to death for non-fulfilment of demand of dowry by poisoning, as also for not fulfilling the demand of motorcycle.

4. On the written report of the informant, Amarendra Kumar

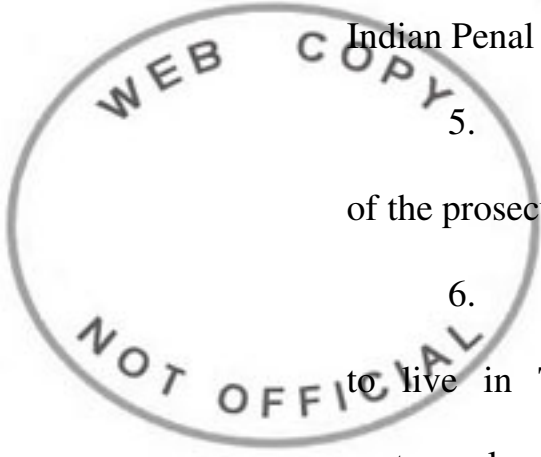
Mandal, First Information Report lodged on 22.04.2008 at 5:00 P.M. registered Tikapatti P.S. Case No. 12 of 2008, dated 22.04.2008 and the Investigating Officer took up the investigation and the investigation proceeded. During investigation the further statement of the informant was recorded. The Investigating Officer inspected the place of occurrence. The place of occurrence is the house of deceased and her husband Prabhash Kumar Mandal situated at village Tikapatti Tirassy Tola P.S. Tikapatti made of soil and tiles. There are two rooms in the house facing east and just adjacent east, there is a Varamdah north-south direction, over which the Investigating Officer found the dead body of the deceased. The informant told the Investigating Officer that the deceased used to sleep in the south-western room of the house. In that room he found one wooden plung over which toshak was lying and two pillows were found. In paragraph 3, the boundary of the house given as in east house of Karu Mandal west house of Chamak Lal Mandal east passage thereafter houses of Manoj Mandal, Chamak Mandal and north house of Khantar Mandal. He prepared the inquest report marked as Ext. 6, sent the dead body for post-mortem, recorded the statement of the witnesses, obtained the post-mortem report and also sent the viscera to the Forensic Science Laboratory, Muzaffarpur. Thereafter on completion of the investigation, charge-sheet was submitted for the offence under Section 304-B of the Indian Penal Code. After submission of the charge-sheet cognizance was taken, case



was committed to the Court of Sessions and thereafter the charge was framed. During the trial, charge was framed under Section 304-B of the Indian Penal Code.

5. During the trial seven witnesses were examined on behalf of the prosecution.

6. P.W. 1 Sobha Devi, the sister of the informant who used to live in Tikapatti village, deposed that there was demand of motorcycle and the victim used to be assaulted for non-fulfilment of the demand and her brother, husband and others used to make the appellant understand that they are poor and cannot give motorcycle and not to assault her but it was retorted that till the motorcycle is given he will not keep Mamta Devi with due dignity and affection. Ultimately, on 22.04.2008 she got information about the death. This witness in her evidence stated that on 22.04.2008 she was informed that any woman has been administered thymate and then she went to the house of appellant and then she had a talk with her sister and the sister disclosed that appellant has administered thymate and then she asked Prabhash Mandal and his other family members for her treatment. Thereafter they brought vehicle and while taking her to the doctor, the victim died in the way. Though she claims to have been the eye-witness but developed the story of a dying declaration that the sister disclosed that the appellant has administered thymate. However, in the cross-examination she stated that she got information about the death of the victim from



the person of Sasural of the deceased. In her further evidence in paragraph 15 she stated that police neither enquired her nor inquired any other person before her and she further deposed in paragraph 16 that when she reached there by the time several persons were present there but none has come forward to depose that victim ever disclosed about administering poison by the appellant.

7. P.W. 2 Vikay Kumar is the husband of P.W. 1 and brother-in-law of the victim. He has supported the prosecution case about the demand and subjecting cruelty but without any reference to date and time. However, this witness stated in paragraph 5 of his deposition that on 22.04.2008 he learnt about the administering of thymate by the appellant to Mamta Devi and has stated that on this information his wife and the brother of the victim came to the Sasural of the victim and he also reached there and saw the victim Mamta Devi lying dead. However, this witness does not say about any dying declaration or disclosure of the victim about cause of death rather he says that his wife, the brother of his wife and he reached there.

8. P.W. 3 is Vinod Kumar Mandal who is cousin brother of the victim and has supported the prosecution case about the demand and subjecting cruelty for non-fulfilment of the demand of motorcycle and he also stated that when he reached he found, Mamta Devi lying dead.

9. P.W. 4 is the informant. Though he has supported the

prosecution case about the demand of motorcycle and subjecting of cruelty and that he got the information about subjecting cruelty and demand of motorcycle through mobile phone by the victim and on 22.04.2008 in the morning at 9:00 A.M. Sobha Devi disclosed about the death of Mamta Devi by administering poison. However, this witness does not say that he went along with his sister Sobha Devi P.W. 1 and nor he says about any utterances by the victim to depose that Sobha Devi disclosed about dying declaration. However, he has stated that when he went to the Sasural of Mamta Devi then he saw dead body of Mamta Devi in a room and froth coming out from her mouth and the smell of thymet.

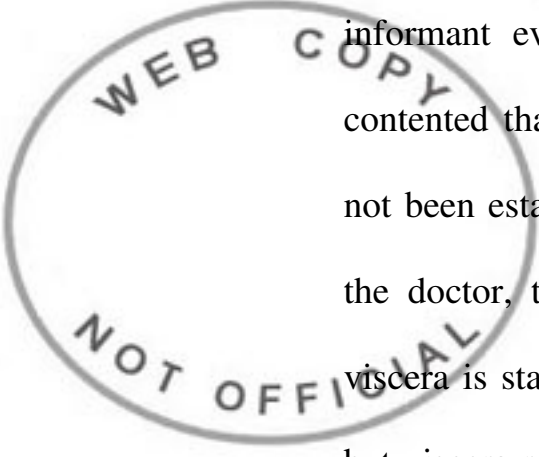
10. P.W. 5 is the doctor who has stated that he has conducted the post-mortem of the victim on 24.04.2008 at 10:00 A.M. and he did not find any external injury except that the rigor mortis present in all four limbs, froth mixed with blood from nostril and the time elapsed since death within 24 hours and has proved the post-mortem report Ext. 3. He has mentioned the cause of death due to poisoning. However, in his cross-examination by the Court he has stated that viscera report has not been produced by the Investigating Officer to ascertain that it is actual case of poisoning and has stated that he gave his opinion only on the basis of clinical observation and P.W. 5 has no idea whether the Investigating Officer has collected viscera from Sadar Hospital for its chemical examination.

11. P.W. 6 is the Investigating Officer of this case. The documents proved on behalf of prosecution are Ext. 1, the signature of Vijay Kumar on the inquest report, Ext. 1/1 the signature of Vinod Kumar Mandal on the inquest report, Ext. 2 the written report, Ext. 3 post-mortem report, Ext. 4 the endorsement of registration of police station case on the written report, Ext. 5 the First Information Report and Ext. 6 signature of the Officer-in-Charge, Tikapatti. Two witnesses have also been examined on behalf of the defence.

12. D.W. 1 is Barun Kumar and D.W. 2 is Manju Kumari. The defence of the accused person is that the victim was mentally retarded and she was assaulted two slaps for keeping her in discipline and so she committed suicide by administering poison.

13. The trial Court taking into consideration the evidence of the witnesses that the deceased died unnatural death within seven years of her marriage following a demand of dowry convicted the appellant and sentenced as mentioned above.

14. Learned counsel for the appellant, however, challenged the judgment of conviction and order of sentence alleging therein that there is no eye-witness to the occurrence though P.W. 1 claims and developed the prosecution case that on information she went to the victim house and the victim disclosed that she has been administered poison by the appellant and then on her persuasion took her to a doctor but in way she died. However, except P.W. 1 none has supported this



part of the prosecution case nor this fact was mentioned in the First Information Report so this fact was not stated by P.W. 1 to the informant even after the death of the victim. It has further been contented that the death of the victim in suspicious circumstance has not been established beyond reasonable doubt. As per the evidence of the doctor, there is no injury on the person of the victim. Though viscera is stated to have been sent to the Forensic Science Laboratory but viscera report has not been proved or brought before the doctor so the doctor could not give a definite report about the cause of death. The prosecution case withheld the viscera report and, therefore, adverse inference may be taken that the victim has not died by poisoning. It has further been contended that there is no evidence that soon before the death the victim was subjected to cruelty and there is no evidence that the victim was last subjected to cruelty for non-fulfilment of the demand. The allegation about demand and subjecting cruelty is totally general and omnibus without any reference of time and place of occurrence. It has further been contended that the victim was illiterate rather it has also come in evidence that there was no phone in the Sasural of the victim to infer that the victim used to inform on telephone and hence, the judgment of conviction and order of sentence cannot be sustained.

15. Learned counsel for the State, however, contended that there is consistent evidence that there was demand and subjecting

cruelty for non-fulfilment of the demand of motorcycle and the death is within seven years as it has been established that the occurrence took place in year 2008 whereas the marriage solemnized within seven years.

16. However, before going to the question of fact it is pertinent to refer Section 304-B of the Indian Penal Code:-

Section 304-B. Dowry death. – (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that “soon before her death” she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called “dowry death”, and such husband or relative shall be deemed to have caused her death.

Explanation. – For the purpose of this sub-section, “dowry” shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

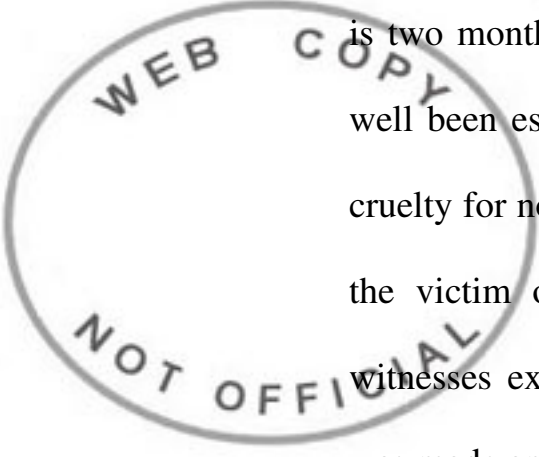
(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.]

Classification of Offence. – The offence under this section is cognizable, non-bailable, non-compoundable and triable by Court of Session.

And hence, to prove the offence under Section 304-B of the Indian Penal Code and to draw inference and presumption under Section 304-B of the Indian Penal Code the ingredients of the offence are required to be proved. The ingredients require to be proved are (a) the victim has been done to death by any burns or bodily injury or

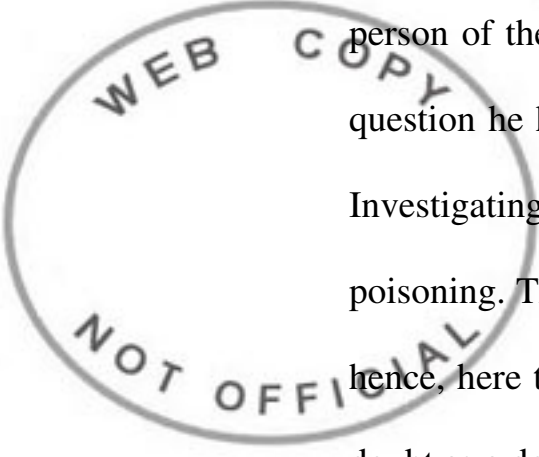
occurs otherwise than under normal circumstances; (b) the death within seven years of her marriage; (c) the death in suspicious circumstance is in relation to demand of dowry and subjecting cruelty for non-fulfilment of demand; (d) that soon before her death she was subjected to cruelty or harassment by her husband and (e) the subjecting cruelty must have been done in connection with any demand of dowry.

17. However, going through the evidence of P.Ws. 1, 2, 3 and 4 though they have specifically stated that marriage was solemnized in year 2006 and after the marriage a demand of motorcycle was made by the husband and the victim was subjected to cruelty for non-fulfilment of the demand and the victim used to inform about subjecting cruelty for non-fulfilment of the demand of motorcycle on telephone to the informant. However, though all the four witnesses specifically stated these facts regarding the demand and subjecting cruelty and intimation about the said demand and subjecting cruelty on telephone but there is no any specific mention that when victim was subjected to cruelty, there is no reference of any time and place where the demand was made and the manner of subjecting cruelty. There is no specific mention about the time. However, the ingredients may be taken to have been proved that the marriage solemnized in year 2005 as per their evidence and there was allegation of demand and subjecting cruelty. However, there is no evidence that with any reference to time that when the last demand was made or when she was subjected to cruelty



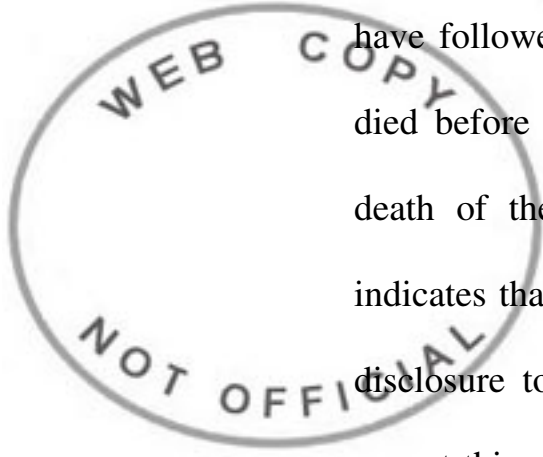
for non-fulfilment of those demands. There is significance of the words “soon before the death” itself though no time has been fixed whether it is two months, four months, six months or one year. However, it has well been established. There must be some nexus between subjecting cruelty for non-fulfilment of demand of dowry to one side and death of the victim on the other. However, in the evidences of the seven witnesses examined there is no mention as to when the last demand was made and when the victim was done to death in relation to demand or non-fulfilment of the demand of dowry and going through the entire record and evidence. These nexus between subjecting cruelty for non-fulfilment of demand of dowry and death of the victim has not been established. There is no evidence that soon before the death she was subjected to cruelty. Moreover, the evidence shows that the victim used to inform on telephone regarding the subjecting cruelty but it has come in evidence that there was no telephone or mobile facility in the house of the victim. However, there is neither any document, like, written letters nor is there any specific person and reliable evidence regarding the demand and subjecting cruelty, except the oral mention without any reference to the time, place of the demand and hence, it does appear to be proper to rely on these documents so as to hold that the victim was subjected to cruelty.

18. However, so far the death of the victim is concerned, as per the prosecution case the victim was done to death by poison. The



doctor P.W. 5 who conducted the post-mortem, though has stated that cause of death is poisoning no any external injury was found on the person of the deceased. However, in his cross-examination to a Court question he has stated that the viscera report was not produced by the Investigating Officer to ascertain that its actual cause of death was by poisoning. There is no conducive evidence that death was by poisoning hence, here the cause of death has not been proved beyond reasonable doubt as a doubt has been created by the doctor itself when in his cross-examination, he has stated that viscera report having not been produced by the Investigating Officer to ascertain that it is actual case of murder by poisoning, opinion on factual aspect is missing. There is no evidence that the victim was done to death by poisoning. There is no eye-witness to the occurrence and the informant has only stated that on 22.04.2008 at 9:00 P.M. he was informed by Sobha Devi his second sister that victim has been done to death by poisoning. As per the written report there is no mention as to when Sobha Devi reached the victim, the victim was alone and disclosed that accused persons have gave her poison and this story has been developed the prosecution case at subsequent stage to create an evidence of a dying declaration of the victim by P.W. 1 who deposed that when she went on the information of administering poison to the Sasural of her sister (the victim) then the sister disclosed that the appellant has administered poison (thymate). However, in her cross-examination she has stated that she got

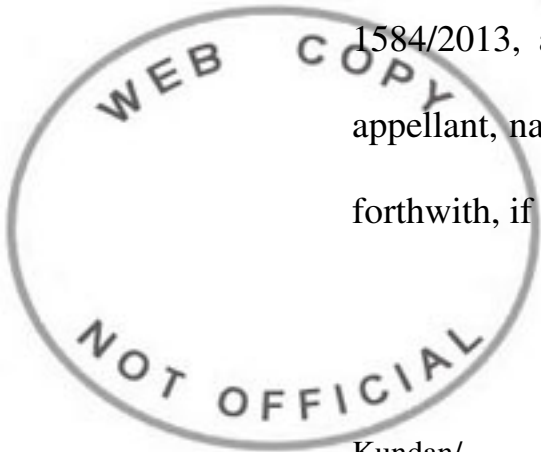
information about the death of the victim by his Sasural people. Had he been there at the time when the victim was taken to doctor she must have followed her being a female member and the victim must have died before her but her evidence that she got information about the death of the victim from the Sasural people of the victim itself, indicates that she was not there and has developed the story about the disclosure to treat as dying declaration which is not acceptable and except this witness none has come forward with this theory of a dying declaration. She has further stated in her deposition in paragraph 16 that when an information was received, he reached there and found victim to be lying dead. There were several persons present there. However, none is saying about the dying declaration and there is no witness on this point except her. Hence, there is no witness to the occurrence either with respect to administering poison before him nor there is any other material for proving except the evidence of the doctor in his examination in chief that death of the victim was due to poisoning. However, doctor in his further evidence accepted that the viscera report was not produced by the Investigating Officer to ascertain that it was actual case of poisoning. He has further deposed that he gave his opinion only on the basis of clinical observation and hence, a doubt has been created regarding the cause of death of the victim whether it was an actual cause of death by poisoning. The Investigating Officer deposed that the viscera was sent for Forensic



Science Laboratory examination but the report of Forensic Science Laboratory having not been proved, an adverse inference may be taken that report did not disclose about poisoning and it creates a circumstance to give benefit of doubt to accused as presumption could not be established that death was by poisoning and as a consequence prosecution could not be able to establish that death is in suspicious circumstance.

19. Hence, having regard to the fact that the prosecution has not been able to prove the death in suspicious circumstance by poisoning and further the fact that there is no evidence that soon before the death of the victim she was subjected to cruelty for non-fulfilment of the demand and hence, I find and hold that the prosecution has not been able to prove the charges leveled against the appellant beyond reasonable doubt. The trial Court apparently appears to have misdirected itself to hold that since the death is within seven years of the marriage and hence, Section 304-B of the Indian Penal Code is made out. However, to take presumption under Section 304-B of the Indian Penal Code and 113B of the Evidence Act the prosecution must have to establish the ingredients for the offence under Section 304-B of the Indian Penal Code and unless the ingredients of Section 304-B of the Indian Penal Code have been established, no presumption can be taken against the appellant that he has caused the dowry death. Hence, the judgment of conviction dated 21.01.2015 and order of sentence

dated 28.01.2015, passed by the learned Additional Sessions Judge-III,
Purnea in Sessions Case No. 784 of 2008 arising out of CIS No.
1584/2013, are hereby set aside and the appeal is allowed. Let the
appellant, namely, Prabhas Mandal, who is in custody, be set at liberty
forthwith, if not required to be detained in any other case.



(Gopal Prasad, J)

Kundan/-
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