

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No. 132 of 2014

Against the judgment of conviction dated 15.02.2014 and order of sentence dated 22.02.2014 passed by Sri Kaushal Kishor Singh, learned Ad hoc Additional Sessions Judge-III, Patna in connection with Sessions Trial No. 1238 of 2008 arising out of Punpun P.S. Case No. 73 of 2007

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Ganesh Prasad Keshri, S/O Ramprit Prasad Keshari, R/O Village Mohanpur, P.S. Punpun, District Patna

.... Appellant

Versus

The State of Bihar

.... Respondent

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Appearance :

For the Appellant : Shri Krishna Prasad Singh, Sr. Advocate
Susri Meena Singh, Advocate

For the Respondent : Shri Binod Bihari Singh, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

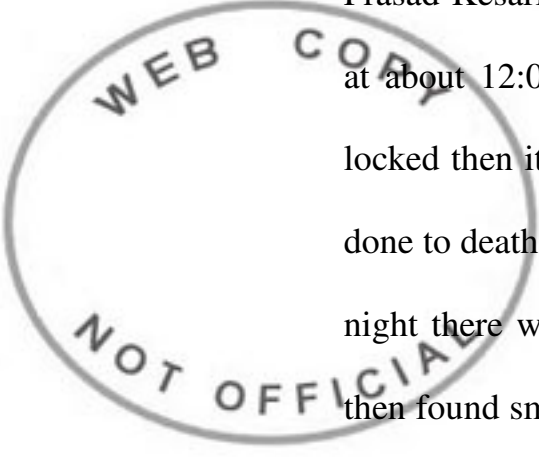
Date: 10-09-2015

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

2. The sole appellant has been convicted under Section 304-B of the Indian Penal Code and sentenced to undergo rigorous imprisonment for ten years. He has further been convicted for the offence under Section 201 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for three months and to pay a fine of Rs.25,000/- and in default of payment of fine has further been directed to undergo simple imprisonment for three months.

3. The prosecution case as alleged in the written report of the mother of the victim Sumitra Devi (P.W.5) is that she has married her

daughter Punam Devi with Ganesh Prasad Kesari, the appellant on 09.05.2005 as per the Hindu rites and rituals and has also given dowry. The further case is that after the marriage her daughter went to Sasural at Mohanpur. In the meantime, the husband of the victim Ganesh Prasad Kesari, the father-in-law Ram Prit Prasad Kesari, Kamta Sao, the mother-in-law Baby Devi, brother-in-law (Debar) Dipu Kumar, sister-in-law (Nanad) July Devi and one of the friends of her husband, namely, Amit Kumar always used to subject her to cruelty by assault. They demanded Rs.1,00,000/- and compelled her to register the house situated in mohalla Jakkanpur near Depulwa in the name of Ganesh Prasad Kesari. The further case of the prosecution is that the informant could not fulfil the demand and the victim always disclosed about the demand made by Sasural people and said that one Amit Kumar the friend of her husband always lives with her husband and abets her husband for subjecting cruelty for non-fulfilment of demand. The victim used to disclose that if the demand is not fulfilled then the Sasural people will make her life measurable and even kill her. The victim has one daughter aged about one year. On 13.09.2007 at about half past eleven Ganesh Prasad Kesari, the son-in-law of the informant informed by his mobile bearing no. 9835065740 to fulfil his demand otherwise he will do whatever he will like. In the meantime, the informant and her son Chandan Prasad Kesari wanted to talk with the victim, the daughter of the informant but they were not allowed to talk and the mobile got switched off. On several attempts



talk could not be possible so the informant along with her son Chandan Prasad Kesari went to Mohanpur on 14.09.2007. Informant reached there at about 12:00 noon then she found the house of Sasural of the victim locked then it was learnt from the neighbours that the Sasural people had done to death the victim by burning her and they disclosed that in the mid-night there was some Hulla and when the neighbours went to the house then found smoke coming out of the house and when they entered into the house by using force on the door then the victim was found to be in injured state. The victim disclosed them that the in-laws of the house are wanting to kill her by burning and at that time her daughter was alive and told that her father-in-law, mother-in-law, brother-in-law burnt them. The further case is that thereafter the victim was kept out of the house and the door was closed and thereafter on the information the family members tried to trace the victim but in vain. As per the disclosure by the co-villagers after killing the victim by burn the Sasural people disposed of the dead body.

4. On the written report of the informant the First Information Report lodged and the investigation proceeded and after investigation charge-sheet submitted.

5. During the trial seven witnesses were examined on behalf of the prosecution. P.W.1 Mahendra Singh, a cultivator of the nearby village who is the hearsay witness. He has supported the prosecution case regarding the marriage solemnized in the year 2005 and there was

bitterness in between the Sasural people and the victim. He has deposed about subjecting cruelty but without any reference of time and has stated that on 14.09.2007 he learnt about the death of the victim from her mother.

6. P.W. 2 is Vijai Kumar the maternal uncle of the victim. P.W. 3 is Rajeev Ranjan Kesari the brother of the victim. P.W. 4 is Chandan Kumar Kesari another brother of the victim. P.W. 5 is Sumitra Devi the informant of this case. P.W. 6 is Sunita Devi co-villager of Ganesh Prasad Kesari. He turned hostile as he has not supported the prosecution case. P.W. 7 is Vijay Bahadur Singh, the Investigating Officer of the case who has proved the formal First Information Report marked as Ext. 3. He has further proved the endorsement on the written report by the Officer-in-Charge for investigation by Vinod Kumar Pandey marked as Ext. 4. The Investigating Officer (P.W. 7) in his evidence has given the description of the place of occurrence in paragraphs 2 and 3. However, he has stated that on the wall and room he found the sign of smoke.

7. The prosecution has exhibited certain documents. Ext. 1 is the written report, Ext. 2 is the signature of Sumitra Devi on the written report, Ext. 2/1 is the signature of Vijay Kumar on the written report, Ext. 3 is the formal First Information Report, Ext. 4 is the endorsement on the written report.

8. The defence has also examined two witnesses. D.W. 1 Rejendra Singh stated to the effect that there was partition between Kamta

Sao and his children. D.W. 2 Navaratan Paswan also adduced evidence on the point of partition.

9. The defence of the accused is that prior to Raksha Bandhan in August, 2007 Punam Devi had gone to Punpun with her one year old baby and she never returned but she fled away leaving behind her one year old baby and to save the prestige this false case has been instituted by the informant. The further defence of the accused is that Ganesh Prasad Kesari and Punam Devi are separate from the other family members.

10. However, going through the evidence of the prosecution witnesses, it appears that the evidence regarding the cruelty is general and omnibus. The neighbours who informed about the occurrence and the death of the victim have not come to depose and support the prosecution case to the effect that the victim was assaulted and burnt to death followed by disappearance of the dead body. However, the trial Court held that the genesis, the place of occurrence and the manner of occurrence has been established by cogent, reliable and impeachable evidence against Ganesh Prasad Kesari and hence, the prosecution has been able to prove the charges against the appellant but the prosecution has measurably failed to establish the charges against the other accused persons and hence, convicted the appellant and sentenced but acquitted the other accused persons. The judgment of conviction and order of sentence as mentioned above has been challenged in appeal.

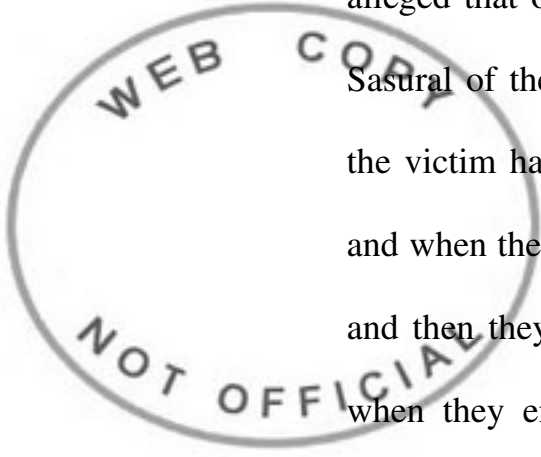
11. Learned counsel for the appellant submits that though the

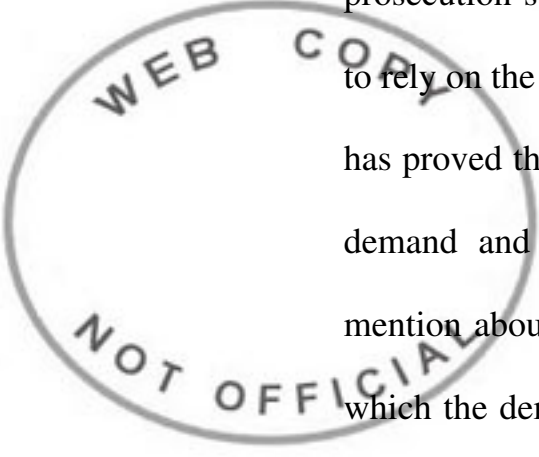
marriage solemnized in the year 2005 but there is no specific allegation about the demand and subjecting cruelty with specific reference of time, place of demand and the allegations are vague. There is no evidence that the victim was done to death and the death was in suspicious circumstance and hence, the ingredients of the offence under Section 304-B of the Indian Penal Code has not been established to shift the onus on the accused or to take presumption under Section 304-B of the Indian Penal Code that the appellant has committed the occurrence.

12. Learned counsel for the State, however, contended that the Investigating Officer has found the mark of smoke in the house and Varamdah of the victim and hence, it may be presumed that the victim was done to death in the house itself by burn. However, this argument is based on suspicion, conjectures and surmises that the victim died. Since the Investigating Officer found the sign of smoke in the house in which the victim was residing and on that basis it cannot be inferred that the victim was done to death by burn injury. It is true that the victim was found missing.

13. Now, I proceed to consider the evidence of the witnesses in view of the submissions made by the parties. However, the prosecution case is that the marriage solemnized in the year 2005 and further there was allegation of demand and subjecting cruelty and the demand of Rs.1,00,000/- and to register the house situated at mohalla Jakkanpur. The further case is that on 13.09.2007 the appellant informed on mobile to

fulfil his demand otherwise he will do whatever he like and thereafter it is alleged that on 14.09.2004 the informant along with his son went to the Sasural of the victim, found the house locked, neighbours disclosed that the victim has been done to death and there was Hulla in the mid-night and when the neighbours went to the house then found smoke coming out and then they entered into the house by applying force on the door and when they entered they found the victim in injured state. The victim Punam Devi disclosed them that her in-laws burnt her and at that time Punam Devi was alive thereafter the victim was thrown out of the house and the door was closed by the inmates of the house, i.e., the in-laws of the victim. However, P.W. 5 though has supported the prosecution case on the basis of the written report but no neighbours has come to support the prosecution case stated in the last part of the written report. No villagers has come to support that in the mid-night they saw smoke or they went there, forcibly opened the door, entered into the house and saw the victim in injured state and the victim disclosed them about the occurrence and hence, this part of the evidence of P.W. 5 is hit by hearsay as neither the persons from whom she learnt about the occurrence has come to support this part of the prosecution story nor P.W. 5 disclosed about the name of the person from whom she (informant) learnt this part of the evidence and hence, the prosecution story regarding the death of the victim and injury on her person or the disclosure by the victim about the occurrence is hit by hearsay, as none of the witnesses from the village or even neighbours has





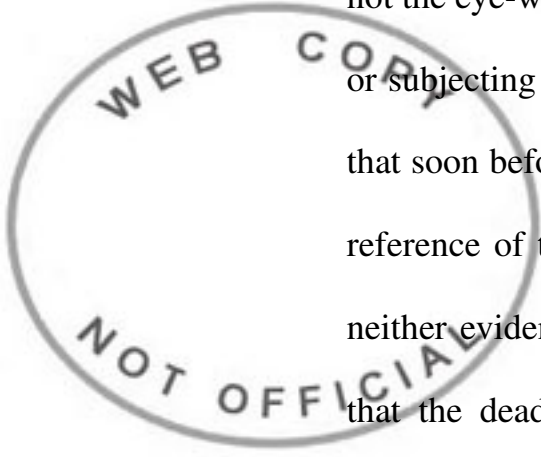
come to support the prosecution case. However, this part of the prosecution story is not proved by the prosecution hence, it is not proper to rely on the evidence of P.W. 5 and it cannot be held that the prosecution has proved this part of the occurrence. Moreover, the allegation regarding demand and subjecting cruelty is general and omnibus. There is no mention about any date on which the demand was made and the date on which the demand was made or cruelty was permeated. It is true that the marriage though solemnized in the year 2005 and the victim was found missing but there is no evidence regarding the fact that the victim was done to death and her death was in suspicious circumstances.

14. However, taking into consideration the ingredient of the offence under Section 304-B of the Indian Penal Code, from the plain reading of Section 304-B of the Indian Penal Code, it is apparent that to establish the offence under Section 304-B of the Indian Penal Code, to take the presumption of the guilt for offence under Section 304-B of the Indian Penal Code, the prosecution is required to establish that (i) the marriage solemnized within seven years (ii) the victim-wife was done to death by burn or bodily injury or her death has occurred otherwise than the normal circumstance and further it has also to be established that (iii) soon before her death she was subjected to cruelty or harassment by her husband or nearby relative and (iv) the death was in consonance with the cruelty permeated in connection with or in relation to demand of any dowry. Hence, before taking presumption of 'dowry death' under Section

304-B of the Indian Penal Code read with Section 113B of the Evidence Act, the prosecution is required to establish the four ingredients. However, even the marriage solemnized within seven years of the occurrence and there is evidence of subjecting cruelty even then it has to be shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand of dowry, then only the Court shall presume that such person has caused the dowry death. To attract the presumption under Section 113B of the Evidence Act, it is required to prove that “soon before the death such woman has been subjected to cruelty”.

15. However, taking into consideration the evidence of the witnesses, it is apparent that the witnesses who have come to support the prosecution case are P.Ws. 2, 3, 4 and 5. P.W. 2 is the maternal uncle of the victim and is only the hearsay witness. P.Ws. 3 and 4 are brothers and P.W. 5 is the informant, the mother of the victim. Their evidence is that the marriage solemnized in the year 2005 and there is evidence that there was demand and subjecting cruelty for non-fulfilment of the demand of dowry and execution of sale deed in favour of the appellant. However, the allegations are vague, general and omnibus. There is neither mention of any specific time, date on which the demand was made nor there is any mention of the place where the demand was made. There is no specific mention in the entire evidence of P.Ws. 2, 3, 4 and 5 about any specific date on which the demand was made, except that the telephone of husband

of the victim received on 13.09.2007. P.Ws. 2, 3, 4 and 5 are admittedly not the eye-witness to the occurrence. Though there is evidence of demand or subjecting cruelty but going into the records there is no evidence at all that soon before the death the victim was subjected to cruelty. There is no reference of time when she was subjected to cruelty. Moreover, there is neither evidence that the victim was done to death nor there is evidence that the dead body recovered nor there is any evidence regarding the victim having been died. However, the prosecution story is that the neighbours disclosed to the informant that in the night on seeing the smoke in the house they entered into the house and saw the victim in injured state and she disclosed about the subjecting cruelty by burning her but none of the witnesses has come to support this part of the evidence and the evidence in this regard is only hit by hearsay which is not admissible in evidence and hence, virtually, there is no evidence at all that the victim was done to death or his death was in relation to subjecting cruelty for non-fulfilment of the demand of dowry in suspicious condition. Hence, the ingredients that the victim was done to death have not been established nor there is evidence that soon before the death the victim was subjected to cruelty by the in-laws and hence, when the ingredients for the offence under Section 304-B of the Indian Penal Code read with Section 113B of the Evidence Act have not been established no presumption can be recorded to hold that the prosecution has been able to prove that the appellant is liable for dowry death unless the ingredients for the offence



under Section 304-B of the Indian Penal Code is established. No presumption can be taken as per Section 304-B of the Indian Penal Code or Section 113B of the Evidence Act.

16. However, going into the finding recorded by the trial Court, it appears that the trial Court did not take into consideration these aspects of the matter and did not consider or take into account the submission that no neighbours has come to support the occurrence regarding death of the victim or the victim was done to death by subjecting cruelty or by burn injury and hence, the trial Court misdirected in holding that the prosecution proved the genesis, manner and place of occurrence. The learned trial Court has misdirected in convicting the appellant when the ingredients for the offence under Section 304-B of the Indian Penal Code has not been established. The submission made by the learned counsel for the State that since the Investigating Officer found sign of smoke in the Varamdah and room and hence, it may be presumed that the victim was done to death by burn injury without any other evidence supporting the same is only a suspicion and any finding to this effect shall amount to conjectures and surmises and not sustainable in law.

17. Hence, having regard to the fact that the prosecution has not been able to prove the ingredients of the offence under Section 304-B of the Indian Penal Code appellant cannot be held guilty for the charges levelled against him for the offence under Section 304-B of the Indian Penal Code and hence, I acquit the appellant of the charge for the offence

under Section 304-B of the Indian Penal Code and set aside the judgment of conviction and order of sentence recorded by the trial Court. The appellant is in jail. He is ordered to be released on bail if not required to be detained in any other case. Hence, the appeal is allowed.

(Gopal Prasad, J.)

Kundan/-
N.A.F.R.

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