

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.707 of 2013

Against judgment of conviction and order of sentence dated 09.09.2013 and 16.09.2013 passed by Shri Abhimanyu Lal Srivastav, learned 6th Additional District & Sessions Judge, Motihari, East Champaran, in Sessions Trial No. 05 of 2012 (arising out of Keshria P.S. Case No. 108 of 2010, G.R. No. 1906 of 2010)

Subodh Kunwar, Son of Saryug Kunwar, Resident of Village-Dilabarpur, Police Station- Kesariya, District- East Champaran.

.... Appellant

Versus

The State Of Bihar

.... Respondent

Appearance :

For the Appellant : Mr. Binoy Kumar, Advocate.
For the State : Mr. S. A. Ahmad, A.P.P.

CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD
ORAL JUDGMENT

Date: 10-09-2015

Heard learned amicus curiae for the appellants and learned counsel for the State.

2. This appeal arises out of the judgment of conviction and order of sentence dated 09.09.2013 and 16.09.2013 passed by Shri Abhimanyu Lal Srivastav, learned 6th Additional District & Sessions Judge, Motihari, East Champaran, in Sessions Trial No. 05 of 2012 (arising out of Keshria P.S. Case No. 108 of 2010, G.R. No. 1906 of 2010 by which the appellant had been convicted for offence under Section 304B of Indian Penal Code and sentenced to undergo rigorous

imprisonment for ten years and further convicted for offence under Section 201 of Indian Penal Code and sentenced to undergo rigorous imprisonment for three years and payment of fine of Rs.3000/- and in default of payment of fine further sentenced to simple imprisonment for six months.

3. The prosecution case as alleged in the First Information Report by the informant, Jamuna Singh, P.W. 8 that he solemnised marriage of his daughter Nitu Singh with the appellant, Subodh Kunwar on 25.04.2008. It has been alleged that after marriage Subodh demanded motorcycle and she buffalo from his daughter and he used to subject her to cruelty. Further case was that victim, daughter of the informant asked the informant to give both the articles else she will be killed. Further case is that informant met with Subodh and intimated that he will give she buffalo within a month and will give motorcycle thereafter. Further case was that on 10.06.2010 the informant had went to the Sasural of his daughter to give invitation card for the marriage of his son then he was informed that his daughter had fled away from the house. The informant makes out search of his daughter at the house of relatives but in vain. It is further alleged that the informant learnt from the reliable source that in-laws and husband of Nitu Devi has done to death of the victim and her dead body had been disposed of and had named the persons who have done to death as

Subodh Kunwar, Dilip Kunwar and Phul Shankar Devi.

4. On the written report filed by the informant, F.I.R. was lodged. Investigation proceeded. After investigation, charge sheet submitted, cognizance was taken and case was committed to the Court of Sessions. After commitment, charge framed and trial proceeded. During trial, ten witnesses on behalf of the prosecution were examined. P.W. 1 Rahul Kumar, P.W. 2 Satchitanand Pandey, P.W.3 Ramdayal Pandey, P.W.4 Rajesh Chaudhari, P.W.5 Chalittar Das, P.W.6 Lakshman Kunwar, P.W.7 Sheo Nath Pd. Singh, P.W.8 Jamuna Singh, the informant of this case, P.W.9 Sunil Singh and P.W.10 Parmeshwar Prasad, the I.O. of the case.

5. However, P.W. 2 to 6 had turned hostile and having not supported the prosecution case. P.W. 7, though, came to state that Nitu Devi, daughter of the informant Jamuna Singh was married with the appellant, resident of Village- Dilabarpur and he learnt that she had fled away from the house. P.W. 8 is the informant Jamuna Singh, he has stated in his evidence that marriage of his daughter Nitu Devi was solemnised with Subodh on 25.04.2008. After marriage his daughter went to Sasural and also blessed with a son and he used to visit Sasural of his daughter. On 10.06.2010, he went to Sasural of his daughter to give invitation card for marriage of his son then he learnt that his daughter was not there then he asked sasural people and



Subodh disclosed that she had fled away in the night itself. Thereafter, he makes out search of his daughter, but he could not find her out. Thereafter, he filed this case. He has further stated that he was learnt that accused persons had done to death of her daughter and her dead body had been disposed off. He had proved written report marked as Exhibit-1. Further, in his cross-examination, he has stated that his daughter was living well in Sasural. She was hard headed and she was mentally ill and once upon a time she flee away from the house in the night. He learnt about his daughter that sometimes she used to go outside of her sasural even they made search but she could find. P.W.9 Sunil Singh had come to depose that Nitu married with Dilwar Sah and further stated that he was not aware whether Nitu was alive or dead and he had not met with Nitu since last two years. P.W.10 is the I.O.

6. The trial court taking into consideration the evidence convicted the appellant on the evidence of P.W.5, that, though, he, P.W.5 has not supported the prosecution case and has been declared hostile by the prosecution, but attention has been drawn to his statement recorded under Section 161 Cr.P.C. by the prosecution. The I.O. P.W.10 in paragraph 6 and 8 had corroborated that P.W.5 had stated so before him and in paragraph 10 the I.O. had stated that, “Chalittar Das has told him that the dead body has been carried out by



his bullock cart and thrown away” and again in paragraph 11 of the evidence of P.W. 10 this fact has been corroborated and the trial court on this evidence has observed that I.O. who is a police officer had no any grudge with the accused has rightly recorded the statement of the P.W.5 Challitar Das during course of investigation and also supported before the court. Further taking into consideration the evidence of P.W.8 the informant in his statement in paragraph 1 had stated that he came to know that the accused had killed his daughter and had disappeared her dead body and taking into consideration this material fact the trial court was of the opinion that prosecution has been able to prove all the ingredients as required for the establishment of offence under Section 304 B of Penal Code and accordingly convicted the appellant and sentenced.

7. Learned counsel for the appellant challenged the order of conviction and sentence. It is submitted that out of ten witnesses examined in this case except P.W. 2, 3, 4, 5 and 6 were co-villagers of the appellant and had not supported the prosecution case and had been declared hostile. However, P.W. 1, 7, 8 and 9 have come to deposed, but from their evidence the ingredients of offence under Section 304 B of Penal Code had not been established to take presumption as enshrined under Section 304 B of Penal Code or Section 113 B of Evidence Act and hence order of conviction and sentence recorded by

the trial court had been based on inadmissible evidence which is not substantiated in law.

8. Learned counsel for the State however contends that there is allegation and evidence of P.W.1 that marriage of Nitu Singh was solemnized in the year 2008 and there is allegation of demand and subjecting cruelty and further fact that victim has been found missing from the matrimonial home, though, explanation had been given that she had fled away in the night and found missing from the night of 10.06.2010 and hence it may be presumed that victim had died and her death is in suspicious circumstance and hence contends that prosecution has been able to prove the ingredients to establish the charges.

9. However, taking into consideration submission of the parties and in the light of evidence, I proceed to consider the evidence of the parties. However, it is pertinent to mention that prosecution case as alleged in the First Information Report by the informant that marriage of his daughter (victim) solemnised on 25.04.2008 with Subodh Kunwar, the appellant and there was allegation that after marriage, there was demand of motorcycle and she-buffalo and victim was subjecting to cruelty and victim had disclosed the informant that if the demand was not fulfilled then she will be done to death. Thereafter, the informant came assured Subodh that he will be give



she-buffalo within a month and thereafter will fulfill the demand of motorcycle. However, as per his evidence of informant, P.W.8, it is apparent that informant had neither supported the prosecution case as alleged in the First Information Report as there is no evidence in his deposition regarding the demand of motorcycle and she-buffalo, nor there is any evidence that any demand was made by the appellant or even his family members. There is no whisper in his evidence that victim was subjected to cruelty and hence ingredient relating to demand and subjecting cruelty is missing in the evidence of P.W. 8 in his deposition rather in his evidence in cross-examination has stated that his daughter used to live in sasural and had good relation with her husband and in-laws and he had stated that his daughter was mentally ill and he has further stated that she had flee away from his house in the night. The evidence of the informant, P.W.8 is in consonance with the defence of the accused-appellant that victim had fled away in the night. However, defence of the accused is not required to look into unless prosecution establishes the ingredient for offence under Section 304B of Penal Code to attract the presumption to hold that appellant was guilty for offence under Section 304(B) of Penal Code.

10. However, going into the evidence of P.W.1 the son of the informant, he has stated that after marriage of his sister on 25.04.2008 he went to sasural of his sister and Subodh Kunwar asked him to give



motorcycle and she-buffalo and thereafter, he told that there was marriage of his elder brother on 23.06.2010 and he along with father went to the sasural of his sister on 10.06.2010 along with invitation card then Subodh disclosed that his sister had fled away from the house. From his evidence, though, he has submitted after the marriage of his sister when he went to sasural of his sister then Subodh demanded motorcycle. However, no date had been given when the said demand was made as only evidence when he went to sasural of his daughter Subodh demanded and thereafter on 10.06.2010 when he went to his sasural then Subodh disclosed that his sister had fled away. However, there is no evidence regarding the fact in between from the alleged date of demand was made and to on what date Subodh disclosed that victim had fled away.

11. However, taking into consideration the ingredients for offence under Section 304 (B) of Penal Code, it is apparent to establish the charge for offence under Section 304 (B) of Penal Code the prosecution has to establish four ingredients for offence under Section 304 (B) of Penal Code (a) marriage of the victim solemnised within seven years of the date of occurrence; (b) that victim has been done to death in suspicious circumstance; (c) death is in connection with non-fulfillment of demand of dowry and (d) soon before death, the victim was subjected to cruelty.

12. However, going to the evidence of witnesses, P.W.1 has supported the prosecution case that victim was subjected to cruelty and there was demand, but there is no reference of any point of time and date when said demand was made and victim was subjected to cruelty. P.Ws. 2, 3, 4, 5 and 6 have been turned hostile. The evidence of P.W. 7 is only to the effect that marriage of the victim Nitu Devi was solemnised with Subodh Kunwar and he learnt that the victim had fled away from her sasural. P.W. 8 has not whisper in his evidence about any demand or subjected to cruelty nor he has whisper about victim's death and there is no evidence at all either in evidence of P.Ws. 1 and 8 that victim died or victim had been done to death in connection with demand of dowry. P.W. 9 has come to depose that marriage of the daughter of the informant was solemnised on 25.04.2008, but he did not know whether Nitu Devi was alive or dead as he had not met with Nitu since last two years.

13. However, from evidence of I.O. P.W.10 does not disclose the fact that whether victim was alive or dead and there is no evidence about whereabouts of the victim. P.W.10 has specifically stated in paragraph 4 of his deposition that during the investigation he did not recover any dead body. P.W.5 Chalittar stated before I.O.(P.W.10) under Section 161 of Cr.P.C. is inadmissible in evidence and cannot be even treated as corroborative piece of evidence and in view of Section 162

Cr.P.C. the statement made by a witness before police under Section 161 Cr.P.C. cannot be used for any purpose except contradiction and contradiction is required to be recorded in terms of section 145 of the Evidence Act by drawing the attention of the witness.

14. Hence, taking into consideration the entire evidence, it is apparent that only material evidence has been brought on record that marriage of Nitu Devi, the victim girl had been solemnised on 25.04.2008 and only evidence of P.W. 1 that there was demand of motorcycle and she-buffalo but without any reference of time. Further in his evidence P.W. 1 stated that after marriage of his sister he went to sasural of the victim then Subodh demanded motorcycle and she-buffalo with threat that else she will be done to death. However, there is no whisper in his evidence that victim was subjected to cruelty for non-fulfillment of demand nor even evidence that victim disclosed about subjecting cruelty and in his evidence he has not disclosed that his sister ever disclosed about subjecting cruelty. He has only stated that whenever he went to house of Subodh, Subodh demanded motorcycle and she-buffalo and hence in his evidence whatever come regarding demand of motorcycle and she-buffalo but there is no evidence at all that victim was subjected to cruelty for non-fulfillment of demand much less there is no evidence that soon before the death, the victim was subjected to cruelty and hence ingredients that victim



was subjected to cruelty for non-fulfillment of demand is find missing from the evidence of P.Ws. 1 and 8. There is no evidence that soon before the death the victim was subjected to cruelty. There is no evidence that victim has died much less whether her death is in suspicious circumstance like burn injury or any other suspicious circumstances. There is no evidence at all to the effect that dead body was disposed off or any attempt was made to deface the evidence. Hence, prosecution has neither been able to prove that victim was subjected to cruelty for non-fulfillment of demand nor there is any evidence that victim had been done to death nor there is any evidence cause of death of the victim was for non-fulfillment of demand nor there is any evidence that soon before the death the victim was subjected to cruelty and hence unless all these ingredients is established no presumption can be drawn that charge against the appellant, Subodh Kunwar for dowry death has been established.

15. Learned Trial Court misdirected in holding the appellant guilty for offence under Section 304 (B) of Penal Code by taking into consideration the inadmissible evidence, the statement of P.W.5 under Section 161 Cr.P.C., the statement recorded by the police under Section 161 Cr.P.C. is not admissible in evidence and statement made under Section 161 Cr.P.C. cannot be used for any other purpose except for contradiction as per Section 162 Cr.P.C. The evidence of



I.O. that witnesses stated before him under Section 161 Cr.P.C. can be taken as corroboration. Learned trial court misdirected and misconceive Section 161 and Section 162 Cr.P.C., that statement recorded by the police made under Section 161 Cr.P.C. cannot be used for any purpose except corroboration and so it can only be used for corroboration but only for contradiction and mode of taking contradiction is mentioned under Section 145 of Evidence Act by drawing attention of the witness of his previous statement recorded under Section 161 Cr.P.C. Hence it is apparent that trial court had misconceived and misdirected itself in taking statement recorded of P.W.5 under Section 161 Cr.P.C. as evidence and has also taken into consideration that I.O. has stated that Challitar Das had told him that the dead body had been carried out by the bullock cart to establish guilt under Section 210 of Penal Code, but this evidence is totally inadmissible in evidence and not required to be taken into consideration.

16. Hence conviction and sentence recorded by the trial is hereby set aside as prosecution has not been able to prove the ingredients for offence under Section 304(B) of Penal code by legal, cogent and unimpeachable evidence and hence prosecution has not been able to prove the charges against the appellant beyond all reasonable doubt. Hence, order of conviction and sentence recorded

by the trial is hereby set aside. The appellant is in jail custody is ordered to be released forthwith immediately, if not required in any other cases.

16. Thus, the appeal is allowed.

m.p.

(Gopal Prasad, J)

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