

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.531 of 2012

Against the judgment of conviction dated 30.05.2012 and order of sentence dated 04.06.2012` passed by Shri Ashok Kumar Srivastava, the learned Additional District & Sessions Judge, F.T.C.-III, Madhepura in Sessions Trial No.123 of 2001.

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Mohammad Gaffar, Son of Mohammad Sakul, Resident of Village Hathoundha Rain, P.S. Bihariganj, District Madhepura.

.... Appellant

Versus

The State Of Bihar

.... Respondent

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Appearance :

For the Appellant : Mr. Pankaj Kumar Jha, Advocate.
Mr. Raja Surendra Mohan Advocate.
Mr. Shekhar Kumar Singh, Advocate.
For the State : Mrs. Abha Singh, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD
ORAL JUDGMENT

Date: 22-09-2015

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

2. This appeal arises out of the judgment of conviction and order of sentence dated 30.05.2012 and 04.06.2012 passed by Shri Ashok Kumar Srivastava, the learned Additional District & Sessions Judge, F.T.C.-III, Madhepura in Sessions Trial No.123 of 2001 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 payment of fine Rs.2,000/- for offence

under Section 304B of the Indian Penal Code and in default of payment of fine further sentenced to undergo rigorous imprisonment for three months and further the appellant had been convicted for offence 201 of Indian Penal Code and sentenced to undergo rigorous imprisonment for three years and further payment of fine of Rs.1000/- and in default of payment of fine further sentence to imprisonment for three months. All the sentences were ordered to run concurrently.

3. The prosecution case as alleged in the First Information Report lodged on the basis of Fardbeyan of Md. Maksud, P.W. 3 the brother of the victim Julekha Khatoon recorded by S.I., O.N. T.P. Yadav, Officer-in-Charge of Bihariganj P.S. alleging therein that Julekha Khatoon had married as per Muslim rites and customs with Md. Gaffar, son of Mohammad Sakul about five years back in Village-Hathoundha, P.S. Bihariganj. The victim Sulekha Khatoon was living with her husband in Village- Hathoundha. The victim was not blessed with any child. She was assaulted since last two years. There was demand of Rs. 10,000/- and was asked to bring the amount from her parents so that the appellant-husband would perform second marriage and she would also be kept as wife. Further case is that the victim used to disclose about the occurrence to the informant. On getting such information, the informant used to go to Hathoundha and met his brother-in-law the appellant and told him that they are poor



persons and unable to pay the amount of Rs.10,000/- as demand of dowry and dowry has already been given at the time of marriage and so the appellant could not vex the victim-sister of the informant. However, option has been given to the appellant that if he does not keep the victim then he would be divorced her. Further case is that on 06.12.2000, while the informant was going from his house at Barhara Kothi to Bihariganj at 11.00 P.M. by train then several persons of Hathoundha met him and forbade not to go to his sister's house and disclosed that in between 5/6.12.2000 his brother-in-law Md. Gaffar along with Md. Jabbar and Md. Sattar had done to death his sister by assault and further alleged that Md. Farooque, Md. Mujo, Md. Amanat, Md. Bechan and Md. Muslim Guriji they were all residents of Hathoundha and in collusion with the appellant murdered his sister and buried the dead body. On said information, the informant went to Village- Hathoundha and enquired and learnt that all the accused persons killed his sister Julekha Khatoon and her dead body had been buried in Kabirasthan. Thereafter, the informant met with S.P. and D.M and further met with Dy.S.P. then he was asked to go to police station then he came to police station and recorded his statement. Further it has been claimed that his sister was not blessed with any child as well as non-fulfillment of demand of dowry of Rs.10,000/- the victim had been done to death and dead body had been buried.

4. On the Fardbeyan, F.I.R. lodged and police after investigation submitted charge sheet. Cognizance was taken. After commitment charge was framed for offence under Section 304(B) and 201 of Indian Penal Code against Md. Gaffar and four other accused persons. After framing of the charge, eight witnesses were examined by the prosecution. P.W. 1 is Md. Karim. However, he has been turned hostile and has not supported the prosecution case, P.W.2 Bhupendra Yadav has also not supported the prosecution case and has turned hostile. P.W. 3 Md. Maksud is the informant has supported the prosecution case. He has stated that marriage of his sister was solemnised about five years back from the alleged date of occurrence and his sister was not blessed with any child. In the meantime, the informant used to go sasural of his sister and his sister disclosed about assault for non-delivery of child and demand to bring Rs. 10,000/- from her parents else she would be divorced or she will be killed. He has further deposed that whenever he used to go to sasural of his sister, his brother-in-law Md. Gaffar used to demand money and he used to show his inability. Thereafter, it is alleged that while he was going to sasural of his sister on 5/6.12.2000 then he learnt that accused persons had done to death his sister and her dead body had been buried in Kabirasthan. After that the informant was reported to the police and dead body was taken out from the buried place and her



dead body was sent for post mortem examination. P.W.8, the doctor who examined the victim opined that death has been caused due to injuries on skull and scalp by hard and blunt substance and one anti mortem injury blackening of left side of skull and forehead. On dissection fracture of left parietal bones, blood present in the skull and under scalp. P.W. 4 Md. Usman who has also been declared hostile, P.W. 5 Ebrahim Chand, and he has also been declared hostile, P.W. 6 Abdul Ajij has stated that on the date of occurrence no quarrel has been occurred and this witness has also been declared hostile. P.W. 7 Md. Sallaudin and he has come to say that police was informed and in presence of Magistrate dead body was taken and Darogaji prepared Sanja. However, documentary evidence has been proved is only post mortem report given by doctor, P.W. 8. However, I.O. has not been examined in this case nor even Fardbeyan or formal report has been marked.

5. The trial court taking into consideration the evidence in the case at hand and submissions made by the parties convicted and sentence the appellant.

6. Learned counsel for the appellant has challenged the order of conviction and sentence and it has been contended that prosecution has not been able to prove the charges as the ingredients of the occurrence has not been established. Further it has been contended

that victim had died in natural circumstance due to her illness and injury on the person of the victim has been found as blackening at left side of skull and forehead due to fall and doctor has suggested that blackening at left side of skull.

7. Learned counsel for the State however contended that prosecution has been able to prove the charges as there is allegation of demand and subjecting to cruelty and as per evidence of the doctor death has been in suspicion circumstance as cause of death due to anti mortem injury on head and hence death is suspicion circumstance has been established by the evidence of the doctor.

8. However, I proceed to consider the evidence of the witnesses in the light of submissions made by the parties. However, going to the prosecution case, there is allegation that marriage of the victim was solemnised within five years of the occurrence and victim was not blessed with any child so there was demand of Rs. 10,000/- and persuaded the victim to satisfy the demand by asking her parents to provide the same so that the appellant may perform second marriage and will also keep the victim. However, eight witnesses were examined in this case. P.W. 1, 2, 4, 5 and 6 have been turned hostile and they had not supported the prosecution case and hence only evidence remained of P.W.3, 7 and 8. However, evidence of P.W.7 is to the effect that the appellant murder the victim by assault



and after death, the dead body had been buried in Kabirasthan and police was informed and dead body has been dragged out from Kabirasthan before the Magistrate. The police prepared Sanha and he signed on it. Further, this witness in cross-examination stated in paragraph 9 of his deposition that he got information about death of Julekha in Bihariganj Hat. Hence, he is not eye witness of assault or death.

9. The prosecution case as alleged in the First Information Report is that marriage of the victim was solemnised about five years back prior to the occurrence. Further P.W. 3 the informant has stated in his evidence that marriage took place about seven years prior to the occurrence. He has further stated that his sister was not blessed with any child. Further alleged that his sister was subjected to cruelty for non-delivery of a child and she was subjected to cruelty for fulfillment of demand of Rs.10,000/- from her parents. However, the allegation that victim was not blessed with any child and hence there was allegation of demand of Rs.10,000/- and for non-fulfillment of demand she was subjected to cruelty. However, the allegation of demand and evidence does not mention any reference of time as to when the demand was made, though, there is evidence that marriage of the victim was solemnized about seven years back prior to the occurrence, but in the entire evidence there is no mention of time



when the demand was made nor there is any reference of the mode and manner by which the victim was subjected to cruelty. There is evidence that on 06.12.2000 he learnt about death of his sister while he was going to Bihariganj by train and hence apparently there is no specific mentioned particularly with reference to time and date about demand or subjected cruelty to the victim. P.W.8 is the doctor who examined the deceased opined that anti mortem injury blackening on left side. However, criticism has been made that death may be due to fall of the victim. However, there is no evidence whether death by assault or fall. However, it is apparent that death has been caused as per evidence of the doctor due injury on head of the victim. However, this evidence is sufficient to infer that death is in suspicious circumstance as death has been caused due to bodily injury found on the person of the deceased. Hence it is immaterial whether death has been caused due to fall or by assault as ingredient for offence under Section 304 (B) of Penal code is established when death in suspicious circumstance.

10. Here, in the fact and circumstance, as per evidence of the doctor that death has been caused by injury on the person of deceased on head and this cause of death is sufficient to hold that death of the victim was in suspicious circumstance as no valid explanation by the accused as how the death has been caused.

11. However, going to the question that as per Section 304(B) of Penal Code to establish the offence under Section 304(B) of Penal Code, four ingredients are required to be proved to hold presumption or take presumption of dowry death as per Section 113 B of Evidence Act and Section 304(B) of the Indian Penal Code and it is apparent that to take presumption under Section 304(B) of Penal Code four ingredients are required to be proved;

- (a) death of a woman has been caused by burn or bodily injury or had occurred otherwise other than in normal circumstance;
- (b) Death has been occurred within seven years of her marriage;
- (c) deceased was subjected to cruelty or harassment by her husband or in-laws in connection with or in relation to demand of dowry; and
- (d) the said demand and subjecting cruelty must be occurred "soon before the death".

12. However, from evidence it is apparent that the death occurred within seven years of the marriage and death is in suspicious circumstance.

13. Hence, taking into consideration the evidence adduced by the prosecution the question is whether the ingredient for offence under Section 304B of the Indian Penal Code has been established to take the presumption of dowry death under Section 304B of the Indian Penal Code read with Section 113B of the Evidence Act. However, the prosecution though has been able to prove that marriage solemnized within seven year and the victim died in suspicions



circumstance but so far the evidence regarding the subjecting cruelty for non-fulfillment of demand is concerned, though, there is evidence that victim was subjected to cruelty for non-fulfillment of demand but without any reference to time. The evidence of P.W.3 though mentions that victim was subjected to cruelty for non-fulfillment of demand but no time is mentioned as to when she was subjected to cruelty for non-fulfillment of demand so the ingredient that soon before the death the victim was subjected to cruelty for non-fulfillment of demand soon before the death has not been established. There is no mention of time when the victim was subjected to cruelty. It is true that the word “soon before death” no time limit is fixed but there must be nexus between the death and subjecting cruelty. However, the evidence regarding the ingredient that victim was subjected to cruelty soon before death is missing and this ingredient has not been established.

14. Hence having regard to the facts and circumstances of the case, I find and hold that ingredients of Section 304 (B) of Penal Code have not been established to record conviction. From perusal of the judgment, it is apparent that trial court has not considered this aspect of provision of law and fact. He has not considered at all ingredients for offence under Section 304 (B) of Penal Code much less the ingredient that soon before the death, the victim was subjected to

cruelty in connection with or in relation to demand of dowry has not been established beyond doubt to infer the dowry death and hence is liable for benefit of doubt and hence, I give the appellant the benefit of doubt.

15. Hence having regard to the fact ingredients of offence Section 304(B) of Penal Code having not been established, I find and hold that prosecution has not been able to prove the charge for offence under Section 304 (B) of Penal Code. So far Section 201 of Penal Code, there is no evidence at all submits by the prosecution that appellant did any act of commission or omission to infer but his act is only to disappear of the dead body, though, there is allegation that deceased was buried, but there is no evidence who buried the dead body. Hence ingredient of Section 201 of Penal code has not been established. Hence, order of conviction and sentence recorded by the trial court is hereby set aside. The appellant is in jail custody bet set at liberty forthwith if not required in any other case.

16. Thus, the appeal is allowed.

m.p.
NAFR

(Gopal Prasad, J)

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