

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.325 of 2014

Against the judgment of conviction dated 26.02.2014 and order of sentence dated 03.03.2014 passed by Sri Om Prakash Singh-II, Ad-hoc Additional District & Sessions Judge-III, Siwan, in Sessions Trial No. 25 of 2013 (arising out of Duranda P.S. Case No. 2 of 2011) (G.R. No. 8 of 2011)

=====

Shailesh Ray, Son of Late Chandeshwar Ray, resident of Village-Chakari Rasulpur, P.S. Duranda, District Siwan.

..... Appellant.

Versus

The State of Bihar

..... Respondent

=====

Appearance :

For the Appellant : Mr. Arbind Kumar Singh, Advocate.
Mr. Rabindar Kr. Tiwary, Advocate.
Mr. Dilip Kumar, Advocate.
For the State : Mr. Bipin Kumar, A.P.P.

=====

CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD
ORAL JUDGMENT

Date: 12-01-2016.

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

2. This appeal arises out of judgment of conviction dated 26.02.2014 and order of sentence dated 03.03.2014 passed by Sri Om Prakash Singh-II, Ad-hoc Additional District & Sessions Judge-III, Siwan, in Sessions Trial No. 25 of 2013 (arising out of Duranda P.S. Case No. 2 of 2011) (G.R. No. 8 of 2011) by which the appellant Asharfi Gupta had been convicted for offence under Section 304B and sentenced to undergo rigorous imprisonment for ten years further convicted for offence under Section 201 of Indian Penal Code and sentenced to undergo rigorous imprisonment for five years and

further payment of fine of Rs. 5000/- and in non-payment of fine further simple imprisonment for six months and both the sentences were ordered to run concurrently.

3. The prosecution case as alleged in the First Information Report on the basis of complaint bearing Complaint Case No. 2990 of 2010 by the complainant/informant Chandrama Ray alleging therein that Ranjita Devi, the daughter of the informant was married on 31.05.2010 with accused No. 1 Shailesh Ray. After marriage Ranjita Devi went to her sasural on 01.06.2010 at Village-Rasulpur, P.S. Duranda, District- Siwan. There is allegation that after Bidai, the victim came to her sasural then demand for Colour T.V., Herohonda motorcycle and golden chain was made and also started subjected her to cruelty. The uncle-in-law Rameshwar Ray used to demand to bring the articles mentioned above from her naihar, else she will be killed. Further case of the prosecution that husband Shailash Ray and her mother-in-law Kusuma Kuar used to brutally assaulted Ranjita Devi and Ranjita Devi got unconscious due to assault and she was not provided food and they used to subject her to cruelty for non-fulfillment of demand and threatened that unless demand is fulfill, she will not be provided food. Further case is that prosecution party used to come to sasural of the victim of hearing the news of subjecting cruelty and assured them to fulfill their demand when their economic



condition is improves. Ultimately, when demand was not fulfilled then on 10.12.2010 the victim was done to death by administering her poison and dead body had been disposed off and intimation was given to her father of the victim. When father of the victim went to her sasural he found that door of the accused persons was closed and on enquiry about daughter of the informant, Rameshwar Ray disclosed that they have been done to death of the victim by administering her poison and dead body had been disposed off.

4. The complaint was sent for institution of F.I.R. under Section 156(3) of Cr.P.C. thereafter F.I.R. was lodged on 02.01.2011. After lodging the F.I.R., the Officer-in-Charge of Duranda police station investigation the case and inspected the P.O. i.e. house of Shailesh Ray and found that the house was facing east within 35 feet long and 35 width and there was a grill on the gate and front of the grill was found open. After grill, there was a verandah and he found yellow plastic rapper and there eastern portion of the house was open. He recorded statements of witnesses and statement of informant as well as statement of Madhu Mangal Ray, P.W. 2 and Shiv Shankar Ray, P.W. 3 and other witnesses. After completion of the investigation charge sheet was submitted. After framing of the charge, cognizance taken and case was committed to the Court of Sessions.



5. During trial six witnesses were examined by the prosecution as P.W. 1 Ramesh Yadav, is brother of the victim Ranjita Devi and his evidence to the effect that his uncle Madhu Mangal Ray and his father disclosed him that Ranjita was subjected to cruelty for non-fulfillment of demand of dowry. Thereafter, he received information on 21.12.2010 that after administering poison, Ranjita had been done to death and her dead body has been disposed off. P.W.2 is Madhu Mandal Ray and he had come to deposed that marriage solemnised on 31.05.2010 between Ranjita and Shailesh Ray and there was allegation of subjecting cruelty for non-fulfillment of demand of colour T.V., motorcycle and golden chain and when the victim informed about the occurrence then his father Chandarma Ray went there, but cruelty permeated and continued to be permeated. Thereafter, on phone, the husband of the victim Shailesh Ray pressurising for fulfillment of demand else she will be killed. Subsequently on 21.12.2010, he was informed that victim was done to death and her dead body had been disposed off. Then this witness along with others went to sasural of the victim and it was learnt that victim was done to death and her dead body had been disposed off. P.W. 3 is Shiv Shankar Ray has also supported the prosecution case regarding demand of colour T.V., motorcycle and golden chain and subjecting to cruelty by not providing food and Ranjita disclosed this



fact to her father on telephone. This witness claims that he along with the informant, Chandarma Ray visited the sasural of the victim and Shailesh Ray demanded motorcycle, golden chain and T.V. P.W. 4 Chandarma Ray is father of the victim had deposed that marriage solemnised on 31.05.2010 with victim and Shailesh Ray and their relation remained cordial for about three-four months and thereafter, the victim used to inform him on mobile regarding demand of colour T.V., motorcycle and golden chain. Then the informant along with brother Madhu Mangal Ray and brother-in-law Shiv Shankar Ray went to sasural of the victim. On 21.12.2010 his brother-in-law Shiv Shankar Ray informed on telephone that his daughter had been done to death and dead body had been disposed off. Thereafter, he went to sasural of the victim and found that door of sasural of the victim was closed under lock and none was there in the house and on enquiry from neighbourer, Rameshwar Ray disclosed that victim had been done to death and she was died by administering poison. Thereafter, the case was lodged. P.W. 5 Vishwanath Ray, is co-villager and had deposed that Madhu Mangal Ray disclosed him regarding demand made by Shailesh ray and daughter of the informant is being subjected to cruelty and after some time Chandarma Ray also disclosed him about the occurrence, then this witness along with the informant and other witnesses went to Rasulpur and found that house of Shailesh

Ray was closed and none met there and when several people collected there then Rameshwar Ray disclosed that victim had been done to death and dead body had been disposed off. P.W. 6 is Amar Kant Jha who had conducted the investigation.

6. The defence had also adduced evidence on defence as D.W.1 Rajdev Ray, D.W.2 Muneshwar Ray, D.W.3 Malik Ray and D.W.4 Rameshwar Ray respectively and they have deposed that Ranjita Devi died due to illness, she was suffering from vomiting, loose motion and fever. Thereafter, Shailesh Ray taken her to hospital then she died in the way on 06.12.2010 and her Shardh ceremony was performed on 19.12.2010. Further plea has taken by the defence that information regarding illness of Ranjita was given to her naihar and on information brother of the victim Ramesh Yadav reached there and he attended last rite of Ranjita.

7. The trial court taking into consideration the evidence of witnesses and submission made by the learned counsel for the appellant and respondent held that marriage of the victim was solemnised within seven years and there was allegation of demand and subjecting cruelty for non-fulfillment of demand and as per evidence of P.W. 4 and P.W. 3 that victim used to informed them on telephone. Further it has been held that prosecution claim that victim died by administering her poison, whereas the case of the defence that



the victim died by illness causing fever, vomiting and loose motion. Hence, it is not disputed about the death of the victim on December, 2010 and only question remained whether death was natural or unnatural or in suspicious circumstance. The trial court convicted the appellant as per the evidence of prosecution witnesses that victim died out of administering poisoning and her in-laws disposed of the dead body in heavy haste. On the other side, the plea taken by the defence that victim Ranjita Devi died due to cause she was suffering from fever, vomiting and loose motion and she was first treated in the village, thereafter, while Shailesh Ray was taking the victim to hospital on 06.12.2010 she died in the way. However, after death of the victim, neither the police was informed nor any post mortem was conducted and so there is no direct evidence to ascertain whether death of the victim was natural or in suspicious circumstance. The trial court however taking into consideration the fact that accused persons even without informing the police and doctor and without conducting post mortem examination, disposed off the dead body by burning to efface the evidence and had held that conduct of the accused persons is taking into consideration the evidence under Section 8 of Evidence Act. Further the trial court took into consideration Section 114(g) of Evidence Act that if cause of death has been concealed by the accused persons or evidence has been



effaced which goes against then death of the victim was not in normal circumstance, but in abnormal circumstance and accused persons tried to conceal the evidence and hence taking into consideration this fact that prosecution has been able to prove the charges about death of the victim is in suspicious circumstance. However, the trial court acquitted the appellant for offence under Section 302 of Indian Penal Code but convicted the appellant under Section 304B of Indian Penal Code and further convicted for offence under Section 201 of Indian Penal Code.

8. Learned counsel for the appellant however challenged the order of conviction and sentence recorded by the trial court. It is contended that ingredients for offence under Section 304B of Penal Code has not been fulfilled and unless ingredient for offence under Section 304B is fulfilled, presumption under Section 113B of Evidence Act cannot be attracted for presuming of dowry death.

9. Learned counsel for the State however contends that prosecution has been able to prove the ingredient for offence under Section 304B of Indian Penal Code as marriage solemnised within seven years and marriage of victim solemnised on 31.05.2010 and victim was died on 21.12.2010 within five to six months and there is allegation of demand and subjecting cruelty for non-fulfillment of demand. As per evidence of P.W.4, the father of the victim himself



had stated that he was informed by the victim about demand and subjecting cruelty and as per evidence of P.W. 3 that on received of telephone he went there and Shailesh Ray demanded motorcycle, golden chain and T.V. However, the evidence regarding death of the victim, though, it has been alleged that victim was done to death by administering poison, but there is no direct evidence, but it has been asserted that taking into consideration fact and circumstance of the defence witnesses that victim died due to illness followed with vomiting, loose motion and fever. Further the fact that dead body had been disposed off in heavy haste without intimating the police and without conducting post mortem examination by the Medical Officer. It has further been submitted that, though, plea has taken that victim was treated at the village and further the victim was taken to hospital and she died in the way, but neither any doctor has been examined regarding her illness nor informed the public authority like police or the doctor or regarding her treatment and hence presumption be remained under Section 106 of the Evidence Act to presume that victim has been done to death in suspicious circumstance and once it is established that victim died in suspicious circumstance then ingredient for offence under Section 304B of Penal Code having been fulfilled to try presumption offence under Section 113B of Evidence Act for dowry death by the appellant and to record conviction. Further,

placed reliance upon decision reported in 2008 (12) S.C. page 51 (State of Rajasthan Vrs. Jaggu Ram and decision reported in 2010 (4) PLJR page 47 S.C. (Dashrath Vrs. M.P.). Hence question for consideration whether prosecution has been able to prove the charges beyond all reasonable doubt.

10. After going into the prosecution case as alleged in the First Information Report that marriage of the victim was solemnised on 31.05.2010 and the victim was sent to her sasural. Thereafter, there was allegation of demand and subjecting her to cruelty for non-fulfillment of demand. Further case that it was learnt that victim was done to death by administering poison. However, witnesses had deposed to the effect that marriage of the victim was solemnised on 31.05.2010 and there is sufficient evidence regarding demand and subjecting her to cruelty by the husband and in-laws of the victim. Further case of the prosecution that victim died out of poisoning, but there is no direct or even circumstantial evidence about death of the victim by administering poisoning. However, taking into consideration the ingredient under Section 304B of Indian Penal Code read with Section 113B of Evidence Act, it is apparent that to establish for offence under Section 304B about dowry death, the prosecution has required to prove (1) that marriage solemnised within seven years, (2) that the victim was subjected to cruelty for non-



fulfillment of demand, (3) that soon before the death the victim was subjected to cruelty and (4) that the victim died in suspicious circumstance. However, when ingredients for offence under Section 304B of Penal Code are established then only presumption arise against the appellant for dowry death giving him to opportunity to rebut. However, it is well settled unless ingredients for offence under Section 304B of Penal Code is established, presumption of dowry death cannot be recorded. Hence, for offence under Section 304B of Penal Code, prosecution has required to prove the ingredient of the offence by cogent, reliable and unimpeachable evidence that victim had been done to death in suspicious circumstance by subjecting cruelty for non-fulfillment of the demand of dowry and to prove for offence under Section 302 of Penal Code of personal liability that person himself had done to death the victim and to prove the ingredients for offence under Section 304B of Penal code, the husband or in-laws are accused in the case and marriage solemnised within seven years and victim was subjected to cruelty for non-fulfillment of demand and victim was subjected to cruelty for non-fulfillment of demand **“soon before the death”**. Further it has to establish that death in suspicious circumstance and hence with regard to presumption of dowry death, it is required to prove that victim died in suspicious circumstance.



11. However, the prosecution as alleged that occurrence took place on 06.12.2010 and there was allegation that victim was done to death by administering poison, but there is no evidence given by the prosecution that victim was done to death by administering poison and as per prosecution case, there is no evidence that victim died by administering poison or death of the victim in suspicious circumstance. It is true that defence had adduced evidence that victim died out of her illness as well as vomiting and loose motion. However, cause of death of the victim by illness as well as vomiting and loose motion has not been supported by any examination of the doctor in evidence nor there is any evidence that police was informed after death of the victim nor there is any evidence that victim was examined by the doctor or any post mortem was conducted. However, in absence of this fact, presumption under Section 114(g) of Evidence Act is only to the effect that defence taken by the accused is not accepted. It is true that nature of prove, the defence is required is not the same as for prosecution to prove beyond reasonable doubt but require only to probabilities the defence set up by the accused.

12. Having regard to the facts and circumstances defence of the accused that death of the victim was in natural by suffering from fever as well as vomiting and loose motion is not acceptable in that view of infirmities that neither the doctor was examined nor police



was informed or post mortem of the victim was conducted for determining the cause of death. However, argument advance by the learned counsel for the state that having regard to the fact that victim was not examined by the doctor or the police officer was not informed for enquiry or investigation to ascertain cause of death. However, question arises whether presumption under Section 106 of Evidence Act can be drawn to presume that death of the victim was done by the appellant or her death is in suspicious circumstance.

13. However, I am afraid such presumption be drawn when fact has not established regarding involvement of the accused persons or presence of accused at the place of occurrence. There is no evidence at all that at the time and place of occurrence what act of commission or omission committed by the accused persons. However, it is true that if death has been committed in matrimonial home, it is for the inmates of the matrimonial home to say how the victim died. However, having regard to the fact where there is no evidence at all in the fact and circumstance about the presence of the appellant where the surrounding circumstance has not established, the presence of knowledge of the fact, the presumption under Section 106 of Evidence Act shall not be at all relevant to presume the cause of death.

14. However, defence has relied upon decision reported in



2008 (12) Supreme Court Cases 51 (State of Rajasthan Vrs. Jaggu Ram). However, the fact of the case report in **2008 (12) S.CC. 51**, there was clear evidence that victim was assaulted by lathi and she got two injuries on her head. However, defence set up that she was suffering from epilepsy but got injuries on head by colliding with frame of the door during the bout of fits and this fact coupled with the conduct of the accused that accused was not informing the parents of the deceased about injuries caused on her head and consequential death and cremation of the victim was conducted in wee hours without intimating to the police or informing her parents and accused has deliberately concocted the story that Shanti was suffering from epilepsy and dead body was disposed of in hush-hush manner. Further reliance placed upon decision reported in **2001 (8) SCC page 311** which contents the fact that accused after brutally assaulting a boy carried him away and thereafter the boy was not seen alive nor his body was found and there is no explanation as what act they did after they took the boy. It was held that for the absence of any explanation from the side of the accused about the boy, there was every justification for drawing an inference that they had murdered the boy. It was observed that even though Section 106 of Evidence Act may not be relying the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but section would apply to

cases like the present, where the prosecution has succeeded in proving the facts from which a reasonable inference can be drawn regarding death.

15. Further the case reported in **2010 (4) P.L.J.R. page 47 (Dasrath Vrs. State of M.P.)** the fact remained that there was evidence that victim was burnt and P.Ws. were specifically stated in their evidence that victim was burning on account kerosene oil having been poured on her body and there was no dispute that Pinky was burnt and her death was unnatural death.

16. However, having regard to the fact and circumstances of the case at hand, it is true that there is no dispute about death of the victim Ranjita Devi, the daughter of the informant and accused persons cremated her dead body. However, question for consideration whether the death of victim was in unnatural or suspicious circumstances. However, the case of the prosecution that victim died out of administering poison, but there is no evidence of poisoning at all and the case of the defence that the death of the victim was natural death and she died out of her illness causing vomiting and loose motion. It is true that after the death, neither the police was informed nor any post mortem was conducted nor the doctor examined. However, defence has not adduced any evidence of natural death. From the decision reported in **2008 (12) SCC page 51** and **2010 (4)**



PLJR 47 where the victim was assaulted and injury was proved. In decision reported in **2010 (4) PLJR**, there was clear evidence that victim was burnt and victim died out of burning, then question for consideration whether facts and circumstance of the case it can be held that victim had been died in suspicious circumstance. The trial court, though, have treated the conduct of the accused under Section 8 as well as Section 114(g) of Evidence Act and argument advanced by the learned counsel for the State that to take presumption about death in suspicious circumstance under Section 106 of Evidence Act to presume that victim died in suspicious circumstance. However, it is apparent that trial court proceeded on conjecture and surmises taking into the conduct of the accused for not informing the police or post mortem examination was conducted by any doctor as an evidence and dead body was disposed off in heavy haste and to give presumption that death in suspicious circumstance or to draw presumption under Section 114(g) of Evidence Act briefing unfavourable to the person. However, presumption under Section 114(g) of Evidence Act is only to the effect that if evidence not produce then that evidence is in favourable to the accused. However, evidence of witnesses recorded by the trial court with the aid of Section 8 of Evidence Act hold that death of the victim was unnatural death has not sustainable as no such presumption can be drawn unless basic fact regarding occurrence is

proved to draw such inference or there is some circumstances as indicated.

17. However, Section 114(g) of Evidence Act has no applicable, therefore, attention of the learned counsel for the State to take aid under Section 106 of Evidence Act in view of the fact that the fact regarding death of accused is specifically knowledge of any person burden to prove the fact and it is for the defence where the victim died, they are responsible to prove how the victim died. However, again burden to prove the case of the prosecution. However, the prosecution has not been able to adduce any evidence that victim died out of administering poisoning and there is no other circumstance having been pointed out or no evidence laid to point out that death of the victim was in suspicious circumstance. However, if evidence produce by the defence that death of the victim causing by illness or out of suffering from vomiting and loose motion is not accepted, then only section apply that defence of the accused may be disbelieve then prosecution may not absolve of primary duty of proving the case beyond reasonable doubt or to prove ingredients for offence under Section 304B of Indian Penal code that death in suspicious circumstance to take presumption under Section 304B of Penal Code read with Section 113 (B) of Evidence Act that death of the victim was dowry death. However, argument advance that



Section 106 of Evidence Act to take in aid to held that victim died out of suspicious circumstance was within the house and it was intimated who can alone are liable to disclose. However, there is no evidence that how the victim died neither there is any evidence victim died out of poisoning nor there is no such evidence to infer that victim died in normal circumstance and hence in such fact and circumstance, presumption under Section 106 of Evidence Act cannot be taken to hold that death of the victim was in suspicious circumstance and any attempt either in evidence or substantial evidence amounts to conjecture and surmises. However, decision reported in 2008 (12) SCC as well as decision reported in 2010 (4) PLJR there was basic fact that the victim was assaulted causing injury on head with fracture and this couple with circumstance laid to section to draw inference under Section 106 of Evidence Act, whereas in other case there was allegation that victim was burning and there is evidence that cloths of the victim was soaked with kerosene. However, there is evidence as such that there is any circumstance of poisoning the victim and hence one ingredient for offence under Section 304B of Penal Code that victim died in suspicious circumstances having not been established and hence presumption under Section 304(B) of Penal Code cannot be recorded.

18. Hence, having regard to the facts and circumstances of

the case, though, the prosecution has not able to prove that death in suspicious circumstance. Accordingly conviction and sentence recorded by the trial court under Section 304B of Penal Code is hereby set aside.

19. So far offence under Section 201 of Penal Code is concerned, it is admitted case that victim died and dead body had been disposed off without intimating the police or the doctor and hence no opportunity was left for ascertaining whether death of the victim was in suspicious circumstance.

20. Regard being had to the fact, conviction under Section 201 of Penal Code recorded by the trial court is sustained. **The appeal is allowed in part.**

m.p.
NAFR

(Gopal Prasad, J)

U		T	
---	--	---	--