

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.163 of 2014

Arising Out of PS.Case No. -67 Year- 2012 Thana -BAJPATTI District- SITAMARHI

Against the judgment of conviction, dated 25.01.2014, and the order of sentence, dated 30.01.2014, passed by Sr Prabhu Nath Singh, 1st Additional Sessions Judge, Sitamarhi, in Sessions Trial No. 181 of 2013/63 of 2013, arising out of Bajpatti Police Station Case No. 67 of 2012

1. Sanjeet Mukhiya Son Of Mahendra Mukhiya Resident Of Village - Rasalpur (Purbi Tola) P.S.- Bajpatti, District - Sitamarhi

.... **Appellant**

Versus

1. The State Of Bihar

.... **Respondent**

Appearance :

For the Appellant : Mr. Ramakant Sharma, Sr. Adv.
Mr. Rakesh Kumar Sharma, Adv.

For the State : Mr. Ajay Mishra, APP

CORAM: HONOURABLE THE ACTING CHIEF JUSTICE

AND

HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

JUDGMENT AND ORDER

ORAL

(Per: HONOURABLE THE ACTING CHIEF JUSTICE)

Date: 25-05-2016

Under challenge, in the present appeal, is the judgment of conviction, dated 25.01.2014, passed, in Sessions Trial No. 181 of 2013/63 of 2013, by learned 1st Additional Sessions Judge, Sitamarhi, and the order, dated 30.01.2014, whereby sentence has been passed against the sole accused-appellant.

2. By the impugned judgment, learned trial Court has convicted the accused-appellant under Sections 302 of the Indian Penal Code. Following his conviction, under Sections 302 of the Indian Penal Code, the accused-appellant has been sentenced to undergo life imprisonment and pay fine of Rs.20,000/- and, in default of payment of fine, further undergo rigorous imprisonment for a period of six months.

3. The case of the prosecution, as unfolded at the trial, may, in brief, be described thus:

(i) Deceased Poonam Devi was the wife of accused Sanjeet Mukhiya, their marriage having been solemnized about 4 (four) years before she died.

(ii) On 12.05.2012, Poonam Devi's uncle, Jitan Mukhiya (PW 2), received a telephonic information from Poonam's matrimonial house that she was ill and that she was being taken to Sitamarhi for treatment, but after half-an-hour, he was informed that Poonam Devi had died and her in-laws were taking her dead-body for cremation, whereupon the informant, accompanied by his relatives and co-villagers, went to the house of the accused, but none was present there and, having learnt that Poonam Devi's dead-body had been taken for cremation, the informant went to the bank of the river, where he found Poonam's body lying on a burning pyre. Poonam Devi's half burnt dead body was recovered by the

police, which was subjected to *post mortem* examination, which revealed that she had died due to haemorrhage and shock, because of the injuries sustained on her skull leading to cardio respiratory failure, the injuries having been caused by hard and blunt object like *lathi*.

(iii) The informant (PW 2), having alleged, in the *fardbeyan*, that accused Sanjeet Mukhiya had been pressurizing Poonam Devi's parents to give him a motorcycle, but as the family members of Poonam Devi were poor, they could not pay for motorcycle and that was the reason why she (Poonam Devi) used to be tortured by her husband and in-laws.

(iv) On the *fardbayan* having lodged by PW 2 and treating the said *fardbayan* as *First Information Report*, Bajpatti Police Station Case No. 67 of 2012, under Sections 302/201/34 of the Indian Penal Code read with Sections 3/4 of the Dowry Prohibition Act, 1961, was registered against (i) Sanjeet Mukhiya, (ii) Ranjeet Mukhiya, (iii) mother of Sanjeet Mukhiya, Rubi Kumar, wife of Ranjeet Mukhiya and Ganaur Mukhiya.

(v) On completion of investigation, a *charge sheet* was laid, under Section 304B of the Indian Penal Code, against the sole accused-appellant, Sanjeet Mukhiya; whereas the rest of the accused persons were not sent up for trial.

4. At the trial, when charges, under Section 302 and 304B of the Indian Penal Code, were framed against the accused aforementioned, he pleaded not guilty thereto.

5. In support of their case, prosecution examined altogether 9 (nine) witnesses including the doctor and the Investigating Officer. The accused was, then, examined under Section 313 (1) (b) of the Code of Criminal Procedure and, in his examination aforementioned, the accused denied that he had committed the offences, which were alleged to have been committed by him, the case of the defence being that of denial.

6. Having reached the finding that the accused-appellant was not proved guilty of the offence punishable under Section 304B of the Indian Penal Code, the learned trial Court acquitted him accordingly. Having, however, reached the finding that the accused-appellant was guilty of the offence under Section 302 of the Indian Penal Code, the learned trial Court has convicted him taking aid of Section 106 of the Evidence Act and, consequent thereupon, sentence has been passed against the accused-appellant as has been mentioned above.

7. Aggrieved by his conviction and the sentence, which has been passed against him, the accused aforementioned, as a convicted person, has preferred this

appeal.

8. We have heard Mr. Ramakant Sharma, learned Senior Counsel, for the appellant, and Mr. Ajay Mishra, learned Additional Public Prosecutor, for the State.

9. Before we enter into the discussion of the evidence of the informant and other prosecution's witnesses, let us take note of the evidence of the doctor, who had performed *post mortem* examination on the dead body of the deceased, Poonam Devi.

10. According to the doctor (PW 7), he, on conducting *post mortem* examination, on 13.05.2012, at about 02:20 PM, on the dead body of Poonam Devi, found following *ante mortem* injuries on the said dead body.

"External injuries : Hairs, eye brows, all skin of skull and face and both the eyes burnt completely. Rest of the body burnt up till hip joint with shooty blackening of the skin. Skull bone and facial bone exposed. No line of redness. No vasication and no sign of inflammation present. Extent of burn is approximately 65 per cent caused by flame of fire and post mortem in nature.

Ante mortem injuries: Left parietal bone fractured into many pieces. Brain matter exposed. Left frontal bone fractured in two pieces.

External Findings :

Skull - left parietal bone fractured into two many pieces. Left part of frontal bone fractured into two pieces. Brain matter lacerated.

Neck - N.A.D. Nasophaxons intact and pale.

Chest - both ribs cage intact, both lungs intact and pale, trachea and brannial tube intact and pale. heart intact, both chambers empty.

Abdomen - All abdominal viscera intact and pale. Stomach contained semi-digested food. Urinary bladder empty, uterus of normal size.

All internal findings are ante mortem in nature."

11. In the opinion of the doctor (PW 7), the cause of death was haemorrhage and shock due to injuries to the skull and brain leading to cardio respiratory failure and the injuries had been caused by hard and blunt object, such as, *lathi*.

12. Apart from the fact that findings of the doctor and his opinion, with regard to the cause of death of the said deceased, have not been disputed by the defence, we, too, notice nothing inherently incorrect or improbable in the evidence given by the doctor.

13. Bearing in mind the medical evidence on record, we come to the evidence of the informant (PW 2). His



evidence is that Poonam was married to accused-appellant, Sanjeet Mukhiya and, on 12.05.2012, he received a telephonic information from her (Poonam Devi's) matrimonial house that she was ill, whereupon he went to Poonam Devi's matrimonial house, but did not find anyone present there and he came to learn that Poonam was dead and her in-laws had taken her for her last rites. It is the evidence of PW 2 that he knew that her in-laws had killed her and that was why, he got a petition written by the Officer-in-Charge and filed it at the Police Station, which is Exhibit-2, and which has been treated, we may hasten to point out, as the *First Information Report*.

14. Notwithstanding his above evidence, the informant (PW 2) has deposed, in his cross-examination, that he had no complain against accused Sanjeet Mukhiya and that neither Sanjeet Mukhiya nor his family members had made any demand for dowry and that Poonam Devi had also not complained about any demand having been raised by her husband or her in-laws. PW 2 has further deposed that he returned to his house after the cremation.

15. What is significant to note in the evidence of the informant (PW 2) is that he has deposed that when he was present at the place of cremation, police came there and they took his signature on a piece of paper at the Police Station meaning thereby that the *fardbayan* (Exhibit-2) was

written by the police and signature of the informant (PW 2) was obtained by the police thereon without the willingness of the informant (PW 2).

16. In view of the fact that the informant did not stick to his evidence given in his examination-in-chief and he has, clearly deposed, in his cross-examination, that he had no complaint against accused Sanjeet Mukhiya and that neither the accused Sanjeet Mukhiya nor his family members had ever demanded any dowry and that Poonam Devi had also not complained about any demand for dowry having been raised, there was no option for the learned trial Court, but to hold that as far as the informant (PW 2) is concerned, his evidence, as finally emerged, did not prove that Poonam Devi had been subjected to cruelty soon before her death or at any time during her matrimonial life.

17. As far as PW 1, Vinod Sah, is concerned, he is merely a witness to the inquest report.

18. PW 3 (Chandeshwar Mukhiya), PW 4 (Kari Rai) and PW 6 (Pradip Mukhiya) have been declared hostile.

19. This leaves us with the evidence of Poonam Devi's father, Sita Sharan Mukhiya (PW 5). According to his evidence, he was at Delhi, when he received the information about the death of his daughter, Poonam Devi. He has categorically deposed that there was no complain against his

son-in-law and that his son-in-law has never demanded any motorcycle.

20. Thus, even PW 5 has not supported prosecution's case as regards Poonam Devi having been subjected to cruelty, because of non-fulfillment of demand of dowry raised by her husband and his relatives.

21. We may pause at this stage to point out that according to Section 304B of the Indian Penal Code, "*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*".

22. From a close reading of Section 304B of the Indian Penal Code, what clearly transpires is that the deceased has to be the wife of the accused, her death must be unnatural, her death must have been caused within seven years of her marriage and, above all, there must be evidence proving that soon before her death, the woman was subjected to cruelty.

23. In the present case, Poonam Devi was the wife



of the accused-appellant, Sanjeet Mukhiya, she died unnatural death within seven years of her marriage, but there being no credible evidence of her having been subjected to cruelty, because of failure of her parental family to fulfill any demand of dowry raised by her husband and/or his family members, the learned trial Court correctly acquitted the appellant of the charge framed against him under Section 304B of the Indian Penal Code.

24. Coming to the conviction of the accused-appellant under Section 302 of the Indian Penal Code, it needs to be noted, as we have already pointed out above, that the learned trial Court has convicted the accused with the aid of Section 106 of the Evidence Act. Section 106 of the Evidence Act reads thus :

"Section 106. Burden of Proving fact especially within knowledge. - When any fact is specially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations: (a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."



25. A cautious reading of Section 106 of the Evidence Act, as a whole, shows that when any fact is specially within the knowledge of any person, the burden of proving that fact is on him. Illustration (b) to Section 106 of the Evidence Act shows that when A is charged with travelling, on a railway, without a ticket, the burden of proving that he had a ticket with him lies on A.

26. The above illustration shows that before the burden is placed on A, the prosecution must establish that A was found travelling on a railway without any ticket. When these facts are proved, the burden would shift to A to show that he had a ticket with him, when he was travelling, on the railway, and unless he proves that he had such a ticket, he will be held guilty of travelling, on the railway, without ticket.

27. Consequently, the initial burden of proving the facts, which are alleged, by the State, namely, that A was found travelling on a railway, without ticket, remains on the prosecution. If the prosecution adduces this much of evidence, it is sufficient to convict A unless he shows that he had a ticket on him, when he was travelling on the railway.

28. What Section 106 of the Evidence Act, thus, creates an exception to Section 101 of the Evidence Act in the sense that when essential facts are proved by the prosecution, the fact, which is within the special knowledge of



the accused and which, if not proved, would lead to the conviction of the accused, the burden would be on the accused to prove such a fact, which would exonerate him from the charge. For instance, when the prosecution proves that an accused 'X' has killed a person, 'Y', by giving him blows with a '*dao*' and if the accused, in such a case, takes the plea that he was insane at the relevant point of time, then, it would be for the accused to prove that at the relevant point of time, he was insane. Section 101 of the Evidence Act does not, however, relieve the prosecution of its burden to, otherwise, prove that accused 'X' has killed 'Y'. Thus, when the prosecution proves that 'X' has killed 'Y', 'X' can escape the conviction only when he can show that when he (i.e., 'X') had killed 'Y', he was insane.

29. Even in **R V. Oliver (1943) 2 All E R 800**, the accused was charged with having sold sugar, as a wholesaler, without necessary licence. The question, that he had sold sugar, as a wholesaler, was not in dispute. The question was as to who had the burden of proving that the accused did not have licence at the time, when he had made the sale. Since it was the accused, who claimed to have had a licence and it was he only, who knew that he had a licence, the Court held that in the circumstances of the case, prosecution was not required to adduce evidence of non-existence of a licence and



that it was for the accused to prove that he made the sale, while he had a valid licence. Thus, what needs to be borne in mind is that Section 106 of the Evidence Act is an exception to Section 101 of the Evidence Act subject to the fact that under Section 101 of the Evidence Act, the party, who has the *onus probandi*, proves the essential facts.

30. Turning to the question of evidential burden, it needs to be noted that Phipson has pointed out that while the persuasive burden is always stable, the evidential burden may shift. The *onus probandi*, in this sense, rests upon the party, who would fail if no evidence at all, or no more evidence, as the case may be, were given on either side, i.e., it rests, before evidence is gone into, upon the party asserting the affirmative of the issue; and it rests, after evidence is gone into, upon the party against whom the tribunal, at the time the question arises, would give judgment if no further evidence were adduced.

31. In the case at hand, the medical evidence on record clearly shows that Poonam Devi died due to the injuries sustained by her on her skull, leading to shock and hemorrhage, which resulted into cardio respiratory failure. Her death was, therefore, not natural. There is, however, no evidence to show that the accused-appellant had any motive to kill his wife. This apart, there is no evidence on record to

show that he was the sole occupant of the house, where Poonam Devi died, and/or that the accused-appellant was present at his house at the time, when Poonam Devi sustained injuries and died.

32. In the backdrop of what has been pointed out above, there can be no escape from the conclusion that the prosecution had failed to prove the presence of the accused-appellant at the place of occurrence at the time, when Poonam Devi sustained injuries and/or breathed her last. The provisions, embodied in Section 106 of the Evidence Act, were, therefore, not attracted to the case at hand.

33. Situated thus, we are firmly of the view that the prosecution had failed, in the present case, to bring home the charge under Section 302 of the Indian Penal Code against the accused-appellant beyond reasonable doubt and that the accused-appellant was entitled to be accorded, at least, benefit of doubt.

34. In the result, and for the reasons discussed above, this appeal stands allowed. The impugned conviction of the accused-appellant and the sentence passed against him by the judgment and order, under appeal, shall accordingly stand set aside. The accused-appellant is held not guilty of the offence, which he was charged with, and he is acquitted of the same under benefit of doubt.

35. Let the accused-appellant, Sanjeet Mukhiya, be set at liberty, forthwith, unless he is required to be detained in connection with any other case.

36. The Registry shall, forthwith, send a copy of this judgment and order to the learned trial Court along with the Lower Courts Record.

(I. A. Ansari, ACJ.)

(Chakradhari Sharan Singh, J.)

Prabhakar Anand/-

AFR/NAFR	AFR
CAV DATE	N.A.
Uploading Date	07.06.2016
Transmission Date	07.06.2016