

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.573 of 2010

Against the judgment of conviction, dated 24.05.2010, and order of sentence, dated 25.05.2010, passed by Mr. Kailash Kumar Mehta, Additional District Judge, IV, Fast Track Court, Jamui, in Sessions Trial No. 36 of 2006 arising out of Jamui P.S. Case No. 157 of 2005

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1. Baleshwar Mandal S/O Late Kishun Mandal Vill.Hartha , P.S.+Distt.-Jamui
2. Mukesh Mandal S/O Baleshwar Mandal Vill.Hartha , P.S.+Distt.-Jamui
3 Sunit Mandal S/O Baleshwar Mandal Vill.Hartha , P.S.+Distt.-Jamui
.... Appellants

Versus

1. The State Of Bihar Respondent

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Appearance :

For the Appellants : M/S Ebrahim Kabir & Shruti Singh, Advs.

For the Respondent : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE GOPAL PRASAD

ORAL JUDGMENT

Date: 20-04-2016

Heard the learned counsel for the appellants and the State.

2. The appellants have been convicted under Sections 304B and 201 of the Penal Code and sentenced to undergo rigorous imprisonment for seven years and a fine of Rs.2,000/- each and in default of payment of fine to undergo rigorous imprisonment for one year.

3. The prosecution case, as alleged in the first information report by the informant, Rajendra Prasad Chauhan that he has solemnized the marriage of his youngest daughter, Nirmala Devi, with Sunit Mandal, resident of village Hartha in the district of Jamui and the gauna was performed at the time of marriage itself and the victim, Nirmala Devi, went to sasural. The marriage alleged to be solemnized in the year 2003. The, further, case is that when Nirmala Devi went to sasural, the mother-in-law and husband used to pass sarcastic remarks for non-payment of sufficient dowry and a demand was made for colour television and Rs.25,000/- cash and when the daughter of the informant showed her inability, then, her husband, father-in-law, mother-in-law and brother of husband used to abuse and assault and not giving food and, in this regard, the information was given to the informant by the wife of Dhan Kumar Chauhan, the husband of his niece. The, further, case is that the informant went to sasural along his family members and

made them understand and requested not to subjected the victim to cruelty, but, they did not hear and continued their demand and so the informant came with assurance for some time to fulfill the demand, but, even the informant tried his best, he could not arrange for a television and Rs.25,000/- cash and it is alleged that the husband, his brother, father-in-law and mother-in-law subjected the daughter of the informant to cruelty. The, further, case is that whenever his daughter used to come, used to disclose about subjecting cruelty for non-fulfillment of the demand. On 21.07.2005, the maternal niece of the informant, Yogmaya Devi, informed on telephone that the sasural people have done her daughter to death and disposed off the dead body, on which the informant along with his brother, Ramlal Chauhan, Gopal Chauhan and Ashok Chauhan, went to sasural of the victim and on seeing the inmates of the house entering into the house his samdhi came out and on query about the daughter of the informant, he said that he does not know and closed the door and, then, it was learnt from neighbourhood that the accused persons have done to death and disposed off the dead body for non-fulfillment of the demand of television and Rs.25,000/- cash. On the written report of the informant, first information report lodged and the investigation proceeded.

4. During the investigation, the investigating officer inspected the place of occurrence, which is the joint house of the accused persons in which the victim used to live with her husband, recorded the statements of the witnesses. However, he could not able to identify where the dead body was disposed off or lost or burnt or buried and did not enquire whether she died of drowning or strangulation.

5. The investigating officer, after investigation submitted the charge sheet, cognizance taken, case committed to the Court of sessions. During the trial, six witnesses were examined by the prosecution.

6. P.W. 4 is Yogmaya Devi. She has deposed that she is the cousin of Nirmala Devi as Nirmala Devi was daughter of her maternal uncle and though supported the prosecution case about subjecting cruelty by assault for non-fulfillment of the demand of Rs.25,000/- and colour television. However, she has stated that she learned about the demand and assault from one Munnu Kumar. She has, further, stated that Mannu

Kumar disclosed that bhabhi has fled away, then, she came to Hartha and got information from here-and-there, then, it was learnt that the dead body has been disposed off, hence, her evidence regarding the disposing off the dead body, after murder, is only based on hear-say as the only evidence is that she learnt about the same is either from Mannu Kumar or from other persons, whom she did not name. However, Mannu Kumar has not been examined. P.W. 5 is Rajendra Prasad, the informant, who has deposed that his daughter Nirmala Devi, the victim, was his youngest daughter whose marriage solemnized in 2003 with Sunit Mandal and has deposed that after six months of the marriage there was demand of colour television and money and on 21.07.2005 he learnt from Yogmaya Devi regarding the murder of the victim and disposal of the dead body. P.W. 1 is Ramlal Chauhan who has deposed that the marriage of Nirmala Devi solemnized in 2003 and deposed about the subjecting cruelty for non-fulfillment of the demand of colour television and Rs.25,000/- cash and has stated that he learnt about it from one Dhan Kumar Chauhan. However, Dhan Kumar Chauhan has not been examined in this case and then he along with other witnesses, P.Ws. 3, 4 and 5, came to the village. The evidence of P.W. 2 is also to the same effect as the evidence of P.W. 1, supported prosecution case regarding demand and subjecting cruelty.

7. The defence has also adduced four witnesses, D.W. 1 is Suresh Choudhary, D.W. 2 is Ramjanam Mandal, D.W. 3 is Hira Mandal, and D.W. 4 is Sanjay Mandal defence witnesses said that the marriage of Nirmala Devi was second marriage with Sunit Mandal and the marriage solemnized in 2004 and prior to this marriage Nirmala Devi was married with another person at another place and she was also bless there with children. The, further, case of the defence that the victim was of suspicious character and used to flee away from sasural and has got married four times.

8. The trial Court, taking into consideration the evidence of the witnesses, convicted the appellants, as mentioned above.

9. The learned counsel for the appellants, however, challenged the order of conviction and sentenced, recorded by the trial Court, on the ground that prosecution has not been able to prove the charge. It is

submitted that there is no evidence that the victim was done to death and soon before death was subjected to cruelty and, further, the evidence regarding subjecting cruelty and death is alleged to have been done by the sasural people, but, there is no mention that from whom they learnt.

10. The learned counsel for the State, however, contends that the prosecution witnesses stated that there is allegation of demand and subjecting cruelty and the victim was alleged to have killed and the dead body disposed off and there is no explanation from which can well be inferred that the death is not in suspicious circumstance.

11. However, to attract conviction under Section 304B of the Penal Code, by raising presumption under Section 113B of the Indian Evidence Act, 1872, the prosecution is required to prove that the death of the victim within seven years from the date of marriage and the death has been done in suspicious circumstance and, further, the victim was subjected to cruelty for non-fulfillment of the demand of dowry and, further, soon before death, the victim was subjected to cruelty for non-fulfillment of the demand of dowry.

12. However, going into the entire evidence the prosecution case, at the very outset that the informant learnt from the husband of his maternal niece, Dhan Kumar Chauhan, about subjecting cruelty and, further, on 21.07.2005 he learnt from his maternal niece, Yogmaya Devi, on telephone regarding the murder of the victim and disposing off the dead body. However, Yogmaya Devi examined as P.W. 4 that about three years back devar (brother-in-law) of the victim disclosed that she has flee away and, then, she came out to enquire and, then, it was learnt that the victim has been killed and the dead body disposed off. However, her evidence suffers from hear-say as her evidence is that she learnt from Mannu, devar of the victim, that she flee and, thereafter, she made enquiry, but, did not say that from whom she learnt about the death and disposal of the dead body and she has disclosed the fact to her maternal uncle on telephone, who is the informant, however, she has not disclosed that from whom she learnt about the murder nor the person come to support about disposal of the dead body, hence, her evidence is hit by hear-say. The informant in his evidence stated that he learnt from Yogmaya Devi on 21.07.2005 and, then, he proceeded along with

Ramlal Chauhan, Gopal Chauhan and Ashok Chauhan, Ramlal Chauhan is P.W. 1, Gopal Chauhan is P.W. 2 and Ashok Chauhan is P.W. 3 and when they reached at the sasural, they also did not see any dead body nor any one disclosed about the fact and their evidence is only that when they reached there and enquired, then, the accused persons entered into the house and the wife of one Baleshwar Chauhan came out have stated that the villagers disclosed that the victim has been killed and dead body disposed off, but, the name of any villagers has not been disclosed from whom they learnt and the evidence that he learnt from one Mannu, which also suffers from infirmity, it is hit by hear-say as the name has not been disclosed nor any one has come to depose that the victim was done to death, hence, there is no evidence at all that the victim was done to death and the dead body was disposed off, hence, it can not be inferred on these facts that the victim was done to death and the dead body disposed off as there is no evidence to the effect that the victim was done to death and the dead body disposed off. Neither there is direct, oral or any eye witness nor there is any circumstantial evidence showing that any mark or sign found by the investigating officer, which show and from those evidences it can be inferred that the victim has been done to death and to hold that it was a case of dowry. However, the investigating officer has been examined as P.W. 6. He has stated that whether the dead body was disposed off or lost or whether it was burnt or whether it was buried, he could not find any place to identify the dead body. He has, further, stated that he did not make any enquiry whether the victim died of sinking in pond or by strangulation or by any other means, hence, virtually there is no evidence about the fact that the victim was done to death. However, on this basis it can not be presumed that the victim was done to death is in suspicious circumstances.

13. However, there is no evidence that soon before death the victim was subjected to cruelty for non-fulfillment of the demand of dowry. The witnesses though have stated that the victim was subjected to cruelty, but, there evidence is only to the effect that after six months of the marriage the victim was subjected to cruelty for non-fulfillment of the demand of colour television and Rs.25,000/- in cash. However, there is no specific time and date mentioned and there is no mention that soon

before death the victim was subjected to cruelty for non-fulfillment of the demand, hence, ingredients to establish the offence under Section 304B of the Penal Code that the victim died in suspicious circumstance is missing and, further, there is evidence that soon before death the victim was subjected to cruelty for non-fulfillment of the demand is also missing.

14. Section 113B of the Indian Evidence Act, 1872, provides that presumption under this act can be recorded only if it is established that soon before death victim was subjected to cruelty for non-fulfillment of the demand and, further, the victim died within seven years of marriage. However, here under the facts and circumstances of the case there is neither any evidence that victim died in suspicious circumstance nor the victim ever has died nor there is any evidence that soon before death the victim has been subjected to cruelty.

15. Hence, if the ingredients for offence under Section 304B of the Penal Code has not been established, then, the presumption under Section 113B of the Indian Evidence Act, 1872, can not be used to conclude or hold that the victim has been done for the dowry death.

16. I find and hold that the prosecution has not been able to prove the charge beyond reasonable doubt and the trial Court misdirected in holding and recording the conviction without going into the fact whether the ingredients under Section 304B of the Penal Code has been established to draw inference under Section 113B of the Indian Evidence Act, 1872.

17. Hence, the conviction and sentence, recorded by the trial Court, is hereby **set aside** and the appeal is **allowed**.

18. Appellants no. 1 and 2, namely, Baleshwar Mandal and Mukesh Mandal, are already on bail. Since, appellant no. 3, Sunit Mandal, is in jail, he is directed to be released forthwith, if not wanted in any other case.

(Gopal Prasad, J)

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