

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.126 of 2015

Arising Out of PS.Case No. -94 Year- 2012 Thana -DIGHA District- PATNA

=====

Awdhesh Rai son of Gajendra Rai permanent resident of village - Bavangawa,
Police Station - Riga, District - Sitamarhi, at present resident of Mohalla - Balu Par,
Shakti Nagar, Police Station - Digha, District - Patna.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

with

Criminal Appeal (SJ) No. 201 of 2015

Arising Out of PS.Case No. -94 Year- 2012 Thana -DIGHA District- PATNA

=====

Chandan Kumar son of Awdhesh Rai, resident of Mohalla- Kurji Shakti Nagar,
Balu Par behind Gas Godown, P.S.- Digha, District- Patna

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

Appearance:

(In CR. APP (SJ) No.126 of 2015)

For the Appellant/s : Mr. Akhauri Kamal Kishore Sahay, Adv.

For the State : Mr. Z. Hoda, APP

(In CR. APP (SJ) No.201 of 2015)

For the Appellant/s : Mr. Akhauri Kamal Kishore Sahay, Adv.

For the State : Mr. Z. Hoda, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

CAV JUDGMENT

Date: 06-12-2017

Criminal Appeal (SJ) No.126 of 2015 wherein

Awdhesh Rai is the appellant and Criminal Appeal (SJ) No. 201 of
2015 wherein Chandan Kumar is the appellant originate against
the common judgment of conviction dated 23.02.2015 and order
of sentence dated 26.02.2015 passed by Additional Sessions
Judge, IXth, Patna in Sessions Trial No.681/2013 whereby and
whereunder both the appellants have been found guilty for an
offence punishable under Section 304B IPC, 201/34 of the IPC,
120B of the IPC and accordingly sentenced R.I. for ten years
under Section 304B IPC, RI for two years, fine of rupees five



thousand under Section 201/34 as well as 120B IPC, respectively and in default of payment of fine to undergo S.I. for one month additionally with a further direction to run the sentences concurrently.

2. Manoj Kumar (PW.4) filed written report on 25.06.2012 disclosing therein that his younger sister Babita Kumari daughter of Mahendra Raut was married with Chandan Kumar, son of Awadhesh Rai on 29.02.2012. At the time of marriage they have given all the articles, cash so demanded by the bridegroom side. About a month thereafter, while his sister was staying at her Sasural, Chandan advanced demand of rupees two lacs and a chain. After having been informed, he undertook to provide after availability of the resources but this undertaking did not satisfy them, on the other hand, his sister continued to be tortured. Lastly, his sister informed about 10-15 days ago on mobile and requested him to come to her Sasural whereupon, he had gone there. The husband, his parents, his younger brother Nandan Kumar as well as sister Salu Kumari insisted upon fulfillment of rupees two lacs as well as a chain. He again replied that after arranging the same, he will provide. Then, thereafter, he returned back. His sister used to talk with them regularly on mobile. Since 22.06.2012 there was no conversation. On 24.06.2012 Chandan came to his place at 06:00 AM and informed that on account of some sort of altercation with his sister Babita in the previous night, he had gone to sleep over roof. On the morning, when he got down found her missing. Whereupon he along with Chandan as well as other relatives made hectic search



but in vain. Then thereafter, he informed the police. During course of conversation in the mohalla, he was informed that his sister was murdered by his brother-in-law along with his family members and got the dead body disposed off by way of throwing the same in the river the Ganges, whereupon, written report has been submitted.

3. After registration of Digha P.S. Case No.94/2012, investigation commenced and after concluding the same, charge sheet has been submitted against the appellants including Vishal and Dilip (since acquitted) at different stages on account of their arrest at different occasions keeping the investigation pending against remaining accused whereupon, the trial commenced and concluded in a manner subject matter of instant appeal.

4. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial. Furthermore, it has also been pleaded that alleged victim Babita Kumari was not inclined to stay at her Sasural whereupon, taking the trivial issue wherein an altercation took place in between husband and wife on domestic affair, she slipped without informing anybody including that of her Naiharwala and for that, none is responsible and for that, even before institution of the case, Sanha was already registered at the P.S. at his end within the knowledge of the prosecution party. In order to substantiate the same, also examined two DWs, DW.1- Biresh Singh and DW.2- the appellant Chandan Kumar himself coupled with Ext.A, the written report (Sanha) filed by the



appellant Chandan.

5. In order to substantiate its case, prosecution had examined six PWs namely, PW.1 Raj Kali Devi, PW.2 Sanjeet Kumar, PW.3 Mahendra Raut, PW.4 Manoj Kumar, PW.5 Pankaj Kumar, PW.6 Prabhat Kumar Saran who was recalled and reexamined as PW.6A, side by side also exhibited Ext.1-Written report, Ext.2-formal FIR and Ext.3-Inculpatory extra judicial confessional statement of co-accused Vishal Kumar. As stated above, two DWs namely DW.1 Biresh Singh, DW.2 Chandan Kumar have been examined on behalf of appellants along with Ext.A, Sanha.

6. The learned counsel for the appellant while assailing the judgment impugned has submitted that from the facts and circumstances of the case, it is apparent that the alleged victim Babita Kumari did not met with her death nor dowry death rather she slipped from her Sasural as she was not inclined to stay. That being so, the instant prosecution since its inception happens to be bad and in likewise manner, the conviction and sentence recorded by the learned lower court.

7. It has further been submitted that had there been not a genuine conduct of the appellants, appellant Chandan, husband would not have gone to the place of prosecution and would not have informed, joined with prosecution party in searching out Babita, which the written report itself divulges. Therefore, it could not be said that there was any kind of criminal intention, activity relating to disappearance of the Babita at their



end. Moreover, appellant Chandan, just after coming to know about disappearance of Babita had gone to the police station and informed with regard to disappearance of Babita which was entered as Sanha No.904/2012 much before institution of this case. Apart from this, it has also been submitted that two DWs including appellant Chandan himself came in witness Box and deposed on that very score, explaining the event. Even during cross-examination of DW.2, Chandan, one of the appellants prosecution could not be able to explicit anything adverse to his interest. On account thereof, it could not be a case of dowry death whereupon, the finding recorded by the learned lower court happens to be wrong and erroneous.

8. It has also been submitted that from the prosecution evidences, it is apparent that they themselves are not at all sure whether Babita had died nor not. They failed to show the source from where they got information with regard to dowry death of Babita, nay the dead body of Babita has been recovered. That being so, they could not even be considered to be hearsay witness apart from having substantial corroborative evidence. Moreover, the prosecution also suffers from vagueness over demand of dowry as well as torture having inflicted upon the Babita. That means to say, the prosecution failed to establish death of Babita demand of dowry, and torture inflicted upon Babita soon before her death by the appellants on account thereof, did not justify conviction and sentence recorded by the learned lower court whereupon, is fit to be set aside.



9. On the other hand the learned Additional Public Prosecutor while counter meeting with the submissions made on behalf of appellants has submitted that the victim Babita was murdered in preplanned manner in the background of the fact that before informing the prosecution, husband Chandan cunningly had already approached the police and got Sanha No.904/2012 registered on that very score. If there was no grievances persisting since before then, there was no occasion for the appellants to be apprehensive at the end of the prosecution party whereupon, instead of rushing to police, would have rushed to the place of informant to see whether Babita was there or not as they, as per his version have quarrelled in the previous night. However, from the evidence it is evident that deceased was already eliminated two days prior, to the date on which prosecution party was informed. Pious conduct of prosecution is itself apparent from the fact that even having Sanha at their end also, did not say anything adverse to the appellants. It is their subsequent conduct coupled with information gathered by the prosecution party, whereupon, illegal activities of appellants in conspiracy with others, found exposed by way of causing death on account of non-fulfillment of demand of dowry whereupon prosecution has been launched, which during course of trial, legally substantiated. Apart from this, it is also apparent that during course of search, appellant parted with the prosecution party and then thereafter, all the family members disappeared after locking the door which the members of the prosecution party found when they came at their place. Their absence continued even after registration of the



case as well as during course of investigation whereunder, I.O. had visited the place and found the house locked. The Investigating Officer apprehended them from different place where they were residing in hidden stay. This part of conduct is self-explanatory and when taken together along with other evidences having adduced on behalf of prosecution, it is found that the learned lower court had rightly, legally convicted and sentenced the appellant.

10. In the aforesaid admitted factual position whereunder marriage of Babita with appellant Chandan took place on 29.02.2012, as well as her disappearance from her Sasural is not at all brought under controversy. Now the only question remains whether it happens to be a case of dowry death or not? For the purpose of attracting dowry death, following ingredients are to be fulfilled:

- (a) The death should be within seven years of marriage.
- (b) It should be by burn or bodily injury or otherwise than under normal circumstance.
- (c) There should be demand of dowry.
- (d) Soon before her death the deceased must have been tortured relating to fulfillment of demand of dowry.
- (e) By her husband or relative of the husband.

After proper saturation of the required ingredients, presumption in terms of Section 113B of the Evidence Act comes into play, whereunder accused is put under obligation to rebut the



presumption, which the court is to presume in accordance thereof.

11. In **Maya Devi & Anr. vs. State of Haryana** reported in **2016 Cr.L.J 629**, the Apex Court has held:

14. In order to convict an accused for the offence punishable under Section 304-B IPC, the following essentials must be satisfied:

(i) the death of a woman must have been caused by burns or bodily injury or otherwise than under normal circumstances;

(ii) such death must have occurred within seven years of her marriage;

(iii) soon before her death, the woman must have been subjected to cruelty or harassment by her husband or any relatives of her husband;

(iv) such cruelty or harassment must be for, or in connection with, demand for dowry.

When the above ingredients are established by reliable and acceptable evidence, such death shall be called dowry death and such husband or his relatives shall be deemed to have caused her death. If the abovementioned ingredients are attracted in view of the special provision, the court shall presume and it shall record such fact as proved unless and until it is disproved by the accused. However, it is open to the accused to adduce such evidence for disproving such conclusive presumption as the burden is unmistakably on him to do so and he can discharge such burden by getting an answer through cross-examination of the prosecution witnesses or by adducing evidence on the defence side.

15. Section 113-B of the Evidence Act, 1872 speaks about presumption as to dowry death which reads as under:

“113-B. Presumption as to dowry death.—When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death.

Explanation.—For the purposes of this section, ‘dowry death’ shall have the same meaning as in Section 304-B of the Indian Penal Code (45 of 1860).”



As stated earlier, the prosecution under Section 304-B IPC cannot escape from the burden of proof that the harassment or cruelty was related to the demand for dowry and such was caused “soon before her death”. In view of the Explanation to the said section, the word “dowry” has to be understood as defined in Section 2 of the Dowry Prohibition Act, 1961 which reads as under:

“2. Definition of ‘dowry’.— In this Act, ‘dowry’ means any property or valuable security given or agreed to be given either directly or indirectly—

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person,

at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.”

12. Be that as it may, the Apex Court found it expedient in the interest of justice to direct the trial court to frame charge under Section 302 IPC also in an alternative wherever there happens to be trial relating to dowry death. The aforesaid direction has got a bearing as, times without number it has been found that instead of being cold blooded murder, the case is being transposed into dowry death at the behest of either I.O. or by having deceptive information, or some times, even having absence of ingredient, registered in order to shirk from performance of intricate mode of investigation which ultimately resultant in clean acquittal. It is needless to say, that no alternative charge under Section 302 IPC has been framed by the learned lower court.

13. In **Rajbir @ Raju and Another Vs. State of Haryana** reported in **(2010) 15 SCC 116**, the Apex Court held as



follows:

“7. We further direct all the trial courts in India to ordinarily add Section 302 to the charge of Section 304-B, so that death sentences can be imposed in such heinous and barbaric crimes against women. Copy of this order be sent to the Registrars General/Registrars of all High Courts, which will circulate it to all trial courts.”

14. Aforesaid Rajbir case has been in consideration in ***Jasvinder Saini v. State (Govt. of NCT of Delhi)*** reported in **(2013) 7 SCC 256** wherein it has been observed as follows:

“14. Be that as it may, the common thread running through both the orders is that this Court had in *Rajbir case (2010) 15 SCC 116* directed the addition of a charge under Section 302 IPC to every case in which the accused are charged with Section 304-B. That was not, in our opinion, the true purport of the order passed by this Court. The direction was not meant to be followed mechanically and without due regard to the nature of the evidence available in the case. All that this Court meant to say was that in a case where a charge alleging dowry death is framed, a charge under Section 302 can also be framed if the evidence otherwise permits. No other meaning could be deduced from the order of this Court.

15. It is common ground that a charge under Section 304-B IPC is not a substitute for a charge of murder punishable under Section 302. As in the case of murder in every case under Section 304-B also there is a death involved. The question whether it is murder punishable under Section 302 IPC or a dowry death punishable under Section 304-B IPC depends upon the fact situation and the evidence in the case. If there is evidence whether direct or circumstantial to prima facie support a charge under Section 302 IPC the trial court can and indeed ought to frame a charge of murder punishable under Section 302 IPC, which would then be the main charge and not an alternative charge as is erroneously assumed in some quarters. If the main charge of murder is not proved against the accused at the trial, the court can look



into the evidence to determine whether the alternative charge of dowry death punishable under Section 304-B is established. The ingredients constituting the two offences are different, thereby demanding appreciation of evidence from the perspective relevant to such ingredients. The trial court in that view of the matter acted mechanically for it framed an additional charge under Section 302 IPC without adverting to the evidence adduced in the case and simply on the basis of the direction issued in *Rajbir case (2010) 15 SCC 116*. The High Court no doubt made a half-hearted attempt to justify the framing of the charge independent of the directions in *Rajbir case (2010) 15 SCC 116*, but it would have been more appropriate to remit the matter back to the trial court for fresh orders rather than lending support to it in the manner done by the High Court.

16. In the light of what we have said above, the order passed by the trial court and so also that passed by the High Court are clearly untenable and shall have to be set aside. That would not, however, prevent the trial court from re-examining the question of framing a charge under Section 302 IPC against the appellant and passing an appropriate order if upon a prima facie appraisal of the evidence adduced before it, the trial court comes to the conclusion that there is any room for doing so. The trial court would in that regard keep in view the decision of this Court in *Hasanbhai Valibhai Qureshi v. State of Gujarat (2004) 5 SCC 347* where this Court has recognised the principle that in cases where “the trial court [upon] a consideration of broad probabilities of the case based upon total effect of the evidence and documents produced is satisfied that any addition or alteration of the charge is necessary, it is free to do so”. (SCC p. 350, para 10)

17. Reference may also be made to the decisions of this Court in *Ishwarchand Amichand Govadia v. State of Maharashtra (2006) 10 SCC 322* and the decision of the Calcutta High Court in *Rajendra Singh Sethia v. State 1989 Cr.L.J 255 (Cal)* and that delivered by the Allahabad High Court in *Shiv Nandan v. State of U.P. 2005 Cr.L.J. 3047 (All)* which too are to the same effect. In any such fresh exercise which the trial court may undertake, it shall remain uninfluenced by the observations made by the High Court on



merits of the case including those touching the probative value of the autopsy surgeon's opinion."

15. Again the matter has been considered by the Apex Court in ***Vijay Pal Singh v. State of Uttarakhand*** reported in **(2014) 15 SCC 163**, and held as follows:

"18. However, it is generally seen that in cases where a married woman dies within seven years of marriage, otherwise than under normal circumstances, no inquiry is usually conducted to see whether there is evidence, direct or circumstantial, as to whether the offence falls under Section 302 IPC. Sometimes, Section 302 IPC is put as an alternate charge. In cases where there is evidence, direct or circumstantial, to show that the offence falls under Section 302 IPC, the trial court should frame the charge under Section 302 IPC even if the police has not expressed any opinion in that regard in the report under Section 173(2) CrPC. Section 304-B IPC can be put as an alternate charge if the trial court so feels. In the course of trial, if the court finds that there is no evidence, direct or circumstantial, and proof beyond reasonable doubt is not available to establish that the same is not homicide, in such a situation, if the ingredients under Section 304-B IPC are available, the trial court should proceed under the said provision. In *Muthu Kutty v. State* (2005) 9 SCC 113, this Court addressed the issue and held as follows: (SCC pp. 122-23, para 20)

"20. A reading of Section 304-B IPC and Section 113-B, Evidence Act together makes it clear that law authorises a presumption that the husband or any other relative of the husband has caused the death of a woman if she happens to die in circumstances not normal and that there was evidence to show that she was treated with cruelty or harassed before her death in connection with any demand for dowry. It, therefore, follows that the husband or the relative, as the case may be, need not be the actual or direct participant in the commission of the offence of death. For those that are direct participants in the commission of the



offence of death there are already provisions incorporated in Sections 300, 302 and 304. The provisions contained in Section 304-B IPC and Section 113-B of the Evidence Act were incorporated on the anvil of the Dowry Prohibition (Amendment) Act, 1984, the main object of which is to curb the evil of dowry in the society and to make it severely punitive in nature and not to extricate husbands or their relatives from the clutches of Section 302 IPC if they directly cause death. This conceptual difference was not kept in view by the courts below. But that cannot bring any relief if the conviction is altered to Section 304 Part II. No prejudice is caused to the accused-appellants as they were originally charged for offence punishable under Section 302 IPC along with Section 304-B IPC.”

19. In a recent decision, this Court in *Jasvinder Saini v. State (Govt. of NCT of Delhi)* (2013) 7 SCC 256, observed thus: (SCC p. 262, para 15)

“15. It is common ground that a charge under Section 304-B IPC is not a substitute for a charge of murder punishable under Section 302. As in the case of murder in every case under Section 304-B also there is a death involved. The question whether it is murder punishable under Section 302 IPC or a dowry death punishable under Section 304-B IPC depends upon the fact situation and the evidence in the case. If there is evidence whether direct or circumstantial to prima facie support a charge under Section 302 IPC the trial court can and indeed ought to frame a charge of murder punishable under Section 302 IPC, which would then be the main charge and not an alternative charge as is erroneously assumed in some quarters. If the main charge of murder is not proved against the accused at the trial, the court can look into the evidence to determine whether the alternative charge of dowry death punishable under Section 304-B is established. The ingredients constituting the two offences are different, thereby demanding appreciation of evidence from the perspective relevant to such ingredients. The trial court in that view of the matter acted mechanically for it framed an additional charge under Section



302 IPC without adverting to the evidence adduced in the case and simply on the basis of the direction issued in *Rajbir case (2010) 15 SCC 116*. The High Court no doubt made a half-hearted attempt to justify the framing of the charge independent of the directions in *Rajbir case (2010) 15 SCC 116*, but it would have been more appropriate to remit the matter back to the trial court for fresh orders rather than lending support to it in the manner done by the High Court.”

20. Though in the instant case the accused were charged by the Sessions Court under Section 302 IPC, it is seen that the trial court has not made any serious attempt to make an inquiry in that regard. If there is evidence available on homicide in a case of dowry death, it is the duty of the investigating officer to investigate the case under Section 302 IPC and the prosecution to proceed in that regard and the court to approach the case in that perspective. Merely because the victim is a married woman suffering an unnatural death within seven years of marriage and there is evidence that she was subjected to cruelty or harassment on account of demand for dowry, the prosecution and the court cannot close its eyes on the culpable homicide and refrain from punishing its author, if there is evidence in that regard, direct or circumstantial.

21. In the instant case, the prosecution has not made any attempt to explain the ante-mortem injuries which conclusively point to the cause of death as asphyxia caused by strangulation. Yet, no serious attempt, it is disturbing to note, was done to connect the murder to its author(s).

22. No doubt, nothing prevents this Court from putting the appellants on notice as to why the punishment should not be appropriately enhanced but why we reluctantly decline to do so, we shall explain in the latter part of the judgment.

23. In two of the early decisions of this Court, after the introduction of Section 304-B IPC, the ingredients of the offence and the interplay of Section 304-B IPC with Sections 498-A, 302, 306 IPC have also been discussed. In *State of Punjab v. Iqbal Singh (1991) 3 SCC 1*, the Court in para 8 stated that: (SCC pp. 9-10, para 8)

“8. The legislative intent is clear to curb



the menace of dowry deaths, etc., with a firm hand. We must keep in mind this legislative intent. It must be remembered that since crimes are generally committed in the privacy of residential homes and in secrecy, independent and direct evidence is not easy to get. That is why the legislature has by introducing Sections 113-A and 113-B in the Evidence Act tried to strengthen the prosecution hands by permitting a presumption to be raised if certain foundational facts are established and the unfortunate event has taken place within seven years of marriage. This period of seven years is considered to be the turbulent one after which the legislature assumes that the couple would have settled down in life. If a married woman is subjected to cruelty or harassment by her husband or his family members Section 498-A IPC would be attracted. If such cruelty or harassment was inflicted by the husband or his relative for, or in connection with, any demand for dowry immediately preceding death by burns and bodily injury or in abnormal circumstances within seven years of marriage, such husband or relative is deemed to have caused her death and is liable to be punished under Section 304-B IPC. When the question at issue is whether a person is guilty of dowry death of a woman and the evidence discloses that immediately before her death she was subjected by such person to cruelty and/or harassment for, or in connection with, any demand for dowry, Section 113-B of the Evidence Act provides that the court shall presume that such person had caused the dowry death. Of course if there is proof of the person having intentionally caused her death that would attract Section 302 IPC. Then we have a situation where the husband or his relative by his wilful conduct creates a situation which he knows will drive the woman to commit suicide and she actually does so, the case would squarely fall within the ambit of Section 306 IPC. In such a case the conduct of the person would tantamount to inciting or provoking or virtually pushing the woman into a desperate situation of no return which would compel her to put an end to her miseries by committing suicide."



16. In ***Shamnsaheb M. Multtani v. State of Karnataka*** reported in **(2001) 2 SCC 577**, it has been held:

“32. The serious consequence which may ensue to the accused in such a situation can be limned through an illustration: If a bride was murdered within seven years of her marriage and there was evidence to show that either on the previous day or a couple of days earlier she was subjected to harassment by her husband with demand for dowry, such husband would be guilty of the offence on the language of Section 304-B IPC read with Section 113-B of the Evidence Act. But if the murder of his wife was actually committed either by a dacoit or by a militant in a terrorist act the husband can lead evidence to show that he had no hand in her death at all. If he succeeds in discharging the burden of proof he is not liable to be convicted under Section 304-B IPC. But if the husband is charged only under Section 302 IPC he has no burden to prove that his wife was murdered like that as he can have his traditional defence that the prosecution has failed to prove the charge of murder against him and claim an order of acquittal.

33. The above illustration would amplify the gravity of the consequence befalling an accused if he was only asked to defend a charge under Section 302 IPC and was alternatively convicted under Section 304-B IPC without any notice to him, because he is deprived of the opportunity to disprove the burden cast on him by law.

34. In such a situation, if the trial court finds that the prosecution has failed to make out the case under Section 302 IPC, but the offence under Section 304-B IPC has been made out, the court has to call upon the accused to enter on his defence in respect of the said offence. Without affording such an opportunity to the accused, a conviction under Section 304-B IPC would lead to real and serious miscarriage of justice. Even if no such count was included in the charge, when the court affords him an opportunity to discharge his burden by putting him to notice regarding the prima facie view of the court that he is liable to be convicted under Section 304-B IPC, unless he succeeds in disproving



the presumption, it is possible for the court to enter upon a conviction of the said offence in the event of his failure to disprove the presumption.

35. As the appellant was convicted by the High Court under Section 304-B IPC, without such an opportunity being granted to him, we deem it necessary in the interest of justice to afford him that opportunity. The case in the trial court should proceed against the appellant (not against the other two accused whose acquittal remains unchallenged now) from the stage of defence evidence. He is put to notice that unless he disproves the presumption, he is liable to be convicted under Section 304-B IPC.”

17. At the stage of framing of charge, though there happens to be obligation on the trial court to see the materials having placed in tune with Section 173 Cr.P.C. and further, analyze the same to find out what kind of offences are coming out therefrom whereunder charge is to be framed. Side by side, whether those materials are sufficient to attract alternative charge. From the L.C. record, it is apparent that the learned lower court was completely influenced with mechanical way of dealing with the issue instead of properly exercising the same as prescribed under Section 227, 228 of the Cr.P.C. Lower court had an opportunity even during course of trial in terms of Section 216 Cr.p.C. which might have take recourse

18. The aforesaid issue has properly been discussed coupled with prospect of retrial in Lalan Kumar Vs. The State of Bihar reported in 2017(3) PLJR 281, as well as in Amarnath Mahato & Another Vs. The State of Bihar reported in 2017(3) BBCJ 202. I don't intend to burden this judgment with repeating those judgments, save and except observing that on account of



fault of the lower court, the matter has not been properly thrashed at an initial stage, whereupon miscarriage of justice has occurred. Details thereof, is forbidden as it may influence the lower court adverse to the interest of appellants.

19. That being so, the judgment impugned is set aside. Both the appeals are allowed. Matter is remitted back to the learned lower court to proceed afresh after framing charge under Section 302 IPC in an alternative, in accordance with law. Appellants are on bail, hence are directed to appear before the learned lower court within fortnight and during said period, privilege of bail is being extended, with a prayer which the learned lower court will consider in accordance with law. After expiry of the aforesaid period, the privilege of bail which the appellants are enjoying will automatically cease to survive, and the learned lower court will be at liberty to proceed against the appellants in accordance with law in case there happens to be absence of the appellants.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/NAFR	A.F.R.
CAV DATE	10.10.2017
Uploading Date	06.12.2017
Transmission Date	06.12.2017

