

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.288 of 2013

Arising Out of PS.Case No. -169 Year- 2010 Thana -KADMA District- KATIHAR

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Baliram Rai S/O Late Tegun Rai Resident Of Village- Jigni, P.S.- Balia Belon,
District- Katihar.

.... Appellant/s

Versus

The State Of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Sanjeev Kumar Singh

For the Respondent/s : Mr. S.N Prasad, APP

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CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL

And

HONOURABLE MR. JUSTICE SANJAY KUMAR

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL)

Date: 09-05-2017

The present appeal filed by the sole appellant assails the judgment of conviction dated 31st January, 2013 passed by the learned Trial Court in S.T. No.494 of 2010 whereby he was held guilty under Section 302 IPC and by order of sentence dated 04.02.2013, he was directed to suffer R.I. for life besides imposition of fine with default clause.

2. The prosecution case, in short, is that the deceased was living in the house of the appellant with whom he had forcibly married. The informant is the son of the deceased born from Sheru Rai with whom the deceased was first married. On the preceding night of 17.08.2010, the appellant had come home in drunken state and was



assaulting the deceased. P.Ws. 1 and 2 went to the house of the appellant, pacified the matter and thereafter returned. The following morning, the dead body of the deceased was found in the house of the appellant. The prosecution case further is that the villagers took the appellant in their custody and upon arrival of the Police, his formal arrest was effected after recording of the fardbeyan. The fardbeyan (Ext.-4) was recorded by the S.H.O. of Balia Belon O.P. (P.W.-8) falling within Kadwa Police Station on 17.08.2010 at 10.30 a.m. at the house of the appellant. P.W.-1 is the uncle of the informant and who became witness to the recording of the F.I.R. The fardbeyan recorded by P.W.-8 was sent for recording of a formal F.I.R. (Ext.7) under the orders of the S.H.O. of the Kadwa Police Station. P.W.-8 prepared the inquest report of the dead body lying at the veranda of the house of the appellant in presence of P.Ws. 4 and 5. The inquest report is Ext.2. The dead body was thereafter dispatched for autopsy. P.W.-3 conducted the post-mortem examination on the dead body on 17.08.2010 and prepared the post mortem report (Ext.-1). Upon conclusion of investigation, charge-sheet was laid against the appellant which gave rise to the present trial in which the prosecution, in order to bring home the guilt, examined 08 prosecution witnesses. The defence also adduced oral evidence and examined D.W.-1 to prove the *alibi* of the appellant taken by him in his statement under



Section 313 of the Cr.P.C. On a critical analysis of the evidence, the learned Trial Court found that there was overwhelming evidence available on record to prove the guilt of the appellant as the deceased was found dead in the house of the appellant. It was a case of homicidal death as she was strangled. The evidence of the doctor (P.W.-3) had fully supported the prosecution case and, accordingly, the conviction was recorded against the appellant.

3. Before dealing with the contentions of the parties, the resume of the witnesses may be stated. P.W.-1 Kalu Rai is the uncle of the informant and also witness of recording of fardbeyan. He has spoken about the incident that had occurred at the house of the appellant on the previous night when the appellant in a drunken state had come home and had subjected the deceased to physical assault. The following morning, her dead body was found. P.W.-2 Manik Rai is the son of the deceased from the first husband. He too has stated about the incident and the fact that the deceased was living since last few years in the house of the appellant. He has also spoken about the assault on her by the appellant on the preceding evening and that the following morning the dead body was found in the house of the appellant. P.W.-3 Dr. Tanvir Haider is the autopsy surgeon who held autopsy and proved the post-mortem report (Ext.-1). P.W.-4 Khidish Rai is a neighbour. From his testimony, it has come that the deceased



was although wife of Sheru Rai but she was living with the appellant where she was found dead. He is also a witness to the inquest report. P.W.-5 Bhikhari Rai is the formal witness in whose presence the inquest report was prepared. P.W.-6 Shiv Shankar Rai is a co-villager of the appellant and the prosecution got him declared hostile and cross-examined him to the effect that in his statement made under Section 161 Cr.P.C., he had fully supported the prosecution case as narrated by P.Ws.-1 and 2. P.W.-7 Tumani Devi is wife of P.W.-5. The prosecution did not rely on her evidence as she was declared hostile. P.W.-8 Yogendra Prasad is the Police Officer who was then Incharge of the Balia Belon O.P. He has deposed that in the morning of 17.08.2010, he got information about unnatural death of a lady in the village. After recording a *Sanha*, he proceeded to the village where the dead body lying in the house of the appellant was found. The appellant was found captivated by the villagers. He arrested the appellant under a memo at his house and thereafter prepared the inquest report on the dead body and dispatched it under a memo for holding post-mortem examination. D.W. 1 has been examined on behalf of the appellant to support the alibi of the appellant.

4. We have heard Mr. Sanjeev Kumar Singh for the appellant and Mr. S.N. Prasad, APP for the state.

5. It has been submitted that it is a case where there is no



eye witness to the occurrence. The prosecution has completely failed to prove the circumstances indicating only the guilt of the appellant. No witness has spoken about the catching of the appellant at his house whereas P.W.-8 has stated that the arrest of the appellant was effected at his house when he found that the villagers had caught and detained him in the house. P.W.-8 is not the Investigating Officer of the case. From the F.I.R., it shall appear that another police officer of the said Police Out Post was deputed as the Investigating Officer who has not been examined in this case. Non-examination of the I.O. has caused serious prejudice to the appellant.

6. In contra, Mr. Prasad has argued that from the evidence of P.Ws.1 and 2, it shall appear that the deceased was living since last 4-5 years in the house of the appellant. Referring to the statement of the appellant made under Section 313 Cr.P.C., it has been submitted that this factum has been admitted by him. On the previous evening, the appellant had indulged in brutally assaulting the deceased when the villagers had to intervene. P.Ws. 1 and 2 are the witnesses who had gone to the house of the appellant to intervene and pacify. The following morning, dead body was found in the house of the appellant. This is a strong circumstance going against the appellant.

7. We have, in the light of the rival submissions of the parties, minutely gone through the evidence. From the evidence of



P.Ws. 1 and 2, it is more than evident that the deceased was living in the house of the appellant since last several years. What was the status of the deceased in the house of the appellant is not very relevant. However, we may note from the statement of the appellant made under Section 313 Cr.P.C. that the victim was living in the house of the appellant as his legally wedded wife. It is further found from the testimony of P.Ws. 1 and 2 that on the previous night, the deceased was subjected to brutality by the appellant who was drunk when the villagers including P.Ws. 1 and 2 had arrived and pacified. The following morning, they could know about the killing of the deceased and had seen the dead body lying in the house of the appellant. P.W.3 is the doctor who held the autopsy. His findings in the post-mortem report (Ext.-1) are as follows:

“Internal postmortem- On dissection of neck, fracture of corcoid cartilage is seen in the neck.

On dissection of skull- Brain congested

On dissection of thorax- lungs congested, Heart right side full of blood & left side empty.

On dissection of Abdomen, stomach contains muddy colour fluid with no specific smell

External genialities are intact. No natural and original discharge present.

Cause of death:- In my opinion, cause of death is due to Asphyxia due to compression of neck by the human hands.

Time elapses since death within 24 hrs.”

8. The estimate of the time of death fits in the prosecution case that she was done to death in the intervening night of 16th and



17th of August, 2010. How the death has occurred has also been clearly explained by the doctor. According to him, the death was due to asphyxia and due to compression of neck by the human hands. On dissection, fracture of corcoid cartilage was found. This leaves no doubt in the mind of the Court that it was a case of homicidal death. She was strangled to death.

9. The following circumstances clearly emerge from the evidence: (i) The deceased was living in the house of the appellant as his wife; (ii) on the previous night, the appellant was seen assaulting the deceased at his house when the villagers including P.Ws. 1 and 2 had come and intervened; (iii) the following morning, the dead body of the deceased was found in the house of the appellant; (iv) the death of the deceased was homicidal.

10. It has been urged by the appellant that no witness examined in this case has narrated the ocular account of the actual killing of the deceased by the appellant. The attending circumstances do not conclusively prove the guilt of the appellant. The appellant was arrested or caught in the house by the co-villagers and on arrival of Police, his formal arrest was made, may be a relevant circumstance but the prosecution cannot rely thereon as the said incriminating circumstance was not put to the appellant by the Court when his statement under Section 313 Cr.P.C. was recorded.



11. We have perused the statement of the appellant made under Section 313 Cr.P.C. where all the incriminating circumstances were put to him except that he was apprehended or caught by the villager in the house and later handed over to the Police. In these circumstances, the Court would exclude the aforesaid part of the prosecution evidence. The place of occurrence is the house of the appellant. The appellant has admitted the deceased as his legally wedded wife who was living with him as such. The crime was committed inside the house and at a time when there is no possibility of any person witnessing it. We have already indicated the other incriminating circumstances which have crystallized in the evidence of the prosecution. How the deceased died inside the house occupied by her and the appellant was specially within the knowledge of the appellant. The law enjoins a legal duty on such person or accused to explain those circumstances. There is no such explanation offered by the appellant.

12. Counsel for the State, in order to amplify this legal burden on the accused, has appropriately relied *on Trimukh Maroti Kirkan vs. State of Maharastra (2006) 10 SCC 681*, wherein the Hon'ble Apex Court, emphasizing the pious duty of the judge presiding over the criminal trial, held as under in paragraphs 14 and 15 of the report:-



“14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in the circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland vs. Director of Public Prosecutions*¹ – quoted with approval by Arijit Pasayat, J. in *State of Punjab v. Karnail Singh*² .) The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:

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

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon



the prosecution and there is no duty at all on an accused to offer any explanation.”

13. Elaborating on Section 106 of the Evidence Act, the Apex Court in the case of ***Ganeshlal vs. State of Maharashtra (1992) 3 SCC 106*** and, again in ***Dnyaneshwar vs. State of Maharashtra (2007) 10 SCC 445*** wherein murder had taken place inside the house wherein the appellant had not set up a case that the offence was committed by somebody else or that there was a possibility of an outsider committing the offence, it was held that the accused was under an obligation to give explanation for the cause of death.

14. The law settled on this point, if applied to the facts of the present case, we see no difficulty in holding that the appellant was responsible for causing death of the victim (his wife) in his house which get corroboration from other attending proved circumstances.

15. We have carefully gone through the entire evidence on record including the evidence of D.W. 1. There is no explanation offered by the defence as to how the deceased died inside the house of the appellant during night. D.W.1, on the contrary, has been produced only to prove the plea of *alibi* taken by the appellant in his statement made under Section 313 Cr.P.C. This witness has stated that he too was lodged in the jail custody in connection with a case of kidnapping/abduction where he met the appellant in the jail. Even if



his examination-in-chief do not support the case of *alibi*. In addition to what we have stated above with respect to the proved circumstances against the appellant, a plea of *alibi* taken by the defence having not been proved, would be considered yet another incriminating circumstance against the appellant. There is no evidence on record that apart from the deceased and the appellant, there was any other family member or stranger available in the house of the appellant on the alleged date and time of occurrence.

16. The discussions made above lead us to conclude that the appellant, on the relevant date and time of occurrence, had committed murder of the deceased by strangulation while they were together inside the house of the appellant. The charge levelled against the appellant is proved.

17. Resultantly, we find no merit in this appeal. It is, accordingly, dismissed.

(Kishore Kumar Mandal, J)

(Sanjay Kumar, J)

Pankaj/-

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