

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.728 of 2011

Arising Out of PS.Case No. -0 Year- null Thana -null District- NALANDA (BIHARSHARIFF)

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Bijendra Raut, son of Late Shri Raut, Resident of village- Bhathar, P.S.-Tharthari,
District- Nalanda

.... Appellant

Versus

The State Of Bihar

.... Respondent

with

=====

Criminal Appeal (DB) No. 542 of 2011

Arising Out of PS.Case No. -0 Year- null Thana -null District- NALANDA (BIHARSHARIFF)

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Lallu Devi W/O Bijendra Raut, Resident of Bhattar, Police Station- Tharthari,
District- Nalanda

.... Appellant

Versus

The State Of Bihar

.... Respondent

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Appearance :

(In both cases)

For the Appellants : Mr. Rajesh Kumar Singh, Advocate
Mr. Anil Kumar Singh, Advocate

For the State : Mr. Ashwani Kumar Sinha, A.P.P.
Mr. Shiwesh Ch. Mishra, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH
And

HONOURABLE MR. JUSTICE ARUN KUMAR

ORAL JUDGMENT

(Per: **HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH**)

Date: 23-03-2017

Both the appellants have been convicted under Sections
302/34, 120B and 201 of the Indian Penal Code by judgment, dated
28.4.2011 passed in Sessions Trial No.15 of 2009 by learned



Additional Sessions Judge-F.T.C.2, Nalanda at Biharsharif.

2. The prosecution case as made out in the fardbeyan of Lallu Devi, wife of Ravindra Raut of village Thartharidih, P.S. Tharthari, District Nalanda recorded by S.I., P.N. Mehta SHO3 P.S. at village Bhatha on 19.12.2007 at 7.05 A.M. at the door of the accused Bijendra Raut in short is as follows :

3. Malti Devi (Deceased) was married with accused Bijendra Raut about 25 years back. The informant's Nanad, Malti Devi is the third wife of Bijendra Raut. The first wife of Bijendra Raut died early, where after he contracted second marriage with Lallu Devi, who is one of the accused in the instant case. Lallu Devi remained with her husband for sometime and later parted ways. Bijendra Raut, thereafter, married the informant's Nanad. However, just after five years of marriage of Bijendra Raut with Malti Devi, his second wife, Lallu Devi returned to her Sasural. Since 1999, Bijendra Raut and his second wife started torturing the informant's Nanad, who both lodged a complaint with the police and also filed a maintenance case in which Bijendra Raut was directed to pay a sum of Rs.300/- per month by way of maintenance. Bijendra Raut was not very particular in paying the maintenance amount and mostly defaulted in its payment. Frustrated with the torture committed by Bijendra Raut and Lallu Devi, Malti Devi was compelled to seek shelter at her brother's



house.

4. On 8.12.2007, Bijendra Raut along with his 2nd wife Lallu Devi came to Malti Devi's Naihar to take her back. They assured good behaviour in future. Relying on their assurance, the informant allowed them to take Malti Devi back.

5. In the early morning of 9.12.2007, she learnt from the villagers that her Nanad Malti Devi has been murdered by Bijendra Raut and his wife Lallu Devi with the help of two other persons, namely, Pramanand Raut and Tipu Raut. On hearing the information, the informant along with others proceeded for Malti Devi's Sasural. As soon as she reached her Sasural, she found Lallu Devi escaping. She managed to hold Lallu Devi, who was unable to explain the death of Malti Devi. She learnt from one Munna Raut (P.W.3) that the previous night, he heard hullah, whereupon he came to the house of the appellants and saw them dumping Malti Devi in a tinned box. On search, the blood clad dead body of Malti Devi was found in a tinned Trunk. Thereafter, she rang police station, and also narrated the incident to local Chaukidar.

6. On the basis of fardbeyan of the informant, Tharthari P.S. Case No.35 of 2007 dated 09.12.2007 was registered under Sections 302/34, 120B/201 of I.P.C. The I.O. (P.W.12), in course of investigation, took the restatement of the informant as well as the



statement of other witnesses. He prepared inquest report and also seized file of maintenance case and L.I.C. papers of Lallu Devi lying in the Trunk. The I.O. obtained postmortem report and finding the case true against the appellants, submitted charge sheet while not sending the rest two F.I.R. named accused, namely, Pramanand Raut and Tipu Raut. The learned Magistrate took cognizance of offence and committed the case to the court of Sessions. Charges were framed against the appellants under Sections 302/34, 201/34 and 120B of the I.P.C. They pleaded not guilty and claimed to be tried. The case of the defence in the statement under Section 313 of the Cr.P.C. was complete denial of the involvement in the crime. The trial court, relying upon the evidence of the informant (P.W.9), the Chaukidar (P.W.10), the I.O. (P.W.12) as well as postmortem report, convicted the appellants under Sections 302/34, 201/34 and 120B of I.P.C.

7. The prosecution in support of the case examined as many as 12 witnesses, who are as follows :-

1. Shravan Kumar
2. Vijendra Paswan
3. Munna Raut
4. Dharam Sheela Devi
5. Anita Devi
6. Sri Prakash Mahto
7. Meena Devi
8. Rajesh Kumar
9. Leela Devi
10. Devnandan Paswan
11. Dr. Faisal Arshad
12. Brajnandan Mahto



8. Out of these 12 witnesses, P.W.1 to P.W.7 have turned hostile and have not supported the prosecution case. We would in brief notice the evidence of prosecution witnesses including those who had turned hostile.

9. P.W.1, Shravan Kumar identified the signature of the informant on inquest but stated that he has not made any statement before the police. P.W.2, Vijendra Paswan, who is the seizure list witness has admitted his thumb impression on the inquest report, but stated to have given thumb impression on a blank paper. P.W.3, Munna Raut is own brother of the appellant Bijendra Raut. He stated that he has not seen the alleged occurrence and does not know as to how Malti Devi died. He denied having made any statement before the police. P.W.4, Dharam Sheela Devi is wife of P.W.3 and also a witness to the seizure list. She too has denied, seeing the occurrence. P.W.5, Anita Devi, P.W.6, Sri Prakash Mahto and P.W.7, Meena Devi have not supported the prosecution case. They stated that they have not been examined by the police. All the aforesaid seven witnesses were declared hostile as they had retracted from their earlier statements made to the police.

10. P.W.8, Rajesh Kumar is a photographer who runs a studio. He stated that on call of the Officer-in-Charge of Tharthari Police Station, he came with Camera to the police station and took the



photographs of the deceased. P.W.9 along with Chaukidar (P.W.10) are the two most relevant witnesses in the case and the prosecution case hinges on their evidence.

11. P.W.9, Leela Devi is the own Bhabhi of the deceased. In her evidence, she stated that her Nanad Malti Devi was married to Bijendra Raut about 25 years back. After 3-4 years of marriage, her husband ousted her from the house. Thereafter, her Nanad began to live with her at her paternal house. She stated that Malti Devi had filed a maintenance case against her husband in which she was awarded a maintenance cost of Rs.300/-. However, her husband often failed to pay the maintenance amount. After some time, the appellant Bijendra Raut along with his second wife Lallu Devi came and on false assurance of good behaviour, took her back on 8.12.2007. Two days, thereafter her Nanad was murdered by her husband Bijendra Raut and his second wife Lallu Devi. She learnt about the murder of her Nanad from Munna Raut (P.W.3) and Sharvan Kumar (P.W.1). On hearing the news of her dead, she rushed to Nanad's Sasural, where the appellant had put her dead body in a Trunk after committing her murder. In the meantime, the Chaukidar also informed the police about the incident. The police also was shown the dead body kept in the Trunk. The police recorded her fardbeyan and finding the same to be correct put her thumb



impression. She stated that the police station is 2-3 kms from her house.

12. P.W.10, Devnandan Paswan is a local Chaukidar. He too has supported the prosecution case and stated that the occurrence took place on the relevant night three years ago. In the morning at 4.00 A.M., he was at his house when P.W.3 (Munna Raut) came and informed him that Bijendra Raut and his wife Lallu Devi had killed Malti Devi. On hearing the news, he went to the house of Bijendra Raut, where he found Lallu Devi hiding in the Banseri. The other accused Bijendra Raut succeeded in escaping. He informed the Tharthari local police on phone. On receipt of information, the police arrived and with the help of local villagers, the Trunk was brought toward the door step. The Trunk was also opened in presence of the I.O. The police recorded the fardbeyan and the formal F.I.R. and also prepared inquest report. As per the inquest report, the deceased had sustained injuries on her left eye and was bleeding. There was cut mark on her neck. According to the doctor, the time elapsed since death was within 6-36 hrs. However, the doctor did not mention any specific cause for the death and as such the viscera was kept for chemical examination.

13. P.W.11, Dr. Faisal Arshad stated that on 9.12.2007, he was posted at Sadar Hospital Bihar Sharif. On the same day at 3.00



P.M., he conducted postmortem examination on the dead body of Malti Devi. He found the following injuries on the person of the deceased : External injury – “Lacerated wound over the left upper eye – lid, two in numbers, measuring $\frac{1}{2}$ ’ x $\frac{1}{2}$ ’ and which was through and through depth. Blood remained from nostril to angle of mouth over face area. (ii) There is semi circular burnt (probably chemical burnt) over neck mid part.”

14. P.W.12, Brajnandan Mahto is the Investigating Officer of the case. He stated that on 9.12.2007, he was posted as Officer-in-charge of Tharthari Police Station. He received telephonic information regarding death of wife of Bijendra Raut of village Bhathar. After entering Sanha, bearing Sanha Case No.156 of 2007 dated 9.12.2007 at 6.00 A.M., he proceeded with the police party and reached the P.O. at 7.00 A.M. He recorded the fardbeyan of Leela Devi (P.W.9), wife of Bijendra Raut and Bhabhi of the deceased Malti Devi. He proved the formal fardbeyan of Leela Devi and also the formal F.I.R. On inspection of the house, he saw the dead body kept in a Trunk in the north east room of Bijendra Raut, with the help of female member. In presence of the witnesses, the dead body was taken out. He also got the photographs of the dead body with the help of Photographer (P.W.8). He found blood on the bed on which the dead body was laid. In course of investigation, he recorded the



statement of witnesses and obtained postmortem of the deceased done.

15. Learned counsel for the appellants submits that there is no eye witness of the occurrence and the prosecution has not produced sufficient circumstances to establish the guilt of the appellants. The I.O. in paragraphs 25 and 27 of his deposition has stated that he did not make any enquiry regarding the specific place where the deceased was murdered. The cause of death has not been established as the doctor, who conducted the postmortem report, was unable to ascertain the cause of death. The defence argued that Malti Devi after leaving the house of the husband, used to stay at the house of Munna Raut, the own brother of Bijendra Raut, who may have killed her. There is no consistent evidence as to who informed the police of the incident.

16. Conversely, Mr. Ashwani Kumar Sinha, learned counsel appearing for the State has defended the conviction and sentence against the appellants. He submits that the dead body was found in a Trunk in the house of the appellants Bijendra Raut and Lallu Devi. The death was homicidal as the deceased had sustained injuries on her person. As the death had occurred in the house of the appellants, it can be safely inferred that they alone would be having special knowledge with respect to the death unless they are able to



provide reasonable explanation that someone else has committed the death.

17. In reply, the appellants submit that neither an application under Section 103 or 106 of the Evidence Act would absolve the prosecution from the duty of discharging its initial or general and primary burden of proving the guilt of the appellant beyond reasonable doubt.

18. In support of his submission, learned counsel has relied upon paragraphs 9 and 10 of the judgment of the Apex Court in the case of **Sawal Das Vrs. State of Bihar** reported in (1974) 4 **Supreme Court Cases 193**, which is quoted below :-

“9. Learned counsel for the appellant contended that Section 106 of the Evidence Act could not be called in aid by the prosecution because that section applies only where a fact relating to the actual commission of the offence is within the special knowledge of the accused, such as the circumstances in which or the intention with which an accused did a particular act alleged to constitute an offence. The language of Section 106 Evidence Act does not, in our opinion, warrant putting such a narrow construction upon it. This Court held in *Gurcharan Singh v. State of Punjab*, (AIR 1956 SC 460 : 1956 Cri LJ 827) that the burden of proving a plea specifically set up by an accused, which may absolve him from criminal liability, certainly lies



upon him. It is a different matter that the quantum of evidence by which he may succeed in discharging his burden of creating a reasonable belief, that circumstance, absolving him from criminal liability may have existed, is lower than the burden resting upon the prosecution to establish the guilt of an accused beyond reasonable doubt.

10. Neither an application of Section 103 nor of 106 of the Evidence Act could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or, which makes out a prima facie case, that the question arises of considering facts of which the burden of proof may lie upon the accused. The crucial question in the case before us is : Has the prosecution discharged its initial or general and primary burden of proving the guilt of the appellant beyond reasonable doubt ?”

19. There cannot be any dispute to the proposition of law laid down by the Hon’ble Apex Court that in a criminal case, the burden of proof is on the prosecution and Section 106 is not intended to relieve it of that duty. On the contrary, the provision is designed to meet exceptional circumstances where certain facts pertaining to a crime that can be only known to be accused and it would be virtually impossible for the prosecution to prove these facts, which are



especially within the knowledge of the accused. The Hon'ble Apex Court in case of **Shambhu Nath Mehra Vrs. The State of Ajmer reported in 1956 Supreme Court 404**, while interpreting Section 106 of the Evidence Act observed as follows in para-11, which is quoted herein below for easy reference :

“11. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and S. 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are “especially” within the knowledge of the accused and which he could prove without difficulty or inconvenience.

The word “especially” stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not.

It is evident that that cannot be the intention & the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the



crime for which he is tried. These cases are Attygalle v. The King, 1936 PC 169 (AIR V 23) (A) and Seneviratne v. R, 1936-3 ALL ER 36 at p. 49 (B).”

20. Again the Hon’ble Apex Court in **Gian Chand v. State of Haryana reported in (2014) 4 SCC (Cri) 226** reiterated the same view taken by the Hon’ble Apex Court in the case of **Shambhu Nath Mehra (Supra)**.

21. In the light of the law laid down by the Hon’ble Apex Court, we would examine whether the prosecution has been able to establish that the deceased was murdered in her Sasural by her husband and the second wife, who are appellants in this case.

22. The evidence of P.W.9, the informant , P.W.10, the local Chaukidar and P.W.11 established beyond all doubt that the dead body of the deceased was found in the house of the appellants, namely, Bijendra Raut and Lallu Devi. The cut marks on the neck of the deceased further goes to show that the death of the deceased was not natural but homicidal in nature. There is nothing in the evidence of the witnesses to doubt their testimony. As the deceased died in the house of the appellants, it would be difficult for the prosecution to produce eye witness with respect to commission of murder, if the facts would be specially within the knowledge of the accused. The defence has not been able to produce any material to



explain much less demonstrate that someone else killed the deceased and kept her body in the Trunk.

23. Situated thus, we have no hesitation in coming to the conclusion that there are sufficient circumstances to hold the appellants guilty for committing the murder of the deceased in conspiracy with each other and also trying to conceal the dead body to wipe off the evidence.

24. In the result, we do not find any reason to interfere with the order of conviction and sentence passed by trial court. Accordingly, the appeals are dismissed. The appellant Bijendra Raut, who is in custody for 9 ½ years would remain so to serve the remaining period of his custody. The appellant Lallu Devi, who is on bail, must surrender in the court below to serve the balance period of her sentence as well.

(Samarendra Pratap Singh, J)

(Arun Kumar, J)

N.H./-

AFR/NAFR	AFR
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