

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.348 of 2015

Arising Out of PS.Case No. -37 Year- 2011 Thana -SRINAGAR District-
WESTCHAMPARAN(BETTIAH)

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1. Shamsher Alam Son of Mahammadin Miyan, resident of village- Baghambarpur
Khalwa Tola, P.S.- Srinagar, District- West Champaran

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Md. Anis Akhtar,
Mr. Arif Daula Siddique,
Mr. Mahtab Alam, Advocates.

For the Respondent/s : Mr. Syed Ashfaque Ahmad, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 08-03-2018

Vide judgment of conviction dated 08.04.2015, sole appellant, Shamsher Alam has been found guilty for an offence punishable under Section 304B IPC, 201 IPC and vide order dated 10.04.2015, he has been sentenced to undergo RI for 8 years under Section 304B IPC, to undergo RI for 3 years as well as to pay fine appertaining to Rs. 5,000/- and in default thereof, to undergo SI for 3 months additionally and further directed to run the sentences concurrently, by Additional District & Sessions Judge-3rd, West Champaran at Bettiah in Sessions Trial No. 54/2012.

2. PW-2, Ibrahim Miyan gave his Fard-e-beyan on 27.07.2011 at about 11:15 hours disclosing therein that he married his daughter Shamima Khatoon with appellant, Shamsher Alam son of Mahammadin Miyan, resident of village- Baghambarpur, Khalwa



Tola, P.S.- Srinagar, District- West Champaran on 28.04.2008 and at the time of marriage, he had given dowry according to his means. Since one and half years, her Sasuralwala started demanding Rs. 30,000/- in lieu of dowry and for that they began to torture. Lastly a case was instituted in the court. Then thereafter, at the intervention of villagers, the matter was amicably sorted out and in pursuance thereof, they (accused) have executed Panchnama on 19.12.2010. They, after giving an undertaking that they will not torture Shamima, nor they will advance any kind of demand of dowry, got Bidai. Again, his daughter was subjected to torture for fulfillment of Rs. 30,000/- in lieu of dowry which his daughter communicated to him. On this information, he inquired from his son-in-law whereupon he had informed that he is going to Mumbai with Shamima. Getting this information, he came to Baghambarpur, Khalwa Tola, to meet his daughter where, he has not found her. On query, his son-in-law was not consistent. Then thereafter, they pressurized whereupon, he disclosed that after causing murder of his wife has concealed the dead body beneath soil of the kitchen. He also made query from the villagers who disclosed that Shamsher, Mahammadin Mian, Salmi Begam, Mausi of Shamsher Alam, elder sister of Shamsher Alam, they all on account of non fulfillment of demand of dowry, caused murder of his daughter and then, buried the dead body in the kitchen



in order to screen themselves.

3. On the basis of aforesaid Fard-e-beyan, Srinagar PS Case No. 37/2011 was registered followed with investigation as well as submission of charge-sheet against the appellant keeping the investigation pending against the others whereupon trial commenced and concluded in a manner subject matter of instant appeal.

4. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is that of complete denial of the occurrence. It has also been pleaded that deceased died of cardiac arrest in the kitchen itself while cooking food which was communicated to the prosecution party but prosecution party taking undue advantage advanced illegal demand which he failed to fulfill whereupon, taking the police in collusion, got this case filed. However, neither oral nor documentary evidence has been adduced on behalf of defence.

5. In order to substantiate its case, prosecution had examined altogether 7 PWs, those are, PW-1, Shahida Khatoon, mother of the deceased, PW-2, Ibrahim Miyan , father of the deceased (informant) PW-3, Babuddin, co-villager of the appellant, PW-4, Shah Mohammad Miyan, Co-villager of the appellant, PW-5, Khurshid Alam, brother-in-law of PW-2, PW-6, Sant Chaudhary, co-villager of the appellant, and PW-7, Fard Hussain. Side by side had



also exhibited Ext-1, Signature of informant over Fard-e-beyan, As stated above neither oral nor documentary evidence has been adduced on behalf of defence.

6. Manifold arguments have been raised on behalf of appellant in order to challenge the finding having been recorded by the learned lower court. The first and foremost argument happens to be that on account of non examination of doctor as well as non exhibition of PM report, the cause of death is not known. That being so, one of the major ingredients attracting Section 304B IPC that death should be by burn or by bodily injury or otherwise than in normal circumstance, is not at all found duly substantiated. It has further been submitted that when the evidences of the prosecution witnesses are to be gone through, it is evident that another limb of Section 304B IPC is also found missing. To substantiate the same, it has been submitted that there should be demand of dowry and soon before her death the deceased should have been tortured by her husband or relative of the husband, on that score, is also found missing as none of the witnesses had disclosed specifically the exact date or time or proximity with the date of death of the deceased over demand as well as torture having been inflicted over the deceased at the end of the appellant and other family members. So, the important ingredient constituting an offence punishable under Section 304B of



the IPC is not at all found duly substantiated.

7. In an alternative it has also been submitted that witnesses i.e. PWs-3, 4, 6 and 7, co-villagers of the appellant, though were declared hostile but it is evident that they have not substantiated the factum of demand of dowry as well as torture having been inflicted upon the deceased soon before her death, contrary to it, they have deposed that the deceased died of epilepsy. There was cordial relation in between the spouses. So, it completely negativates the allegation. So far evidence of PWs, 1, 2 and 5 are concerned, it has been submitted that the same is suffering from vagueness and on account thereof, their testimony could not be accepted on the score of demand as well as torture having been inflicted upon her soon before her death relating thereto.

8. In its continuity, it has also been submitted that Investigating Officer has not been examined. That being so, the interest of the appellant is found highly prejudiced. Magnifying the same, it has been submitted that there happens to be discloser at the end of the prosecution that dead body was recovered after excavating the earth of the kitchen. Had there been examination of Investigating Officer, then in that event, the narration having at the end of the prosecution on that very score would have been properly tested. Furthermore, it has also been submitted that from the evidence of PW-



2, informant, it is evident that during course of cross-examination at para-10, he had stated that police had taken signature over a paper which, had there been examination of Investigating Officer would have been properly exposed whether it was a Fard-e-beyan or was taken during course of other kind of activity. So submitted that the cumulative effect did not justify the finding having been recorded by the learned lower court, consequent thereupon, the same is fit to be set aside.

9. On the other hand, learned APP while supporting the finding of the learned lower court, has submitted that in usual phenomenon the co-villagers of the accused relating to dowry death became *volte face*, even then, they have not supported the plea of the defence in the background of the fact that they have themselves admitted the cause of death to epilepsy, that means to say, irrespective of non examination of Investigating Officer, the death of deceased is not under controversy otherwise than normal circumstance as the aforesaid assertion of the witnesses have not been challenged at the end of appellant. Furthermore, It has also been submitted that from the evidence of the witnesses, it is evident that it happens to be the prosecution and not the accused who got prejudiced on account of non examination of Investigating Officer as majority of the witnesses had gone hostile to the prosecution.



10. Apart from this, It has also been submitted that marriage was in the year 2009, death is in the year 2011 and the intermediary event discloses discord amongst the spouse over demand of dowry, institution of case which culminated under the theme of compromise, undertaking having at the end of appellant and then, Bidai, is so intermingled that the same should be considered in a sequence while appreciating one of the ingredients, torture soon before her death and on account thereof, all the ingredients of Section 304B of the IPC is found duly substantiated. It has also been submitted that the appellants failed to rebut the presumption in tune of Section 113B of the Evidence Act and that being so, it happens to be additional ground to be inferred against the appellant as all the ingredients of 304B IPC is found duly substantiated.

11. Before coming to adjudicate upon, there should be a glance over Section 304B of the IPC and the corresponding act relating thereto. From the plain reading of Section 304B of the IPC which has been introduced to put safeguard upon a woman from the miseries of dowry by way of prescribing punishment against the accused being responsible thereof with the aid of Section 113B of the Evidence Act and so, in the backdrop of aforesaid social legislation, the following ingredients have laid down for satisfaction of Section 304B IPC and the same are as follows:-



A. The death should be within seven years of marriage.

B. The death should be by burn or bodily injury or otherwise than normal circumstance.

C. There should be demand of dowry and for that, deceased would have been tortured soon before her death

D. By her husband or relative of the husband.

12. Then in that circumstance, it will be presumed in terms of Section 113B of the Evidence Act to be dowry death and in the aforesaid background defence/accused will have an opportunity to rebut the same. It is also apparent that the meaning of cruelty or torture is found duly explained in terms of definition under Section 498A of the IPC.

13. Now the evidences having been led on behalf of prosecution is to be seen whether the same has been able to satisfy the ingredients as discussed hereinabove in order to justify the finding having been recorded by the learned lower court. From perusal of the record, it is evident that two kinds of witnesses are available. The first one happens to be Naiharwala or connected therewith and those are PWs 1, 2 and 5. The other set of witnesses are co-villagers of appellant and those are PWs-3, 4, 6 and 7.

14. Now coming to evidence, it is evident that PW-3, 4, 6 and 7 have not said anything with regard to date of marriage, rather they simply stated that deceased died of epilepsy. That means to say, death has not been controverted. Whether the evidence of these



witnesses regarding cause of death is reliable or not, is to be seen from the evidence of other witnesses, that means to say PWs-1, 2 and 5. At the present juncture, it look prudent to identify that none of these witnesses, i.e. PWs, 1, 2 and 5 are eyewitnesses to occurrence. That means to say, whatever they disclosed, they disclosed on the information as well as circumstances so visualizing tested by the appellant during course of cross-examination, suggested to them by the appellant during course of examination.

15. PW-1 is the mother of the deceased who had deposed that Shamima Khatoon was her daughter who was married with Shamsher Alam about 3-4 years ago and accordingly, her daughter had gone to her Sasural where she stayed. During course of stay, her husband, mother-in-law, father-in-law advanced demand of Rs. 30,000/- and for that, they began to torture whereupon case was instituted against them. Shamsher came to her place and then took Rukhsati of Shamima. During course of her stay at her Sasural, Shamsher with the help of his other family members caused murder of Shamima and then buried her dead body in the kitchen. Later on, Shamsher met with them who on query disclosed that Shamima happens to be quite well but they could not be able to talk with Shamima whereupon they became suspicious and made query during course of which, the family members of Shamsher disclosed that



Shamsher had taken away Shamima to Mumbai. Then thereafter, they had gone to police station, informed the police. Police apprehended Shamsher and recovered dead body after excavation from the place as pointed out by Shamsher (kitchen room). At that very time, she was present there. Identified the accused. During cross-examination, she had stated that Shamima was kept in congenial atmosphere for 2-4 months after the marriage. She had gone to Sasural after one month of marriage. She had come back to her Maika twice or thrice during intervening period and lastly, Shamsher took her away. Shamsher worked at Bombay since before marriage. Her daughter was not complaining why Shamsher is residing at Bombay. Her daughter was not insisting to go to Bombay. There was no hardship to her over her livelihood. In para-3, she had stated that her daughter was residing along with her mother-in-law, father-in-law. Her daughter had visited her place twice-thrice from the date of marriage to the date of her death. Whenever, she came to her place she had complained with regard to torture. In para-4, she had stated that apart from having been disclosed by her daughter regarding demand of dowry, demand of dowry was also made from her after six months of marriage. In para-5, she had stated that her daughter had instituted a case relating to dowry. Then had denied the suggestion that no case was instituted. In para-6, she has stated that she had not seen the occurrence. She further



stated that after institution of the case relating to dowry Shamsher had not gone to Bombay. He had gone only once after marriage. In para-7, she has stated that after coming to know about murder of her daughter, Mukhia, Sarpanch along with others have gone there. Her husband had gone there. Her husband had instituted the case. Then at para-8, she had stated that once she had gone to the place of her daughter during her life time and the next, after her murder. She had further stated that she along with her husband and others were present at the Kitchen. There happens to be two rooms in the house. Then she had disclosed that there was no fire in the furnace. Kitchen was duly washed. Police had gone there. After excavating dead body was taken out and then, the dead body was kept in Angan. Police had not recovered Farsa, Katta etc. Police in standing posture had taken out the dead body. She had not seen cut mark over the dead body. Police prepared some document relating to dead body. Police had recorded her statement. In para-9, She had stated that at that very time there was Salwar Sameez over the dead body. It was of red colour. At that very time, none of the accused persons were present there. Police took away dead body along with them over jeep. Then had denied the suggestion that Shamsher was staying at Mumbai during course of murder of the victim.

16. PW-2 is the informant/father of the deceased. He



had narrated that his daughter Shamima was married with Shamsheer about three years ago and on account thereof, she had gone to her Sasural where after staying for 2-3 months, his son-in-law advanced demand of Rs. 30,000/- which, he failed to provide and on account thereof, Shamsheer began to torture, whereupon, she came back to his place. Then thereafter, his daughter had instituted a case. Later on Shamsheer and his parents came and then executed Panchnama and further, assured that henceforth, they will not torture Shamima, case was compromised and then thereafter, they took Bidai of Shamima. While she was staying they re-agitated the demand and on account thereof, caused murder of his daughter. His son-in-law had come to his village and during course thereof, his wife inquired about Shamima. He disclosed that Shamima had gone to Mumbai whereupon, they became suspicious and rushed to Sasural of Shamima and found her absent. Her Sasuralwala were also found missing. Then they had gone to police station, narrated the event to the police whereupon, Shamsheer was taken to the police station and on query, he disclosed that Shamima has been murdered and her dead body has been buried in the kitchen room whereupon police along with them came to the place of Shamsheer. Kitchen room was dug and then, dead body was recovered. Police had recorded Fard-e-beyan, whereupon he had put his signature (exhibited). Identified the



accused.

17. During course of cross-examination at para-3, he had stated that Shamima had visited his place twice-thrice. Shamima had disclosed regarding demand. He had not visited place of Shamima on that very score. In para-4, he had stated that he is unable to disclose the exact date of Panchayati but it was held in presence of Mukhiya of Mahavirpur participated by his co-villager, Manzoor, Saghir and other respectable persons. Document was prepared but he is not remembering who had signed over the same. The document might have been produced before the police. In para-5, he had stated that he is not remembering the names of witnesses relating to dowry case instituted by his daughter at an earlier occasion. At that very time, he had not accompanied his daughter. So, he is unable to say in which court it was filed and what was the judgment. In para-6, he had stated that he had not seen the occurrence but Shamsher had disclosed regarding murder of Shamima. In para-7, he had stated that he accompanied the police to the place of Shamsher where had seen the dead body in the kitchen. At that very time, dead body was wearing red Salwar Sameez . He had not seen scratch over the dead body. He had not seen the police making any kind of documentation. Shamsher had disclosed regarding the dead body having been buried in the kitchen. Police had not recovered weapon from the house. Then at



para-9, he had stated that Shamsheer has got four brothers and two sisters. He had denied that rice-soup is being poured off in the ditch having been dug in the kitchen. Then had denied the suggestion that there was ditch for aforesaid purpose and at that very moment, Shamima suffered from cardiac arrest as a result of which, she fell down in the said ditch. At that very time, none was present. He had also denied the suggestion that later on, Shamsheer came and had seen Shamima dead, rushed to his place and informed regarding death of Shamima. In para-10, he had stated that in his presence, the police had not recorded statement of any villager though large number of persons have assembled. Police got his signature over a document. None other signed. Then at para-12, he had denied the suggestion that no demand was there, nor deceased was done to death at that very pretext. This case has falsely been filed putting false and frivolous allegation.

18. PW-6 is Khurshid Alam who during course of examination-in-chief had reiterated the version of PWs-1 and 2 over marriage of Shamima, demand of dowry, torture during her stay, over which she returned back and a case was instituted by the deceased against her husband and others relating to torture on the pretext of procurement of dowry, compromise having been effected, Rukhsati of deceased and then, causing murder of deceased, recovery of dead body from kitchen after digging. He along with one other had dug.



During cross-examination at para-4, he had admitted that informant happens to be his brother-in-law (Bahnoi). He had further stated that they reached at the place of occurrence at about 6-7 A.M. Inquest report was prepared, might have been by the S.P.. It was prepared at 4.00 PM. S.P., O/C, D.M. and villagers were present there. Mukhiya, Kanhaiya Pandey were also present. In para-5, he had stated that in the year 2010, there was demand of dowry and for that, information was given to the court. He had also stated that they had inquired from Shamsheer who confessed that after committing murder he had buried the dead body of Shamima in the house itself whereupon, they along with police personnel came at the house of accused, kitchen room was excavated and then dead body was taken out. He had further stated that the dead body was taken away by the police. He had further stated that inquest was prepared for the same whereupon, he has put his signature. Then he had denied the suggestion that Shamima was suffering from epilepsy and on account thereof, she died. He had also denied the suggestion that accused had informed him regarding aforesaid mishapening. He had also denied the suggestion that they have advanced illegal demand from the accused which he declined and on account thereof, this case has been instituted levelling false and frivolous allegation.

19. From the evidence available on the record, it is



evident that there happens to be no denial at the end of the appellant that at the time of death deceased was not staying at his place. That being so, in terms of Section 106 of the Evidence Act, it was incumbent upon him to have explained the death as, the same occurred within four walls of the house without having any access to anybody during course of occurrence. None of co-villagers, that means to say, PWs, 3, 4, 6 and 7 have stated that they had gone and seen the death having due to epilepsy. In likewise manner, when the evidences of PW-1, 2 and 5 have been gone through, it is evident that accused had suggested PW-1 and 5 that she died of epilepsy while PW-2 that she died on account of heart failure while she was in the kitchen and fell down in a ditch which was dug for storage of rice-soup. Furthermore, when the evidence of PW-5 has been minutely gone through, it is apparent that he claimed himself to be a person along with one another who excavated the kitchen in presence of appellant as well as police pointed out by the appellant and the dead body was taken out, which is found tallied with the suggestion whatever been made to PW-2 (para-9). That being so, presence of dead body having buried in the kitchen, excavated, taken out, is found duly substantiated and part thereof had also been admitted by the appellant by way of suggestion and is found admissible in accordance with Section 7 of the Evidence Act.



20. In likewise manner, it is apparent while cross-examining PW-2, informant, PW-5, PW-1, it is evident that the accused had not denied institution of a case at the instance of deceased, compromise having effected subsequently, execution of Panchnama, an assurance having at their end and then, effecting Rukhsati which happens to be the last one as the deceased was subjected to death and so all the ingredients are found satisfied. Furthermore, defence had not examined nor produced any kind of oral or documentary evidence in order to rebut the prosecution.

21. In *Maya Devi v. State of Haryana* as reported in **2016 CrLJ 629**, soon before death has been taken into consideration in depth and explained in following manner:-

16) To attract the provisions of [Section 304B](#), one of the main ingredients of the offence which is required to be established is that “soon before her death” she was subjected to cruelty or harassment “for, or in connection with the demand for dowry”. The expression “soon before her death” used in [Section 304B](#) IPC and [Section 113B](#) of the Evidence Act is present with the idea of proximity test. In fact, learned senior counsel appearing for the appellants submitted that there is no proximity for the alleged demand of dowry and harassment. With regard to the said claim, we shall advert to while considering the evidence led in by the prosecution. Though the language used is “soon before her death”, no definite period has been enacted and the expression “soon before her death” has not been defined in both the enactments. Accordingly, the determination of the period which can come within the term “soon before her death” is to be determined by the courts, depending upon the facts and circumstances of each case. However, the said expression would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. In other words, there must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the death concerned. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence.



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18) This Court, in [Mustafa Shahadal Shaikh vs State of Maharashtra](#) (2012) 11 SCC 397 held as under:-

“9. 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 compulsory 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.

11. To attract the provisions of [Section 304-B](#), one of the main ingredients of the offence which is required to be established is that “soon before her death” she was subjected to cruelty or harassment “for, or in connection with the demand for dowry”. The expression “soon before her death” used in [Section 304-B](#) IPC and [Section 113-B](#) of the Evidence Act is present with the idea of proximity test. In fact, the learned counsel appearing for the appellant submitted that there is no proximity for the alleged demand of dowry and harassment. With regard to the said claim, we shall advert to the same while considering the evidence led in by the prosecution. Though the language used is “soon before her death”, no definite period has been enacted and the expression “soon before her death” has not been defined in both the enactments. Accordingly, the determination of the period which can come within the term “soon before her death” is to be determined by the courts, depending upon the facts and circumstances of each case. However, the said expression would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. In other words, there must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the death concerned. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental



equilibrium of the woman concerned, it would be of no consequence. These principles have been reiterated in [Kaliyaperumal v. State of T.N.](#) and [Yashoda v. State of M.P.](#)”

19) In the case of [Ramesh Vithal Patil vs. State of Karnataka](#) (2014) 11 SCC 516 this Court held as follows:-

“20. Moreover, admittedly the deceased committed suicide within a period of seven years from the date of her marriage. [Section 113-A](#) of the Evidence Act is, therefore, clearly attracted to this case. Presumption contemplated therein must spring in action. This provision was introduced by the [Criminal Law \(Second Amendment\) Act, 1983](#) to resolve the difficulty of proof where married women are forced to commit suicide but incriminating evidence is difficult to get as it is usually available within the four walls of the matrimonial home.....”

22. Now coming over non examination of doctor as death has not been denied which on account of infirmities persisting at the end of appellant, clearly suggest otherwise than normal circumstance. In likewise manner, non examination of Investigating Officer has also not caused prejudice to the appellant as there happens to be no contradiction visible in the evidence of PWs, 1, 2, 5 while other stood hostile. Furthermore, apart from suggestion accepting death in the kitchen, having dead body in a ditch, the PWs-1, 2 and 5 are consistent over digging of floor of kitchen, and then dead body was taken out.

23. Having minute consideration as well as observation of the evidence available on the record, it is apparent that prosecution has succeeded in substantiating its case and that being so, the judgment of conviction and sentence needs no interference.



Hence, instant appeal is found meritless whereupon, dismissed.

24. Appellant is on bail, his bail bond is, hereby, cancelled directing him to surrender before the learned lower court to serve out the remaining part of sentence, failing which learned lower court will proceed against the appellant in accordance with law.

(Aditya Kumar Trivedi, J)

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AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	14.03.2018
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