

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.490 of 2015

Arising Out of PS.Case No. -264 Year- 1999 Thana -PHULWARI District- PATNA

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1. Dablu @ Avinash Kumar @ Avinash Singh Son of Kunwar Singh R/o Village
Basant Chak, P.S. Phulwarisharif, District Patna

.... Appellant/s

Versus

1. The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Gajanan Mishra, Adv.

For the Respondent/s : Mr. Binod Bihari Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 25-06-2018

1. Appellant Dablu @ Avinash Kumar @ Avinash

Singh has been found guilty for an offence punishable under Section 304 (B) of the IPC and sentenced to undergo R.I for 7 years, under Section 498 (A) of the IPC and sentenced to undergo R.I for one year as well as to pay fine appertaining to Rs. 1,000/- in default thereof to undergo S.I for 6 months, additionally, under Section 201 of the IPC and sentenced to undergo S.I for one year as well as to pay fine appertaining to Rs. 1,000/- in default thereof to undergo S.I for six months additionally vide judgment of conviction dated 25.07.2015 and order of sentence dated 31.07.2015 passed by 5th Additional Sessions Judge, Patna in Sessions Trial No. 507/2000/5655/2014

2. Mithilesh Singh, (PW-3) gave his fard-beyan on 07.06.199 at 10.00 A.M hours at police station, Phulwari Sharif alleging inter alia that his sister Amrita Devi had been married to Dablu Singh, son of Kunwar Singh of village- Basant chak, P.S- Phulwari Sharif, District- Patna in the year 1995. However, she was



issueless. He has further stated that Gauna was effected in the year 1996 and on that very occasion, he had gifted the articles (so detailed) but, as promised Rs. 8,000/- remained to be paid at their end as dowry. Furthermore, it has also been disclosed that during the intervening period, father-in-law of his sister Kunwar Singh and his sons Lal Babu Singh, Satya Narayan Singh were repeatedly demanding but, on account of financial crunch they were not in a position to fulfill their demand. In the aforesaid background, it has been disclosed that his sister was frequently tortured. Even on 06.06.1999 at about 10 A.M when his sister had come to visit, at that very occasion, also she had disclosed that her father-in-law Kunwar Singh and his sons, Lal Babu Singh and his wife, another son of Kunwar Singh, Satya Narayan Singh were torturing her as well as she shown her apprehension that they will not allow to live. On this, they have consoled her and further stated not to be disturbed. They also instructed to respect her elders and not to react on their activity. Moreover, they were intending to pay the remaining dowry amount after selling onion. At about 2 P.M, she proceeded there from. On 07.06.1999 at about 12 Noon they received information that his sister had died out of Diarrhea. Just after getting this information, he along with his younger brother, Murari Ji, mother rushed to the place of his sister where they saw Kunwar Singh and his sons Lal Babu Singh as well as Satya Narayan Singh at their house. On query, Kunwar Singh instructed his sons to take out gun and shoot all of them therefrom.



Out of fear, they dispersed there from. They inquired from neighborhood and during course thereof, they came to know that Kunwar Singh and his sons Lal Babu, his wife, Satya Narayan Singh and others committed murder of his sister by administering poison and further got dead body disposed of in order to screen themselves.

3. On the basis of aforesaid fard-beyan Phulwari Sharif P.S. Case No. 264/1999 was registered and as is evident, charge-sheet was submitted at different stages against the accused persons on account thereof two sessions trial originated, the first one Sessions Trial no. 507/2011 and the second one 941/2001 but, before examination of the witnesses both the sessions trial got amalgamated and then trial proceeded meeting with the ultimate result whereunder other co-accused were acquitted while appellant/ husband has been convicted 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 of their defence. Furthermore, it has been pleaded that on account of going to her *Naihar* and taking food at that place, she developed some sort of complication as a result of which while coming to the place of appellant she suffered from diarrhea, vomiting and was immediately rushed to the clinic of Doctor Sushil Kumar Singh, who after giving first aid directed to carry to Kurji Hospital and during course thereof unfortunately, she died, whereupon, the Naiharwala were informed, who participated in



funeral. Furthermore, it has also been pleaded that after death of the deceased informant PW-4 insisted upon to get his daughter married with the appellant but, the family declined whereupon, they advanced demand of return of ornaments of the deceased, which also they declined as a result of which the prosecution party got indulged in a criminal action and for that a complaint case no. 1024C/1999 has been brought up by Kunwar Singh, one of the accused (since acquitted) and in revengeful activity, this case has been launched putting false & frivolous allegation. In order to substantiate the same, apart from oral evidence, relevant document has also been made exhibit.

5. In order to substantiate its case, prosecution had examined altogether 6 PWs, PW-1, Gopal Singh, PW-2, Jasoda Devi, PW-3, Mithilesh Singh, PW-4, Deep Narayan Singh, PW-5 Nawal Singh, PW-6, Bishwanath Prasad. Side by side, had also exhibited Ext.1, fard-beyan, Ext.2, case diary, Ext.3- Formal F.I.R. In likewise manner, defence had also examined two DWs, DW-1, Shiv Shevak Singh and DW-2, Dr. Sushil Kumar Singh and had also exhibited Ext.A- Panchnama, Ext.B- prescription issued by Dr. Sushil Kumar Singh.

6. While assailing the judgment of conviction and sentence, learned counsel for the appellant has submitted that learned lower court had dealt with the matter in hand in mechanical way and that happens to be reason behind that in spite of presence of so many flaws persisting on the record, appellant has been convicted ignoring



the same. The first and foremost argument of this very score happens to be the irrespective of the fact that there happens to be material development in the evidence of PWs which on account of non-examination of the I.O could not legally been brought up on record and in the aforesaid background, non-examination of the I.O has caused prejudice to the interest of the appellant. Apart from this, it has also been submitted that had there been examination of the I.O, relevant materials collected during course of investigation suggesting innocence of the appellant would have surfaced, attracting judgment of acquittal. That means to say, due to non-examination of I.O., caused there happens to be major set back to the prosecution case, simultaneously, also caused serious prejudice to the appellant.

6. Then, it has been submitted that majority of the independent witnesses have not been examined. There happens to be no explanation at the end of the prosecution over their non-examination. Whoever been examined, PW-2 and PW-4 are the parents of the deceased while PW-1 and PW-3 happens to be full brother of the deceased. PW-5 is the co-villager of the informant and PW-6 is the formal witness. So, the witnesses who have deposed are family members, being interested so, their evidences could not be considered more particularly in the background of material contradiction due to development as well as embellishment and that being so their evidences are fit to be discarded.

7. Furthermore, it has also been submitted that right



from *fard-beyan*, there happens to be disclosure at the end of the prosecution party that deceased died of vomiting and diarrhea. Though, there happens to be some sort of consistency in between evidence of PW-2 mother along with other witnesses but the fact remains that after getting information, prosecution party came to the place of deceased where they inquired and then, thereafter, case was registered. Therefore, whatever information, prosecution party got while they were staying at their place was properly verified at the *sasural* of the deceased that means to say, death by diarrhea and vomiting is found duly substantiated. That means to say, evidence of DW-2 is found full of truthfulness while he shown to have examined the deceased, who was suffering from diarrhea and vomiting and in the aforesaid facts and circumstances of the case, it could not be said that deceased was anyway harmed.

8. It has also been submitted that unreliability over the prosecution version is found exposed from the narration of the evidences of the witnesses as the marriage was solemnized in the year 1995, Donga was held in the year 1996 and since, thereafter, deceased remained at her *sasural* without having any hurdle. Had there been any kind of demand or torture having meted out at the end of the appellant's family, then in that circumstances, she would not have been allowed to remain at her *sasural* for three consecutive years without any hitch or hindrance. Apart from this, it is also apparent from the prosecution evidence that no step was taken during



intermediary period and that is suggestive of the fact that aforesaid theme has been purposely introduced for extraneous consideration.

9. Then, coming to the status of the appellant, it has been submitted that virtually his innocence was found at the end of the prosecution party themselves and that happens to be reason behind that nothing has been alleged against the appellant at an initial stage. The prosecution party had not alleged in the fard-beyan that anything was demanded at the end of appellant and further, any kind of torture physical or mental was at the end of the appellant during course of stay of the deceased at her Sasural. It is also evident that even during course of evidence of PW-1, prosecution could not explicit in their favour, so far involvement of appellant is concerned. It is also apparent that though due to slackness at the end of the appellant the relevant document could not be exhibited but, the matter was negotiated, case was compromised. The case having instituted at the end of the appellant disposed of in terms of compromise and taking benefit of delay, the prosecution party again advanced their plea and being refused at the end of the appellant, PW-2 introduced presence of the appellant and that is indicative of the malicious attitude of the prosecution party whereupon, not only the prosecution witnesses be identified as untrustworthy, unreliable rather the evidence having led at their end also be inadmissible in the eye of law as it lost its credibility. Furthermore, it has also been submitted that there happens to be no specific disclosure at the end of the prosecution party with



regard to any specific event identifying the appellant/husband to be cruel or torturous to the deceased on the pretext of non-fulfillment of demand of dowry and so, the bald statement of the witnesses could not justified the narration, the allegation, and on account thereof, judgment impugned did not attract its prevalence whereupon, is fit to be set aside.

10. On the other hand, the learned APP while substantiating the finding recorded by the learned lower court has submitted that from a plain reading of the judgment, it is apparent that the learned lower court has gone through the each and every aspect before giving the findings of guilt against the appellant. That being so, the judgment of conviction and sentence recorded by the learned lower court is fit to be confirmed.

11. I.O has not been examined. Whether non-examination of the I.O will cause prejudice to the interest of the appellant. The aforesaid questionnaire has properly been explained by the Apex Court in *Lahu Kamlakar Patil v. State of Maharashtra* as reported in *(2013) 6 SCC 417* under para-18, wherein it has been held by the Hon'ble apex Court that non examination of the Investigating Officer is to be perceived in the background of nature of the case as well as evidence having adduced during course of trial in order to infer whether it has caused prejudice to the interest of the accused or not. For better appreciation the same is quoted hereinbelow:-

18. Keeping in view the aforesaid position of law, the testimony of PW 1 has to be appreciated. He has



admitted his signature in the F.I.R. but has given the excuse that it was taken on a blank paper. The same could have been clarified by the Investigating Officer, but for some reason, the Investigating Officer has not been examined by the prosecution. It is an accepted principle that non-examination of the Investigating Officer is not fatal to the prosecution case. In *Behari Prasad v. State of Bihar* [(1996)2 SCC 317], this Court has stated that non-examination of the Investigating Officer is not fatal to the prosecution case, especially, when no prejudice is likely to be suffered by the accused. In *Bahadur Naik v. State of Bihar* [(2000) 9 SCC 153], it has been opined that when no material contradictions have been brought out, then non-examination of the Investigating Officer as a witness for the prosecution is of no consequence and under such circumstances, no prejudice is caused to the accused. It is worthy to note that neither the trial judge nor the High Court has delved into the issue of non-examination of the Investigating Officer. On a perusal of the entire material brought on record, we find that no explanation has been offered. The present case is one where we are inclined to think so especially when the informant has stated that the signature was taken while he was in a drunken state, the panch witness had turned hostile and some of the evidence adduced in the court did not find place in the statement recorded under Section 161 of the Code. Thus, this Court in *Arvind Singh v. State of Bihar* [(2001)6 SCC 407], *Rattanlal v. State of Jammu and Kashmir* [(2007)13 SCC 18] and *Ravishwar Manjhi and others v. State of Jharkhand* [(2008)16 SCC 561], has explained certain circumstances where the examination of Investigating Officer becomes vital. We are disposed to think that the present case is one where the Investigating Officer should have been examined and his non-examination creates a lacuna in the case of the prosecution.

12. That means to say, mere non-examination of the I.O will not cause dent in the prosecution case nor it would be presumed that on account of non-examination of the I.O, the interest of the accused is found prejudiced. It varies case to case and further, to appreciate in its right perspective, the fact of the case is to



considered. If from the facts of the case, it is evident that right of the accused is found prejudiced on account of inconsistency over genesis, manner of occurrence evidence full of contradiction, P.O. happens to be fluctuating, then in that circumstance, certainly non-examination of I.O. will be hazardous. Now, the facts of the prosecution case is to be seen and further, while appreciating the evidence of the respective PWs, it would be considered whether on account of non-examination of the I.O, interest of the appellant/ accused has been found prejudiced or not.

13. Whenever there happens to be a case of dowry death, the prosecution is under obligation to substantiate the following ingredients requiring constitution of dowry death and, if any of the ingredients is found lacking in that circumstance, the case of the prosecution would be brushed aside. Furthermore, if the prosecution succeeds in fulfilling the ingredients then, in that circumstance, there would be presumption against the accused as provided under Section 113B of the Evidence Act which happens to be subject to rebuttal. So, before coming to the main issue, the supporting pillars for constituting the dowry death is to be duly acknowledged as (a) There should be the death by burn or bodily injury or otherwise than normal circumstance, (b) Within 7 years of marriage (c) soon before death, the deceased has been subjected to torture on the score of demand of dowry and (d) by the husband or relative of the husband.

14. Furthermore, as in majority of the case, the death



occurs at the *sasural* within the four corners of the house of the accused on account thereof, the family members (*Naiharwala*) could not stand as an eye witness to the occurrence, save and except being corroborative in nature and once found substantially proved, apart from Section 113B of the Evidence Act, the accused will have also to explain in accordance with Section 106 of the Evidence Act because of the fact that the aforesaid fact remains exclusively within the knowledge of the accused. In the background of aforesaid basic legal fundamental, now it has to be seen whether the prosecution has been able to substantiate its case beyond all reasonable doubts?

15. Considering the evidence available on record, suggestion given to the prosecution witnesses, by way of examination of the prosecution witness including that of DWs, the following facts are found to be out of controversy.

(A) Year of marriage that of 1995 is out of controversy and in likewise manner, the year of *Donga* in the year 1996.

(B) Continuous staying of deceased at her *sasural* since thereafter.

(C) Frequent visit of deceased to her *Naihar*.

(D) The death of deceased as per prosecution version on 07.06.1999 while at the end of appellant on 06.06.1999.

(E) Information having been conveyed to the prosecution party though with some variance.



(F) Police was not informed.

(G) Dead body was not found, so no question of postmortem.

(H) There happens to be bleak evidence over participation of the prosecution party during course of funeral.

(I) Death having been otherwise than normal circumstance.

16. Thus, from the evidence available on the record, the death of deceased within 7 years of marriage as well as, otherwise than normal circumstance is found admitted. Now two remaining ingredients are to be seen i.e. (a) soon before death, deceased was subjected to torture over demand of dowry and (b) By husband or relative of the husband. Before coming to discuss the aforesaid points, it is apparent that the learned lower court had acquitted all the family members and the reason assigned therefore apart from others, happen to be that witnesses were suggested during course of cross-examination that there was partition in the family since before and all the brothers were looking after their affair individually, independently and on that very score, the defence had also examined DW-1 and had also exhibited a *panchnama*, Ext.A by which, they had pleaded that in the year 1994 on account of family feud, there was partition by metes and bounds. So, individual status of the appellant has been duly recognized as well as acknowledged by the appellant himself and in the aforesaid background, the learned lower court had given the



benefit to his family members.

17. It is also apparent from the evidence of witnesses that marriage was negotiated by the own maternal uncle of the deceased namely Devendra Singh. It is also evident that daughter of Devendra Singh namely Babita was the elder *gotni* of the deceased. These two persons have also been added as the accused (since acquitted). So, the family was not unknown nor strange. It is further evident from the evidence of the witnesses that they had not spoken a word over demand, if any, at the time of settlement of marriage and further, how much amount was paid as dowry though, it has been stated that Rs. 8,000/- was persisting due. In the aforesaid background, it has been disclosed by the witnesses that victim was tortured and, ultimately cost her life. From the evidences more particularly that of father PW-4, paragraph (not mentioned), family members of *Sasural* of his daughter are separate but, food was being cooked conjointly which was usually prepared by his daughter. He was unable to disclose who lives at which side of the house. Even considering the defence version, it is apparent that deceased was under the exclusive domain of the appellant being husband.

18. The other remaining ingredients, from the *fard-beyan*, as is evident apart from having the allegation in bald manner, over torture meted out to deceased by her *sasuralwala*, though contends names of others but having absence of appellant. Likewise status happens to be with regard to evidence of PW-1, one of the



brother of the deceased save and except identified. Rs. 8,000/- was continuing due out of Tilak but, he had not disclosed the terms and condition of the negotiation more particularly, the quantum of dowry having agreed amongst the parties. Thus, the evidence of PW-1 is also not going to encircle the appellant.

19. PW-2, is the mother of the deceased she had disclosed that after marriage her daughter Amrita Devi had gone to her *sasural*. After staying for three days, she returned back to her *Maika* where she stayed for a year and then thereafter, in the year 1996 she gone to her sasural on *Ruksati*. It has been alleged that her father-in-law Kunwar Singh, husband Avinash Kumar, Bhaisur Lal Babu Singh, Satya Narayan Singh, wife of Lal Babu Singh, wife of Satya Narayan Singh, father-in-law of Satya Narayan Singh, daughter of Kunwar Singh, son-in-law of Kunwar Singh conjointly asked for payment of Rs. 8,000/- which was continuing due and all the accused persons, on that very score, not only tortured her rather frequently physically manhandled her. She had further disclosed that on 06.06.1999, deceased had come to her place and disclosed that in case of non-payment of the aforesaid due amount she would not remain alive whereupon, she consoled her and then she (deceased) returned back. On 07.06.1999, she received information that her daughter died on account of vomiting as well as dysentery. During cross-examination, it is evident that she was not at all cross-examined over the demand of dowry as well as torture having meted out though



under Para-10, she had stated that deceased remained at her place on up till 3.30 P.M on 06.06.1999. She had further stated that one hour will cover in getting the destination. In Para-11, she had further stated that about 15 days before 06.06.1999, she had come alone. Again they have consoled her and then, send to her back to *sasural*. She had further stated that on 06.06.1999 deceased had taken food at her place at about 2.00 P.M. Then thereafter, at Para-17, there happens to be contradiction and from the nature of the contradiction suggests that it happens to be material. In Para-19, she had stated that at the time when occurrence took place her son-in-law was engaged in driving tempo which was purchased by her as, his father, brothers did not help him in getting the tempo purchased. Then thereafter, she purchased and from the earning coming out there from, he was able to meet his daily expense. Then there happens to be suggestion at Paras- 24 and 25, the defence plea as narrated hereinabove. In Para-26, though informant had not stated during course of his examination-in-chief, she was cross-examined during course of which, she had stated that at the time of recording of statement of Mithilesh Singh, police had left name of her son-in-law.

20. PW-3 is the informant. During his examination-in-chief, he has reiterated the version of PW-2. In Para-2, he had further stated that while the deceased had come to his place on 06.06.1999 at about 10.00 A.M, she disclosed that accused persons are repeatedly demanding the due amount and for that, she is being



tortured. In case, the due amount is not paid then she will not be spared. Anyhow, he consoled her and then got her to her *sasural*. In the night the accused persons administered poison in meal (bread and chicken) as a result of which she died. On 07.06.1999 after getting information they have gone there where they faced horrifying situation at the end of the accused persons. Thereafter, they moved in village, gathered information which was to the effect that accused persons administered poison and then disposed of the dead body. Then thereafter, they have gone to police station and instituted the case. He has further stated whatever been stated by him was recorded by the police and then it was read over to him and finding it correct, he put his signature. He had further stated that neither accused persons explained the death of his sister nor allowed to participate during course of funeral nor have an occasion to see the dead body. During course of cross-examination at Para-6, he had stated that he had handed over Rs. 20,000/- as well as ornaments in dowry. Marriage was solemnized in a temple. But he had not disclosed the terms of negotiation or the demand having at the end of the accused persons. Furthermore, in Para-15 of the cross-examination, he has stated that he had not informed nor filed petition before any competent authority regarding torture at the end of the accused. He had further stated that on query made by him, deceased during course of her lifetime, had disclosed that accused persons even including her maternal sister was engaged in torturing her. In Para-16, he had further stated that at the



time of marriage his brother-in-law was a tempo driver. In Para-20, he had stated that whatever been stated by him, police had recorded correctly and then finding it correct, he had put his signature. In Para-21, there happens to be contradiction with regard to further statement as well as fard-beyan.

21. PW-4, is the father. During examination-in-chief, he has reiterated the version whatever been disclosed by PW-2 and PW-3. He had further stated that they have gone to police station on the same day where his son Mithilesh Singh (PW-3) had instituted this case. During cross-examination (No Paragraph), he has stated that his son-in-law was plying three wheeler which was purchased by him. He is not knowing as to how much he earns but, was sufficient for maintaining his family. Then, there happens to be contradiction over demand as well as torture, her arrival on 06.06.1999, her presence at the place of her *sasural* and then suggested that deceased died of ailment.

22. PW-5 is the co-villager of the informant who had deposed that in a way to Naubatpur from Patna, his motorcycle gone out of order at village Basantpur. He began to wait for the other vehicle in order to get help in getting the motorcycle properly repaired and during course thereof, he had seen one tempo coming from Naubatpur and going towards Danapur. He signaled to stop and asked wrench. He had seen one lady inside who was unconscious. Tempo was being driven by the owner Dablu and victim was being carried by



2-3 persons. Then he was declared hostile. However, defence on their own risk took his earlier statement given to the I.O.

23. DW-1 is the witness, who had exhibited the panchnama of the year 1994, while DW-2 is the doctor who had exhibited his prescription, Ext. D, with a further disclosure that he had examined the patient who was precarious and accordingly after giving I.V., referred the patient to Kurji.

24. After analyzing the evidences available on the record as referred hereinabove, as well as considering impact of non-examination, it is apparent that though there happens to be some sort of deficiencies at the end of the prosecution over demand of dowry as well as soon before her death Amrita was being subjected to torture at the end of the appellant but, from the nature of the evidence having been adduced as well as mode of cross-examination, it is apparent that the dead-body of the deceased was disposed of in order to screen themselves and that being so, irrespective of the fact that no offence under Section 304B of the I.P.C as well as 498A of the I.P.C are made out, appellant is found guilty for an offence punishable under Section 201 of the I.P.C and that being so, the findings of the learned lower Court to that extent including the sentence therefor is being concurred. Accordingly, appeal is partly allowed. Appellant is on bail. Hence, his bail bond is hereby cancelled. Directing him to surrender before the learned lower Court within a fortnight to serve out remaining part of sentence, failing which, the lower Court will be at liberty to proceed



against him, in accordance with law.

Ranjeet/Amjad

(Aditya Kumar Trivedi, J)

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