

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.408 of 2015

Arising Out of PS. Case No. -167 Year- 2010 Thana -SIMRI District- BUXAR

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1. Matak Sah S/o Late Kanhaiya Sah
 2. Chanda Devi @ Chandrawati Devi S/o Matak Sah
- Both R/o Village Badka Rajpur, P.S. Simri, District Buxar.

.... **Appellant/s**

Versus

The State of Bihar **Respondent/s**

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Appearance:

For the Appellant/s : Mr. Arun Kumar Tripathi, Amicus Curiae

For the Respondent/s : Mrs. Abha Singh, APP

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

CAV JUDGMENT

Date: 26-06-2018

As the learned counsel for the appellant failed to appear on account thereof, Mr. Arun Kumar Tripathi, learned advocate has been requested to assist the court as an Amicus Curiae.

2. Appellant, Matak Sah and Chanda Devi @ Chandrawati Devi by the judgment of conviction dated 26.05.2015 found guilty for the offences punishable under Section 304B IPC as well as 201 of the IPC and vide order of sentence dated 29.05.2015 sentenced to undergo R.I. for seven years as well as pay fine appertaining to Rs.5000/- in default thereof to undergo S.I. for six months, additionally, to undergo R.I. for two years, respectively with a further direction to run the sentences concurrently by the Additional Sessions Judge, Illrd, Buxar in Sessions Trial No.131/2011.

3. PW.3, Shanti Kunwar filed written report on 22.09.2010 disclosing therein that her daughter Kanchan Devi was married with Raju Gupta in the year 2003. Her daughter was issueless. At the time of marriage, she had gifted the articles, cash



according to her means. While her daughter was staying at her Sasural, her father-in-law, mother-in-law began to demand money and for that, she was being coaxed. Her daughter used to inform her whenever she came at her place and sometimes, over mobile. On account of poverty she was unable to fulfill their demand whereupon her mother-in-law, father-in-law began to abuse as well as, sometimes causing physical assault. In the evening of 21.09.2010 her daughter had informed that she be called from there otherwise she will be murdered by her father-in-law, mother-in-law whereupon, her son rushed to the place of her sister. After arrival, he had not found his sister or her in-laws. On query, he came to know that his sister has been murdered and her dead body has been disposed of. It has also been disclosed that for the last two months her son-in-law Raju Gupta was staying at Surat where he was engaged in a private firm wherefrom, he used to abuse on account of non-fulfillment of demand of dowry.

4. After registration of Simri (TRHOP) P.S. Case No.167/2010 investigation commenced and concluded by way of submission of charge sheet, facilitating the trial, meeting with the ultimate result, subject matter of instant appeal.

5. 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. It has further been pleaded that the deceased died of natural death whereupon prosecution party was informed, Raju Gupta brother of deceased came, participated in the funeral and then thereafter, as they have failed to satisfy the greed of the prosecution party whereupon this false case has been filed.



However, nothing has been adduced in defence.

6. In order to substantiate its case, prosecution had examined altogether seven PWs, PW.1-Gorakh Paneri, PW.2-Dadan Kanu, PW.3-Shanti Devi, PW.4-Hridaya Nath Yadav, PW.5-Vijay Shankar Sah, PW.6-Bhagelu Yadav and PW.7-Jani Lal Ravidas. Side by side had also exhibited Ext.1-Signature of PW.4 over seizure list, Ext.2-Formal FIR, Ext.3-Endorsement over written report. As stated above, nothing has been adduced in defence.

7. Learned amicus curiae while assailing the judgment of conviction and sentence has submitted that virtually this case happens to be of no evidence and so, the learned lower court should have acquitted the appellants. Magnifying his submission, the learned amicus curiae has submitted that PW.1, PW.2, PW.5, PW.6 have not supported the case of the prosecution and so, they all were declared hostile. Even thereafter, prosecution could not be able to procure any substantive material. PW.4 is the seizure list witness who during course of examination had admitted his presence paper was blank over seizure list but disclosed that at the time of putting signature. So, from the evidence of PW.4 prosecution could not be able to gain anything. Now remains the evidence of PW.3, informant. From her evidence, it is evident that the same suffers from vagueness without having any specific incident having been at her end, if any committed during such long tenure of seven years or more than that nor, the Investigating Officer on that very score been able to collect corroborative evidence. That being so, the demand of dowry, torturing the deceased soon before her death by the husband or relative of the husband for the fulfillment of demand of dowry is



not at all found duly substantiated.

8. Furthermore, it has been submitted that the written report as well as during course of evidence PW.3 had stated that she was being informed by the deceased on mobile but, neither during course of investigation she produced nor disclosed her mobile number as well as mobile number of her daughter, son-in-law whereupon, it could have been traced out by call details that at least victim was in regular contact with her as well as on 21.09.2010 she had informed to her whereupon Raju had gone to the place of the accused persons. Therefore, the aforesaid infirmities persisting in the prosecution case happen to be sufficient to annul the finding recorded by the learned lower court. Consequent thereupon, appeal is fit to be allowed.

9. On the other hand, the learned Additional Public Prosecutor while controverting the submission having been made on behalf of appellants has submitted that the present prosecution has fallen victim of apathy of the court in the background of the fact one of the major ingredients is found hanging under midst of controversy as, marriage has been shown in the year 2003 while the occurrence is of month of September, 2010, so, with all expectation, it must have cross the barrier of seven years whereupon, the charge would have been framed under Section 302 IPC along with Section 498A, 201 of the IPC instead of 304B of the IPC. Apart from this, it has also been submitted that Hon'ble Apex Court had, in the Rajbeer case as well as at subsequent stages also observed that whenever charge is being framed under Section 304B of the IPC there should be always a charge under Section 302 of the IPC. Had there been proper



charge, then in that circumstance, the controversy persisting on the record would not have been taken a ground on behalf of the appellant. Side by side, the learned lower court would have done complete justice and in likewise manner, the appellant would have been under obligation to explain the death of deceased Kanchan Devi who, admittedly died at their place. That being so, it happens to be a fit case wherein matter be remitted back to the learned lower court for retrial after setting aside the judgment impugned.

10. From perusal of the record, it is evident that out of seven witnesses examined on behalf of prosecution, PW.1, PW.2, PW.5 and PW.6 have gone volte-face to the prosecution, while PW.4 though stood as a seizure list witness but prosecution had failed to explicit from his mouth with regard to nature of recovery and for that, the concerned seizure list was prepared, which ought to have been though is found from the evidence of PW.7. That being so, the prosecution rest upon the evidence of two PWs that means to say informant PW.3 and the Investigating Officer PW.7. That means to say mere examination of single witness without having corroboration from other witnesses. It is Section 134 of the Evidence Act which rules out requirement of number of witness rather evidence of single witness if, inspires confidence could be accepted and form basis for conviction and sentences. More recently in ***Kuna @Sanjaya Behera vs The State Of Odisha*** reported in **(2018) 1 SCC 296** at para-19, it has been held:-

“19. That conviction can be based on a testimony of a single eye witness if he or she passes the test of reliability and that it is not the number of witnesses but the quality of evidence that is important, have been propounded consistently in *Anil Phukhan* (1993) 3 SCC 282, *Ramji Surya* (1983) 3 SCC



629, Patnam Anandam (2005) 9 SCC 237 and Gulam Sarbar (2014) 3 SCC 401 with the apparent emphasis that evidence must be weighed and not counted, decisive test being whether it has a ring of truth and it is cogent, credible, trustworthy or otherwise”

11. In case, a lady dies at her Sasural within seven years of marriage by burn or bodily injury or otherwise than normal circumstance and during intervening period, there happens to be an allegation of demand of dowry as well as torture on pretext thereof, is liable to be proceeded under the garb of dowry death punishable under Section 304B of the IPC and for that, the necessary requirements are (a) the death should be within seven years of marriage, (b) the death should be on account of burn or bodily injury or otherwise than normal circumstance, (c) soon before her death she has been tortured with regard to demand of dowry and (d) by her husband or relative of the husband, which the prosecution is bound to substantiate.

In case, prosecution succeeds in proving the aforesaid ingredients then, in that circumstance, it will be deemed to be a dowry death and then thereafter, the onus shift upon the accused to explain as provided under Section 113B of the Evidence Act. More recently in ***Bajnath and Ors vs State of M.P*** reported in **(2017) 1 SCC 101**, it has been held:-

“24. The evidence on record and the competing arguments have received our required attention. As the prosecution is on the charge of the offences envisaged in Sections 304B and 498A of the Code, the provisions for reference are extracted hereunder:

“304B. Dowry death.-(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal



circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called “dowry death”, and such husband or relative shall be deemed to have caused her death.

Explanation. - For the purpose of this subsection, “dowry” shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

498A. Husband or relative of husband of a woman subjecting her to cruelty.—

Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.—For the purpose of this section, “cruelty” means—

(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

25. Whereas in the offence of dowry death defined by Section 304B of the Code, the ingredients thereof are:

(i) death of the woman concerned is by any burns or bodily injury or by any cause other than in normal circumstances and

(ii) is within seven years of her marriage and

(iii) that soon before her death, she was subjected to cruelty or harassment by her husband or any relative of the husband for, or in connection with, any demand for



dowry.

The offence under Section 498A of the Code is attracted qua the husband or his relative if she is subjected to cruelty. The explanation to this Section expositis “cruelty” as:

(i) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) or

(ii) harassment of the woman, where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

26. Patently thus, cruelty or harassment of the lady by her husband or his relative for or in connection with any demand for any property or valuable security as a demand for dowry or in connection therewith is the common constituent of both the offences.

27. The expression “dowry” is ordained to have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961. The expression “cruelty”, as explained, contains in its expanse, apart from the conduct of the tormentor, the consequences precipitated thereby qua the lady subjected thereto. Be that as it may, cruelty or harassment by the husband or any relative of his for or in connection with any demand of dowry to reiterate is the gravamen of the two offences.

28. Section 113B of the Act enjoins a statutory presumption as to dowry death in the following terms:

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

Explanation. - For the purpose of this section, “dowry death” shall have the same meaning as in section 304B of the Indian



Penal Code (45 of 1860)”

29. Noticeably this presumption as well is founded on the proof of cruelty or harassment of the woman dead for or in connection with any demand for dowry by the person charged with the offence. The presumption as to dowry death thus would get activated only upon the proof of the fact that the deceased lady had been subjected to cruelty or harassment for or in connection with any demand for dowry by the accused and that too in the reasonable contiguity of death. Such a proof is thus the legislatively mandated prerequisite to invoke the otherwise statutorily ordained presumption of commission of the offence of dowry death by the person charged therewith.

30. A conjoint reading of these three provisions, thus predicate the burden of the prosecution to unassailably substantiate the ingredients of the two offences by direct and convincing evidence so as to avail the presumption engrafted in Section 113B of the Act against the accused. Proof of cruelty or harassment by the husband or her relative or the person charged is thus the sine qua non to inspirit the statutory presumption, to draw the person charged within the coils thereof. If the prosecution fails to demonstrate by cogent coherent and persuasive evidence to prove such fact, the person accused of either of the above referred offences cannot be held guilty by taking refuge only of the presumption to cover up the shortfall in proof.

31. The legislative primature of relieving the prosecution of the rigour of the proof of the often practically inaccessible recesses of life within the guarded confines of a matrimonial home and of replenishing the consequential void, by according a presumption against the person charged, cannot be overreased to gloss-over and condone its failure to prove credibly, the basic facts enumerated in the Sections involved, lest justice is the casualty.

32. This Court while often dwelling on the scope and purport of Section 304B of the Code and Section 113B of the Act have propounded that the presumption is contingent on the fact that the prosecution first spell out the ingredients of the offence of Section 304B as in *Shindo Alias Sawinder Kaur and another Vs. State of Punjab* –



(2011) 11 SCC 517 and echoed in Rajeev Kumar Vs. State of Haryana – (2013) 16 SCC 640. In the latter pronouncement, this Court propounded that one of the essential ingredients of dowry death under Section 304B of the Code is that the accused must have subjected the woman to cruelty in connection with demand for dowry soon before her death and that this ingredient has to be proved by the prosecution beyond reasonable doubt and only then the Court will presume that the accused has committed the offence of dowry death under Section 113B of the Act. It referred to with approval, the earlier decision of this Court in K. Prema S. Rao Vs. Yadla Srinivasa Rao – (2003) 1 SCC 217 to the effect that to attract the provision of Section 304B of the Code, 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 and harassment “in connection with the demand for dowry”

12. Now coming to the facts of the case, it is apparent that only PW.3 is the material witness in order to substantiate the allegation. She had deposed that Kanchan was her daughter whose marriage was solemnized about eight years ago with Raju Gupta. At the time of marriage, she had gifted according to her means. Kanchan was issueless. After sometime while Kanchan was staying at her Sasural her father-in-law Bhagat Sah and mother-in-law Chanda Devi began to demand money in lieu of dowry which, her daughter Kanchan had informed over phone. She had accepted the demand but, on account of non-fulfillment thereof, Kanchan was abused as well as physically tortured. Before her death she had come to her place on the eve of Vishwakarma Pooja and returned back on the next day. Immediately thereafter she informed that you should come and take her away otherwise, they are bent upon to murder her whereupon, she sent her son Chhotu Kumar. He had gone there but, had not found her. Her sister happens to be *Gotani*



of her daughter whom she informed whereupon she disclosed that she has been burnt. Then she rushed and till then, her dead body was thrown away. Her son-in-law, who was at Surat, had telephoned her before the occurrence and had demanded dowry and for that, he used to talk in filthy language. Then thereafter, she informed the police. Identified the accused. During cross-examination at para-7 she had stated that she had only one daughter and a son namely Kanchan (deceased) as well as Chhotu. In para-11, she had stated that she had made complain before the police on the next day of the occurrence. In para-12, she had stated that Chhotu Kumar had gone to the place of deceased on the date of occurrence itself. In para-13, she had deposed that Chhotu had participated in the funeral of Kanchan. In para-15, she had stated that she had not made complaint against Bhagat Singh and Chanda Devi before institution of this case to any authority. In para-16, she had stated that she used to visit at the place of Kanchan and in likewise manner, Kanchan used to visit at her place. Then had denied the suggestion. At para-18 had stated that she had not informed to anybody with regard to the disclosure made by Kanchan when she had gone to her Sasural on the next day of Vishwakarma Pooja asking her to take her aback otherwise she will be murdered. In para-19, she had stated that the house of her sister happens to be adjacent to her daughter. In para-19, she had stated that she had not stated before the police that her husband was also demanding the dowry. Then had denied the suggestion that Chhotu and deceased quarreled whereupon, she (deceased) committed suicide and after funeral, this false case has been filed with ulterior motive.



13. PW.7 is the Investigating Officer had deposed that on being entrusted with the investigation, he had gone to the place of occurrence. He had searched out informant for further statement but failed (rightly been as was resident of different village). Inspected the place of occurrence which happens to be the tiled roof building of the accused having eastern front. He had found one tin box, half burnt, two sound box half burnt, one quilt half burnt, one bed half burnt, one sari, one shawl half burnt which were seized and for that in presence of Mahendra and Vidyanand Yadav seizure list was prepared. Exhibited all the relevant documents including the seizure list. Recorded statement of witnesses and then, submitted charge sheet. During cross-examination at para-10 the defence had drawn statement of a witness Vijay Shankar Kanu (PW.5) having been declared hostile.

14. After analyzing the evidence available on the record, as discussed hereinabove, it is evident that two kinds of evidences are there, in first one, sole testimony of PW.3 and the other one, co-village of the appellant being PW.1, PW.2, PW.5 and PW.6 completely diminishing the prosecution case. When the evidence of PW.3 has been gone through, it is evident that she under para-13 of the cross-examination had admitted that Raju, her son had participated in the funeral. Had there been some kind of activity adverse to the interest of the deceased, then in that circumstance, instead of participating in the funeral, the police would have been informed by the Raju. It is also evident from her evidence that she had stated that when she had gone to the place of her daughter, her dead body was already disposed of is not at all found reliable in the background of



disclosure having made under para-13, as discussed hereinabove. Furthermore, it is also evident from deposition of PW.3 that deceased frequently came to her place alone, then, in that circumstance why not she came out on fateful day, after being threats. Not only this, there also happens to be disclosure at the end of PW.3 that she was in contact with deceased over mobile but neither during investigation nor during course of evidence mobile number was disclosed.

15. So, apart from other improbability coming out from the evidence of PW.3, it is apparent, after overall analysis of the evidence of PW.3 that the allegation whatever been attributed at her end is not at all found free from suspicion. Consequent thereupon, the judgment of conviction and sentence recorded by the learned lower court is set aside. Appeal is allowed. Both the appellants are on bail, hence are discharged from its liabilities. First and last page of judgment be handed over to the learned amicus curiae for the needful.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

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