

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.647 of 2015

Arising Out of PS.Case No. -45 Year- 2014 Thana -RAHUI District- NALANDA
(BIHARSHARIFF)

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1. **Shailesh Kumar**, son of Ram Deo Prasad
2. **Ram Deo Prasad**, son of Mahabir Prasad, both residents of village/ Mohalla-
Malbigha, P.S. - Noor Sarai, District – Nalanda.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Rajendra Prasad-Sr. Advocate
Mr. Pramod Kumar-Advocate
Mr. Ritesh Kumar-Advocate
For the Respondent/s : Mr. Binod Bihari Singh-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date: 16-08-2018

Vide judgment of conviction dated 26.08.2015 and order of sentence dated 31.08.2015, appellants, Shailesh Kumar and Ram Deo Prasad have been found guilty for an offence punishable under Section 304B of the I.P.C. and sentenced to undergo R.I. for ten years, under Section 201/34 of the I.P.C. and sentenced to undergo S.I. for two years as well as to pay fine appertaining to Rs.3,000/- and in default thereof, to undergo S.I. for three months, additionally, with a further direction to run the sentences concurrently by the 1st Additional Sessions Judge, Nalanda at Biharsharif in Sessions Trial No.433 of 2014.

2. Raj Nandan Prasad (PW-5) gave his fard-bayan on



20.02.2014 at about 9.30 A.M. before the Officer-in-Charge, Rahui (Bena) P.S. at Sadar Hospital, Biharsharif disclosing the fact that his daughter Bibha Kumari, deceased was married with Shailesh Kumar, son of Ram Deo Prasad of village-Malbiga, P.S. Noor Sarai, District-Nalanda in the Year 2013. His son-in-law Shailesh Kumar, Samdhi Ram Deo Prasad advanced demand of a golden chain, ring at the time of Duragman, whereupon he assured that at the time of marriage of his son, aforesaid items will be given, but they declined to accede. About four days ago, his son-in-law Shailesh Kumar came to his place and asked for Bidai of his daughter Bibha Kumari, whereupon he said that as Rosgadi has not been effected, so it looks inappropriate to facilitate Bidai. Hearing the same, his son-in-law became enraged and said, his daughter now has become his wife, so he will take her away and then, his son-in-law took away his daughter forcibly. Yesterday i.e. on 19.02.2014 at about 6.00 P.M. his daughter talked with her mother on mobile and during course thereof, she disclosed that her husband is under illicit relationship with his Bhabhi on account thereof, her husband is annoyed with her as she obstructs. Furthermore, she has also disclosed that her Gotni Khushbu Devi, Bhainsur Madan Singh, Bhainsur Suraj Kumar @ Satyendra Singh are torturing her on the pretext of demand of dowry. Yesterday at about 10.30 P.M., his Samdhi Ram Deo Prasad has telephonically informed to his wife that her daughter Bibha died on account of motorcycle



accident while her husband is lying at Sadar Hospital unconsciously. After getting such information, he rushed to Sadar Hospital Biharsharif where found dead body of his daughter Bibha Devi. Her husband has been found conscious. After seeing the dead body of his daughter, they found sign of assault over the head as well as sign of string over her neck and so, he alleged that his daughter has been murdered by way of strangulation by the accused persons on account of dowry and further, falsely informed the death on account of motorcycle accident.

3. After registration of Rahui (Bena) P. S. Case No.45 of 2014, investigation commenced and after concluding the same, chargesheet has been submitted against these two appellants keeping the investigation pending against others, whereupon trial commenced and concluded 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. Furthermore, it has also been pleaded that during course of travelling over motorcycle along with her husband, both of them met with an accident as a result of which, both of them sustained injury. Both of them were lifted to hospital for proper treatment, but the deceased could not survive. However, nothing has been adduced in defence.



5. Prosecution had examined altogether thirteen PWs, who are PW-1, Dilip Kumar, PW-2, Dayanand Prasad, PW-3, Karan Yadav, PW-4, Madhuri Devi, PW-5, Raj Nandan Prasad, PW-6, Chandrika Yadav @ Chanirak Yadav, PW-7, Anil Yadav, PW-8, Raj Ballav Yadav, PW-9, Suresh Yadav, PW-10, Bhaso Yadav @ Ganga Kishun, PW-11, Anugrah Narayan Singh, PW-12, Dev Lal Yadav and PW-13, Dr. Raj Kishore Raju. Side by side, had also exhibited as Exhibit-1, signature of informant while Exhibit-1/1, signature of PW-1 over the fard-bayan, Exhibit-2 series, signature of the seizure list witnesses, Exhibit-3, chargesheet, Exhibit-4, fard-bayan, Exhibit-5, seizure list, Exhibit-6, post mortem report. As is evident, nothing has been adduced in defence.

6. While assailing the judgment of conviction and sentence, it has been submitted on behalf of learned counsel for the appellants that the finding recorded by the learned lower Court appears to be non-sustainable in the eye of law, because of the fact that none of the material witnesses has supported the case of the prosecution. Therefore, it happens to be a case of no evidence. The finding of the learned lower Court is based upon conjecture and surmises as well as hermetically influenced because of the fact that the things which is not at all found on record, has been perceived by the lower Court to justify the finding against the appellants.



Furthermore, it has been submitted that on the basis of the evidence of PW-12, Investigating Officer and PW-13, doctor recorded the judgment of conviction and sentence which ought not to be as the evidence of I.O. as well as doctor could not be considered to be evidence of fact and further, their status happens to be corroborative in nature, moreover, is not at all supported by material witnesses. That being so, on account of absence of substantial evidence, the evidence of I.O. and doctor would not boost the case of the prosecution nor the evidence was sufficient to loll for drawing an adverse inference against the appellants and that being so, the judgment impugned is fit to be set aside.

7. On the other hand, learned Additional Public Prosecutor while strongly defending the judgment impugned has submitted that witness may lie not the circumstance. From the evidence of doctor, it is apparent that death of deceased was not on account of motorcycle accident and further, from the evidence of the I.O., it is apparent that no site where allegedly accident is said to have taken place was located nor he had seen any connecting material to justify the theory of the accident. Moreover, nothing has been said towards the alleged motorcycle nor it was found by the I.O. during course of investigation, what to say, being in damaged condition. In likewise manner, appellants have not been able to discharge their



burden as provided under Section 106 of the Cr.P.C. in the background of the fact that it is an admitted case that deceased was along with them till her last, and so, it was within their exclusive knowledge, whereupon adverse inference is to be drawn. As such, the conviction and sentence recorded by the learned lower Court is found duly justified.

8. PW-13 had conducted post mortem over the dead body of deceased on 20.02.2014 and found the following ante-mortem injuries:-

1. Injury No.1-Left parietal bone.

(a) 1" x ½" skull deep lacerated wound.

(b) 1 ½" x ½" x skull deep lacerated wound side by side.

2. Multiple abrasion both thigh (back), all finger of lt. foot.

3. Transverse ligature mark 3 m.m. to 4 m.m. wide up to both side of neck, on the thyroid, bruise and abrasion around ligature skull.

On Dissection

1. Cranial bone intact. Ménages intact. Conjested chest. Blood clot around both side of trachea and larynx of the thyroid bone. Heart-intact-both chamber fill with blood.

Abdomen: *Bladder full. Uterus-normal in size. All visceras intact. Stomach –about 303 undigested food present.*



Cause of death:- Death is caused by

asphyxia due to above said injury No.3. Time elapsed since death within 24 hours (twenty four hour)

According to doctor, the death is caused by asphyxia due to injury no.3. During cross-examination, it is evident that so far injury no.1 is concerned, he had accepted the suggestion at the end of the defence that by fall from a speeding vehicle, such kind of injury may be caused, but with regard to remaining ante-mortem injuries, there happens to be no cross-examination, more particularly, with regard to injury no.3. That means to say, the doctor had found cause of death otherwise than accident.

9. PW-12 is the Main I.O., who had stated that on account of having been entrusted with the investigation after registration of case, he had proceeded there with, copied the F.I.R., inquest report in the case diary. At the hospital itself, he had seized necklace under seizure list (exhibited). On 25.02.2014, he had seized a bangle as well as lady sandal. He had recorded further statement of the informant, statement of witnesses Dilip Kumar, Dayanand. He had visited the place of occurrence, which happens to be the house of the accused persons and detailed the same having boundary North-house of Arvind Yadav, South-house of Kailash Yadav, East-house of Umesh Yadav and West-house of Nawal Yadav. No incriminating material has been found at the P.O. Then thereafter, he had recorded



statement of witnesses Sunil Prasad, Madhuri Devi, Karan Yadav, Bhola Yadav, Ram Ballav Yadav, Anil Yadav, Mahendra Yadav, procured post mortem report and then, his attention has been drawn up towards the previous statement of the witnesses, who were examined during course of trial and were declared hostile. During cross-examination at Para-12, he had stated that he had not found any kind of incriminating material, such as blood, stick, part of string at the P.O. nor he had found any sign relating to commission of an offence. He had further stated that he had not sent the seized articles to the F.S.L. for examination.

10. Now, coming to oral evidence, it is evident that PW-1 had deposed that deceased Bibha Devi was his niece and was married with Shailesh Kumar in the Year 2013. At the time of marriage, cash appertaining to Rs.1,50,000/- (Rs. One lac fifty thousand), ornaments, motorcycle, utensils were given. In spite of the same, there was demand of golden chain, ring at the end of the accused persons namely husband Shailesh Kumar, his brother Madan, Suraj Kumar, Khushbu, Ram Deo Prasad, which they were not in a position to fulfil at that very moment, whereupon they assured that those items will be provided later on, but they were not at all inclined to accept the same and on account thereof, the marriage of his niece became misery. After marriage, Bibha Devi had gone to her sasural



where she stayed 2-2 ½” months, during midst thereof, she was assaulted even in their presence, while they have gone there. They consoled Bibha Kumari and then, returned back. On 19.02.2014 at 10.00 P.M., there was commotion in the house, whereupon he made query from his brother, who disclosed that they have received telephonic information regarding Bibha Kumari, meeting with death in an accident. After receiving such information, he along with Raj Nandan, Madhuri and others gone to Sadar Hospital, Biharsharif where they have not seen anybody nor dead body of Bibha Devi was there. During course of returning, they have gone to Bena P.S. and inquired, whereupon police officials disclosed that no accident had taken place within its jurisdiction. On the following morning, they came to know that dead body of a female has been taken to Bakhtiyarpur Ghat for funeral, whereupon they reached at the Bakhtiyarpur Ghat and found the dead body of Bibha Devi. They have also seen Madan, Raj Deo along with others. Then thereafter, they informed the police and after whose arrival, dead body was seized. They have seen mark over the neck of the deceased. Post mortem was conducted over the dead body. Police had recorded his statement. Case was instituted by his brother, whereupon he put his signature (exhibited). He had also admitted his presence over the inquest report. During cross-examination, he had admitted that he had stated before the police that he came to know from his brother regarding death of



his niece Bibha Devi in road accident. Then had denied the suggestion that he had made statement before the police that they have gone to hospital where found dead body of Bibha Devi. He had not stated before the police that during course of taking to hospital, deceased died out of injuries so sustained during course of accident. He had further denied that he had stated before the police that she met with an accident over NH-31. Then his cross-examination was deferred on which day, he changed his status and gone in favour of accused admitting the plea, presence of cordial relationship with the deceased along with her sasuralwala, absence of demand, absence of torture as well as meeting with an accident wherein she died.

11. In likewise manner, PW-2, PW-3, PW-4, PW-5, PW-6, PW-7, PW-8, PW-9 and PW-10, all have become hostile to the prosecution and as is evident, their evidences are completely immiscible to the initial prosecution version. Even the mother of the deceased, PW-4 and the informant, father of the deceased (PW-5) have not supported the case of the prosecution rather all of them supported the defence version that while deceased was going to her sasural along with her husband on a motorcycle, met with an accident, wherein she sustained injury and died while her husband was taken to hospital for treatment. PW-11 is the Part I.O., who had simply submitted the chargesheet. This happens to be nature of the evidence



available on the record.

12. From the record, it is manifest that accused persons were charged for an offence punishable under Sections 304B, 120B, 201 I.P.C. and in an alternative under Section 302 of the I.P.C. From the judgment impugned, it is evident that learned lower Court had dealt with the issue right from Para-17 to Para-21 and then, concluded under Para-22 as well as Para-23 that prosecution had succeeded in substantiating the case punishable under Section 304B of the I.P.C. as well as Section 201 of the I.P.C., but had not commented over Section 302 I.P.C., at least discussing whether same is made out or not and further, accused being acquitted for the same. That means to say, the learned lower Court had not considered the facts and circumstances emerging out from the L.C. Record, after making parallel scrutiny, whether the facts of the case speaks about the commission of offence of murder, concealment of the evidence of the murder in order to screen themselves coupled with the fact whether accused have properly discharged the obligation as laid down under Section 106 of the Evidence Act. That means to say, the learned lower Court failed to denote itself by making sincere effort in order to properly scrutinize, appreciate the situation including the evidence of the witnesses, on the other hand, adopted simplest part while concluding it a case of dowry death. That means to say, absolutely, the lower



Court failed to discharge its onerous duty.

13. However, from the aforesaid piece of evidence, it is apparent that all the witnesses are consistent with regard to the fact that on the alleged date, deceased was with her husband. Though it has been deposed/ stated during course of cross-examination that while she along with her husband was going to sasural over motorcycle met with an accident and died. However, none are an eye witness to occurrence. Apart from this, from the medical evidence, it is evident that deceased had not sustained any kind of injury, which might have occurred on account of falling from speeding vehicle responsible for causing death rather she died of asphyxia on account of transverse ligature mark 3 mm to 4 mm width upto both sides of neck and further, evidence of PW-12, the I.O. suggests otherwise than the circumstance whatever been projected by the witnesses. From his evidence, it is apparent that he had not found the place where allegedly accident took place, had not seen the damaged, if any motorcycle, had not found the husband admitted at Sadar hospital nor there happens to be cross-examination on that score. Furthermore, defence could not be able to produce relevant documents to substantiate the same much less injury report. Because of the fact that deceased was in company of appellants, whereupon there happens to be no controversy and so, it was incumbent upon the appellants to



have explained presence of injury no.3 over the neck of the deceased, ante-mortem in nature, the cause of death as required under Section 106 of the Evidence Act. There happens to be settled proverb “*witness may lie, but not the circumstance.*” In ***Gopal vs. State of Karnataka reported in (2011) 14 SCC 396***, it has been held:-

“6. It is true that the witnesses, who carried the deceased to the hospital, turned hostile during their examinations but that may not be an escape route for the accused because the man may lie but the circumstances do not. The circumstances in this case clinch the proof that it is the accused and the accused alone who has committed this offence.”

14. In ***Ashok vs. State of Maharashtra reported in (2015) 4 SCC 393***, it has been held:-

“12. From the study of above stated judgments and many others delivered by this Court over a period of years, the rule can be summarized as that the initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of accused. However, in case of last seen together, the prosecution is exempted to prove exact happening of the incident as the accused himself would have special knowledge of the incident and thus, would have burden of proof as per [Section 106](#) of Indian Evidence Act. Therefore, last seen together itself is not a conclusive proof but along with other circumstances surrounding the



incident, like relations between the accused and the deceased, enmity between them, previous history of hostility, recovery of weapon from the accused etc., non-explanation of death of the deceased, may lead to a presumption of guilt.”

15. In ***Gajanan Dashrath Kharate v. State of Maharashtra reported in (2016) 4 SCC 604***, it has been held:-

“13. As seen from the evidence, appellant-Gajanan and his father- Dashrath and mother-Mankarnabai were living together. On 07.04.2002, mother of the appellant-accused had gone to another village-Dahigaon. Prosecution has proved presence of the appellant at his home on the night of 07.04.2002. Therefore, the appellant is duty bound to explain as to how the death of his father was caused. When an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution. In view of [Section 106](#) of the Evidence Act, there will be a corresponding burden on the inmates of the house to give cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on the accused to offer. On the date of occurrence, when accused and his father Dashrath were in the house and when the father of



the accused was found dead, it was for the accused to offer an explanation as to how his father sustained injuries. When the accused could not offer any explanation as to the homicidal death of his father, it is a strong circumstance against the accused that he is responsible for the commission of the crime.”

16. In *Issac @ Kishor vs. Ronald Cheriyan and others* reported in 2018 (2) P.L.J.R. 57 (SC), it has been held:-

“8. We have heard learned counsel for the parties and perused the impugned judgment and materials on record. The point falling for consideration is whether the High Court was right in setting aside the judgment of the trial court and remitting the matter back to the trial court for retrial.

9. Section 386 Cr.P.C. defines the powers of the Appellate Court in dealing with the appeals. The powers enumerated thereon are vested in all courts, whether the High Court or subordinate courts, except that Clause (a) of the section is restricted to the powers of the High Court only, since an appeal against an order of acquittal lies only to that court, while Clause (b) of the section is not so restricted and embraces all courts. The power to direct the accused to be retried has been conferred on the High Court not only when it deals with an appeal against acquittal but also when it deals with an appeal against conviction. Section 386 Cr.P.C. reads as under:- "Section 386:- After perusing



such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under Section 377 or Section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may :- (a) In an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law; (b) In an appeal from a conviction:- (i) Reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of Competent jurisdiction subordinate to such Appellate Court or committed for trial, or (ii) Alter the finding, maintaining the sentence, or (iii) With or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;"

10. Under Section 386(a) and (b)(i), the power to direct retrial has been conferred upon the Appellate Court when it deals either with an appeal against judgment of conviction or an appeal against acquittal (High Court). There is a difference between the powers of an Appellate Court under Clauses (a) and (b). Under Clause (b), the Court is required to touch the finding and sentence, but under Clause (a), the Court may reverse the order of acquittal and direct that further enquiry be made or the



accused may be retried or may find him guilty and pass sentence on him according to law.

11. Normally, retrial should not be ordered when there is some infirmity rendering the trial defective. A retrial may be ordered when the original trial has not been satisfactory for particular reasons like..., appropriate charge not framed, evidence wrongly rejected which could have been admitted or evidence admitted which could have been rejected etc. Retrial cannot be ordered when there is a mere irregularity or where it does not cause any prejudice, the Appellate Court may not direct retrial. The power to order retrial should be exercised only in exceptional cases.

12. In K. Chinnaswamy Ready v. State of Andhra Pradesh and Another, AIR 1962 SC 1788, the accused had been convicted by the trial court. The Sessions Court took the view that an important piece of evidence held against the accused was inadmissible and acquitted him. The High Court in revision by the de facto complainant held that the evidence held to be inadmissible by the Sessions Court was admissible and set aside the acquittal directing the accused to be retried on the same charges. The Supreme Court agreed with the High Court that the acquittal deserved to be set aside. In para (7), this Court has spelt out what could be termed as exceptional circumstances which reads as under:- "7. It is true that it is open to a High Court in revision to set aside an order of acquittal even at the instance of private parties, though the State may not have



thought fit to appeal; but this jurisdiction should in our opinion be exercised by the High Court only in exceptional cases, when there is some glaring defect in the procedure or there is a manifest error on a point of law and consequently there has been a flagrant miscarriage of justice. Sub-section (4) of Section 439 forbids a High Court from converting a finding of acquittal into one of conviction and that makes it all the more incumbent on the High Court to see that it does not convert the finding of acquittal into one of conviction by the indirect method of ordering retrial, when it cannot itself directly convert a finding of acquittal into a finding of conviction. This places limitations on the power of the High Court to set aside a finding of acquittal in revision and it is only in exceptional cases that this power should be exercised. It is not possible to lay down the criteria for determining such exceptional cases which would cover all contingencies. We may however indicate some cases of this kind, which would in our opinion justify the High Court in interfering with a finding of acquittal in revision. These cases may be: where the trial court has no jurisdiction to try the case but has still acquitted the accused, or where the trial court has wrongly shut out evidence which the prosecution wished to produce, or where the appeal court has wrongly held evidence which was admitted by the trial court to be inadmissible, or where material evidence has been overlooked either by the trial court or by the appeal court,



or where the acquittal is based on a compounding of the offence, which is invalid under the law. These and other cases of similar nature can properly be held to be cases of exceptional nature, where the High Court can justifiably interfere with an order of acquittal; and in such a case it is obvious that it cannot be said that the High Court was doing indirectly what it could not do directly in view of the provisions of Section 439(4)....." (underlining added) The same principle was again reiterated in Mahendra Pratap Singh v. Sarju Singh and Another AIR 1968 SC 707.

13. In Matukdhari Singh and others v. Janardan Prasad, AIR 1966 SC 356, accused was tried for offences under Sections 420, 466, 406 and 465/471 IPC and acquitted. The trial court did not frame charge under Section 467 IPC regarding which there were prima facie materials available, that is an offence triable exclusively by the Sessions Court. The High Court, in appeal, set aside the acquittal and ordered retrial. The Supreme Court dismissed the appeal preferred before it. The court referred to earlier decisions in Abinash Chandra Bose v. Bimal Krishna Sen and Another AIR 1963 SC 316 and Rajeshwar Prasad Misra v. State of West Bengal and Another AIR 1965 SC 1887 with reference to the facts of those cases and emphasized that wide discretion available with the Appellate Court in ordering retrial.

17. In Gopi Chand vs. Delhi Administration reported



in A.I.R. 1959 SC 609, it has been held by Constitution Bench as follows:-

“29.

The offences with which the appellant stands charged are of a very serious, nature; and though it is true that he has had to undergo the ordeal of a trial and has suffered rigorous imprisonment for some time that would not justify his prayer that we should not order his retrial. In our opinion, having regard to the gravity of the offences charged against the appellant, the ends of justice require that we should direct that he should be tried for the said offences de novo according to law. We also direct that the proceedings to be taken against the appellant hereafter should be commenced without delay and should be disposed as expeditiously as possible.”

18. In ***State of M.P. vs. Bhooraji and others reported in (2001) 7 SCC 679***, it has been held:-

“15. A reading of the section makes it clear that the error, omission or irregularity in the proceedings held before or during the trial or in any enquiry were reckoned by the legislature as possible occurrences in criminal courts. Yet the legislature disfavoured axing down the proceedings or to direct repetition of the whole proceedings afresh. Hence, the legislature imposed a prohibition that unless such error, omission or irregularity has occasioned “a failure of



justice” the superior court shall not quash the proceedings merely on the ground of such error, omission or irregularity.

16. What is meant by “a failure of justice” occasioned on account of such error, omission or irregularity? This Court has observed in [Shamnsaheb M. Multtani vs. State of Karnataka](#) {2001 (2) SCC 577} thus:

“23. We often hear about ‘failure of justice’ and quite often the submission in a criminal court is accentuated with the said expression. Perhaps it is too pliable or facile an expression which could be fitted in any situation of a case. The expression “failure of justice” would appear, sometimes, as an etymological chameleon (the simile is borrowed from Lord Diplock in *Town Investments Ltd. v. Deptt. of the Environment*, 1977 (1) All E.R. 813). The criminal court, particularly the superior court should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage.

19. In ***Ramesh and others vs. State of Haryana*** reported in (2017) 1 SCC 529, it has been held:-

“39. We find that it is becoming a common phenomenon, almost a regular feature, that in criminal cases witnesses turn hostile. There could be various reasons for this behaviour or attitude of the witnesses. It is possible that



when the statements of such witnesses were recorded under [Section 161](#) of the Code of Criminal Procedure, 1973 by the police during investigation, the Investigating Officer forced them to make such statements and, therefore, they resiled therefrom while deposing in the Court and justifiably so. However, this is no longer the reason in most of the cases. This trend of witnesses turning hostile is due to various other factors. It may be fear of deposing against the accused/delinquent or political pressure or pressure of other family members or other such sociological factors. It is also possible that witnesses are corrupted with monetary considerations.

40. In some of the judgments in past few years, this Court has commented upon such peculiar behaviour of witnesses turning hostile and we would like to quote from few such judgments. [In Krishna Mochi v. State of Bihar](#)[(2002) 6 SCC 81], this Court observed as under:

“31. It is matter of common experience that in recent times there has been sharp decline of ethical values in public life even in developed countries much less developing one, like ours, where the ratio of decline is higher. Even in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be credible by courts for manifold reasons. One of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders



are habitual criminals or high-ups in the Government or close to powers, which may be political, economic or other powers including muscle power.”

41. Likewise, in [Zahira Habibullah v. State of Gujarat](#)[(2006) 3 SCC 374], this Court highlighted the problem with following observations:

“40. “Witnesses” as Bentham said: “are the eyes and ears of justice”. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control, to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by the court on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface. Broader public and social interest require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State representing by their presenting agencies do not



suffer... there comes the need for protecting the witnesses. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth presented before the Court and justice triumphs and that the trial is not reduced to mockery.

41. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who has political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. As a protector of its citizens it has to ensure that during a trial in Court the witness could safely depose truth without any fear of being haunted by those against whom he had deposed. Every State has a constitutional obligation and duty to protect the life and liberty of its citizens. That is the fundamental requirement for observance of the rule of law. There cannot be any deviation from this requirement because of any extraneous factors like, caste, creed, religion, political belief or ideology. Every State is supposed to know these fundamental requirements and this needs no retaliation. We can only say this with regard to the criticism levelled against the State of Gujarat. Some legislative enactments like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (in short the "TADA Act") have taken note of the reluctance shown by witnesses to depose against people with muscle power, money power



or political power which has become the order of the day. If ultimately truth is to be arrived at, the eyes and ears of justice have to be protected so that the interests of justice do not get incapacitated in the sense of making the proceedings before Courts mere mock trials as are usually seen in movies.”

42. Likewise, in [Sakshi v. Union of India](#)[(2004) 5 SCC 518], the menace of witnesses turning hostile was again described in the following words:

“32. The mere sight of the accused may induce an element of extreme fear in the mind of the victim or the witnesses or can put them in a state of shock. In such a situation he or she may not be able to give full details of the incident which may result in miscarriage of justice. Therefore, a screen or some such arrangement can be made where the victim or witnesses do not have to undergo the trauma of seeing the body or the face of the accused. Often the questions put in cross-examination are purposely designed to embarrass or confuse the victims of rape and child abuse. The object is that out of the feeling of shame or embarrassment, the victim may not speak out or give details of certain acts committed by the accused. It will, therefore, be better if the questions to be put by the accused in cross-examination are given in writing to the Presiding Officer of the Court, who may put the same to the victim or witnesses in a language which is not embarrassing. There



can hardly be any objection to the other suggestion given by the petitioner that whenever a child or victim of rape is required to give testimony, sufficient breaks should be given as and when required. The provisions of sub-section (2) of [section 327](#) Cr.P.C. should also apply in inquiry or trial of offences under [Section 354](#) and [377](#) IPC.”

43. [In State v. Sanjeev Nanda](#)[(2012) 8 SCC 450], the Court felt constrained in reiterating the growing disturbing trend:

“99. Witness turning hostile is a major disturbing factor faced by the criminal courts in India. Reasons are many for the witnesses turning hostile, but of late, we see, especially in high profile cases, there is a regularity in the witnesses turning hostile, either due to monetary consideration or by other tempting offers which undermine the entire criminal justice system and people carry the impression that the mighty and powerful can always get away from the clutches of law thereby, eroding people’s faith in the system.

100. This court in [State of U.P. v. Ramesh Mishra and Anr.](#) [AIR 1996 SC 2766] held that it is equally settled law that the evidence of hostile witness could not be totally rejected, if spoken in favour of the prosecution or the accused, but it can be subjected to closest scrutiny and that portion of the evidence which is consistent with the case of



the prosecution or defence may be accepted. [In K. Anbazhagan v. Superintendent of Police and Anr.](#), (AIR 2004 SC 524), this Court held that if a court finds that in the process the credit of the witness has not been completely shaken, he may after reading and considering the evidence of the witness as a whole with due caution, accept, in the light of the evidence on the record that part of his testimony which it finds to be creditworthy and act upon it. This is exactly what was done in the instant case by both the trial court and the High Court and they found the accused guilty.

101. We cannot, however, close our eyes to the disturbing fact in the instant case where even the injured witness, who was present on the spot, turned hostile. This Court in [Sidhartha Vashisht @ Manu Sharma v. State \(NCT of Delhi\)](#), (2010) 6 SCC 1 and in [Zahira Habibullah Shaikh v. State of Gujarat](#), AIR 2006 SC 1367, had highlighted the glaring defects in the system like non-recording of the statements correctly by the police and the retraction of the statements by the prosecution witness due to intimidation, inducement and other methods of manipulation. Courts, however, cannot shut their eyes to the reality. If a witness becomes hostile to subvert the judicial process, the Courts shall not stand as a mute spectator and every effort should be made to bring home the truth. Criminal judicial system cannot be overturned by



those gullible witnesses who act under pressure, inducement or intimidation. Further, [Section 193](#) of the IPC imposes punishment for giving false evidence but is seldom invoked.”

44. On the analysis of various cases, following reasons can be discerned which make witnesses retracting their statements before the Court and turning hostile:

“(i) Threat/intimidation.

(ii) Inducement by various means.

(iii) Use of muscle and money power by the accused.

(iv) Use of Stock Witnesses.

(v) Protracted Trials.

(vi) Hassles faced by the witnesses during investigation and trial.

(vii) Non-existence of any clear-cut legislation to check hostility of witness.”

45. Threat and intimidation has been one of the major causes for the hostility of witnesses. Bentham said: “witnesses are the eyes and ears of justice”. When the witnesses are not able to depose correctly in the court of law, it results in low rate of conviction and many times even hardened criminals escape the conviction. It shakes public confidence in the criminal justice delivery system. It



is for this reason there has been a lot of discussion on witness protection and from various quarters demand is made for the State to play a definite role in coming out with witness protection programme, at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert trial getting tainted and derailed and truth becoming a casualty. A stern and emphatic message to this effect was given in Zahira Habibullah's case (2006) 3 SCC 374 as well.

46. Justifying the measures to be taken for witness protection to enable the witnesses to depose truthfully and without fear, Justice Malimath Committee Report on Reforms of Criminal Justice System, 2003 has remarked as under:

“11.3 Another major problem is about safety of witnesses and their family members who face danger at different stages. They are often threatened and the seriousness of the threat depends upon the type of the case and the background of the accused and his family. Many times crucial witnesses are threatened or injured prior to their testifying in the court. If the witness is still not amenable he may even be murdered. In such situations the witness will not come forward to give evidence unless he is assured of protection or is guaranteed anonymity of some form of physical disguise...Time has come for a comprehensive law being enacted for protection of the



witness and members of his family.”

47. Almost to similar effect are the observations of Law Commission of India in its 198th Report [Report on “witness identity protection and witness protection programmes”], as can be seen from the following discussion therein:

“The reason is not far to seek. In the case of victims of terrorism and sexual offences against women and juveniles, we are dealing with a section of society consisting of very vulnerable people, be they victims or witnesses. The victims and witnesses are under fear of or danger to their lives or lives of their relations or to their property. It is obvious that in the case of serious offences under the Indian Penal code, 1860 and other special enactments, some of which we have referred to above, there are bound to be absolutely similar situations for victims and witnesses. While in the case of certain offences under special statutes such fear or danger to victims and witnesses may be more common and pronounced, in the case of victims and witnesses involved or concerned with some serious offences, fear may be no less important. Obviously, if the trial in the case of special offences is to be fair both to the accused as well as to the victims/witnesses, then there is no reason as to why it should not be equally fair in the case of other general offences of serious nature falling under [the Indian Penal Code](#), 1860. It is the fear or



danger or rather the likelihood thereof that is common to both cases. That is why several general statutes in other countries provide for victim and witness protection.”

48. Apart from the above, another significant reason for witnesses turning hostile may be what is described as 'culture of compromise'. Commenting upon such culture in rape trials, Pratiksha Bakshi[“Justice is a Secret: Compromise in Rape Trials” (2010) 44, Issue 3, Contributions to Indian Sociology, pp. 207-233] has highlighted this problem in the following manner:

“During the trial, compromise acts as a tool in the hands of defence lawyers and the accused to pressurise complainants and victims to change their testimonies in a courtroom. Let us turn to a recent case from Agra wherein a young Dalit woman was gang-raped and the rapist let off on bail. The accused threatened to rape the victim again if she did not compromise. Nearly a year after she was raped, she committed suicide. While we find that the judgment records that the victim committed suicide following the pressure to compromise, the judgment does not criminalise the pressure to compromise as criminal intimidation of the victim and her family. The normalising function of the socio-legal category of compromise converts terror into a bargain in a context where there is no witness protection programme. This often accounts for why prosecution witnesses routinely turn hostile by the time the case comes



on trial, if the victim does not lose the will to live.

In other words, I have shown how legality is actually perceived as disruptive of sociality; in this instance, a sociality that is marked by caste based patriarchies, such that compromise is actively perceived, to put it in the words of a woman judge of a district court, as a mechanism for 'restoring social relations in society'."

49. In this regard, two articles by Daniela Berti delve into a sociological analysis of hostile witnesses, noting how village compromises (and possibly peer pressure) are a reason for witnesses turning hostile. In one of his articles [Daniela Berti, "Courts of Law and Legal Practice", pp.6-7], he writes:

"For reasons that cannot be explained here, even the people who initiate a legal case may change their minds later on and pursue non-official forms of compromise or adjustment. Ethnographic observations of the cases that do make it to the criminal courtroom thus provide insight into the kinds of tensions that arise between local society and the state judicial administration. These tensions are particularly palpable when witnesses deny before the judge what they allegedly said to the police during preliminary investigations. At this very moment they often become hostile. Here I must point out that the problem of what in common law terminology is called



“hostile witnesses” is, in fact, general in India and has provoked many a reaction from judges and politicians, as well as countless debates in newspaper editorials. Although this problem assumes particular relevance at high-profile, well-publicized trials, where witnesses may be politically pressured or bribed, it is a recurring everyday situation with which judges and prosecutors of any small district town are routinely faced. In many such cases, the hostile behavior results from various dynamics that interfere with the trial's outcome – village or family solidarity, the sharing of the same illegal activity for which the accused has been incriminated (as in case of cannabis cultivation), political interests, family pressures, various forms of economic compensation, and so forth. Sometimes the witness becomes “hostile” simply because police records of his or her earlier testimony are plainly wrong. Judges themselves are well aware that the police do write false statements for the purpose of strengthening their cases. Though well known in judicial milieus, the dynamics just described have not yet been studied as they unfold over the course of a trial. My research suggests, however, that the witness's withdrawal from his or her previous statement is a crucial moment in the trial, one that clearly encapsulates the tensions arising between those involved in a trial and the court machinery itself.”

“In my fieldwork experiences, witnesses become



“hostile” not only when they are directly implicated in a case filed by the police, but also when they are on the side of the plaintiff's party. During the often rather long period that elapses between the police investigation and the trial itself, I often observed, the party who has lodged the complaint (and who becomes the main witness) can irreparably compromise the case with the other party by means of compensation, threat or blackmail.”

50. Present case appears to have been stung by 'culture of compromise'. Fortunately, statement of PW-4 in attempting to shield the accused Ramesh has been proved to be false in view of the records of PGIMS, Rohtak and, therefore, we held that High Court was right in discarding his testimony.

20. In *Vijay Pal Singh and others vs. State of Uttarakhand* reported in (2014) 15 SCC 163, it has been held:-

“18. However, it is generally seen that in cases where a married woman dies within seven years of marriage, otherwise than under normal circumstances, no inquiry is usually conducted to see whether there is evidence, direct or circumstantial, as to whether the offence falls under [Section 302](#) of IPC. Sometimes, [Section 302](#) of IPC is put as an alternate charge. In cases where there is evidence, direct or circumstantial, to show that the offence falls under [Section 302](#) of IPC, the trial court should frame the charge under [Section 302](#) of IPC even if the police has not



expressed any opinion in that regard in the report under [Section 173\(2\)](#) of the Cr.PC. Section 304B of [IPC](#) can be put as an alternate charge if the trial court so feels. In the course of trial, if the court finds that there is no evidence, direct or circumstantial, and proof beyond reasonable doubt is not available to establish that the same is not homicide, in such a situation, if the ingredients under [Section 304B](#) of IPC are available, the trial court should proceed under the said provision. In [Muthu Kutty and another v. State](#) by Inspector of Police, T.N.[(2005) 9 SCC 113], this Court addressed the issue and held as follows:

"20. A reading of [Section 304-B](#) IPC and [Section 113-B, Evidence Act](#) together makes it clear that law authorises a presumption that the husband or [pic]any other relative of the husband has caused the death of a woman if she happens to die in circumstances not normal and that there was evidence to show that she was treated with cruelty or harassed before her death in connection with any demand for dowry. It, therefore, follows that the husband or the relative, as the case may be, need not be the actual or direct participant in the commission of the offence of death. For those that are direct participants in the commission of the offence of death there are already provisions incorporated in [Sections 300, 302 and 304](#). The provisions contained in [Section 304-B](#) IPC and [Section 113-B](#) of the Evidence Act were incorporated on the anvil



of the [Dowry Prohibition \(Amendment\) Act, 1984](#), the main object of which is to curb the evil of dowry in the society and to make it severely punitive in nature and not to extricate husbands or their relatives from the clutches of [Section 302](#) IPC if they directly cause death. This conceptual difference was not kept in view by the courts below. But that cannot bring any relief if the conviction is altered to Section 304 Part II. No prejudice is caused to the accused- appellants as they were originally charged for offence punishable under [Section 302](#) IPC along with [Section 304-B](#) IPC."

19. In a recent decision, this Court in [Jasvinder Saini and others v. State \(Government of NCT of Delhi\)](#)[(2013) 7 SCC 256], observed thus:

"15. It is common ground that a charge under [Section 304-B](#) IPC is not a substitute for a charge of murder punishable under [Section 302](#). As in the case of murder in every case under [Section 304-B](#) also there is a death involved. The question whether it is murder punishable under [Section 302](#) IPC or a dowry death punishable under [Section 304-B](#) IPC depends upon the fact situation and the evidence in the case. If there is evidence whether direct or circumstantial to prima facie support a charge under [Section 302](#) IPC the trial court can and indeed ought to frame a charge of murder punishable under [Section 302](#) IPC, which would then be the main



charge and not an alternative charge as is erroneously assumed in some quarters. If the main charge of murder is not proved against the accused at the trial, the court can look into the evidence to determine whether the alternative charge of dowry death punishable under [Section 304-B](#) is established. The ingredients constituting the two offences are different, thereby demanding appreciation of evidence from the perspective relevant to such ingredients. The trial court in that view of the matter acted mechanically for it framed an additional charge under [Section 302](#) IPC without adverting to the evidence adduced in the case and simply on the basis of the direction issued in Rajbir case. The High Court no doubt made a half-hearted attempt to justify the framing of the charge independent of the directions in Rajbir case, but it would have been more appropriate to remit the matter back to the trial court for fresh orders rather than lending support to it in the manner done by the High Court."

21. Now, coming to the case in hand, it is apparent that the conviction recorded by the lower Court is under Section 304B, 201 of the I.P.C., but the same is not at all found substantiated. On the other hand, there happens to be complete lacking of judicial mind on account of failure on the part of lower Court due to which, no finding has been recorded with regard to alternative charge framed under Section 302 I.P.C. along with other allied Sections whether it is found



proved or not. That being so, the judgment impugned is set aside. Appeal is allowed. Matter is remitted back to the learned lower Court for retrial right from the stage of argument, giving patient hearing to both the parties and then, will pass judgment in accordance with law. In the aforesaid background, the bail bond of the appellants are hereby cancelled directing them to surrender before the learned lower Court within fortnight, failing which the learned lower Court will be at liberty to proceed against the appellants in accordance with law. If the appellants appear and there happens to be co-operation at their end, then in that circumstance, the learned lower Court will dispose of the Sessions Trial within three months from the date of the receipt of the judgment. Office is directed to transmit the L.C. Record at once.

(Aditya Kumar Trivedi, J)

Vikash/-

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