

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.175 of 2016

Arising Out of PS. Case No.-65 Year-2013 Thana- BEERPUR District- Begusarai

Mukesh Kumar Son of Sri Ganga Mahto Resident of village - Nawlakha, P.S.
Nowkothi, District - Begusarai

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Subodh Prasad, Adv. Mr. Kapildeo Singh, Adv.
For the Respondent/s	:	Mr. Binod Bihari Singh, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

08-08-2019 Appellant Mukesh Kumar, vide judgment of conviction dated 26.02.2016 and order of sentence dated 29.02.2016 has been found guilty for an offence punishable under Section 304B of the IPC and sentenced to undergo RI for 10 years as well as to pay fine of Rs. 10,000/- in default thereof, to undergo SI for six months, additionally, by the 6th Additional Sessions Judge, Begusarai in Sessions Trial No. 855/2013/862/2014.

2. Manju Devi (PW-4), mother of the deceased, namely, Hiramani Devi filed a written report on 22.07.2013 alleging *inter alia* that marriage of her daughter Hiramani Devi was solemnized with Mukesh Kumar of Village-Naulakha about two years ago. Since after marriage, her son-in-law frequently



threatened to desert her daughter. However, her daughter has begotten a son who is aged about 15 months. About three months ago, her daughter came to her place as her Sasuralwala had quarreled and since thereafter, was residing. Today, i.e. on 22.07.2013, all of a sudden, Mukesh Kumar came at her place at about 7:00 PM., and then, at about 10:00 PM directed Hiramani to accompany whereupon, she as well as Hiramani disclosed that it is better to go at morning but, her son-in-law insisted upon, as a result of which, Hiramani became ready. Then she effected Bidai. At about 10:30 PM, there was rumour in the village that daughter of Chamru Mahto (her husband) has been shot at. She along with majority of the villagers rushed to the spot lying at Pakri Barawan near Pakri Village and found the dead body of her daughter under a mango tree by the side of the road. Her son-in-law was about 400 Metres west to the dead body of her daughter. Because of the fact that her son-in-law was persistently demanding money, on account thereof, she has every reason to believe that her daughter has been murdered, as she failed to satisfy their greed and in likewise manner, for getting himself remarried.

3. It has further been disclosed that at an earlier occasion, in order to save her daughter, money was given but,



she was unable to satisfy the quantum of money so demanded at the end of her son-in-law.

4. After registration of Beerpur PS Case No. 65/2013, investigation commenced and completed followed with submission of charge-sheet facilitating the trial meeting with the ultimate result, subject matter of the instant appeal. From Column-9 of the Formal FIR, it is evident that there happens to be description of recovery of the article at the PO and those are one fired bullet, Hero Honda Passion-pro motorcycle bearing Registration No. BRO9K-5320, cash appertaining to Rs. 425/- and one attache, for that, seizure list is also found.

5. Defence case as is evident from the mode of cross-examination as well as statement recorded under Section 313 CrPC is that of complete denial. It has further been pleaded that on the alleged date and time of occurrence, while the spouse were travelling over motorcycle fell prey at the hands of robbers who tried to snatch away the ornaments and during course thereof, was resisted by the deceased, consequent thereupon, she was shot dead by the criminals. The appellant/accused tried to save the deceased, his wife and during course thereof, he was also assaulted over his head and to substantiate the same, oral as



well as documentary evidence has been adduced.

6. In order to substantiate its case, the prosecution has examined altogether ten PWs who are PW-1, Ram Kumar Mahto, PW-2, Sudhesh Kumar, PW-3, Chamru Mahto, PW-4, Manju Devi, PW-5, Shambhu Sharma, PW-6, Dr. Pramod Kumar Singh, PW-7, Dilip Paswan, PW-8, Ajit Kumar, PW-9, Ganga Ram Mahto and PW-10, Sita Ram Mahto. Side by side, has also exhibited Ext-1, Seizure list, Ext-2, Arrest Memo, Ext-3, Inquest Report, Ext-4, Endorsement on written report, Ext-5, Formal FIR, Ext-6, Requisition for sending test of seized articles, Ext-7, Postmortem Report, Ext-8, Written report, Ext-9, Passbook of SBI standing in the name of Ram Kr. Mahto, Ext-10, Protest petition.

7. In likewise manner, defence has examined two DWs, DW-1, Batoran Maharaj and DW-2, Dr. Diwakar Singh and has exhibited the Medical report as Ext-A.

8. Learned counsel for the appellant has submitted that judgment impugned is non sustainable in the eye of law because of the fact that the reasoning so assigned and the inference so drawn up at the end of the learned lower court are completely in isolation to settled principle of law. In order to substantiate the same, it has been submitted that prosecution is



under obligation to substantiate its case when it happens to be case of dowry death, then in that circumstance the ingredients in order to attract the dowry death to be saturated which are (a) the death should be within seven years of marriage, (b) it should be due to bodily injury, fire or otherwise than normal circumstance, (c) there was demand of dowry, (d) soon before her death, the deceased was subjected to torture on the score of demand of dowry (e) by the husband or by the relative of the husband.

9. So far facts of the case is concerned, it is an admitted fact that the deceased died of gun-shot injury within seven years of marriage but, so far other ingredients are concerned, the vagueness persisting in the prosecution case did not justify the inference adverse to the interest of the appellant, whereupon, applicability of Section 113(b) of the Evidence Act permitting presumption of dowry death would not survive, hence, the judgment impugned is nothing but nullity in the eye of the law.

10. Learned counsel for the appellant has submitted that due to ignorant of law, the learned lower court proceeded with the trial in contravention of direction of the Apex Court, which has perceived at the fag end of trial whereupon, change has been framed, but the step having taken at the end of lower



court subsequent thereto, suggest halfheartedly adoption of Section 217 CrPC, and in likewise manner during course of dictating judgment, overlooked the important aspect, whereupon it is fit case to be remanded for *de novo* trial.

11. Learned APP does concede that the judgment impugned did not justify its prevalence on account of illegality having been committed by the learned lower court during course of conduction of the trial and that being so, it is a fit case whereunder remand could be made after setting aside the judgment impugned. It is needless to say that case has sailed as dowry death.

12. The Apex Court in the case of ***Rajvir @ Raju v. State of Haryana: (2010) 15 SCC 116*** has directed under para-7, “ We further direct all trial courts in India to ordinarily add Section 302 IPC to the charge of Section 304B, so that death sentence could be imposed in such heinous and barbaric crimes against women. A copy of this order be sent to Registrar Generals/Registrars of all High Courts which will circulate it to all trial courts.

13. It is needless to say that the aforesaid judgment has been subject to consideration in the case of ***Amar Nath Mahto v. The State of Bihar :2018 (4) PLJR 108*** whereunder it



has been as follows:-

“ 20. All the Courts within the Indian Territory is bound to obey the order of the Hon'ble Apex Court as laid down under Article 141 of the Constitution of India. Furthermore, non-obedience of the order will be subject to contempt under Article 129 of the Constitution of India. In the aforesaid background, first of all, the relevant direction of the Hon'ble Apex Court is to be seen. In *Rajvir @ Raju and another v. State of Haryana* reported in (2010)15 SCC 116, the same has been directed in following way:-

"7. We further direct all trial Courts in India to ordinarily add Section 302 to the charge of section 304B, so that death sentences can be imposed in such heinous and barbaric crimes against women. Copy of this order be sent to Registrar Generals/Registrars of all High Courts, which will circulate it to all trial Courts."

21. The aforesaid view has further been subject to close scrutiny before the Hon'ble Apex Court in *Jasvinder Saini & others v. State (Government of NCT of Delhi)* reported in : (2013) 7 SCC 256, wherein it has been observed:-

"14. Be that as it may the common thread running through both the orders is that this Court had in *Rajbir's* case (*supra*) directed the addition of a charge under Section 302 IPC to every case in which the accused are charged with Section 304-B. That was not, in our opinion, the true purport of the order passed by this Court. The direction was not meant to be followed mechanically and without due regard to the nature of the evidence available in the case. All that this Court meant to say was that in a case where a charge alleging dowry death is framed, a charge under Section 302 can also be framed if the evidence otherwise permits.



No other meaning could be deduced from the order of this Court.

15. It is common ground that a charge under Section 304B 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 304B also there is a death involved. The question whether it is murder punishable under Section 302 IPC or a dowry death punishable under Section 304B 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 304B 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 advertting to the evidence adduced in the case and simply on the basis of the direction issued in Rajbir's case (supra). The High Court no doubt made a half hearted attempt to justify the framing of the charge independent of the directions in Rajbir's case (supra), 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.

16. In the light of what we have said above, the order passed by the trial Court



and so also that passed by the High Court are clearly untenable and shall have to be set aside. That would not, however, prevent the trial Court from re-examining the question of framing a charge under Section 302 IPC against the appellant and passing an appropriate order if upon a prima facie appraisal of the evidence adduced before it, the trial Court comes to the conclusion that there is any room for doing so. The trial Court would in that regard keep in view the decision of this Court in *Hasanbhai Valibhai Qureshi v. State of Gujarat and Ors.* : (2004) 5 SCC 347 where this Court has recognized the principle that in cases where the trial Court upon a consideration of broad probabilities of the case based upon total effect of the evidence and documents produced, is satisfied that any addition or alteration of the charge is necessary, it is free to do so.

17. Reference may also be made to the decisions of this Court in *Ishwarchand Amichand Govadia and Ors. v. State of Maharashtra and Anr.* : (2006) 10 SCC 322 and the decision of the Calcutta High Court in *Rajendra Singh Sethia v. State and Ors.* : 1989 Cri.L.J. 255 and that delivered by the Allahabad High Court in *Shiv Nandan and Ors. v. State of U.P.* : 2005 Cri. L.J 3047 which too are to the same effect. In any such fresh exercise which the trial Court may undertake, it shall remain uninfluenced by the observations made by the High Court on merits of the case including those touching the probative value of the autopsy surgeon's opinion."

22. Again the issue came up for consideration in *Vijay Pal Singh and others v. State of Uttarakhand* reported in : (2014) 15 SCC 163 and the same has been dealt with in following way:-

"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.P.C.. 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* : (2005) 9 SCC 113 by Inspector of Police, T.N. 1, 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 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 304B 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 halfhearted 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."

20. Though in the instant case the accused were charged by the Sessions Court under Section 302 of IPC, it is seen that the trial court has not made any serious attempt to make an inquiry in that regard. If there is evidence available on homicide in a case of dowry death, it is the duty of the investigating officer to investigate the case under Section 302 of IPC and the prosecution to proceed in that regard and the court to approach the case in that perspective. Merely because the victim is a married woman suffering an unnatural death within seven years of marriage and there is evidence that she was subjected to cruelty or harassment on account of demand for dowry, the prosecution and the court cannot close its eyes on the culpable homicide and refrain from punishing its author, if there is evidence in that regard, direct or circumstantial.

21. In the instant case, the prosecution has not made any attempt to explain the ante-mortem injuries which conclusively point to the cause of death as asphyxia caused by strangulation. Yet, no serious attempt, it is disturbing to note, was done to connect the murder to its author(s).



22. No doubt, nothing prevents this Court from putting the appellants on notice as to why the punishment should not be appropriately enhanced but why we reluctantly decline to do so, we shall explain in the later part of the judgment.

23. In two of the early decisions of this Court, after the introduction of Section 304B of IPC, the ingredients of the offence and the interplay of Section 304B of IPC with Sections 498A, 302, 306 of IPC have also been discussed. In *State of Punjab v. Iqbal Singh and others* : (1991) 3 SCC 1, the Court in paragraph-8 stated that:

"8. ... The legislative intent is clear to curb the menace of dowry deaths, etc., with a firm hand. We must keep in mind this legislative intent. It must be remembered that since crimes are generally committed in the privacy of residential homes and in secrecy, independent and direct evidence is not easy to get. That is why the legislature has by introducing Sections 113-A and 113-B in the Evidence Act tried to strengthen the prosecution hands by permitting a presumption to be raised if certain foundational facts are established and the unfortunate event has taken place within seven years of marriage. This period of seven years is considered to be the turbulent one after which the legislature assumes that the couple would have settled down in life. If a married women is subjected to cruelty or harassment by her husband or his family members Section 498-A, IPC would be attracted. If such cruelty or harassment was inflicted by the husband or his relative for, or in connection with, any demand for dowry immediately preceding death by burns and bodily injury or in abnormal circumstances within seven years of marriage, such husband or relative is deemed to have caused her death and is liable to be punished under Section 304-B,



IPC. When the question at issue is whether a person is guilty of dowry death of a woman and the evidence discloses that immediately before her death she was subjected by such person to cruelty and/or harassment for, or in connection with, any demand for dowry, Section 113-B, Evidence Act provides that the court shall presume that such person had caused the dowry death. Of course if there is proof of the person having intentionally caused her death that would attract Section 302, IPC. Then we have a situation where the husband or his relative by his willful conduct creates a situation which he knows will drive the woman to commit suicide and she actually does so, the case would squarely fall within the ambit of Section 306, IPC. In such a case the conduct of the person would tantamount to inciting or provoking or virtually pushing the woman into a desperate situation of no return which would compel her to put an end to her miseries by committing suicide. ..."

14. In *Sarda Prasanna Dalai v. Inspector General of Police, Crime Branch, Odisha* reported in (2017)5 SCC 381 wherein though charge was under dowry death, but not for murder, it has been as follows:-

"4. Having heard learned Counsel for the parties, we are of the view that it is just and proper for the Sessions Court before whom the case is pending to consider framing of an additional charge Under Section 302 of the Indian Penal Code. Therefore, the Sessions Court is directed to peruse the entire material on record in order to consider the aspect of framing of an additional charge for the offence punishable Under Section 302 Indian Penal Code. However, this shall not be construed as our opinion on



merits of the case.

15. At the present juncture, it looks pertinent to take notice of the fact emerging out from lower court record itself. Initially, charge was framed on 14.02.2014 under Section 304B IPC and 27 of the Arms Act but no charge under Section 304 of the Dowry Prohibition Act has been framed and for that, no reason is available on the record. In likewise manner no charge under Section 302 IPC was framed. All the witnesses were examined. Statement under Section 313 CrPC was recorded. DWs have been examined. Then thereafter, as is evident, there was submission that as per direction of the Hon'ble Apex Court an alternative charge under Section 302 IPC has to be framed on account thereof, vide order dated 29.10.2015, charge under Section 302 IPC as well as Section 27 of the Arms Act were added. Then thereafter, as the order-sheet speaks, a petition was filed on behalf of the defence on 04.11.2015 to recall the witnesses i.e. Pws-1, 3, 4, 9, 10 whereupon, no order was passed. On the other hand, prosecution was directed to produce witness and so, the prosecution should have indulged in such exercise, and as is evident, on 14.12.2015, PW-4 was produced for further cross-examination, PW-1 was produced on 01.12.2015 for further cross-examination, PW-9 has been



produced on 23.11.2015 for further cross-examination. Neither remaining witness has been produced for further cross-examination, nor any petition was on behalf of prosecution in terms of Section 216, 217 CrPC

16. It will be worthwhile to mention here that from the order-sheet dated 19.12.2015 wherefrom, it is evident that at the request of prosecution the case was closed as the prosecution does not want to produce any witness. From the order-sheet dated 06.04.2015, it is evident that there was petition at the end of the prosecution on 26.03.2015 praying therein to allow examination of Ganga Ram Mahto, Gopal Mahto and Sita Ram Mahto, whereupon after hearing, the petition was allowed and out of them PW-9, Ganga Ram and PW-10, Sita Ram Mahto were examined but nothing happens to be relating to Gopal Mahto.

17. From the petition dated 26.03.2015 as well as from the order dated 06.04.2015, there happens to be no disclosure nor finding that till then all the charge-sheet witnesses have already been examined and in likewise manner, there happens to be no disclosure that these witnesses were examined by the IO or not and, if so examined, then in that circumstance, copy of their statement would have been served



upon the appellant in accordance with Section 207 of the CrPC.

18. It is needless to say that alteration/addition of the charge is permissible till judgment is pronounced and the relevant Sections guiding the issues are Sections 216 and 217 CrPC. For better appreciation, the same are quoted hereinbelow:-

“216. Court may alter charge.

(1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.

217. Recall of witnesses when charge altered.--Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed-



- (a) to recall or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, unless the Court, for reasons to be recorded in writing, considers that the prosecutor or the accused, as the case may be, desires to recall or re-examine such witness for the purpose of vexation or delay or for defeating the ends of justice;
- (b) also to call any further witness whom the Court may think to be material.

19. In *Ranbir Yadav v. State of Bihar* reported in (1995) 4 SCC 392, it has been held as follows:-

“23.On a combined reading of the above two sections it is, therefore, evident that after an alteration or addition of the charge the interest of the prosecution and the accused has to be safeguarded by permitting them to further examine or cross examine the witness already examined, as the case may be, and by affording them an opportunity to call other witnesses. It is undoubtedly true that discretion has been given to the Court to direct a new trial after addition or alteration of any charge, but it does not mean that every such addition or alteration in the charge which has been read over and explained to the accused would lead to inevitable inference that the Court has directed a new trial for them. It, therefore, follows that unless the Court passes a specific order and directs a new trial it cannot be presumed that a new trial has commenced only because an alteration or addition to a charge which has been read over and explained to the accused has been made. Indeed the order dated April 30, 1987 shows that while directing the prosecution to examine the 4 witnesses afresh the 5th Court adjourned the case for further trial and did not direct fresh trial. This apart, any such direction given by the Court has to be judged on the touchstone of prejudice to the accused or the prosecution. In the instant case, as has already been noticed after the addition of charges the prosecution expressly stated



that they did not want to further examine the four witnesses already examined but they were willing to produce them if the accused so wanted. The accused, however, did not avail of this opportunity in accordance with Section 217 of the Code and, therefore, it is too late in the day for them to raise a grievance on that score. We hasten to add that even if we had found that there was any irregularity in the continuation of the trial against the appellants after the additional charges were framed, we would not have been justified in setting aside the impugned judgment on that ground alone for there is not an iota of material on record wherefrom it can be said that a failure of justice has occasioned thereby. To put it differently, in our view in such a case Section 465 of the Code would have squarely applied.

20. In *R. Rachaiah v. Home Secretary, Bangalore*

reported in **2016 CrLJ 2943**, it has been held as follows:

“9. The bare reading of Section 216 reveals that though it is permissible for any Court to alter or add to any charge at any time before judgment is pronounced, certain safeguards, looking into the interest of the accused person who is charged with the additional charge or with the alteration of the additional charge, are also provided specifically under Sub-sections (3) and 4 of Section 216 of the Code. Sub-section (3), in no uncertain term, stipulates that with the alteration or addition to a charge if any prejudice is going to be caused to the accused in his defence or the prosecutor in the conduct of the case, the Court has to proceed with the trial as if it altered or added the original charge by terming the additional or alternative charge as original charge. The clear message is that it is to be treated as charge made for the first time and trial has to proceed from that stage. This position becomes further clear from the bare reading of Sub-section (4) of Section 216 of the Code which empowers the Court, in such a situation, to either direct a new trial or adjourn the trial for such period as may be necessary. A new trial is insisted if the charge is altogether different and



distinct.

10. Even if the charge may be of same species, the provision for adjourning the trial is made to give sufficient opportunity to the accused to prepare and defend himself. It is, in the same process, Section 217 of the Code provides that whenever a charge is altered or added by the Court after the commencement of the trial, the prosecutor as well as the accused shall be allowed to recall or re-summon or examine any witnesses who have already been examined with reference to such alteration or addition. In such circumstances, the Court is to even allow any further witness which the Court thinks to be material in regard to the altered or additional charge.

11. When we apply the aforesaid principles to the facts of this case, the outcome becomes obvious. The accused persons were initially charged for an offence Under Section 306 of the Indian Penal Code, i.e. abetting suicide which was allegedly committed by Dr. Shivakumar. It is manifest therefrom that the entire case of the prosecution, even after repeated investigations and medical examination of the dead body/skeleton of Dr. Shivakumar, was that the cause of the death was suicide. Thus, after the investigation, what the prosecution found was that Dr. Shivakumar had committed suicide and, as per the prosecution, the three Appellants had aided and abetted the said suicide which was committed by Dr. Shivakumar. On this specific charge, 26 witnesses were examined and cross-examined by the Appellants. Obviously, when the Appellants are charged with an offence Under Section 306 i.e. abetting the suicide, the focus as well as stress in the cross-examination shall be on that charge alone. At the fag end of the trial, the charge is altered with "Alternative Charge" with the framing of the charge Under Section 302 Indian Penal Code. This gives altogether a different complexion and dimension to the prosecution case.

12. Now, the charge against the Appellants was that they have committed murder of Dr. Shivakumar. In a case like this, addition and/or substitution of such a charge was bound to create prejudice to the Appellants. Such a charge has to be treated as original charge. In order to take care of the said prejudice, it



was incumbent upon the prosecution to re-call the witnesses, examine them in the context of the charge Under Section 302 of Indian Penal Code and allow the accused persons to cross-examine those witnesses. Nothing of that sort has happened. As mentioned above, only one witness i.e. official witness, namely, Deva Reddi, Deputy Superintendent of Police, was examined and even he was examined on the same date i.e. 30.09.2006 when the alternative charge was framed. The case was not even adjourned as mandatorily required under Sub-section (4) of Section 216 of the Code.

21. It is needless to that charge under Section 302 IPC has got distinct identity than 304B of the IPC. Neither Section 302 IPC is the major Section of the 304B nor vice versa. Both have got independent identity and prescribes separate ingredients for its applicability. Furthermore, Section 302 IPC prescribes severe punishment than to 304B of the IPC and that happens to be reason behind that legislature has taken precaution and that was rightly when alternative charge happens to be for the severe offence then in that circumstance, there must be enforcement of Sub-Section 3 of Section 216 of the CrPC which even prescribed the *de novo* trial for the reason that evidence would have been examined under the guise of penal provision so added. That means to say, having *de novo* trial the evidence would have been gathered in order to justify which of the charges are being substantiated, and that happen to be the



finding of the Apex Court as referred above.

22. Now coming to the judgment impugned, it is evident that right from page no.29 to 31, the evidence of the witnesses have been taken into consideration but, during course of appreciation thereof, there happens to be no reason assigned at the end of the learned lower court as to why no charge under Section 3/4 of the Dowry Prohibition Act has been framed, its repercussion, the vagueness on that very score and further, proper identification relating to *“soon before her death, deceased was subjected to torture or cruelty relating to demand of dowry.”*.

23. Contrary to it, though the learned lower court had failed to do proper exercise over Section 302 of the IPC, however, at page no. 31, it has been observed that as to how the deceased Hiramani Devi was murdered, is only within exclusive knowledge of Mukesh Kumar as none is an eye-witness to occurrence and so, the death of Hiramani Deiv is to be presumed against the accused under the banner of Section 113B of the Evidence Act and that being so, charge under Section 304B of the IPC is made out. At page 32, it has been observed by the learned lower court that so far alternative charge under Section 302 IPC is concerned, because of the fact that charge



under Section 304B IPC is made out and further there happens to be no direct/circumstantial evidence, on account thereof, the court refrained from giving any finding on that very score. The worst part is that the learned lower court had not recorded the judgment of acquittal so far Section 302 IPC is concerned.

24. As stated above, the defence has not declined that the deceased was not murdered by means of fire arm while she was in his company. The defence, as pleaded, is that they fell victim of road robbery and during course of resistance, the deceased was done to death by the robbers and during course thereof, the accused/appellant also sustained lacerated injury over his head. From the evidence of the prosecution witness including the I.O., it is apparent that appellant was arrested at the spot. It is also evident that some injury was found over the person of the appellant and for that, he was referred to Sadar Hospital and was examined by DW-2, by the police. From the evidence of DW-2, it is apparent that all the injuries having over person of appellant, though only over head, superficial in nature in the background of considering the dimension of the injury as found by the doctor so enumerated below:-

- (i) Lacerated wound 1 ½ " x ½ " x 1" over front parietal region of scalp, blood clot.
- (ii) Lacerated wound ¾ " x ¼ x ¼ " over right lower occipital region near scalp blood clot.



(iii) Lacerated wound $\frac{1}{2}$ " x $\frac{1}{4}$ x $\frac{1}{4}$ " over right occipital region, scalp blood clot.

(iv) Lacerated wound $\frac{1}{4}$ " x $\frac{1}{4}$ x over dorsum of proximal phalanx of left hand with blood clot.

Time of injury within six hours. Cause of injury. HBS.

He was advised X-ray skull-epi lateral and X-ray Lt. Hand epi-lateral, X-ray was done at Sadar Hospital, Begusarai vide plate no. 497 dated 24.07.2013. X-ray report shows no bruise injury. Therefore, nature of injury (i)-(iv) is simple in nature.

25. At the present stage, identifying the circumstances will cause severe prejudice to the appellant, however, it looks desirable to refer the principle promulgated by the Apex Court in *Tomaso Bruno v. State of Uttar Pradesh: (2015) 7 SCC 178* wherein it has been held as follows:-

“12. In every case based upon circumstantial evidence, in this case as well, the question that needs to be determined is whether the circumstances relied upon by the prosecution are proved by reliable and cogent evidence and whether all the links in the chain of circumstance are complete so as to rule out the possibility of innocence of the accused.

13. There is no doubt that conviction can be based solely on the circumstantial evidence. But it should be tested on the touchstone of the law relating to circumstantial evidence. This Court in *C. Chenga Reddy and Ors. v. State of A.P. : (1996) 10 SCC 193*, para (21) held as under:

21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the



circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In the present case the courts below have overlooked these settled principles and allowed suspicion to take the place of proof besides relying upon some inadmissible evidence.

14. After referring to a catena of cases based on circumstantial evidence in Shivu and Anr. v. Registrar General, High Court of Karnataka and Anr. : (2007) 4 SCC 713, this Court held as under:

12. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See Hukam Singh v. State of Rajasthan : (1977) 2 SCC 99; Eradu v. State of Hyderabad : AIR 1956 SC 316), Earabhadrapa v. State of Karnataka : (1983) 2 SCC 330, State of U.P. v. Sukhbasi : 1985 (Supp.) SCC 79), Balwinder Singh v. State of Punjab (1987) 1 SCC 16 and Ashok Kumar Chatterjee v. State of M.P. : 1989 Supp. (1) SCC 560) The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram v. State of Punjab : AIR 1954 SC 621, it was laid down that where the case depends upon the conclusion drawn from circumstances, the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt.

15. In Padala Veera Reddy v. State of A.P. and Ors. : 1989 Supp. (2) SCC 706, it was laid down that in a case of circumstantial evidence such evidence must satisfy the following test:



(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (See *Gambhir v. State of Maharashtra* : (1982) 2 SCC 351).

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17. Be that as it may, an important circumstance relied upon by the prosecution and accepted by the courts below is that the offence had taken place inside the privacy of the hotel room in which the accused and the deceased were staying together and only the accused had the opportunity to commit the offence. Prosecution mainly relied upon Section 106 of Indian Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Prosecution mainly relied upon the circumstance that the occurrence was inside the hotel room and that death had occurred in the privacy of the hotel room and that the Appellants have no plausible explanation for the death of Francesco Montis and the absence of explanation or untrue explanation offered by the accused point to their guilt.

18. The principle underlying Section 106 of the Evidence Act is that the burden to establish those facts, which are within his personal knowledge is cast on the person concerned, and if he fails to establish or explain those facts, an



adverse inference may be drawn against him. Explaining the death of deceased Francesco Montis, the Appellants have stated that in the wee hours of 4.2.2010 at 4.00 A.M., they had gone to see the famous 'Subahe Banaras' and returned back to the hotel room at 8.00 A.M. and found the condition of Francesco Montis very serious and immediately informed PW-1 about the condition of their friend and then with the assistance of the hotel staff, Francesco Montis was taken to the hospital.

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27. As per Section 114(g) of the Evidence Act, if a party in possession of best evidence which will throw light in controversy withholds it, the court can draw an adverse inference against him notwithstanding that the onus of proving does not lie on him. The presumption Under Section 114(g) of the Evidence Act is only a permissible inference and not a necessary inference. Unlike presumption Under Section 139 of Negotiable Instruments Act, where the court has no option but to draw statutory presumption, Under Section 114 of the Evidence Act, the Court has the option; the court may or may not raise presumption on the proof of certain facts. Drawing of presumption Under Section 114(g) of Evidence Act depends upon the nature of fact required to be proved and its importance in the controversy, the usual mode of proving it; the nature, quality and cogency of the evidence which has not been produced and its accessibility to the party concerned, all of which have to be taken into account. It is only when all these matters are duly considered that an adverse inference can be drawn against the party.



26. Now coming to other aspect, as to what kind of order at the present moment could be passed.

27. The Hon'ble Apex Court in the case of *Issac @ Kishor v. Ronald Cheriyan reported in 2018(2) PLJR 57 (SC)* dealt with a situation whereunder retrial could be directed, explained under para-11 as follows:-

“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."

28. That being so, the findings of learned lower court is found perverse, cryptic as well as against the settled principle of law whereupon, the same is set aside. Appeal is allowed.



29. The matter is remitted back to the learned lower court to proceed afresh in accordance with procedure so prescribed under Section 216, 217 CrPC in light of principle laid down by the Apex Court in **2016 CrLJ 2943 (supra)**.

30. Appellant is under custody, he is directed to be produced before the learned lower court. Considering the period of custody of the appellant, the District & Sessions Judge, Begusarai is directed to proceed with the trial himself with a further direction that it should not be transferred to any court till judgment is pronounced and will endeavour to conclude the same as early as possible.

(Aditya Kumar Trivedi, J)

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