

(2015) 09 PAT CK 0039

In the Patna High Court

Case No : Criminal Appeal (SJ) No. 263 of 1999

Bhola Marik and Others

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 02-09-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 113-A, 113B, 113-B, 137, 138
Penal Code, 1860 (IPC) — Section 201, 304B, 304-B, 306, 34

Citation : (2015) 4 PLJR 615

Hon'ble Judges : Aditya Kumar Trivedi, J

Bench : Single Bench

Advocate : Animesh Kumar Mishra, Amicus Curiae, for the Appellant; Sujit Kumar Singh, APP, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Aditya Kumar Trivedi, J—Appellants Bhola Marik, Megho Devi @ Meghiya Devi along with Shyam Sunder Marik (non-appellant) have been found guilty for an offence punishable under Sections 304B/34 I.P.C., 498A I.P.C., 201/34 of the I.P.C. vide judgment of conviction dated 06.09.1999 whereupon each one has been directed to undergo rigorous imprisonment for eight years under Section 304B/34 of the I.P.C. though no separate sentence has been passed for an offence punishable under Sections 498A I.P.C. and 201/34 of the I.P.C., vide order dated 14.09.1999 by the 2nd Additional Sessions Judge, Banka in Sessions Trial No. 138 of 1994, hence this appeal.

2. Bhudev Manjhi, (PW-5) gave his fard-bayan on 04.05.1993 at about 11.30 a.m. at the bank of Odhini River disclosing therein that in the evening of 03.05.1993, his co-villager Shyam Lal Manjhi had informed him regarding commission of murder of his daughter Taruna Devi @ Marua Devi by her Sasuralwala and had disposed of her dead body. On this information, he along with his younger brother Bhola Manjhi, Badri Manjhi son of Bhola Majhi, Mohan

Manjhi son of Vishnu Majhi came at village-Bahera, at the place of his daughter and found all the family members absent. On query made by the neighbours, they have disclosed that Shyam Sunder (husband), Bhola Manjhi (father in-law), wife of Bhola Majhi (mother in-law), Mahavir and wife of Mahavir brutally assaulted her and then, forcibly administered poison on account of which, she died. Then thereafter, her dead body has been thrown away. While they were looking for deceased, there was rumour with regard to recovery of a dead body in the Odhini River whereupon they rushed and found the police officials engaged in taking out the dead body. After taking out the dead body from the river, he had identified that of his daughter Marua Devi.

3. It has also been disclosed that Marua Devi was married with Shyam Sunder in the year 1988. Since after marriage his son in-law Shyam Sunder was insisting upon demand of Rs. 5,000/- in lieu of dowry and further, began to torture his daughter for procurement of the same.

4. On the basis of the aforesaid fard-bayan, Banka P.S. Case No. 162 of 1997 was registered followed with an investigation as well as submission of charge-sheet whereupon trial commenced and concluded in a manner, the subject matter of instant appeal.

5. The defence case, as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is of complete denial of the occurrence. It has also been pleaded that deceased died of snake biting. However, neither any DW nor any kind of document has been exhibited.

6. In order to substantiate its case, prosecution had examined altogether eleven (11) PWs, out of whom, PW-1 Shyamlal Manjhi, PW-2 Mohan Manjhi, PW-3 Badri Manjhi, PW-4 Shashikant Mandal @ Srikant Mandal, PW-5 Bhudev Manjhi, PW-6 Govind Manjhi, PW-7 Tulo Manjhi, PW-8 Narayan Manjhi, PW-9 Shiv Shankar Manjhi, PW-10 Manohar Pandit and PW-11 Mahendra Prasad Singh. Side by side had also exhibited the documents as Exhibit-1 letter written by the deceased to his brother, Exhibit-1/1 writing over envelope, Exhibit-2 fard-bayan, Exhibit-3 formal F.I.R., Exhibit-4 post mortem report, Exhibit-5 endorsement over fard-bayan, Exhibit-6 signature over formal F.I.R. and Exhibit-7 carbon copy of inquest report.

7. Learned Amicus Curiae while assailing the judgment of conviction and sentence has raised primarily an objection over admissibility of post mortem report and for that, submitted that doctor, who had conducted post mortem report has not been examined nor the prosecution was desirous to lead evidence in terms of requirement of Section 32 of the Evidence Act, hence, the post mortem report cannot be taken into consideration. It has also been submitted that to exhibit- post mortem report, prosecution had examined PW-10, a formal witness, who had simply identified the writing of the doctor and on account thereof, its content could not be considered. That being so, the cause of death is absent apart from the fact that viscera report, as the viscera was sent for F.S.L.

Examination as doctor did not give opinion over cause of death, is not on the record. Therefore, first ingredient that death was otherwise than normal circumstance is found completely lacking.

8. It has further been submitted that when the evidence of I.O. (PW-11) is gone through, it is apparent there from that dead body was completely decomposed and on account thereof, was not identifiable. As such, claim of the prosecution party regarding identification of the dead body is also found sketchy.

9. It has further been submitted that right from the fard-bayan, allegation has been attributed against Shyam Sunder and not against the appellants. Subsequently, during course of trial, the prosecution began to develop its initial version with an ulterior motive dragging the appellants also responsible asking for dowry as well as torturing the deceased on that very score. However, considering the evidences in its entirety itself speak regarding exaggeration in their deposition and on account thereof, prosecution completely failed to suggest that soon before the death of deceased, she was subjected to torture for or with regard to dowry. At this crucial moment, the learned Amicus Curiae also referred contents of Exhibit-1, letter written by the deceased to his brother which, though discloses maltreatment having at the end of accused, but did not contain the averment regarding demand of dowry as well as torture on that very score.

10. Furthermore, it has also been submitted that the other witnesses, who were tendered by the prosecution clearly stated that deceased died of snake biting and on account thereof, dead body of deceased, as per custom, was thrown away in the river. Accordingly, the case of the prosecution suffers from inherent lacuna side by side defence had succeeded in discharge of his burden. Consequent thereupon, appeal is fit to be allowed.

11. At the other end, the learned Additional Public Prosecutor submitted that there happens to be consistent, conclusive evidence adduced by the prosecution of the competent, natural witnesses and so, the judgment impugned did not attract interference. It has also been submitted that non-examination of the doctor is not going to give any kind of adverse impact upon the prosecution case, because of the fact that defence/appellants have not challenged death of deceased as well as disposing of the dead body. With regard to other aspect, it has been submitted that death has occurred within five years of marriage as well as during the intervening period, deceased was subjected to torture and cruelty. Hence, the judgment impugned is based upon sound logic as well as concrete, credit worthy evidence of the witnesses.

12. Before coming to merit of the case, the legal conundrum relating to admissibility of evidence of tendered witnesses have to be explained. In likewise manner, there happens to be contra- pose relating to post mortem report, though is found not of much relevance, as no opinion regarding cause of death is found therein, as well as the viscera report is not on the record.

13. So far, propriety of post mortem report is concerned, it is apparent from the

record that doctor has not been examined. It is also apparent that while examining PW-10, the prosecution had not satisfied the ingredients, so prescribed under Section 32 of the Evidence Act and that being so, the contents of the post mortem report (Exhibit-4) cannot be looked into being inadmissible in the eye of law.

14. Now, coming to remaining question, it is apparent that PW-6 Govind Manjhi, PW-7 Tulo Manjhi and PW-8 Narayan Manjhi, being co-villagers of the appellants, were tendered for cross-examination through whom, the appellants advanced the story of snake biting. The procedure of tendering the witness has been deprecated by the Hon"ble Apex Court in the background of the fact that as per Section 138 of the Evidence Act, only examination-in-chief, cross-examination as well as re-examination of a witness has been permitted. Furthermore, the aforesaid event was subsisting under old Cr.P.C. whereunder commitment inquiry was permissible. Subsequently thereof, by an Amendment Act, 26 of 1955, the aforesaid event was restricted in a way that examination of prosecution witnesses during the committal inquiry in respect of cases instituted on police report only, to those, who were to give an ocular evidence of the incident were permitted.

15. In Sukhwant Singh Vs. State of Punjab, AIR 1995 SC 1601 : (1995) 2 Crimes 148 : (1995) 3 JT 495 : (1995) 2 SCALE 482 : (1995) 3 SCC 367 : (1995) 2 UJ 29 , the issue has been thoroughly discussed and held:-

"8. It will be pertinent at this stage to refer to Section 138 of the Evidence Act which provides

"138. Order of examinations. Witnesses shall be first examined-chief then (if the adverse party, so desires) cross-examined, then (if the party calling him so desires) re-examined. The examination and cross-examination must relate to relevant facts but the cross-examination need not be confined to the facts to which the witness testified on his examination-in chief. Direction for re-examination. The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

9. It would, thus be seen that Section 138 (supra) envisages that a witness would first be examined in chief and then subjected to cross-examination and for seeking any clarification, the witness may be re-examined by the prosecution. There is, in our opinion, no meaning in tendering a witness for cross examination only. Tendering of a witness for cross-examination, as a matter of fact, amounts to giving up of the witness by the prosecution as it does not choose to examine him in chief however, the practice of tendering witness for cross-examination in Session Trials had been frequently resorted to since the enactment of the Code of Criminal Procedure, 1898. The reason behind taking recourse to such a practice, which undoubtedly is inconsistent with Section 138 (supra), is not for to seek.

Under that Code as it stood prior to its amendment by Act 26 of 1955 a full-fledged magisterial enquiry was to be held, in a case which was triable exclusively by the Court of Sessions or the High Court, in accordance with the procedure laid down in Chapter XVIII thereof and in that enquiry prosecution was required to examine all its witnesses. Under Section 288 of that Code the evidence of the witnesses so recorded by the Committing Magistrate could be treated, at the discretion of the Session Judge, as substantive evidence at the trial. More often than not, the prosecution taking advantage of the above provision, use to ask for and obtain leave of the Sessions Court to treat the depositions of these witnesses whom they did not intend to examine afresh, recorded in the committal enquiry as its evidence in the trial and then tender them for cross-examination. In other words, the prosecution brought on record of the trial court and relied upon the testimonies of some of the witnesses recorded at its instance before the Committing Magistrate as its evidence during the trial and then tendered them for cross-examination by the defences. It will be pertinent to mention here that Act 26 of 1955 which amended the Code of 1898 restricted the examination of prosecution witnesses in the committal enquiry in respect of cases instituted on police report only to those who were to give an ocular version of the incident only.

10. The question as to whether such a practice was legal and valid in view of Section 138 (supra) and, if so to what extent and in what manner it could be adopted came up for consideration by different High Courts.

11. In *In Re: Veera Koravan and Others*, (1930) ILR (Mad) 69 : (1929) 30 LW 701 : (1930) 58 MLJ 145 a Division Bench of the Madras High Court opined that merely tendering of a prosecution witness for cross-examination is not a practice which should be encouraged specially in a murder case as the procedure would be unfair to an accused.

12. In *Emperor Vs. Sadeppa Gireppa Mutgi*, (1941) 43 BOMLR 946 Beaumont, C.J. speaking for the Division Bench of the Bombay High Court opined:

"The other Kakeri witness is Shambu, (Ex.34), and a very irregular course was adopted with regard to him. He was tendered for cross-examination. The practice of tendering witnesses for cross-examination which is no doubt often adopted, is inconsistent with S.138, Evidence Act, which says that witness shall be first examined-in-chief and then, if adverse party so desires, cross-examined, and if, the party calling him so desire, re-examined. It is obvious that if a witness is examined by the defence without having given any evidence-in-chief, he is not being cross-Examined, by whatever name the process may be described. The practice of tendering for cross-examination should only be adopted in cases of witnesses of secondary importance. Where the prosecution have already got sufficient evidence on a particular point, and do not want to waste time by examining a witness who was examined in the lower Court, but at the same time do not want to deprive the accused of the right of cross-examining such witness, they tender him for cross-examination. But, I think, strictly speaking, the witness

ought to be asked by the prosecution, with the consent, of course, of the pleader for the accused, and the leave of the Judge, whether his evidence in the lower Court, is true. If he gives a general answer as to the truth of his evidence in the lower Court, he can be cross-examined on that. But he must in some way be examined-in-chief before he can be cross-examined. However, the practice of tendering a witness for cross-examination certainly should not be employed in the case of an important eye-witness."

(Emphasis supplied)

13. A Full Bench of the Bombay High Court in *Emperor Vs. Kasamalli Mirzalli*, (1942) 44 BOMLR 27 approved the opinion of Beaumont, C.J. (*supra*) and "condemned" the practice of tendering a witness for cross-examination in no uncertain terms.

13A. A Division Bench of the Punjab High Court in *Kesar Singh and Another Vs. The State*, AIR 1954 P&H 286 : (1955) CriLJ 86 after analysing the provisions of Sections 137 and 138 of the Evidence Act, followed the law laid down by the Full Bench of the Bombay High Court in *Kasamalli's* case (*supra*) and observed:

"The other witness of this fact is Jai Ram P.W.21 who was tendered for cross-examination, but he was not cross-examined. That again in my opinion is no evidence. The law in regard to examination of witnesses is contained in Section 137 and 138, Evidence Act. There is no provision in that Act for permitting a witness to be tendered for cross-examination without his being examined-in-chief and this practices opposed to S. 138 of the Act."

(Emphasis ours)

14. In *Dhirendra Nath Vs. State*, AIR 1952 Cal 621 , a Division Bench of the Calcutta High Court held:

"There is a type of case where witnesses of a secondary importance who have been examined before the Committing Magistrate are not called before the Sessions Court, because the prosecution considers that it has already had a sufficient body of evidence on the point concerned and then in fairness to the defence, it those witnesses for cross-examination. But the fact that the witness is tendered for cross-examination means and implies that there has been some examination-in-chief. As far as I can see, the only Practical way in which a witness can be tendered for cross-examination is by asking him generally, may be by a single question, in the sessions court as to whether the statements made by him before the committing Magistrate were true and on his answering in the affirmative, tendering the evidence given in the committing Magistrate's court which would then serve as the examination-in-chief. Unless the examination-in-chief is brought on the record in that fashion, I cannot understand on what the defence will cross-examine the witness tendered for cross-examination. It does not appear from the record in this case that the evidence of the witness before the Committing Magistrate was brought on the record at all. In these

circumstances, tendering for cross-examination seems to me to have been almost meaningless."

15. In *Chotta Singh v. State* (AIR 196 Punjab, 120), the Punjab High Court held:

"Tendering a witness for cross-examination is almost tantamount to giving up a witness. There is nothing in law that justifies such a course. The trial courts adopt this manner of examining witnesses simply to lighten their burden, but it is not realized that in a serious case like the present murder case when the learned trial Judge failed to examine Wazira P.W.5, he was very seriously remiss in his duty."

16. A Division Bench of the Kerala High Court in *Thazhathethil Hamsa and Another Vs. State of Kerala*, AIR 1967 Ker 16 : (1967) CriLJ 73 observed:

"In this connection we wish to clarify the mistaken impression which the teamed Judge seems to have entertained about the propriety of the procedure adopted by the prosecution in tendering eye-witnesses for cross-examination. PW10 who had given evidence in the Committing Court as an eye-witness was tendered for cross-examination in the Sessions Court after he made a bald statement that he has correctly stated all he knew about the incident in the enquiry Court. The learned Judge has evidently relied on an observation made by the Patna High Court in *Manzurul Haque and Others Vs. State of Bihar*, AIR 1958 Patna 422 : (1958) CriLJ 931 to find that such a procedure is proper. But it is really not. The very decision relied on by the learned Judge started by enunciating the principle thus:

"The practice of tendering witnesses leads to considerable confusion and is to be deprecated. A material witness should not be merely tendered but should be sworn and asked to give evidence by the prosecution.

Tendering if at all should be confined to witnesses of secondary importance."

17. Thus, it is seen that the Bombay Kerala, Calcutta, Madras and Punjab High Courts have notwithstanding the provisions of Sections 288 of the Code of 1898 consistently taken the view that there is no procedure whereby the prosecution is permitted to tender a witness for cross-examination only, without there being any examination-in-chief in relation to which, such a witness can be cross examined. The practice of tendering a witness for cross-examination has been consistently discouraged and even condemned by those High Courts and in our opinion rightly. Our attention has not been drawn to any judgment of any other High Court which may have taken the contrary view.

18. In the *State of U.P. and Another Vs. Jaggo alias Jagdish and Others*, AIR 1971 SC 1586 : (1971) CriLJ 1173 : (1971) 2 SCC 42 : (1971) SCC(Cri) 401 which has been referred to and relied upon by the prosecution and the trial court for adopting the procedure of tendering PW4 and PW5 for cross examination only in our opinion, has not been properly appreciated and has been misapplied. That judgment cannot be read to lay down, as a matter of legal preposition, that a

witness can be "tendered" for cross-examination even without there being any examination in chief. If there is some earlier statement of the witness recorded by a competent court or an affidavit filed in the trial court and the witness testifies to the correctness of that earlier statement at the trial, it (in certain cases of witnesses of a formal nature) as noticed earlier be permissible to tender him for cross-examination after he is sworn to the correctness of the earlier statement, because in that event that earlier statement is treated as the examination-in-chief of the witness but that is not the same thing as tendering a witness for cross-examination only, without there being any examination-in-chief on the record. In Jaggo's case (supra) a Bench of this court was considering the question whether the mere presentation of an application by the prosecution to the effect that a certain witness had been "won over" was conclusive of the allegation that he had been so "won over" and the prosecution was therefore relieved of its obligation to examine him at the trial. The proposition was negatived and it was in that context, that this court observed:

"On behalf of the appellant it was said that Ramesh Chand was won over and therefore the prosecution could not call Ramesh. The High Court rightly said that the mere presentation of an application to the effect that a witness had been won over was not conclusive of the question that the witness has been won over. In such a case Ramesh could have been produced for cross-examination by the accused. That would have elicited the correct facts. If Ramesh were an eye-witness the accused were entitled to test his evidence particularly when Lalu was alleged to be talking with Ramesh at the time of the occurrence."

(Emphasis ours)

16. As such, the evidence of PW-6, PW-7 and PW-8 appeared to be non-cognito in the eye of law as such found out of purview of consideration.

17. Before coming to scrutinize and analyze the evidence of remaining witnesses over merit of the case, the ingredients of application of Section 304B of the I.P.C. coupled with the presumption in terms of Section 113-B of the Evidence Act have to be seen in consonance with an obligation having over shoulder of accused, as governed under Section 113-B of the Evidence Act.

18. In Suresh Kumar Vs. State of Haryana, (2014) CriLJ 551 : (2014) 2 JT 404 : (2013) 14 SCALE 90, the Hon'ble Apex Court dealt with each and every aspect of Section 304B I.P.C. along with parallel scrutiny of Section 113B of the Evidence Act and held under:-

"33. Importantly, Section 304-B IPC does not categorise death as homicidal or suicidal or accidental. This is because death caused by burns can, in a given case, be homicidal or suicidal or accidental. Similarly, death caused by bodily injury can, in a given case, be homicidal or suicidal or accidental. Finally, any death occurring "otherwise than under normal circumstances" can, in a given case, be homicidal or suicidal or accidental. Therefore, if all the other ingredients of Section 304-B IPC are fulfilled, any death (whether homicidal or suicidal or

accidental) and whether caused by burns or by bodily injury or occurring otherwise than under normal circumstances shall, as per the legislative mandate, be called a "dowry death" and the woman's husband or his relative "shall be deemed to have caused her death". The section clearly specifies what constitutes the offence of a dowry death and also identifies the single offender or multiple offenders who has or have caused the dowry death".

19. In Suresh Kumar (Supra), the Hon"ble Apex Court has taken into account the earlier relevant judicial pronouncement so laid down on this score and concluded under:-

"48. We are, of course, bound by the decision of a larger Bench of this Court in Shamnasheb M. Multtani Vs. State of Karnataka, AIR 2001 SC 921 : (2001) CriLJ 1075(1) : (2001) 1 DMC 332 : (2001) 2 JT 92 : (2001) 1 SCALE 365 : (2001) 1 SCR 514 : (2001) 1 UJ 719 : (2001) AIRSCW 532 : (2001) 1 Supreme 348 . Following that decision, we must hold that the initial burden of proving the death of a woman within seven years of her marriage in circumstances that are not normal is on the prosecution; such death should be in connection with or for a demand of dowry which is accompanied by such cruelty or harassment that eventually leads to the woman's death in circumstances that are not normal. After the initial burden of a deemed dowry death is discharged by the prosecution, a reverse onus is put on the accused to prove his innocence by showing, inter alia, that the death was accidental".

20. PW-1 had stated that while he was at Shankar Beez Bhandar at Banka Bazar, met with some persons of Hasia Bahera, who disclosed regarding commission of murder of deceased by her Sasuralwala which he conveyed to father of deceased Bhudev Manjhi. During cross-examination, he had stated that on the same day, he had informed and the same is found duly corroborated with.

21. PW-2 is Mohan Manjhi, who had stated that in the evening of 03.05.1993, Shyamlal Manjhi (PW-1) had informed regarding commission of murder of Marua Devi @ Taruna Devi by her Sasuralwala as well as disposing of her dead body. On the following morning, they have gone to Sasural of deceased and during midst of way, he came to know that deceased was brutally assaulted by her Sasuralwala. When they reached at the house of deceased, they found house locked. On query, they came to know that deceased was done to death by means of administering poison. They also came to know Bhola, wife of Bhola, Shyam Sunder, Mahabir and wife of Mahabir have caused murder. He had further stated that marriage was solemnized in the year 1988 with Shyam Sunder Manjhi, son of Bhola Manjhi. It has also been disclosed that accused persons were demanding Rs. 5,000/-. At an earlier occasion also, deceased was assaulted by her Sasuralwala and was ousted there from whereupon she came to her Naihar and disclosed the event. He had further narrated that deceased was done to death on account of non-fulfilment of demand of dowry. He had identified the accused. During cross-examination at Para-3, his attention has been drawn up with regard to his previous statement and to some extent the same has been

corroborated by PW-11 under Para-6. At Para-4, he had stated that occasionally, he had visited place of deceased. He had further stated that he is unable to disclose the name of persons from whom he got information. He had denied the suggestion that he had deposed falsely.

22. PW-3 is Badri Manjhi, who had stated that after being informed by Shyamlal Manjhi regarding murder of Marua Devi @ Taruna Devi as well as disposing of her dead body, he along with others Mohan Manjhi (PW-2), Bhola Manjhi, Bhudev Manjhi (PW-5) gone to Sasural of deceased on 04.05.1993 and found the house locked. From neighbours, they came to know that her Sasuralwala had committed murder and have disposed of her dead body. It has also been disclosed that while they were at Bahera (Sasural of deceased), they came to know regarding presence of a dead body in Odhini river as well as presence of police officials whereupon they gone to the place and identified the dead body that of deceased. It has also been disclosed that there was demand of dowry to a tune of Rs. 5,000/- and for that, deceased was subjected to torture by her husband, mother in-law, father in-law along with other family members. He had also stated that deceased had sent letter to her brother Nishikant Mandal, who happens to be a B.S.F. Personnel regarding her woe which she was facing at her Sasural at the hands of husband, in laws. He had further named Shyam Sunder, Bhola, wife of Bhola, Mahabir and wife of Mahabir to be responsible for commission of the murder of deceased as well as disposing of the dead body. During cross-examination, he had stated that he had not seen any letter written by the deceased to her brother, but the same was informed by his uncle, Bhudev Manjhi, father of deceased, however is not remembering the actual date. He had further stated that he came to know from Bhudev Manjhi regarding demand of Rs. 5,000/-. He has further stated that he got information regarding commission of murder by Shyamlal Manjhi in the evening of 03.05.1993. He has further disclosed that they came to know about the occurrence from the neighbours, but he is unable to disclose their names. He had further narrated that after commission of the occurrence the accused persons disappeared. Where they have gone, he is unable to say. In Para-6, he had stated that whenever deceased used to come to her Maika, she specifically disclosed regarding torture meted out to her for fulfilment of demand of dowry. But he had not taken any legal recourse. He is unable to disclose the exact date. In Para-7, he has stated that he had seen the dead body in Odhini river where police was also present. It lies 2-3 kilometer away from Bahera village. He had further stated that level of water was below knee. He had denied the suggestion that there was no demand nor deceased was tortured there for. It has also been suggested that deceased died of snake biting and on account thereof, her dead body was thrown in a river.

23. PW-4 is brother of deceased namely Shashikant @ Srikant Mandal. He had stated that in the evening of 03.05.1993, he was informed by Shyamlal Manjhi regarding commission of murder of Marua Devi @ Taruna Devi as well as disposing of her dead body whereupon he along with his father, cousin brother, uncle proceeded and reached at Village-Bahera (sasural of deceased) on

04.05.1993. On query, they came to know regarding commission of the occurrence at the end of accused persons. He had further narrated that deceased was married with Shyam Sunder Manjhi in the year 1988 and since thereafter, Shyam Sunder Manjhi advanced demand of dowry to a tune of Rs. 5,000/- and for that, his sister was mentally, physically tortured. He had further stated that mother in-law, father in-law used to abuse her as well as also assaulted her time to time. In order to save her life, deceased came at his place where she used to say the incidence of torture and cruelty for fulfilment of demand of dowry to a tune of Rs. 5,000/-. Deceased had also informed his younger brother through letter and had exhibited the same. It has also been disclosed that Sasuralwala of deceased had not informed them regarding death of his sister.

24. In Para-2 of his cross-examination, his attention has been drawn up relating to his previous statement. But the same is not found corroborated with the evidence of PW-11, the I.O. He had further stated that at an earlier occasion, he used to visit Sasural of deceased and had occasion to stay. He had further disclosed that Shyam Sunder Manjhi had demanded Rs. 5,000/- from his father at his place in presence of he himself as well as his mother, but he is unable to say the exact date. In Para-4, she had stated that deceased had come to his place four times after the marriage. At three occasions she was accompanied by father while at one occasion, she came alone. At every occasion, Sasuralwala came and took Bidai. He had further stated that though they have come to know of incarnation of deceased for fulfilment of demand of dowry, but they have not filed any sort of prosecution. The dead body of deceased was taken out from Odhini river. He had denied the suggestion that deceased was not murdered rather she died out of snake biting.

25. PW-5 is the informant, who had reiterated his earlier version as narrated by him in the fard-beyan. However, he had detailed that at lastly Bidai of deceased took place on 26.01.1993 from his place where she had come in order to escape from torture and cruelty meted out for fulfilment of demand of dowry. Also disclosed regarding recovery of dead body as well as identification. He also claimed that deceased was done to death by her Sasuralwala on account of non-fulfilment of demand of dowry. During cross-examination at Para-6, he had disclosed that he had got no documentary proof regarding demand of dowry. In likewise manner, he is unable to say the exact date on which demand was advanced. He had further said that he had gone to Sasural of deceased 4-5 times. Shyam Sunder had advanced demand of dowry, but he had not made complaint to anybody of village-Bahera (sasural of deceased). He had stated that police had taken his statement twice, the first one at the time of recovery of dead body and secondly, subsequent thereof. He had further given the detailed physical condition of the dead body. In Para-8, his attention has been drawn out towards his further statement, but is not at all found corroborated with PW-11.

26. PW-11 is the I.O., he had deposed that he recorded fard-beyan of PW-5, informant at the bank of Odhini River on 04.05.1993 and took up investigation.

He had taken out the dead body from Odhini River, which was identified that of deceased, prepared inquest report and sent the dead body for post mortem, recorded statement of witnesses and after completing investigation, submitted chargesheet. During cross-examination, he had stated that he had not visited the place of accused and on account thereof, there is no description relating to the same. It has also been disclosed that one vulture was found dead after eating flesh of the dead body, one dog was also in semi-conscious state and on account thereof, he found that deceased was done to death by administering poison. He had further stated that dead body was decomposed and was not identifiable. Para-6 contains the relevant portion of the previous statement of Mohan Manjhi.

27. As is evident, neither the post mortem happens to be legally entertainable nor the viscera report is available on the record, then in that event, what will be the ultimate result. The aforesaid event has been taken into account by the Hon"ble Apex Court in Bhupendra Vs. State of Madhya Pradesh, (2013) 11 AD 237 : AIR 2014 SC 378 : (2014) 117 CLT 967 : (2014) CriLJ 546 : (2013) 3 DMC 726 : (2014) 1 JCC 107 : (2013) 14 JT 506 : (2014) 1 RCR(Criminal) 143 : (2013) 13 SCALE 552 : (2014) 2 SCC 106 : (2014) 1 SCJ 627 :-

"26. These decisions clearly bring out that a chemical examination of the viscera is not mandatory in every case of a dowry death; even when a viscera report is sought for, its absence is not necessarily fatal to the case of the prosecution when an unnatural death punishable under Section 304-B IPC or under Section 306 IPC takes place; in a case of an unnatural death inviting Section 304B IPC (read with the presumption under Section 113-B of the Evidence Act, 1872) or Section 306 IPC (read with the presumption under Section 113-A of the Evidence Act, 1872) as long as there is evidence of poisoning, identification of the poison may not be absolutely necessary".

28. From the suggestion which the appellants have flashed before the witnesses, it is apparent that death otherwise than normal circumstance within seven years of marriage is found admitted. Throwing of dead body in the Odhini River is also found admitted. Now, the only question remains whether deceased had died on account of snake biting as suggested or otherwise, alleged by the prosecution on account of non-fulfillment of demand of dowry.

29. On account of legal deficiency as discussed above, the evidence of PW-6, PW-7 and PW-8 lost its legal identity. Discarding the same, there happens to be complete silence at the end of the appellants regarding cause of death of deceased. Not only this, they also kept mum during course of statement under Section 313 Cr.P.C.

30. Furthermore, it is apparent that save and except in competency at the end of the prosecution witnesses in having the date properly disclosed concerning continued demand of dowry as well as torture inflicted over deceased soon before her death, virtually neither there happens to be proper cross-examination on that very score as well as over torture having meted out to the deceased in

order to coerce her for procurement of Rs. 5,000/- in lieu of dowry and on account thereof, is found duly substantiated. Apart from this, the death having been committed within five years of marriage that means to say, year of marriage 1988 and commission of murder 1993 is also found uncontroverted. Then in that event, the obligation now shifts over shoulder of accused in terms of Section 113B of Evidence Act to explain whereunder they failed.

31. In *Surinder Singh Vs. State of Haryana*, AIR 2014 SC 817 : (2014) 1 CCR 671 : (2014) CriLJ 561 : (2014) 1 DMC 722 : (2013) 15 JT 9 : (2014) 1 RCR(Criminal) 535 : (2013) 13 SCALE 691 : (2014) 4 SCC 129 : (2014) 1 SCJ 701 , it has been observed:-

"15. The evidence of brothers of Anita show that after marriage Anita was unhappy in the matrimonial house because of the ill-treatment meted out to her. Anita died otherwise than under normal circumstances in her husband's house within three months and four days of marriage. It is, indeed, a very short period. The cruelty was spread over the short period covering the date of her marriage till her death displaying a course of conduct. In her case, in our opinion, cruelty caused to her on any day from the date of her marriage i.e. 20/04/1994 till the date of her death i.e. 22/07/1994 could be cruelty caused "soon before" her death. Therefore, even if date of their visit to the appellant's house, when the demand was made, is not stated by Anita's brothers in the Court, that hardly makes any difference. In any case, the brothers have stated that on 05/07/1994 Anita came to their house and told them about the demand. Anita died shortly thereafter".

"25. Before closing, the most commonplace argument must be dealt with. In all cases of bride burning it is submitted that independent witnesses have not been examined. When harassment and cruelty is meted out to a woman within the four walls of the matrimonial home, it is difficult to get independent witnesses to depose about it. Only the inmates of the house and the relatives of the husband, who cause the cruelty, witness it. Their servants, being under their obligation, would never depose against them. Proverbially, neighbours are slippery witnesses. Moreover, witnesses have a tendency to stay away from courts. This is more so with neighbours. In bride burning cases who else will, therefore, depose about the misery of the deceased bride except her parents or her relatives? It is time we accept this reality. We, therefore, reject this submission.

32. In *M. Narayan v. State of Karnataka* reported in 2015 Criminal Law Journal Page-3302, it has been observed

"29. Qua the words "soon before" appearing in Section 113-B of the Indian Evidence Act, 1872 and Section 304-B of the IPC, it is no longer *res integra* that the same is laden with the notion of proximity, test, but not synonymous with the term "immediately before". It has been *inter alia* stated also in *Surinder Singh Vs. State of Haryana*, AIR 2014 SC 817 : (2014) 1 CCR 671 : (2014) CriLJ 561 : (2014) 1 DMC 722 : (2013) 15 JT 9 : (2014) 1 RCR(Criminal) 535 : (2013) 13

SCALE 691 : (2014) 4 SCC 129 : (2014) 1 SCJ 701 that though the applicability of this expression would obviously depend on the facts and circumstances of each case, it ought to mean that the time interval cannot be stretched to any period. This Court in *Kans Raj Vs. State of Punjab and Others*, AIR 2000 SC 2324 : (2000) CriLJ 2993 : (2000) 1 DMC 645 : (2000) 5 JT 223 : (2000) 3 SCALE 429 : (2000) 5 SCC 207 : (2000) AIRSCW 2093 : (2000) 3 Supreme 554 while dwelling upon the import of the words "soon before death" observed that there ought to be a proximate and live link between the impact of cruelty based on dowry demand and the consequential death. That these words, however, should receive a fair and pragmatic construction keeping in mind the great social evil that has led to the enactment of Section 304-B was highlighted by this Court in *Sher Singh Vs. State of Haryana*(2015) 5 AD 608 : AIR 2015 SC 980 : (2015) CriLJ 1118 : (2015) 1 RCR(Criminal) 790 : (2015) 1 SCALE 250 : (2015) 3 SCC 724 : (2015) 1 SCJ 386 . In *Dinesh Vs. State of Haryana*, (2014) AIRSCW 3400 : (2014) CriLJ 3092 : (2014) 2 DMC 125 : (2014) 2 RCR(Criminal) 882 : (2014) 5 SCALE 641 : (2014) 5 SCJ 132 , it was underscored that the expression "soon before" cannot be lodged in a straitjacket formula so as to fix any time for its relevance and applicability".

33. On a cumulative consideration of the materials, it is found and held that prosecution has succeeded in proving its case, while appellants failed to discharge their onus in terms of Section 113-B of the Evidence Act. That being so, instant appeal is found devoid of merit and is accordingly, dismissed. Both the appellants are on bail, hence, their bail bonds are cancelled with a direction to surrender before the learned lower Court to serve out the remaining part of sentence. First and last page of judgment be handed over to learned Amicus Curiae for the needful.