

(2019) 07 JH CK 0147

In the Jharkhand High Court

Case No : Criminal Appeal (D.B.) No. 687 Of 2009, Criminal Revision No. 711 Of 2009

Birendra Yadav And Ors

APPELLANT

Vs

State Of Jharkhand And Ors

RESPONDENT

Date of Decision : 09-07-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 304B
Evidence Act, 1872 — Section 113B
Code Of Criminal Procedure, 1973 — Section 315

Citation : (2019) 07 JH CK 0147

Hon'ble Judges : Shree Chandrashekhar, J

Bench : Single Bench

Advocate : Munna Lal Yadav, Anil Kumar Sinha, Abhishek Kumar Geasen, Satish Kumar Keshari, Anil Kumar Sinha, Abhishek Kumar Geasen, Munna Lal Yadav

Final Decision : Allowed/ Dismissed

Judgement

Shree Chandrashekhar, J

1. The learned APP tenders a copy of letter dated 23.06.2019, on total period of custody of the appellant.
2. Taken on record.
3. Criminal Appeal (DB) No. 687 of 2009 has been preferred by the appellant-Birendra Yadav challenging the judgment of conviction under section 304-B IPC dated 05.05.2009 and the order of sentence of R.I for life dated 06.05.2009 for the aforesaid offence passed by the Additional Sessions Judge, FTC, Koderma in Sessions Trial No. 138 of 2005.
4. Criminal Revision No. 711 of 2009 has been filed by Sudama Devi, the informant of Koderma P.S. Case No. 186 of 2005, challenging the judgment dated 05.05.2009 of acquittal of the accused persons namely, Bishun Yadav, Holiya Devi, Surendra Yadav and Basanti Devi @ Kalawati Devi passed in

Sessions Trial No. 138 of 2005.

5. The appellant namely, Birendra Yadav has challenged the judgment of his conviction under section 304-B IPC, primarily on the ground that unless essential ingredients for constituting the offence under section 304-B IPC are proved by the prosecution onus to prove his innocence would not shift on the accused.

6. On the basis of a written report dated 07.04.2005 of Sudama Devi given to the Officer-in-Charge, P.S.-Koderma, alleging that the accused persons who were demanding Rs. 30,000/- and a motorcycle as dowry were harassing and torturing her daughter namely, Sunita Devi in respect of which a Panchayati was convened at village-Baddiha, however, the accused persons did not treat her daughter well in her matrimonial home and finally killed her, Koderma P.S. Case No. 186 of 2005 was registered against the husband of the victim-Birendra Yadav, father-in-law-Bishun Yadav, mother-in-law-Holia Devi, brother-in-law-Surendra Yadav and sister-in-law-Basanti Devi @ Kalawati Devi under section 304-B/34 IPC. After the investigation, charge-sheet was filed against the above-named accused persons under section 304-B/34 IPC and they faced the trial for dowry death in Sessions Trial No. 138 of 2005.

7. During the trial, the prosecution has examined eight witnesses; except Dr. Zafar Hassan-P.W.7 who has conducted autopsy over the dead body and the Pharmacist namely, Kaushlendra Kumar, who is P.W. 6, all other witnesses are parental relatives of the victim lady.

8. Dr. Zafar Hassan-P.W. 7 has conducted autopsy at about 4.30 p.m on 07.04.2005. He has found the lungs spongy and congested and filled with water bubbles. In the stomach of Sunita Devi he has found undigested food and water (about 250ml). In his opinion cause of death was asphyxia due to drowning and the time elapsed since death was within 24 hrs.

9. The offence under section 304-B IPC has been inserted in the Indian Penal Code by way of Amendment Act, 1986. A corresponding amendment was made in the Indian Evidence Act, 1872 by which section 113-B was inserted to raise a presumption of dowry death. The language employed in section 304-B IPC and section 113-B of the Evidence Act would reveal a common point of reference in both the provisions; the woman must have been "soon before her death" subjected to cruelty or harassment for or in connection with the demand of dowry. In "Bajinath and others Vs. State of Madhya Pradesh" reported in (2017) 1 SCC 101, the Hon'ble Supreme Court has dealt with the presumption under section 113-B of the Evidence Act, 1872 and proof of cruelty or harassment, thus;

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

Such a proof is thus the legislatively mandated prerequisite to invoke the otherwise statutorily ordained presumption of commission of the offence of dowry death by the person charged therewith.

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

10. The prosecution has laid evidence through the mother, father, brother and uncle of the deceased on demand of dowry and harassment and torture of Sunita Devi by the accused persons. The prosecution has also produced documentary evidence-the order-sheet of MTS Case No. 09 of 2004, copy of the petition dated 04.04.2005 filed on behalf of Sunita Devi in MTS Case No. 09 of 2004, the Informatory petition filed by Sunita Devi and two petitions dated 05.02.2005 filed on behalf of the Sunita Devi in MTS Case No. 09 of 2004 which were marked as Ext.-6, Ext.-7, Ext.-8 and Ext.-9 - to prove that soon before her death Sunita Devi was subjected to cruelty and harassment by the accused persons.

11. The uncle of the deceased, who has been examined as P.W. 1, has spoken about demand of Rs. 30,000/- and motorcycle by the accused persons. He has deposed that a Panchayati was convened at village-Lakhibagi, however, in his cross-examination he admits that no demand was made in his presence and he has not seen any act of cruelty by the accused persons. He has failed to state the date when Panchayati was held at village-Lakhibagi and he admits that no complaint regarding cruelty upon the deceased was made in the police station (paragraph no. 18 of the judgment).

12. P.W. 2 is the brother of the deceased. He has made allegations about demand of Rs. 30,000/- and motorcycle by the appellant-Birendra Yadav and his father and mother. He further says that when he came to know about harassment of his sister by the accused persons he took his sister home and lodged a case. In his cross-examination, he says that he had no knowledge about the date and time when dowry was demanded and which of the accused persons has made demand of dowry from his parents. Then he says that all demands of dowry were made at Panchayati, in respect of which a paper was prepared. He has asserted that his father has given that paper to the police, however, no such paper has been produced on the record of Sessions Trial No. 138 of 2005. He has alleged that the appellant-Birendra Yadav had illicit relationship with his elder sister-in-law (bhabhi) and one year before the Panchayati his sister was staying in her parental house. Contrary to what P.W. 1 has deposed, he says that a report to

the police was made, however, he has no knowledge whether the police has taken any action or not. We find that any complaint made to the police regarding harassment of Sunita Devi has not been brought on record (para 19 of the judgment).

13. P.W. 3 who is father of the deceased, P.W.4-brother of the deceased and P.W.5-mother of the deceased, they all have deposed in the Court on similar lines and during their cross-examination they have also failed to give specific details about the demand of dowry, Panchayati, harassment to Sunita Devi and any report to the police about her harassment and torture by the accused persons in connection to demand of dowry.

14. The defence has examined Mahabir Yadav (D.W.3) who was one of the panchas and the co-villager namely, Janki Yadav to establish that Panchayati was convened due to conduct of Sunita Devi who frequently left her matrimonial home on her own and it was decided by the Panchas that the appellant would seek divorce, and thereafter the appellant had instituted the suit for divorce. In their cross-examination the prosecution has not elicited any contradiction from these witnesses. D.W. 1 and D.W. 2 have spoken about attitude of Sunita Devi who used to frequently leave her matrimonial home and complain about marriage with Birendra Yadav as not of her liking.

15. The learned Additional Sessions Judge has recorded a finding that on the point of demand of dowry, except P.W. 3, other witnesses are hear-say witnesses and none of them has spoken about details of demand of dowry by the accused persons (para-23 of the judgment). The learned Judge has also held that the written report submitted by the informant is silent on the point of subjecting the victim to cruelty for non-fulfillment of dowry, still, he writes; "It means the accused persons as named in the typed petition started the act of torturing Sunita Devi due to non-fulfillment of dowry demand".

16. Referring to the proceedings in MTS Case No. 09 of 2004 and the Informatory petition, the learned Judge has held that soon before her death Sunita Devi was subject to mental and physical torture by the appellant-Birendra Yadav.

17. In our opinion, the learned Judge has committed a serious error in law in holding that the prosecution has been able to establish demand of dowry and harassment to Sunita Devi. In MTS Case No. 09 of 2004, vide order dated 05.02.2005 the parties were directed to remain physically present in the court during the conciliation proceeding. In a conciliation proceeding, as normally happens, it is for the parties to participate. It is not that once a direction for physical presence of the parties during conciliation is ordered, it is the duty of the husband to produce his wife in the court. The claim of the informant that the appellant has failed to produce his wife in the proceeding of MTS Case No. 09 of 2004 is not supported by any documentary evidence. In so far as Informatory petition and the complaints filed in MTS Case No. 09 of 2004 are concerned, we

find that these are directed against the appellant-Birendra Yadav only.

18. In a trial of dowry death, the presumption under section 113-B of the Evidence Act, 1871 is attracted only when the prosecution has successfully proved the essential ingredients under section 304-B IPC. The evidences laid during the trial of Sessions Trial No. 138 of 2005 reveal two different stories on demand of dowry and harassment to Sunita Devi and the prosecution as well as the defence, both have laid evidences. In the judgment in Sessions Trial No. 138 of 2005, the learned Judge has reproduced cross-examination of the prosecution witnesses which would reveal that none of the witnesses have spoken about specific details of demand of dowry, torture and harassment to Sunita Devi, and story of panchayati as projected by the prosecution. The defence witnesses have remained unshaken during their cross-examination and nothing material could be elicited from them by the prosecution in their cross-examination. The learned judge has rejected the defence evidence of D.W. 3 on the ground that in the Panchayati paper statement of Sunita Devi is not recorded and on the evidence laid through D.W. 1 and D.W. 2, the learned Judge is completely silent. It is a well-accepted principle in criminal jurisprudence that defence evidence shall be tested with the same yardstick with which the prosecution's evidence is examined.

19. In the light of the aforesaid principle, when we examine the prosecution evidence viz-a-viz the evidence led by the defence, we find that the prosecution's evidence on demand of dowry and harassment to Sunita Devi do not inspire confidence and, accordingly, we hold that the prosecution has failed to establish demand of dowry, torture and harassment of Sunita Devi by any of the accused persons in connection to demand of dowry.

20. The essential ingredients to constitute the offence under section 304-B IPC are; (i) death has occurred within seven years of marriage, (ii) death was caused by any burns or bodily injury or otherwise than under normal circumstance, and (iii) soon before her death the victim was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection to any demand for dowry. To raise a presumption under section 113-B of the Evidence Act, one of the essential ingredients for constituting the offence under section 304-B IPC which the prosecution must establish is that the death has occurred otherwise than under normal circumstances. An accidental death, strictly speaking, may not be said to be under normal circumstances, but then, the prosecution must atleast show that the death was not under normal circumstances.

21. On examination of the evidences laid during the trial of Sessions Trial No. 138 of 2005, we find the prosecution has failed to establish that death of Sunita Devi has occurred not under normal circumstances as envisaged under section 304-B IPC.

22. The doctor-P.W. 7 has not found any external injury over the dead body of Sunita Devi. He has opined that the death has occurred due to asphyxia caused

by drowning. The prosecution's evidence laid through P.W. 7 is binding on the prosecution and no material contrary to the evidence of P.W. 7 and the defence evidence has been produced by the prosecution.

23. The defence taken by the accused persons was that Sunita Devi has died an accidental death due to fall in the well. The defence has laid evidence through the accused-Birendra Yadav and Kalawati Devi, who were examined under section 315 Cr.P.C. The defence witnesses have categorically stated that Sunita Devi had gone to wash utensils and when she did not come back after a considerable time they went for her search. She was found drowned in the well wherefrom she was recovered, but found dead. During their cross-examination the defence witnesses have remained unshaken, still, the learned Additional Sessions Judge has not endeavored to find out whether the defence taken by the accused persons and other materials on record probablise the defence story of accidental death of Sunita Devi.

24. We are of the opinion that the observations of P.W. 7 probablise the defence story, in as much as, no external injury was found on Sunita Devi. The inquest report also mentions that the deceased Sunita Devi had died due to drowning (column no. 9).

25. In "Rajiv Singh vs. State of Bihar And Another" reported in (2015) 16 SCC 369, a case under Section 304-B IPC, the Hon'ble Supreme Court has observed thus:

"66. It is well-entrenched principle of criminal jurisprudence that a charge can be said to be proved only when there is certain and explicit evidence to warrant legal conviction and that no person can be held guilty on pure moral conviction. Howsoever grave the alleged offence may be, otherwise stirring the conscience of any court, suspicion alone cannot take the place of legal proof. The well-established canon of criminal justice is "fouler the crime higher the proof. In unmistakable terms, it is the mandate of law that the prosecution in order to succeed in a criminal trial, has to prove the charge(s) beyond all reasonable doubt."

26. In the light of the above discussions, having examined the materials on record, we hold that the prosecution has failed to establish demand of dowry and harassment of Sunita Devi and that soon before her death Sunita Devi was subjected to harassment or cruelty and that she has died an unnatural death as envisaged under section 304-B IPC. Accordingly, we hold that the prosecution has failed to establish charge under section 304-B IPC against the appellant.

27. Criminal Revision No. 711 of 2009 which has been filed challenging the judgment of acquittal of other accused persons, on the ground that once essential ingredients of the offence under section 304-B IPC has been found proved by the learned Additional Sessions Judge, not only the appellant-Birendra Yadav all the accused persons must be held guilty for the offence under section 304-B IPC, thus, fails.

28. The judgment of conviction under section 304-B IPC dated 05.05.2009 and the order of sentence dated 06.05.2009 passed by the Additional Sessions Judge, FTC, Koderma in Sessions Trial No. 138 of 2005 against the appellant-Birendra Yadav are set-aside.

29. In the result, Criminal Appeal (DB) No. 687 of 2009 is allowed and Criminal Revision No. 711 of 2009 is dismissed.

30. The appellant namely, Birendra Yadav in Cr. A. (DB) No. 687 of 2009 shall be released forthwith, if not required in connection to any other criminal case.

31. Let the lower-court records be transmitted to the court concerned, forthwith.