

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.693 of 2018

Arising Out of PS. Case No.-175 Year-2013 Thana- BARGAINIA District- Sitamarhi

Abdul Kadir Khan S/o Late Saheed Khan, resident of Village-Jhakarkhan
(Tole), P.S. Bairagania, District Sitamarhi.

... .. Appellant

Versus

The State Of Bihar

... .. Respondent

with

CRIMINAL APPEAL (SJ) No. 919 of 2018

Arising Out of PS. Case No.-175 Year-2013 Thana- BARGAINIA District- Sitamarhi

Sadre Alam Khan S/o Abdul Kadir Khan, R/o Village- Jhakarkhan (Tole),
P.S.- Bairagania, District- Sitamarhi.

... .. Appellant

Versus

The State Of Bihar

... .. Respondent

Appearance :

(In CRIMINAL APPEAL (SJ) No. 693 of 2018)

For the Appellant : Mr. Ashhar Mustafa, Advocate

For the Respondent : Mr. Zeyaul Hoda, APP

(In CRIMINAL APPEAL (SJ) No. 919 of 2018)

For the Appellant : Mr. Ashhar Mustafa, Advocate

For the Respondent/s : Mr. Zeyaul Hoda, APP

CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
C.A.V. JUDGMENT

Date : 30-09-2021

These appeals have been preferred against judgment dated 15.01.2018 and order of sentence dated 20.01.2018 passed in Sessions Trial No. 551 of 2014/56 of 2016 arising out of Bairagania P.S. Case No. 175 of 2013. The appellants were charged for offences under Sections 304(B)/34 IPC and 302 IPC, however, acquitted of the charge under Section 302/34 IPC. The



learned trial Judge awarded rigorous imprisonment for ten years and a fine of rupees ten thousand for the proved charge under Section 304(B)/34 IPC. In default of payment of fine, the appellants were directed to undergo three months simple imprisonment. The fine amount was to be paid to the legal heirs of the deceased.

2. The prosecution case as disclosed in the written report of Chandtara Khatoon (PW-4) is that her sister “A” was married with appellant Sadre Alam Khan seven months back. After few days of marriage, Sadre Alam Khan started demanding a motorcycle, however, the matter was pacified and the sister of the informant went to her *Sasural*. Again the demand started.

The informant came to know that appellant Sadre Alam Khan had illicit relation with his *Bhabhi*. This fact was reported by deceased “A”. Thereafter, the informant enquired about this relationship and came to know that the information was correct one.

Sadre Alam Khan sent to his sister to her parents house saying that until motorcycle is provided to him, he would not keep her. However, under a conspiracy, pretending illness of his mother, Sadre Alam took the victim to his house on 13.12.2013. On 15.12.2013, the sister of the informant was poisoned to death and



strangled with a rope. FIR was registered under Section 302/34 IPC. However after investigation, the police submitted charge sheet under Section 304(B)/34 IPC.

3. Mr. Ashhar Mustafa, learned counsel for the appellants submits that there is lack of acceptable evidence of “torture to the victim before her death by the husband and other relations for non fulfillment of dowry demand,” hence, most important ingredient of the offence under Section 304(B) IPC is missing. That is the reason that this incriminating circumstance was not put to the appellants while they were examined under Section 313 Cr.P.C. Moreover, not drawing attention of the appellants, at the time of examination under Section 313 Cr.P.C. regarding cruelty/harassment to the deceased by her husband and other relations for non fulfillment of dowry demand seriously prejudiced the defence of the accused because they could not get opportunity to explain such circumstance. Learned counsel submits that the prosecution case is that *Panchayats* were held for resolution of the demand of motorcycle but no *Panches* were produced before the court of law. Learned counsel contends that none of the prosecution witnesses of the occurrence are eye witnesses of the alleged act of torture for non fulfillment of dowry demand before death nor there is trustworthy evidence that the



victim had disclosed them about torture and demand though she had occasion to remain in the parents' family for long. No witness of the vicinity of place of occurrence was produced to support torture to the victim for non fulfillment of dowry demand by the husband and others.

4. To contra, Mr. Zeyaul Hoda learned counsel for the State submits that the learned trial Judge has considered that ingredients of the offence under Section 304(B) are proved against the appellants, hence, presumption under Section 113 B of the Evidence Act would be applicable.

5. PW-1 Jalaluddin Khan, PW-2 Salauddin Khan, PW-3 Alauddin Khan and PW-4 Chandtara Khatoon are siblings of the deceased.

PW-1 deposed that the deceased was married with the appellant Sadre Alam Khan. Thereafter, there was demand of motorcycle. The witness promised that whenever he would manage money, he would give motorcycle but the accused persons sent his sister to his house and said that until motorcycle would be provided they would not keep her. On the fateful morning, the victim was poisoned to death. In cross-examination, the witness admitted that the deceased went to her *Sasural* after marriage and remained there for seven to eight months. Thereafter, she came to



her parents' house and stayed there for two months. Again she went to her *Sasural* and remained there for six months. Again she came to her parents' house and stayed there for 10-15 days. Whenever the deceased was in her matrimonial house PW-4 Chandtara Khatoon and PW-2 Salauddin Khan used to go there off and on. The attention of this witness was drawn to his statement under Section 161 Cr.P.C. that he had not stated before the police that there was demand of motorcycle and the witness had promised to provide the motorcycle whenever would have money for that. The witness denied that he had not stated before the police that unless motorcycle is provided the appellants would not keep his sister. When attention of the investigating officer (PW-6) was drawn to the making of the aforesaid statement (Para 13) she denied that she had recorded the statement of this witness whereas in Para 7 and 18 she admitted that she had recorded the statement of this witness also.

PW-2 Salauddin Khan deposed that after marriage there was demand of motorcycle and for that twice to thrice *Panchayati* took place in his village Ruphara. Appellant Abdul Kadir Khan had participated in the Panchayat and took the deceased to his own house. In the cross examination, the witness states that he could not remember the date of *Panchayat*, however several persons had



participated in the said *Panchayat*. No *Panch* was of the village of the accused persons. In none of the *Panchayat* the accused persons turned up rather the *Panchayat* was for discussion among the members.

PW-2 does not say that the deceased was being tortured by her husband or relations of the husband for non fulfillment of the demand of motorcycle before her death.

6. PW-3 Alauddin Khan had deposed that on non-fulfillment of demand of motorcycle the accused persons used to assault his sister. This witness deposes that the *Panchayat* of the dispute was convened in the village of the accused persons and this witness along with his brother Salauddin Khan had participated in the *Panchayat*. The witness is not specific whether he had seen the occurrence of assault against the deceased or had heard from someone. Moreover, he is inconsistent with the evidence of Salauddin Khan (PW-2) that *Panchayat* ever took place in the village of the accused persons.

7. PW-4 Chandtara Khatoon has supported the allegation of demand of motorcycle and assault to the deceased by the accused persons for non fulfillment of the said demand but there is lack of evidence that the witness had seen the incident of assault committed against the deceased for non fulfillment of dowry



demand nor there is evidence that from whom she heard about the incident of assault. During cross-examination, she gave detail description of her visit to the house of the deceased but she does not say that the deceased ever complained about any torture meted to her by her in laws for non fulfillment of dowry demand.

8. PW-5 Dr. Shakil Anjoom had performed postmortem examination on the dead body of the victim. In conclusion, she found asphyxial death caused by strangulation by rope like substance. She deposes that since allegation was of poisoning also, hence she preserved the viscera and sent it for forensic examination. The viscera report (Ext. 5) reveals that no poisonous substance was found.

9. PW-6 Rita Kumari has supported the investigation done by her.

10. PW-7 Md. Merajul Haque has deposed that he had written the first information report on the dictate of PW-4 which was marked as Ext. 2. The witness has been declared hostile for the reason that he expressed his unawareness about the occurrence.

11. On scrutiny of the prosecution evidence, it appears that none of the prosecution witnesses are eye witnesses of the occurrence of torture for non fulfillment of dowry demand by the husband and other relations. None of the witnesses have deposed



that they heard about the torture from the deceased though deceased had occasion to be with them for months. No witness of the vicinity has been produced to prove that anyone had seen the deceased being tortured at the hands of her husband or other relations for non fulfillment of dowry demand. Therefore, prosecution claim of torture to the deceased by the in-laws for non fulfillment of dowry demand before her death is unworthy of acceptance.

12. To prove the charge under Section 304(B) IPC, only factum of unnatural death in matrimonial home within seven years of marriage would not by itself suffice to hold the appellants guilty rather the prosecution has to prove that the deceased was subjected to cruelty or harassment in connection with any demand of dowry and such cruelty or harassment was soon before her death. On proof of all these ingredients, the presumption under Section 113 B of the Evidence Act would arise. Reference may be made to **Bakshish Ram's case** reported in **(2013) 4 SCC 131**.

13. In **Sunil Bajaj Vs. State of Madhya Pradesh** reported in **2001 CRI. L. J. 4700**, the prosecution had produced only vague and inconsistent statement of interested witnesses being relation of the deceased. There was no evidence of any independent witness or neighbor of the place of occurrence



regarding cruelty to the deceased by the accused in relation to demand of dowry. The Hon'ble Supreme Court set aside the judgment of conviction.

In the case on hand, there is no independent corroboration, of any torture to the deceased, by any neighbor or any evidence of a witness who had occasion to watch the relationship of the deceased with her in-laws nor there is any evidence that deceased ever made any complaint while she was staying in her parents' house in between the period of demand of motorcycle and her death. The so-called *Panches* who were claimed to be aware of the demand of motorcycle were not produced by the prosecution to substantiate the claim of demands and torture.

14. It is settled law that incriminating circumstances appearing against the accused in prosecution evidence must be put to the accused at the time of statement under Section 313 Cr.P.C.. Unless such circumstances are put to the accused to give opportunity to meet the same with explanation, the same cannot be used against the accused.

15. In the case on hand, the following questions were put to the appellants:-



“Question no. 1: Have you heard the statement of the prosecution witnesses?

“Question no. 2: There is prosecution evidence against you that within seven years of marriage for non fulfillment of demand of motorcycle as dowry caused death of “A” on 15.12.2013 in a conspiracy with other co-accused, in your house.

“Question no. 3: Have you anything to say in defence?”

It is evident that attention of the appellants was not drawn to the fact that there was torture/harassment to the deceased for non fulfillment of demand of motorcycle. The reason appears to be apparent as there was no such prosecution evidence.

16. In **Naval Kishore Singh v. State of Bihar** reported in **(2004) 7 SCC 502**, the Hon’ble Supreme Court observed as follows:

“5. The questioning of the accused under Section 313 Cr.P.C. was done in the most unsatisfactory manner. Under Section 313 Cr.P.C. the accused should have been given opportunity to explain any of the circumstances appearing in the evidence against him. At least, the various items of evidence, which had been produced by the prosecution, should have been put to the accused in the form of questions and he should have been given opportunity to give his explanation. No such opportunity was given to the accused in the instant case. We deprecate the practice of putting the entire evidence against the accused put together in a single question and giving an opportunity to explain the same, as the accused may not be in a position to give a rational



and intelligent explanation. The trial judge should have kept in mind the importance of giving an opportunity to the accused to explain the adverse circumstances in the evidence and the Section 313 examination shall not be carried out as an empty formality. It is only after the entire evidence is unfurled the accused would be in a position to articulate his defence and to give explanation to the circumstances appearing in evidence against him. Such an opportunity being given to the accused is part of a fair trial and if it is done in slipshod manner, it may result in imperfect appreciation of evidence.”

17. The aforesaid Judgment was followed by a three Judges Bench of the Hon’ble Supreme Court in **Maheshwar Tigga Vs. State of Jharkhand** reported in **(2020) 10 SCC 108** and the law was stated in Para-8 of the judgment as follows:-

“8. It stands well settled that circumstances not put to an accused under Section 313 Cr.P.C. cannot be used against him, and must be excluded from consideration. In a criminal trial, the importance of the questions put to an accused are basic to the principles of natural justice as it provides him the opportunity not only to furnish his defence, but also to explain the incriminating circumstances against him. **A probable defence raised by an accused is sufficient to rebut the accusation without the requirement of proof beyond reasonable doubt.**”

18. In **Asraf Ali v. State of Assam** reported in **(2008) 16 SCC 328**, the Hon’ble Supreme Court said:

“21. Section 313 of the Code casts a duty on the court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It



follows as necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.

22. The object of Section 313 of the Code is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial Court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed a similar view in *S. Harnam Singh v. State (Delhi Admn.)* (1976) 2 SCC 819, while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non-indication of inculpatory material in its relevant facets by the trial Court to the accused adds to vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise.”

19. Evidently, the trial Judge did not put specific incriminating material as to “torture and harassment to the deceased by the appellants for non fulfillment of dowry demand.” The apparent reason was lack of prosecution evidence of the fact.

20. The aforesaid infirmities in the prosecution evidence make the prosecution case doubtful. Benefits whereof would go in favour of the appellants. Accordingly, the appellants deserve



acquittal on benefit of doubts. Consequently, the impugned judgment of conviction and order of sentence are set aside and these appeals are allowed. Both the appellants are in jail. Appellant Sadre Alam Khan is in jail since 15.12.2013 and appellant Abdul Kadir Khan has remained in jail for more than four years. Let them be set free at once.

(Birendra Kumar, J)

shahzad/-

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