

IN THE HIGH COURT OF JUDICATURE AT PATNA

Kisto Paswan

vs.

The State of Bihar

Criminal Appeal (DB) No. 415 of 2017

31 August, 2023

[Hon'ble Mr. Justice Vipul M. Pancholi & Hon'ble Mr. Justice Chandra Shekhar Jha]

Issue for Consideration

Whether the conviction of the appellant under Sections 302 and 201 IPC was sustainable when there was no direct evidence, and the trial court relied solely on Section 106 of the Evidence Act.

Headnotes

There is no eye-witness to the incident in question and nothing has come on record as to how the deceased died, whether because of the burn injuries or by throttling. The dead body of the deceased was disposed of and the post-mortem on the dead body was not conducted. Near relatives of the deceased have for the first time stated before the court about the demand of dowry. Similar type of allegations are levelled against all the accused by the relatives of the deceased. In spite of that, the Trial Court has not believed the story of the said witnesses, so far as the other co-accused were concerned. (Para 18)

Four independent prosecution witnesses, who are neighbours of the deceased, have specifically stated that there was no demand of dowry by the in-laws of the deceased and the deceased was having good relation with her husband and her in-laws. Prosecution has failed to discharge its burden and, therefore, the reliance placed by the learned Trial Court upon Section 106 of the Evidence Act is misplaced. (Para 22)

Trial Court has committed an error while recording the order of conviction. Appeal is allowed. (Para 24, 26)

Case Law Cited

Reena Hazarika v. State of Assam, **(2019) 13 SCC 289**; Shambhu Nath Mehra v. State of Ajmer, **AIR 1956 SC 404**

List of Acts

Indian Penal Code, 1860; Code of Criminal Procedure, 1973; Indian Evidence Act, 1872

List of Keywords

Dowry Death; Burden of Proof; Section 106 Evidence Act; Mental Health of Deceased; Independent Witnesses; Circumstantial Evidence; Acquittal Contradiction in Prosecution Case; Fast Track Court; Last Seen Theory

Case Arising From

Judgment of conviction dated 06.03.2017 and order of sentence dated 08.03.2017 rendered by learned Presiding Officer, Fast Track Court-I, Nalanda at Bihar Sharif in S. T. Case Nos. 421 of 2006/649 of 2007/434 of 2008 arising out of Bihar P.S. Case No.429 of 2005.

Appearances for Parties

For the Appellant: Mr. Rabindra Prasad Singh, Advocate;
For the State: Mr. Dilip Kumar Sinha, APP

Headnotes Prepared by Reporter: Amit Kumar Mallick, Adv.

Judgment/Order of the Hon'ble Patna High Court

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.415 of 2017

Arising Out of PS. Case No.-429 Year-2005 Thana- BIHAR District- Nalanda

Kisto Paswan, Son of Garabhu Paswan, Resident of Village-Sakunat, Police Station -Bihar, District-Nalanda.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant	:	Mr. Rabindra Prasad Singh, Advocate
For the State	:	Mr. DilipKumar Sinha, APP

CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI

and

HONOURABLE MR. JUSTICE CHANDRA SHEKHAR JHA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

Date : 31-08-2023

The present appeal has been filed by the appellant-convict under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') challenging the judgment of conviction dated 06.03.2017 and order of sentence dated 08.03.2017 rendered by learned Presiding Officer, Fast Track Court-I, Nalanda at Bihar Sharif in S. T. Case Nos. 421 of 2006/649 of 2007/434 of 2008 arising out of Bihar P.S. Case No.429 of 2005, whereby the concerned Trial Court has convicted the present appellant for the offences punishable under Sections 302 and 201 of the Indian Penal Code (hereinafter referred to as 'I.P.C.'). He has been sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 10,000/- and in default of payment of fine, to further undergo



rigorous imprisonment for two years under Section 302 of the I.P.C. and rigorous imprisonment for five years and to pay a fine of Rs.5,000/- and in default of payment of fine, to further undergo rigorous imprisonment for six months under Section 201 of the I.P.C. However, both the sentences have been ordered to run concurrently.

2. The factual matrix of the present case is as under:-

“The informant’s daughter Babita Devi was married with Kisto Paswan about four years ago in which the informant gave dowry according to his capacity. Since the deceased Babita Devi was hard hearing, due to which Garabhu Paswan has returned back his daughter to his house by saying that she was hard hearing and was unable to do any work. It is also stated that after four months, the daughter of the informant compelled her father to send her to matrimonial home then, she was sent there and, thereafter, she had been living at Sakunat. It is also alleged that on 21.12.2005, when the son of informant, namely, Sanjay Paswan went to meet his sister at Sakunat, Nanhkoo Paswan informed him that his sister was burnt. Sanjay Paswan reached at the house of accused and enquired about his sister from Garabhu Paswan. He told him that his sister fled away from house. Then, he inquired from villagers about his sister and the nearby people told him that his sister was burnt to death and her body was cremated by her in-laws including the appellant.



The son of informant came back to his house and told him about the incident. The informant suspected the hands of appellant and the others in disappearance of the body of his sister.”

3. On the basis of the aforesaid written report given by the first informant, FIR was lodged on 26.12.2005 at about 7.30 for the offences punishable under Sections 302, 201 and 498-A of the I.P.C. against all the named accused. The Investigating Officer thereafter started the investigation and during the course of investigation, recorded the statement of the witnesses and collected the documentary evidence and after the investigation was over, filed charge-sheet against the appellant and other accused before concerned Magistrate Court. However, as the case was exclusively triable by the Court of Session, the learned Magistrate committed the same to the concerned Sessions Court where the same was numbered as S.T. Case Nos. 421 of 2006/649 of 2007/434 of 2008.

4. During the course of trial, the prosecution has examined ten witnesses and also produced the documentary evidence. Thereafter, the statement of the accused under Section 313 of the Code has been recorded. After conclusion of the trial, the trial court convicted the present appellant as observed hereinabove. However, the other accused, who are near relatives



of the appellant, have been acquitted by the Trial Court.

5. Against the judgment of conviction passed by the Trial Court, the appellant has preferred the present appeal.

6. Heard learned Advocate, Mr. Rabindra Prasad Singh for the appellant and Mr. Dilip Kumar Sinha, learned Additional Public Prosecutor for the Respondent-State.

7. Learned Advocate, Mr. Rabindra Prasad Singh appearing on behalf of the appellant has referred to the deposition given by the prosecution witnesses and, thereafter, submitted that there is no eye-witness to the incident in question and, in fact, the dead body of the deceased, i.e. wife of the appellant, was not recovered and, therefore, her *postmortem* was also not conducted. It is further submitted that the FIR came to be lodged on the basis of the information received by the brother of the deceased from the neighbours of the deceased and one Nanhku Paswan. The said witness received the information that the deceased died due to burn injuries and she has been killed by the present appellant and all the other accused. On the basis of the said information, the father of the deceased has lodged the FIR. At this stage, it is submitted that the prosecution has not examined Nanhku Paswan or the other neighbours from whom brother of the deceased got the information about the



death of the deceased. On the contrary, from the deposition given by the independent witnesses, namely, P.W.-2, P.W.-3, P.W.-7 and P.W.-8, who are neighbours of the deceased, it is revealed that the said witnesses have specifically stated that there was no demand of dowry by the appellant and other accused and the deceased was having very good relation with her husband and the in-laws. The said witnesses have also stated that the deceased was mentally challenged and of hard hearing/deaf and she burnt out of her own and nobody has burnt her. Learned Advocate, therefore, submitted that when the prosecution witnesses have not supported the version of the relatives of the deceased, the Trial Court has committed an error by passing a judgment of conviction against the present appellant.

7.1. At this stage, learned advocate has also pointed out that all the other near relatives of the appellant, who are also in-laws of the deceased, have been acquitted by the Trial Court and while acquitting the other co-accused, the Trial Court has not believed the similar type of story put forth by the prosecution. At this stage, learned Advocate further submit that the Trial Court has recorded the conviction of appellant relying upon Section 106 of the Indian Evidence Act. However, it is the



duty of the prosecution to prove the case against the accused beyond reasonable doubt and in the present case, the prosecution has failed to prove the same. In spite of that, the Trial Court has passed the impugned order. Learned Advocate, therefore, urged that the impugned order be quashed and set aside and the appellant be acquitted.

8. On the other hand, Mr. Dilip Kumar Sinha, learned Additional Public Prosecutor for the State has opposed the appeal and referred to the deposition given by the prosecution witnesses and mainly referred to the deposition of PW-1, PW-4 and PW-6, who are mother, father and brother respectively of the deceased. It is submitted that from the deposition of the said witnesses, it is revealed that the deceased died in the house of the ownership of the appellant and the dead body of the deceased was disposed of by the appellant after her death and, therefore, it was the appellant to discharge the burden under Section 106 of the Indian Evidence Act to prove the manner in which the deceased died. Therefore, the Trial Court has rightly placed reliance upon the provisions contained in Section 106 of the Indian Evidence Act. Learned APP, therefore, urged that no error is committed by the Trial Court while passing the impugned judgment of conviction and, therefore, the



present appeal be dismissed.

9. Having heard learned Advocates appearing for the parties and having gone through the materials placed on record, it would emerge that the prosecution had examined ten witnesses before the Trial Court including three near relatives of the deceased. The prosecution has also examined four independent witnesses, who are neighbours of the deceased and also examined Investigating Officer (PW-9).

10. PW-1, Chandeshwari Devi, is the mother of the deceased, who has stated in her examination-in-chief that marriage of her daughter Babita was solemnized with the appellant herein before seven years. Thereafter, she was residing at her in-laws' house. It is further stated that all the accused were demanding ₹ 20,000/- as a dowry. The said witness also given the name of all the accused, who were demanding dowry from the deceased. It is also alleged that all the accused were giving physical and mental torture to her daughter. It is also stated by the said witness that she sent her son namely, Sanjay Paswan at the house of Babita. However, there was a lock applied on the door of the said house. When Sanjay inquired from the neighbours, the neighbours informed him that his sister is killed and her dead body is disposed of by all the accused



persons. The said witness identified the accused who were present in the court.

10.1. During cross-examination, the said witness has stated that her son Sanjay did not inform her about the name of the neighbour who had informed him about the death of Babita. Sanjay did not inform her the manner in which Babita was killed. He has further stated that her son-in-law i.e. the present appellant had demanded money from her. She has further stated that she did not inform the police that her daughter died because of the burn injuries.

11. PW-2 Prahlad Paswan, who is neighbour of the deceased, stated in examination-in-chief that Babita Devi was residing near his house and the name of her husband is Kisto Paswan. Babita died because of the burn injuries. During cross-examination, the said witness has specifically stated that Babita was having good relation with her husband and in-laws and the in-laws of Babita have not asked for dowry from her, nor they were giving any torture to Babita. The said witness further stated that Babita was hard hearing and mentally challenged and she died because of the burn injuries. Nobody has burnt her.

12. PW-3 Jagdish Paswan is also neighbour of the deceased and the said witness has also given the same version



which was given by PW-2. Similarly, PW-7 Brijnandan Paswan and PW-8 Ram Nandan Paswan are also neighbours of the deceased. Both the aforesaid witnesses have also stated during the cross-examination that Babita was hard hearing and mentally challenged and she burnt herself and, therefore, she died. The appellant (accused Kisto Paswan), therefore, informed about the said incident to his in-laws (parents of the deceased) and they were present at the time of cremation. The said witnesses have also further stated that the appellant/accused was not demanding dowry from the deceased, nor he was giving any torture to her.

13. PW-4 Rajendra Paswan, who is the father of the deceased and informant, has stated in his examination-in-chief that Babita Kumari was his daughter. Marriage of Babita was solemnized with the appellant herein i.e. Kisto Paswan before 7-8 years. All the in-laws were demanding ₹ 20,000/- from her and also giving physical and mental torture to Babita as the dowry was not given to his daughter. Babita was killed by the accused by throttling and, thereafter, the dead body was disposed of. The said witness has stated in cross-examination that it is not true that his daughter died because of the burn injuries. The said witness was also not aware about the name of



the neighbour/person who informed to his son that Babita was killed by her in-laws. The said witness has also denied the suggestion that his daughter Babita was mentally challenged and hard hearing.

14. PW-5 Ramjee Prasad is a witness, who came to know that the daughter of Rajendra Paswan has died in her in-laws house and he also came to know from Rajendra Paswan i.e. PW-4, wife of Rajendra Paswan, and other villagers that Babita is killed because the parents of Babita have not given ₹ 20,000/- to the in-laws of Babita and, thereafter, her dead body is disposed of. The said witness has specifically admitted in cross-examination that he is not having any personal knowledge with regard to the death of the deceased Babita.

15. PW-6 Sanjay Paswan is the brother of the deceased, who, for the first time, came to know that his sister died at her in-laws place and, thereafter, her dead body has been disposed of. During his examination-in-chief, the said witness has specifically stated that when he had gone to the house of his sister Babita, the neighbours informed him that Babita was killed by her in-laws. The said witness further stated that his sister is killed because ₹40,000/- as dowry was not given to the in-laws of Babita and, therefore, her dead body has been



disposed of. During cross-examination, the said witness has stated that the in-laws were demanding ₹20,000/-. He is not aware about the name of the neighbours. However, the said witness further gave name of one Prahlad as neighbour of his sister Babita.

16. PW-9 Birendra Kumar was working as Police Officer in Bihar Police Station. The said Investigating Officer has stated in his examination-in-chief about the manner in which he has conducted the investigation and recorded the statement of the witnesses. He has also stated that he has visited the place of occurrence i.e. the house of the deceased. He has also stated that it was informed to him during that visit that the deceased died in her room because of the burn injuries. However, during cross-examination of the said witness i.e. I.O., has specifically admitted that the informant has not stated in her statement recorded under Section 161 of the Code about the demand of dowry by the in-laws or giving physical and mental torture to the deceased by her in-laws and, therefore, he initially registered the F.I.R. under Section 302, 201 of the I.P.C. The said witness further admitted that the first informant has specifically stated in his statement, which was recorded under Section 161 of the Code, that his daughter Babita was hard



hearing and mentally challenged. Further, the informant has also not stated in his statement that the accused have killed his daughter by setting her on fire. However, it was only informed that she was killed and, thereafter, her dead body was disposed of. The said witness further admitted that though he had visited the place of occurrence and he came to know that the deceased died in her room, the said room was not opened, nor he has prepared any *panchnama* of the said place nor he has collected any material from the said room.

16.1. The Investigating Officer has further admitted during cross-examination that the mother of the deceased i.e. PW-1 Chandeshwari Devi while giving the statement on 15.02.2006 had not stated that ₹20,000/- by way of dowry was demanded by in-laws of Babita, nor she has disclosed the name of Bipin Paswan who is the brother-in-law of the deceased. It is further admitted by the said witness that the brother of the deceased, namely Sanjay Paswan PW-6, has also not stated in his statement about the demand of ₹20,000/- by way of dowry by in-laws of the deceased. Further, Sanjay Paswan has informed the I.O. that his sister was hard hearing and the information with regard to the death of his sister was given by one Nanhku Paswan.



17. PW-10 Mithilesh Chaudhary is a witness who has signed as a witness in the *fardbeyan* given by the informant.

18. We have gone through the deposition given by the prosecution witnesses and the other materials placed on record, from which, it transpires that there is no eye-witness to the incident in question and nothing has come on record as to how the deceased died, whether because of the burn injuries or by throttling. The dead body of the deceased was disposed of and the *postmortem* on the dead body was not conducted. With a view to prove the case against the accused, the prosecution had examined three near relatives of the deceased i.e. PW-1 mother, PW-4 father and PW-6 brother of the deceased. The prosecution has also examined four independent witnesses who are neighbours of the deceased. From the deposition of the prosecution witnesses, it would emerge that the near relatives of the deceased have for the first time stated before the court about the demand of dowry i.e. ₹20,000/- by the in-laws of the deceased. The said aspect has been admitted by the Investigating Officer during his cross-examination. It is pertinent to note at this stage that except the appellant who is the husband of the deceased, all the other accused, who are near relatives of the appellant, have been acquitted by the Trial



Court. It is pertinent to note that similar type of allegations are levelled against all the accused by the relatives of the deceased i.e. PW-1, PW-4 and PW-6. In spite of that, the Trial Court has not believed the story of the said witnesses, so far as the other co-accused are concerned. It is also required to be noted that initially the F.I.R. came to be registered under Section 302 and 201 of the I.P.C. However, before the Trial Court, charge was framed under Sections 304-B, 498-A and 201 of the I.P.C. From the impugned order passed by the Trial Court, it transpires that the Trial Court has not believed the story of the prosecution with regard to the demand of dowry and, therefore, all the accused have been acquitted so far as the offence punishable under Section 304-B and 498-A of the I.P.C. is concerned. The present appellant has been convicted for the offence punishable under Section 302 read with Section 201 of I.P.C. only relying upon Section 106 of the Evidence Act, 1872.

19. In the aforesaid background of the present case, at this stage, we would like to refer the provision contained in Section 106 of the Indian Evidence Act, 1872, which provides as under:-

"106. Burden of proving fact especially within knowledge.—When any fact is especially within the knowledge of any person, the burden of proving that



fact is upon him.”

19.1. From the aforesaid provision, it is revealed that when any fact is especially within the knowledge of any person the burden of proving that fact is upon him.

20. It has been observed by the Trial Court that when the death of the deceased has taken place at the house of the appellant in which the appellant and his wife i.e. the deceased were residing and when the said house is of the ownership of the appellant, it was the duty of the appellant to discharge the burden under Section 106 of the Indian Evidence Act i.e. it was for the appellant to disclose before the Court the manner in which the incident took place and the deceased died and, therefore, on this ground, the appellant has been convicted.

20.1. At this stage, we would like to refer the decision rendered by the Hon’ble Supreme Court in the case of **Reena Hazarika Vs. State of Assam** reported in (2019) 13 SCC 289, wherein the Hon’ble Supreme Court has observed in Paragraph-9 as under:-

“9. The essentials of circumstantial evidence stand well established by precedents and we do not consider it necessary to reiterate the same and burden the order unnecessarily. Suffice it to observe that in a case of circumstantial evidence the prosecution is required to establish the continuity in



the links of the chain of circumstances, so as to lead to the only and inescapable conclusion of the accused being the assailant, inconsistent or incompatible with the possibility of any other hypothesis compatible with the innocence of the accused. Mere invocation of the last-seen theory, sans the facts and evidence in a case, will not suffice to shift the onus upon the accused under Section 106 of the Evidence Act, 1872 unless the prosecution first establishes a prima facie case. If the links in the chain of circumstances itself are not complete, and the prosecution is unable to establish a prima facie case, leaving open the possibility that the occurrence may have taken place in some other manner, the onus will not shift to the accused, and the benefit of doubt will have to be given”.

21. In the case of **Shambhu Nath Mehra Vs. The State of Ajmer** reported in **AIR 1956 SC 404**, the Hon’ble Supreme Court has observed that Section 106 of the Evidence Act is not a substitute for the burden of proof that rests upon the prosecution.

21.1. Thus, from the aforesaid decisions, it can be said that in a Criminal Trial, the burden is always on the prosecution to prove the guilt of the accused beyond reasonable doubt and Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden. Further, only when the prosecution proves certain fact from which reasonable inference



can be drawn regarding certain other facts, which unless explained by the accused by virtue of his special knowledge, tend to inculcate the accused. In such circumstances, the accused owe an explanation, otherwise Section 106 of the Evidence Act does not put any burden on the accused to prove his innocence.

22. Keeping in view the aforesaid observations made by the Hon'ble Supreme Court and the provisions contained in Section 106 of the Evidence Act, if the facts of the present case, as discussed hereinabove, it is revealed that the prosecution has failed to discharge its burden and, therefore, the reliance placed by the learned Trial Court upon Section 106 of the Evidence Act is misplaced. At this stage, it is also relevant to note that there are four independent prosecution witnesses, who are neighbours of the deceased, have specifically stated while giving the deposition before the Court that there was no demand of dowry by the in-laws of the deceased and the deceased was having good relation with her husband and her in-laws. They have also stated that the deceased was hard hearing and mentally challenged and her in-laws have not killed her. Thus, from the deposition of the independent prosecution witnesses, it can be said that the prosecution has failed to prove the case



against the appellant/accused beyond reasonable doubt and, therefore also, reliance placed by the Trial Court on Section 106 of the Evidence Act is not tenable.

23. From the impugned order passed by the learned Trial Court, it is further revealed that the Trial Court has not believed the story put forth by the prosecution *qua* the other accused except the appellant and, therefore, the Trial Court has acquitted all the near relatives of the present appellant and the in-laws of the deceased. However, surprisingly, the Trial Court has relied upon the deposition of the said witnesses while passing an order of the conviction against the appellant.

24. In view of the aforesaid discussions, we are of the view that the Trial Court has committed an error while recording the order of conviction against the present appellant and, therefore, the impugned order is required to be quashed and set aside.

25. The impugned judgment of conviction dated 06.03.2017 and order of sentence dated 08.03.2017 passed by learned Presiding Officer, Fast Track Court-I, Nalanda at Bihar Sharif in S. T. Case Nos. 421 of 2006/649 of 2007/434 of 2008 arising out of Bihar P.S. Case No. 429 of 2005 is quashed and set aside. The appellant, namely, Kisto Paswan is acquitted of



the charges levelled against him by the learned trial court. He is directed to be released from jail forthwith, if his presence is not required in any other case.

26. The appeal stands allowed.

(Vipul M. Pancholi, J.)

(Chandra Shekhar Jha, J.)

Sanjeet/Sachin/-

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