

**(2021) 02 PAT CK 0002**

**Patna High Court**

**Case No:** Criminal Appeal (Sj) No. 125, 129, 712 Of 2020

Gudhiya Devi @ Gddhiya Kumari  
@ Guriya Kumari And Anr

APPELLANT

Vs

State Of Bihar

RESPONDENT

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**Date of Decision:** Feb. 2, 2021

**Acts Referred:**

- Indian Penal Code, 1860 - Section 34, 302, 304B, 498A
- Dowry Prohibition Act, 1961 - Section 2
- Evidence Act, 1872 - Section 113B

**Hon'ble Judges:** Birendra Kumar, J

**Bench:** Single Bench

**Advocate:** Rajendra Kumar Dubey, Bipin Kumar, Ajay Kumar Thakur

**Final Decision:** Allowed

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### **Judgement**

Heard the parties.

2. These appeals have been preferred against the judgment of conviction dated 02.12.2019 and order of sentence dated 11.12.2019 passed against the

appellants by learned Additional Sessions Judge-X, Ara, Bhojpur, in Sessions Trial No.297 of 2017 corresponding to Bihiya P.S. Case No.132 of 2016.

Appellant Sanjay Sharma, who is husband of the alleged victim of dowry death, has been awarded rigorous imprisonment of 8 years and a fine of

rupees ten thousand for offence under Section 304B of the Indian Penal Code. In default of payment of fine six months rigorous imprisonment has

been awarded. The appellant Sanjay Sharma has further been convicted under Section 498A of the Indian Penal Code and rigorous imprisonment of

three years along with fine of rupees five thousand have been awarded. In default of payment of fine he was directed to undergo rigorous imprisonment for one month. Other appellants were convicted under Section 498A of the Indian Penal Code only and rigorous imprisonment of three years besides fine of rupees ten thousand has been awarded. In default of payment of fine rigorous imprisonment of six months has been ordered. The sentences have been ordered to run concurrently and the fine amount is to be paid to the minor son of the victim.

3. The prosecution case as disclosed in the written report of Jagroshan Sharma (PW 3) is that daughter's daughter of Jagroshan Sharma, namely, Anshu Devi daughter of Jagjivan Sharma was married two years back with appellant Sanjay Sharma. Just after the marriage there was demand of a motorcycle from the victim and the victim used to inform about the demand to the informant. Since the informant had no money, he assured that motorcycle would be given later on. In the meantime, the victim gave birth to male child, who was of about seven months at the time of occurrence.

On 04.05.2016, at about 6:00 PM, someone informed on mobile call to the daughter-in-law of the informant that victim has died after sustaining burn injury. To verify about the correctness of the information, the informant along with Gupteshwar Sharma (PW 1), Om Prakash Sharma (PW 2) and Chulhan Rai (all co-villagers) went to the village of the appellants in the morning at about 6:00 AM on 05.05.2016. The informant saw that the victim was dead by sustaining burn injuries. The informant was confident that the appellants committed her murder for non-fulfillment of the demand of motorcycle. A copy of the written report is Exhibit-1 on the record.

4. On the basis of the aforesaid written report Bihya P.S. Case No.132 of 2016 was registered under Section 304B/34 of the Indian Penal Code and after investigation of the case police submitted charge sheet accordingly.

5. The learned trial Judge framed charges under Section 304B/34 of the Indian Penal Code and under Section 302/34 of the Indian Penal Code.

During trial the prosecution examined altogether six witnesses. PW 1 Gupteshwar Sharma, PW 2 Om Prakash Sharma and PW 3 Jagroshan Sharma are witnesses on the occurrence. PW 4 Dr. Arun Kumar had performed the post mortem examination. PW 5 Anil Kumar and PW 6 Vijay Kumar

Singh are Investigation Officer of the case.

6. The defence also produced four witnesses DW 1 Ravi Sharma, DW 2 Tribhuwan Thakur, DW 3 Fulwariya Devi and DW 4 Dinanath Sharma. All

these defence witnesses have deposed that there was no demand of dowry and the victim caught fire while cooking food.

7. Learned trial Judge has relied on the evidence of prosecution witnesses and recorded conviction as above.

8. Learned counsel for the appellants Mr. Ajay Kumar Thakur submits that Pws 1 and 2 are hearsay witnesses. Hence, the prosecution case is based

on sole testimony of PW 3 the informant of this case. There is lack of iota of evidence that for non-fulfillment of the demand of motorcycle the victim

was being tortured/harassed by the appellants before her death. That is why no question was put to the appellants as incriminating circumstance that

there was torture to the victim for non-fulfillment of the aforesaid demand before her death. According to learned counsel, the learned trial Judge has

ignored the aforesaid serious infirmities in the prosecution case while recording the judgment of conviction.

9. Learned Additional Public Prosecutor for the State submits that the prosecution has successfully established the case of dowry death as the victim

died in unnatural circumstances in her matrimonial house within seven years of her marriage and there is allegation of demand of dowry before her

death which took place merely within two years of her marriage. Hence, pedantic approach in appreciation of evidence cannot be adopted. Moreover,

for technical flaws the trial Court judgment need not be interfered with.

10. PW 1 Gupteshwar Sharma in para-2 of examination-in-chief clearly stated that Jagroshan Sharma (PW 3), who is uncle of PW 1 had told him

about the demand of motorcycle. Jagroshan Sharma has not stated that he had told the aforesaid fact to PW 1. Therefore, testimony of PW 1 is

completely a hearsay evidence. In the same way, PW 2 Om Prakash Sharma deposed that on the same day (i.e., the date of occurrence), he came to

know that the victim died and there was demand of dowry. This fact was reported by PW 3 Jagroshan Sharma, who is uncle of PW 2. Jagroshan

Sharma has not stated in his deposition that he had reported the matter to PW 2. Therefore, evidence of PW 2 is also completely a hearsay evidence

on the issue of demand of dowry and torture before death.

11. PW 3 Jagroshan Sharma deposed that Anshu Devi was his daughter's daughter. Anshu Devi was married with Sanjay Sharma (appellant) in the year 2014. After marriage Anshu went to her matrimonial house. The family members were cordial with her. Anshu Devi was burnt to death.

Appellants Goverdhan Sharma, Sanjay Sharma, Lagani Devi, Sanjeet Sharma and Gudhiya had burnt her. These peoples were demanding a

motorcycle and for non-fulfillment of demand she was burnt to death. This fact was informed to him by daughter-in-law Asha Devi, who got

information on mobile call that Anshu has been burnt to death. Thereafter, the informant along with others went to sasural of Anshu Devi, found the

dead body there. Burn injury was there all over the body. In the cross-examination, the witnesses stated that he had never made any complaint about

demand of motorcycle to any authority in the past. Prior to death of the victim the informant had attended the "Chhathi" celebration of the new

born child of the victim. The appellants had informed about the death of the victim and thereafter the informant and others had gone there.

Neither the daughter-in-law of this witness was produced nor there was any specific evidence as to who had informed to the informant that the victim

was burnt to death by the appellants.

12. PW 4 Dr. Arun Kumar, who had performed the post mortem examination had found 90-95% burn injury from top to bottom on the body of the

victim and that what the reason of death. PW 5 and PW 6 supported the investigation part of the case done by them.

13. Thus, from the prosecution evidence it is established that the victim was married two years prior to her death in her matrimonial house. The death

was caused by burn injury i.e., in unnatural circumstances. It is also established that there was demand of motorcycle by the appellants before the

death. However, there is complete lack of evidence that for non-fulfillment of the demand aforesaid the victim was being tortured or treated with

cruelty.

Section 304-B of the Indian Penal Code reads as follows:

"304-B. Dowry death.- (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal

circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by

her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry

death", and such husband or relative shall be deemed to have caused her death.

Explanation.- For the purposes of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act,

1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may

extend to imprisonment for life."

14. Section 113B of the Evidence Act, 1872 which raises presumption against the accused on proof of the ingredients of the offence under Section

304B of the Indian Penal Code by the prosecution reads as follows:

"Section 113-B. Presumption as to dowry death.\_ When the question is whether a person has committed the dowry death of a woman and

it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with,

any demand for dowry, the Court shall presume that such person had caused the dowry death. Explanation.- For the purposes of this

section, "dowry death", shall have the same meaning as in section 304-B of the Indian Penal Code (45 of 1860)."

15. In *Bakshish Ram and Another V. The State of Punjab* reported in (2013) 4 SCC 131, the Hon<sup>ble</sup> Supreme Court quoted its earlier judgment

in *M Srinivasulu V. State of A.P.* reported in (2007) 12 SCC 443 which is being reproduced below:

"8. 4. 1. The presumption (under Section 113-B of the Evidence Act) shall be raised only on proof of the following essentials:

(1) The question before the court must be whether the accused has committed the dowry death of a woman. (This means that the presumption

can be raised only if the accused is being tried for the offence under Section 304-B IPC.)

(2) The woman was subjected to cruelty or harassment by her husband or his relatives.

(3) Such cruelty or harassment was for, or in connection with any demand for dowry.

(4) Such cruelty or harassment was soon before her death.â€

16. The aforesaid proposition was reiterated in Baijnath and Others V. State of Madhya Pradesh reported in AIR 2016 SC 5313 in following words:

â€œ32. 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 pre-requisite to invoke the otherwise statutorily ordained presumption of commission of the

offence of dowry death by the person charged therewith.

33. 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 113B 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 above referred offences cannot be held guilty by taking refuge only of the

presumption to cover up the shortfall in proof.â€

In the case before this Court; there is complete lack of evidence that the victim was subjected to cruelty or harassment by the appellants in connection

with any demand for dowry. Thus, in my view, one of the important ingredients to prove the charge under Section 304-B or 498-A of the Indian Penal

Code is missing in this case.

17. In the case of Amar Singh V. State of Rajasthan reported in AIR 2010 SC 3391, convicts Jagdish and Gordhani were acquitted by the High Court.

The State challenged the acquittal before the Supreme Court and the Supreme Court refused to interfere with acquittal because there was lack of evidence against Jagdish and Gordhani regarding nature of harassment and torture meted out by them and the Hon<sup>ble</sup> Supreme Court in para-23 of the judgment observed as follows:

“a prosecution witness who merely uses the word ‘harassed’ or ‘tortured’ and does not describe the exact conduct of the accused which, according to him, amounted to harassment or torture may not be believed by the Court in cases under Sections 498A and 304B IPC...”

In this case, the sole prosecution witness has not even used the words that the victim was ‘harassed’ or ‘tortured’ much less the nature of harassment and torture, before her death.

18. Thus, the cumulative consideration of the prosecution evidence does not inspire confidence that the prosecution has established beyond reasonable doubt the charges levelled against the appellants as there is complete lack of evidence of harassment or torture for non-fulfillment of demand of motorcycle. The learned trial Judge has miserably overlooked the aforesaid lapses. Hence, judgment of conviction passed against the appellants is not sustained in law.

19. Accordingly, the impugned judgment of conviction and sentence are hereby set aside and these appeals are allowed.

20. Appellant Sanjay Sharma is in jail. Let him be released at once. Other appellants are exonerated from the liability of their bail-bonds.