Criminal Appeal (D.B.) No. 651 of 2002

[*Arising out of judgment of conviction dated 12.09.2002 and order of sentence dated 13.09.2002 passed by learned Additional District & Sessions Judge (Fast Track Court), Garhwa in Sessions Trial No. 200 of 1992]*

Etwariya Bibi @ Taibun Nisa wife of Sulaman Mian resident of Village Sondiha, P.S. Dhurki, District Garhwa

.... …. **Appellant**

--Versus--

The State of Jharkhand …. …. …. **Respondent**

For the Appellant : Mr. Gopal Krishna Sinha, Advocate
For the State : Mr. Saket Kumar, A.P.P.

PRESENT: SRI ANANDA SEN, J.

SRI GAUTAM KUMAR CHOUDHARY, J.

JUDGMENT

Reserved on: 18.11.2024 **Pronounced On: 25.11.2024**

Per Gautam Kumar Choudhary, J. Sole appellant is before this Court in appeal against the judgment of conviction and sentence passed under Section 302 of the IPC.

2. Appellant is the first wife of Suleman Ansari and as per the prosecution case, she committed the murder of the second wife of her husband.

3. Informant (P.W. 1) is the father of the deceased- Shakila Bibi. As per the FIR lodged on 22.09.1991, his daughter Shakila was married to Suleman Ansari about 7 – 8 years ago before the incidence. His daughter was the second wife of Suleman Mian, as he had no child from his first wife therefore, he contracted second marriage with her. After the marriage, there used to internecine quarrel between the deceased and the appellant and she even threatened her life. On 22.09.1991, nephew of his son-in-law gave the message that his daughter had died of diarrhea. On getting this information when he went there, from the appearance of the dead body, it appeared that she had died of poisoning. From neighbors, he came to know that his daughter was hale and hearty till the evening on 21.09.1991 and suddenly died at night. At the time of incidence, his son-

in-law was not at home, as he had gone to Madhya Pradesh for some business. It is alleged that appellant in conspiracy with the brother of Suleman Mian had poisoned the deceased to death.

4. On the basis of the written report, Dhurki P.S. Case No.36/91 was registered under Sections 302, 328, 120B of the IPC against this appellant and Kasim Mian. After investigation, charge sheet was submitted against these two accused persons, who were jointly put on trial under Sections 302/34 and 120B of the IPC. Altogether seven prosecution witnesses have been examined and thereafter, statement of appellant was recorded under Section 313 of the Cr.P.C. Defence is of innocence, but no specific defence has been pleaded.

5. Learned trial Court gave benefit of doubt to Kasim Ansari and convicted the appellant under Section 302 of the IPC.

6. It is argued by the learned counsel on behalf of the appellant that there is no direct eye witness to the incidence and the appellant has been convicted on mere suspicion. As per the FIR, death was due to poisoning, whereas as per the post-mortem report, death was due to throttling. There was no direct eye witness and the prosecution case rests on circumstantial evidence in which chain is not complete from which an inference of guilt of the appellant can be drawn. I.O has not been examined and there is material discrepancy in recording the statement of the appellant under Section 313 of the Cr.P.C.

7. Learned A.P.P. has defended the judgment of conviction and sentence. It is submitted that there was history of past bickering and quarrel between the appellant and the deceased. At the time of incidence, the appellant was alone with the deceased, who died of throttling as per the post-mortem examination report. Law of evidence does not cast unconscionable burden on any party to prove a fact in issue. Since the death occurred at home when the husband was away in the sole company of the appellant, it was incumbent on her part under Section 106 of the Evidence Act to throw light on the homicidal death of the deceased. Appellant has not discharged the statutory burden, thereby leading to the only conclusion that it was the appellant who was author of the crime.

FINDING

8. Death is a reality of life, but its cause is a matter of investigation when attending circumstance cast cloud over the natural death of a person.

9. In the present case, daughter of the informant died a homicidal death is established by the post-mortem examination report (Exhibit 2). Autopsy Surgeon (P.W. 6) noted ante mortem injuries (bruises and abrasions) on the dead body and opined that death was due to Asphyxia by pressing of neck.

10. Informant (P.W. 1) has deposed that appellant being the first wife, had no child and his daughter (deceased) was blessed with two daughters. It was for this, she used to assault the deceased and, on that night she threatened her life. In para 4 he deposed, when on receiving information he went there, it was informed by the appellant that his daughter had died of diarrhea. In his cross-examination at para 10, he has stated that daughter was in the room.

P.W. 2 is father-in-law of the deceased and has testified in para 2 that she has died, but cannot say the cause of her death.

P.W. 3 is a farmer who deposed that when he went to the place of occurrence and found the dead body lying there and it was informed by the appellant that she had died due to diarrhea.

Testimony of P.W. 4, who is a co-villager, is also to the same effect. He is the Chowkidar and it has been stated by him that the appellant had informed him that deceased died of diarrhea.

P.W. 5 is an independent witness and a co-villager. He has corroborated the testimony of other witnesses that the appellant has died due to diarrhea. He has also stated that at times, there used to be some quarrel between the deceased and the appellant.

11. There is consistent evidence of the witnesses that it was this appellant who had given death, the color of a natural death caused by diarrhea. The real cause of death could be found only after post-mortem examination of the dead body which completely over turns the story of death by diarrhea, and that it having been caused by throttling.

12. Motive for committing the offence is obvious, for deceased was the second wife. Informant (P.W. 1) and independent witness P.W. 5 stated that there used to be quarrel between the deceased and the appellant.

13. On perusal of the questions put under Section 313 of the Cr.P.C., I find that there is an apparent error in putting the question to the appellant that there was evidence regarding death being caused by poisoning. There is no medical evidence that deceased died of poisoning, rather the evidence is that death was the result of throttling. There were oral evidences which was suggestive of death by poisoning, but this was not supported by medical evidence and therefore, cannot be accepted as such. The appellant was not given opportunity to explain the evidence of death being caused by throttling.

14. Matter for consideration is whether the above lapse in recording of statement under Section 313 of the Cr.P.C, is fatal to the prosecution case. It has been held in ***Fainul Khan v. State of Jharkhand & Another*, (2019) 9 SCC 549** that Section 313 Cr.P.C. incorporates the principle of *audi alteram partem*. It provides an opportunity to the accused for his defence by making him aware fully of the prosecution allegations against him and to answer the same in support of his innocence. But equally there cannot be a generalised presumption of prejudice to an accused merely by reason of any omission or inadequate questions put to an accused thereunder. Ultimately, it will be a question to be considered in the facts and circumstances of each case including the nature of other evidences available, the kind of questions put to an accused, considered with anything further that the accused may state in his defence. In other words, there will have to be a cumulative balancing of several factors. While the rights of an accused to a fair trial are undoubtedly important, the rights of the victim and the society at large for correction of deviant behaviour cannot be made subservient to the rights of an accused by placing the latter at a pedestal higher than necessary for a fair trial.

15. Present case rests on circumstantial evidence and therefore, it was necessary for the learned trial Court to put all the incriminating circumstances to the appellant, so as to give her opportunity to explain

them. The main incriminating circumstance against the appellant was that the deceased was all alone with the appellant at her home when the incidence took place, and secondly that she died of throttling. Learned trial Court failed to put these circumstances to the appellant and rather put a misleading circumstance in question, that death was due to poisoning. It is not that in all cases omission in putting evidence to the accused will be fatal. It will be fatal to the prosecution case only when it results in serious prejudice to the defence. Here, since the case is based on circumstantial evidence and all the circumstances were not put to the appellant, but non-existent evidence was put to the appellant, therefore, I am of the view that a serious prejudice is caused to the appellant. Further, even the I.O. has not been examined in the present case to establish the place of occurrence with clarity, and if any one else had access to it or not.

Under the circumstance, Judgment of conviction and sentence is set aside. **Criminal Appeal is allowed.**

Appellant is on bail. Sureties are discharged from the liabilities of their bail bond.

Pending Interlocutory Application, if any, is disposed of.

Let the Trial Court Records be transmitted to the Court concerned along with a copy of this judgment.

(Gautam Kumar Choudhary, J.)

Ananda Sen, J. I agree.

(Ananda Sen, J.)

High Court of Jharkhand, Ranchi

Dated, 25th November, 2024

AFR/Anit