

MANU/WB/0050/2013

Equivalent Citation: 2013CriLJ2126, III(2013)DMC34

IN THE HIGH COURT OF CALCUTTA

C.R.A. No. 141 of 2010

Decided On: 11.02.2013

Appellants: **Bappa Ghosh**
Vs.

Respondent: **State of West Bengal**

Hon'ble Judges/Coram:

N. Patherya and Asim Kumar Roy, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Mr. Tirthankar Ghosh, Adv., Mr. Koushik Kundu, Adv., and Mr. Satadru Lahiri, Adv.

For Respondents/Defendant: Mr. Shiladitya Sanyal, Adv., and Mr. Navanil De, Adv., for the State

JUDGMENT

N. Patherya, J.

1. In this appeal filed by the accused (convicted person) the judgment dated 22nd February, 2010 is sought to be set aside along with the sentence imposed. By the said judgment the appellant was convicted and sentenced to suffer rigorous imprisonment for ten years under Section 304B of IPC and for further two years simple imprisonment with fine of Rs. 20,000/- under Section 498A of the Indian Penal Code (IPC). In default of payment the appellant was to suffer further simple imprisonment for three months.

2. The victim who was the wife of the appellant died under unnatural circumstances on 19th April, 2001. An FIR was lodged on 17th May, 2001. In the said FIR the de facto complainant alleged murder of his daughter for the cause of dowry.

3. Counsel for the appellant submits that the FIR has proceeded on the basis of murder but nowhere has it been stated in the FIR that there was any demand of dowry or physical cruelty as a consequence thereof was inflicted on the victim. The disposal order, letter of the Officer-in-Charge, Chitpur Police Station and copy of the victim's handnote were enclosed with the FIR but the said documents were not exhibited and therefore raises a presumption that if produced the same would have gone against the prosecution. It is for the first time in the evidence of the de facto complainant P.W. 2 (father) and P.W. 3 (mother) that the issue of demand for dowry has been raised. In fact in Exhibit-2 which is a letter dated 20th April, 2001 in the handwriting of P.W. 3 there is no mention of any demand for dowry nor is there any allegation against the appellant or his parents. P.W. 2 and P.W. 3 by virtue of deposition have tried to fill the lacuna and improve the case which was not set out in the complaint of 17th May, 2001 or of 20th April, 2001 and not also recorded in the statement prepared under Section 161 of the CrPC before the Investigating Officer. P.W. 2 has stated about the demand for dowry but the same has not been corroborated by the evidence of P.W. 3. P.W. 4 (uncle) has also stated that the complaint was a result of consultation and discussion among themselves with regard

to giving of evidence. P.W. 4 was informed by P.W. 3 about the telephonic conversation between the victim and P.W. 3 with regard to the threat meted out by Karabi and Gurupada. P.W. 4 in his evidence has submitted that a diary was found under the bed of the victim, such diary finds mention in the seizure list and although the seizure list has been marked as exhibit-8 the diary was not exhibited as the same would have gone against the prosecution. The same was withheld by the prosecution. P.W. 7, the doctor who conducted the post mortem examination has categorically stated that in his opinion the death was not caused by murder but was a case of death by hanging. From the evidence of P.W. 8 (Investigating Officer) it will appear that in the statement recorded under Section 161 of CrPC no case of dowry or any demand was made. Therefore it is for the first time the said has come in evidence before the Court and the improvement/embellishment was made with the intent that an order of conviction would be passed against the appellant, therefore the order be set aside.

4. By virtue of Section 313 of the CrPC an opportunity is given to the accused to counter the case made out against him/her. In the instant case, the questions put to the appellant are rolled up and in view of the decision reported in 1997 C Cr LR (Cal) 54 the said questions have prejudiced the appellant. Karabi and Gurupada who according to the victim had threatened her have been acquitted and therefore none of the ingredients of Sections 478A or 304B have been satisfied. In the inquest report dated 20th April, 2001 it has been stated that no foul play was detected. The parents were also present at the time of inquest and from 19th April, 2001 to 22nd April, 2001 the relations between the appellant and his parents and the parents of the victim was cordial as it has been admitted by P.W. 4 in his evidence that during the said period they stayed at Baguihati i.e. the matrimonial home of the victim. The cremation took place in the presence of the father therefore the allegation made in the FIR that the cremation was done in hot haste or without sending the body to Jamshedpur is contrary to the evidence on record.

5. Reliance is placed on decisions reported in MANU/SC/0483/2012 : (2011) 3 SCC (Cri) 394 and (2012) 6 SCC 589 for the proposition that improvements in evidence cannot be allowed although a presumption in cases under Section 304B of CrPC arises, under Section 113B of the Indian Evidence Act but the said presumption is relatable to the evidence spelt out by the prosecution.

6. In the decision reported in MANU/SC/8397/2008 : (2008) 16 SCC 155 and MANU/SC/7695/2008 : (2008) 16 SCC 512 the phrase "soon before her death" has been considered and would mean cruelty meted out to the victim which led her to commit dowry death.

7. Non-production of material evidence gives rise to the presumption that if produced the same would have gone against the prosecution. Delay in lodging the FIR is bereft of spontaneity and therefore, the FIR has in fact lost its value as held in the decision reported in 1994 SCC (Cri) 1390.

8. Withholding of inquest has also prejudiced the appellant as held in (2011) 1 C Cr LR (Cal) 687. Therefore for all the said reasons the order of conviction be set aside.

9. Opposing the said appeal counsel for the State submits that the FIR is not to contain details and mere non-mentioning of dowry will not be fatal for the prosecution. In the evidence of P.Ws. 2, 3 and 4 it has been specifically stated that there was a further demand for dowry. Assuming that no case has been made out against the appellant under Section 304B of the IPC the appellant may be convicted under Section 306 of IPC and the High Court in its appellate jurisdiction is

empowered to convict the appellant under the said section on the basis of available evidence as held in the decision reported in MANU/SC/0720/2012 : AIR (2011) SC 686 and (2012) 9 SCC 650.

10. Having considered the submissions of the parties there is no doubt that the victim died on 19th April, 2001 and on the same day her parents came down to Calcutta. Cremation as will appear from the evidence of P.W. 2 was done in his presence. On 20th April, 2001 P.W. 3 informed the Officer-in-Charge, Rajarhat P.S. by a letter being Exhibit-2 about the demise of her daughter but no allegation of demand for dowry or any allegation was made against the appellant or his parents in the said letter. It was further stated that a complaint would be lodged after the postmortem report. This would not be of any relevance to either P.W. 2 or P.W. 3 in filing the FIR. Ultimately the FIR was lodged on 17th May, 2001 and received by the concerned police station on 21st May, 2001. Therefore it was after nearly a month that the FIR was lodged and on a reading of the FIR "murder" has been alleged for "dowry" but no particulars of demand for dowry has been stated in the said FIR. P.W. 8 who is the Investigating Officer in his evidence has also nowhere stated that any case of demand for dowry was alleged either by P.W. 2, 3 or 4 in the statement recorded by him under Section 161 of CrPC. P.W. 2 has stated that it is from his wife P.W. 3 that he came to know of the demand for Rs. 1 lakh but nowhere has P.W. 3 stated in her evidence that this information was given by her to P.W. 2. Therefore the evidence of P.W. 2 with regard to demand for dowry of Rs. 1 lakh cannot be accepted as it is nothing but hearsay evidence which has not been supported by the evidence of P.W. 3. P.W. 3 has also stated in her evidence that the victim had made a telephonic call to her on 18.4.2001 between 11.15 and 11.39 PM and informed P.W. 3 that Karabi and Gurupada had gone to her house and had threatened her. This is the only incident which occurred "soon before the death" of the victim but both, Karabi and Gurupada, have been acquitted, therefore threat is not a cause for the death of the victim.

11. To constitute an offence under Section 304B of the IPC the essential ingredients are viz.:-

- (i) death of a woman must have been caused by any burns or bodily injury or otherwise than under normal circumstances;
- (ii) such death must have occurred within seven years of marriage; (iii) soon before her death she was subjected to cruelty or harassment by her husband or relative of her husband;
- (iv) such cruelty or harassment must be in connection with the demand of dowry.

12. Section 113B of the Indian Evidence Act raises a presumption of dowry death when the victim is subjected to cruelty for demand of dowry. "Soon before her death" mentioned in Section 304B of the IPC though not defined will mean an incident or a demand for dowry made within a few days before the death occurred. In other words, the nexus between the death and the dowry related cruelty must be evident and must be proximate to the dowry death.

13. In the instant case, P.W. 2 and P.W. 3 in their respective evidences have alleged physical and mental torture upon the victim, but no date proximate to the occurrence of the incident has been mentioned. The most proximate date mentioned is 18.4.2001 but no mental or physical cruelty was meted out by the accused to the victim on such date. P.W. 3 in her statement recorded under Section 161 CrPC did not mention the demand for dowry and it was for the first time in her evidence before the Court the

said demand was highlighted. The threat meted out by Karabi and Gurupada was also not mentioned by P.W. 3 in her statement under Section 161 of CrPC. P.W. 2 has admitted that in the intimation dated 20th April, 2001 no complaint was made by P.W. 3 against anyone. P.W. 4 in his evidence has categorically stated that before filing the FIR P.W. 2 and P.W. 3 consulted with P.W. 4 and the deposition is the result of discussion. Therefore filing of the FIR and the deposition is the result of consultation and discussion among themselves and not made independently.

14. In the FIR lodged by P.W. 2 it has been categorically stated that written note of the victim girl was recovered from her matrimonial home. The same was also enclosed with the FIR but was not exhibited. This therefore raises a presumption that in the event the same was exhibited it would have gone against the case of the prosecution.

15. From the discussion above it is evident that the FIR is bereft of spontaneity and is the result of consultation. The evidence of P.W. 2, P.W. 3 and P.W. 4 suffers from improvements and as held in the decision reported in MANU/SC/0483/2012 : (2012) 6 SCC 589 in case of improvements in the prosecution witnesses and no demand mentioned in the statement recorded under Section 161 of CrPC the same will act contra to the prosecution case and will support the case of the appellant.

16. From a reading of the statements under Section 313 of CrPC it will appear that the questions have been rolled up and several questions have been formulated in a lengthy form which has been deprecated in the decision reported in 1997 C Cr LR (Cal) 54. Assuming that the said questions have prejudiced the appellant but in view of the findings above with regard to improvements and embellishments the said issue need not be addressed. There is no doubt that the Court is empowered to alter the charges from Section 304B of the IPC to those under Section 306 of the IPC but there is no evidence to convict the appellant even under Section 306 of the CrPC. The only evidence in support of the charge under Section 306 would be of P.W. 3 but this too has come for the first time in the evidence of P.W. 3 before Court and is not borne out from the statement under Section 161 of the CrPC. Therefore no charge under Section 306 of IPC can be said to have been substantiated against the accused and the decisions, therefore, relied on by the State do not come to its aid. Accordingly, the judgment dated 22nd February, 2010 and the sentence imposed on the appellant are set aside and the appeal allowed. The bond furnished be also cancelled.

Asim Kumar Roy, J.

I agree

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