

MANU/WB/0780/2012

Equivalent Citation: (2012)3CALLT445(HC), 2013(1)CHN378

IN THE HIGH COURT OF CALCUTTA

C.R.A. No. 407 of 2002

Decided On: 02.05.2012

Appellants: **Swapan Kumar Das and Ors.**
Vs.

Respondent: **State of West Bengal**

Hon'ble Judges/Coram:

G.C. Gupta and Indira Banerjee, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Mr. Sekhar Bose, Mr. Abhijit Ganguly, Mr. Imran Siddique and Mr. Imran Ali

For Respondents/Defendant: Mr. Siladitya Sanyal and Mr. Amartya Ghosh for the State

JUDGMENT

G.C. Gupta, J.

1. This appeal is directed against a Judgment dated 27th September 2002 passed by the learned Additional Sessions Judge 2nd Court, Nadia in Sessions Trial No. VI (February) 2002 corresponding to Sessions Case No. 34 (12) 2001 arising out Nabadwip P.S. Case No. 115 of 2000 dated 18th October 2000 by which the learned Trial Court held the appellants guilty of the offences punishable under section 498A and 304B of the Indian Penal Code but acquitted them of the offence punishable under section 302. By an order dated 30th September 2002 the learned Trial Court sentenced both the appellants to rigorous imprisonment for 2 years as also to pay a fine of Rs. 2,000/- each in default to suffer further rigorous imprisonment for 6 months each for the offence punishable under section 498A of the Indian Penal Code. They were also sentenced to rigorous imprisonment for 10 years as also to pay a fine of Rs. 5,000/- each in default to suffer further rigorous imprisonment for 2 years each for the offence punishable under Section 304B of the Indian Penal Code. Both the sentences were directed to run concurrently. The facts and circumstances of the case briefly stated are as follows:-

On 17th January, 2000 the victim Chaitali was married to the accused Swapan. She died on 18th October 2000 at her matrimonial home an unnatural death. The accused Swapan was an Assistant-Sub- Inspector of Police. It is alleged that at the time of marriage various articles including gold ornaments, furniture were given but soon after the marriage demand for cash dowry for a sum of Rs. 15,000/- was raised which the victim refused to revive with her parents. As a result on various pretext both the accused persons started inflicting mental torture upon her of which the party of the complainant was kept informed. The accused Shefali, it is alleged, had told the victim that in default of payment of the said sum of Rs. 15,000/- she would be driven out. Sometime before the incident when the victim had called at her parental home, she had also narrated the misery to which she was subjected. On 18th October 2000 at around 14 hours the party of the

complainant came to know that the victim had died at her matrimonial home. They rushed to the place of occurrence and saw the dead body lying in the floor of the bedroom whereas rest of the articles in the bedroom were intact. They entertained a belief or formed an opinion that the accused persons had killed her.

2. 14 witnesses were examined. P.W. 1 is the de facto complainant and a brother of the deceased. P.W. 6 is an uncle of the deceased. P.W. 7 is a younger brother of the deceased. P.W. 8 is a neighbour of the de facto complainant. P.W. 9 is a sister of the deceased.

3. P.W. 2, P.W. 3, P.W. 4 and P.W. 7 are the co-villagers of the accused Swapan. P.W. 5 is a photographer. P.W. 11 is a constable who escorted the dead body. P.W. 12 is the A.S.I. of Police who received the written complaint, P.W. 13 is the autopsy surgeon. P.W. 14 is the I.O.

4. Mr. Basu, learned Advocate appearing for the appellants submitted that the prosecution has failed to prove any case under section 498A or any case under section 304B of the Indian Penal Code. The appellants have already been acquitted of the charge under section 302 of the Indian Penal Code. He, therefore, prayed for an outright acquittal. Elaborating his submission Mr. Basu contended that P.W. 2, P.W. 3 and P.W. 4 were examined for the purpose of proving the charge under section 302 of the Indian Penal Code. Since the charge Under section 302 of the Indian Penal Code has failed, the evidence adduced by the P.W. 2, P.W. 3 and P.W. 4 has become useless.

5. Dealing with the evidence of the near relations of the victim namely P.W. 1, P.W. 6, P.W. 7, P.W. 8 and P.W. 9. Mr. Basu submitted that the evidence of the P.W. 1 is not believable because he deposed in Court that the victim had on 6/7 occasions, when she had called at her paternal house, had disclosed about the torture inflicted by the accused persons. But this fact was not indicated in the written complaint. As regards the evidence of P.W. 6. Mr. Basu contended that his evidence adduced in Court was contradictory to what was stated by him during investigation to the I.O. (P.W. 14). Criticizing the evidence of P.W. 7 Mr. Basu submitted that he had altogether a different story to tell from the witness box, which is also largely exaggerated. Moreover the demand of dowry allegedly made by the accused persons was not disclosed by him to the I.O. Criticizing the evidence of P.W. 8 Mr. Basu contended that her evidence neither satisfies the requisite ingredients of section 498A of the Indian Penal Code nor does the same satisfy the requisite ingredients of section 304B of the Indian Penal Code. With respect to the evidence of P.W. 9 Mr. Basu contended that the evidence adduced by her in Court concerning the alleged demand for dowry was not disclosed to the I.O. during the investigation. In sum and substance his submission is that there is no satisfactory evidence to show that there was ever any demand of any dowry nor does the evidence adduced by the prosecution satisfy the requirements of section 304B of the Indian Penal Code that the victim was subjected to cruelty or harassment soon before her death. He in support of his submissions relied on a number of judgments. The first judgment relied upon by him is in the case of Hem Chand v. State of Haryana reported in 1995 SCC (Cri) 36 for the proposition that the accused may be presumed to have committed the dowry death under section 304B of the Indian Penal Code provided the other requirements laid down in the section are satisfied. The Second judgment relied upon by him is in the case of Sunil Bajaj v. State of M.P. reported in 2002 SCC (Cri) 608 for the proposition that soon before her death the woman must have been subjected to cruelty or harassment in connection with a demand of dowry. The third judgment relied upon by him is in the case of Biswajit Halder v. State of West Bengal

reported in (2008) 1 SCC (Cri) 172 wherein the apex Court set aside the order of the High Court affirming the conviction under Section 304B of the Indian Penal Code because the aforesaid two important ingredients were not satisfied. Same were the facts in the 4th Case cited by Mr. Basu in the Case of M. Srinivasulu v. State of A.P. reported in (2008) 3 SCC (Cri) 169. Same was also the case in Durga Prasad & Anr. v. State of Madhya Pradesh reported in (2010) 3 SCC (Cri) 1154.

6. Mr. Basu also cited the judgment in the case of Vimal Suresh Kamble v. Chaluverapinakeapal S.P. & Anr. reported in 2003 SCC (Cri) 596 for the proposition that a particular fact not disclosed to the Police during investigation and deposed from the witness box for the first time is of no significance.

7. Mr. Ghosh led by Mr. Sanyal appearing for the state submitted that material evidence on record was ignored. He submitted that a heinous crime has been committed by the appellants. The fact that the appellants did not offer any explanation whatsoever is also a telling circumstance, which should be taken into consideration.

8. We have considered the submissions advanced by the learned advocates appearing for the parties and have also perused the records. Considering the submissions made by Mr. Basu the only question which arises for consideration may be formulated as follows:-

(1) Whether there is dependable evidence to show that the appellants subjected the victim Chaitali soon before her death to cruelty or harassment in connection with a demand for dowry?

9. We shall now tabulate the evidence in support of the aforesaid issue. The relevant allegation appearing from the written complaint in vernacular when translated in English would read as follows:-

Besides that, the husband and the mother-in-law of my sister continued to pressurize her to bring a sum of Rs. 15,000/- from her paternal house. But my sister refused to demand the said amount of dowry. As a result her husband and her mother-in-law were highly enraged and inflicted mental torture upon her. The mother-in-law would every now and then remark that she would be driven away from the matrimonial home if the sum of Rs. 15,000/- was not paid. She would no longer in that case share her food in that household. My sister disclosed this to us even a few days ago when she had called at our house.

10. The Witnesses who could have thrown light in support of the aforesaid allegation naturally are the near relations of the victim.

11. The de facto complainant (P.W. 1) during his evidence deposed inter alia as follows:-

She was not given proper food and she was ill-treated and they used to create pressure upon her to bring Rs. 15,000/- from our house. She used to tell us about such fact while she used to come to our house. We could not be able to meet their demand and after making her understanding we sent her to her matrimonial house. Due to not meeting the said demand, she was tortured physically and also mentally by her husband and mother-in-law. She used to tell such torture 6/7 times while she used to come to our house.

12. The criticism of Mr. Basu with regard to the evidence of P.W. 1 is that the P.W. 1

in the written complaint did not allege that the inmates of the paternal house were informed as many as 6/7 times about the torture by the victim. We are unable to accept this submission because the allegation in the written complaint is that even during the last visit a few days ago before the incident she had informed about the torture. By implication it means that she had also informed earlier.

13. P.W. 6 uncle of the deceased deposed inter alia as follows:-

She used to tell us that she was tortured physically by her husband and her mother-in-law and she was demanded Rs. 15,000/- and she also stated before us that she was beaten up by her husband and she was abused and was not given proper food. She used to narrate about such torture before me for 3/4 times while she used to come to our house. We made her understand and sent her to her matrimonial house.

14. Mr. Basu contended that the evidence of the P.W. 6 had been contradicted by the I.O. The I.O. during his cross-examination deposed as follows with regard to the statement made by the P.W. 6 during the investigation. "P.W. 6 Sukha Ranjan Bhawal did not tell before me that Chaitali told before them 3/4 times that she was tortured but she narrated about the torture. He did not tell before me that Chaitali told before them that she was beaten up. He did not tell before me that Chaitali told before them that she was abused for demanding Rs. 15,000/- but she has stated about the demand of Rs. 15,000/- more." The evidence given in Court, it is difficult to hold, is contradictory to what was disclosed to the I.O.. The I.O. has asserted that the P.W. 6 had told him that the victim had narrated about the torture and had also disclosed about the demand of a further sum of Rs. 15,000/-.

15. P.W. 7 younger brother of the deceased deposed in Court inter alia as follows:-

She used to tell us that she was tortured physically and also abused and she was demanded Rs. 15,000/-. She also told us that if their demand of Rs. 15,000/- will not be met then she would be further tortured. She also told us that her husband told her that he would get more money if he would marry else where. She also told us that she was tortured by her husband and mother-in-law in presence of myself, mother and elder brother and others in our house.

16. Mr. Basu submitted that the evidence of the P.W. 7 is different from that of the P.W. 1 and 6. In substance we are unable to find that the P.W. 7 deposed something which is contrary to what was deposed by the P.W. 1 and 6. It is however true that the demand for Rs. 15,000/- was not disclosed by the P.W. 7 to the I.O. but the fact that the victim was tortured was disclosed.

17. P.W. 8 a neighbour of the de facto complainant deposed in Court inter alia as follows:-

While she came in her father's house, she complained that she was abused by her mother-in-law and husband and she was also physically tortured by them. I heard about the same from her.

18. Mr. Basu contended that the evidence adduced by P.W. 8 satisfies neither the ingredients of section 498A IPC nor those of section 304B IPC All the pieces of evidence have to be taken together in order to arrive at a finding whether the case of the prosecution has been proved. The I.O. during the cross-examination deposed that P.W. 8 had disclosed to him that the victim wanted to go to her husband's place of service but he was not agreeable to take her along. What was stated during

investigation can only be used for contradiction and for no other purpose under section 162 Cr.PC. But in any event and even assuming that such statement should be taken into account, the fact that the husband chose to remain separately from the newly wedded wife would not go to show a healthy relationship between the two. In that case all that one can say is that the witness added details not disclosed earlier, which is not inconsistent with what he had disclosed.

19. P.W. 9, a sister of the deceased, deposed in Court inter alia as follows:-

My father-in-laws house is 5/6 kms away from the house of Swapan Das. My sister was throttling to death and thereafter she was burnt away. She lived in her matrimonial house for 8/9 months. During that period I met her for 4/5 times in all in my father's house Chaitali's matrimonial house and also in my matrimonial house. At first, she did not tell anything about her matrimonial house and subsequently, she told us that she was beaten up and she was abused over the demand of Rs. 15,000/- by her husband and mother-in-law.

20. Mr. Basu submitted that the evidence adduced by the P.W. 9 in Court is altogether a new story than what was disclosed to the I.O. who during his cross-examination deposed that the P.W. 9 had told him that the victim used to cry because her husband was indifferent to her and the behavior of one of the wives of one of the elder brother of her husband was suspicious. Even this statement points at cruelty. Moreover the P.W. 9 at best can be said to have added details which were not disclosed earlier. Reference in this regard may be made to the judgment in the Case of Matadin v. State of U.P. reported in MANU/SC/0270/1979 : AIR 1979 SC 1234 wherein the following view was taken The Sessions Judge did not realize that the statements given by the witnesses before the Police are meant to be brief statement and could not take the place of evidence in the Court. Where the omissions are vital, they merit consideration, but mere small omissions will not justify a finding by a court that the witnesses concerned are self-contained liars." In the case of N.C. Chowdhury v. State of Maharashtra reported in MANU/SC/0547/2000 : (2000)8 SCC 457, Their Lordships held that "Even if there is contradiction of statement of a witness on any material point, that is no ground to reject the whole of the testimony of such witness." In the case of State of Punjab v. Karnail Singh reported in MANU/SC/0585/2003 : (2003) 11 SCC 271 it was held that "material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so."

21. From the evidence discussed above it can safely be concluded that at the time of marriage articles including gold ornaments were given but cash money was not given. The demand for cash money was raised immediately after the marriage. The victim was not agreeable to ask for the sum of Rs. 15,000/- from her parents which was the beginning of discontent. As a result the husband appears to have refused to take her along to his place of service. The mother-in-law at home continued to pass the remarks that the victim would be driven away unless the money was forthcoming. Gradually the degree of torture was enhanced which forced the victim to disclose this fact to the members of her parental house and the near ones. The victim died within 9 months of marriage at the matrimonial house. But not a word was spent by the appellants during their examination under section 313 Cr.PC disclosing the reason which might have contributed to her death.

22. The P.W. 1 was suggested on behalf of the defence as follows:-

It is not a fact that Chaitali committed suicide as she was not taken to her husband's place of posting and she was kept with her mother-in-law.

23. Even this suggestion does not point at a healthy relationship between the couple. On the contrary by implication she appears to have been abandoned by the husband. The question formulated above is accordingly answered in the affirmative.

24. The conduct of the appellants immediately after the incident goes a long way to betray their guilt.

25. From the inquest report it appears that the neighbours came to know the incident at 10 A.M. P.W. 3 a rickshaw puller at about 10.30 am on the day of the incident entered the place of occurrence and found the victim burning but neither of the appellants are deposed by him to have been present thereat. There is on the contrary evidence to show that the P.W. 4 noticed the appellants escaping from the area. The evidence of the P.W. 4 during the examination of the appellants under section 313 Cr.PC was summarized and put to them and this is how they responded.

26. The relevant question to and answer of the mother-in-law is as follows:-

Ques. Witness No. 4 deposed in his evidence that he went to Poramatal for purchasing books and while he was returning there he found you, your son, eldest boudi and her two daughters were standing at the Bablari Bus Stand. That witness further stated that he found gathering in front of your house and heard your daughter-in-law (Wife of Swapan) sustained burn injury. After that he returned to the bus stand informed you about the incident. What do you say about it?

Ans. Yes, we were informed. I have nothing to say further.

27. The same question was also put to the husband who chose to give no answer thereto and the learned trial Judge has recorded "witness stated nothing.

28. In the case of Ganesh Lal v. State of Maharashtra reported in MANU/SC/0506/1992 : (1992)3 SCC 106 the Apex Court opined as follows: -

When the death had occurred in their custody the appellant is under an obligation in section 313 Cr. PC statement at least to give a plausible explanation for the cause of her death. No such attempt was even made excepting denying the prosecution case. These facts completely are inconsistent with the innocence, but consistent with the hypothesis that the appellant is a prime accused in the commission of gruesome murder of his wife.

29. P.W. 1 was suggested by the defence that the victim had committed suicide. The learned trial Judge has also proceeded on the basis that she committed suicide but he missed the fact that the autopsy surgeon did not give any opinion that the death was suicidal. On the contrary he asserted "no sooty carbon particles were present in the larynx and trachea."

30. From the inquest report (Ext. 2) it appears that the tongue was protruded bitten by the teeth which is also clearly discernible from the photographs marked Mat Ext. i. Opinion of the P.W. 13 the autopsy surgeon was that it was a case of 100% burn. In the case of Prabhudayal & Ors. v. State of Maharashtra reported in MANU/SC/0330/1993 : (1993)3 SCC 573, Their Lordships after examining the authorities on medical jurisprudence held that "if the death has occurred from

suffocation, aspirated blackish coal particles are seen in the nose, mouth and whole of the respiratory tract. Their presence is proof that the victim was alive when the fire occurred." The absence of soot in the larynx and trachea is a pointer to show that the victim had died before her body came in contact with fire. The protruded tongue is also an important symptom of manual strangulation as pointed out by their lordships in the case of *Prabhudayal & Ors. v. State of Maharashtra* (supra) in paragraph 31. This fact is further supported by the evidence of the P.W. 3 rickshaw puller whose evidence is set out in extenso herein:

I know accused Swapan Das and his wife. His house is adjacent to our village. His wife died about one and half years ago at about 10.30 a.m. While I was coming with my trolley van, then I heard noise in front of the house of Swapan. Then I went there and found on entering into his house that the wife of Swapan was burning with cloths and I poured water on her person. In the meantime, she had died. Water was pouring on her and seeing this, I left the place.

Cross-examination by the defence:-

While I came in front of the house of Swapan, then I found many persons assembled there.

31. It would appear the P.W. 3 wanted to douse the fire but it occurred to him that she had already died.

32. The other telling circumstance is that the P.W. 14, who held the inquest (Ext. 2) at the P.O. at 18.05 hrs. found the dead body covered with a bed sheet. He also found sindur in her forehead. Who made this dressing of the dead body could only be known to the accused but they did not divulge it. Both the P.W. 7 and 9 deposed that all the articles in the bedroom were intact. This fact is corroborated by the photographs marked mat ext. 1. If she had burnt herself as the witnesses were suggested, she was bound to have made frantic attempt to survive after she was in the grip of fire and in that case the household articles could not have remained the way as if nothing had happened. In the case of *State of Rajasthan v. Jaggu Ram* reported in MANU/SC/0253/2008 : (2008) 12 SCC 51: 2008 CRI. LJ 1039 the Apex Court relying upon earlier judgments reversed the order of acquittal passed by the High Court and held the accused guilty of the offence punishable under section 304B of the Indian Penal Code. As to the scope of section 106 of the Evidence Act the following view appear from para 28:-

13. The demand for dowry or money from the parents of the bride has shown a phenomenal increase in the last few years. Cases are frequently coming before the Courts, where the husband or in-laws have gone to the extent of killing the bride if the demand is not met. These crimes are generally committed in complete secrecy inside the house and it becomes very difficult for the prosecution to lead evidence. No member of the family, even if he is a witness of the crime, would come forward to depose against another family member. The neighbours, whose evidence may be of some assistance, are generally reluctant to depose in Court as they want to keep aloof and do not want to antagonize a neighbourhood family. The parents or other family members of the bride being away from the scene of commission of crime are not in a position to give direct evidence which may inculcate the real accused except regarding the demand of money or dowry and harassment caused to the bride. But, it does not mean that a crime committed in secrecy of inside the houses should go unpunished.

14. If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A judge does not preside over a criminal trial merely to see that no innocent man is punished. A judge also presides to see that a guilty man does not escape. Both are public duties. (See *Stirland v. Director of Public Prosecutions*-quoted with approval by Arijit Pasayat, J. in the *State of Punjab v. Karnail Singh*.) The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (sic) appended to this section throws some light on the content and scope of this provision and it reads:

(b) A is charged with travelling on a railway without ticket. The burden of proving that he had a ticket is on him.

15. Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation.

33. This Court by its order dated 23rd February 2011 issued a rule as to why the punishment awarded by the trial Court should not be enhanced. After the rule was served the appellants challenged the order before the Apex Court. By an order dated 5th April 2011 the Supreme Court had stayed the operation of the order. Accordingly the hearing of the matter was adjourned from time to time. Ultimately the special leave petition was dismissed by the Supreme Court by an order dated 5th August 2011. Thereafter the appeal was fixed from time to time and was ultimately heard out.

34. Section 304B of the IPC is a deeming provision whereunder the husband or any other relative may be deemed to have caused the death provided it is shown that the victim was subjected, soon before her death within the statutory period, to cruelty or harassment in connection with any demand of dowry. The accused is deemed to have caused the death is one thing and the accused did in fact cause the death is another. In the case before us the evidence discussed above goes to show that the appellants caused the death of Chaitali in connection with a demand for dowry. The Judgments cited by Mr. Basu have as such no application to the facts and circumstances of this case. All those judgments are on the question as to when can the accused be presumed to have caused the death. In the case before us the evidence does not merely point at any probability but on the contrary it points at a certainty.

35. We are not unmindful of the fact that the accused have been acquitted of the charge under section 302 IPC and there is no appeal against that. This cannot stand in the way of appreciating the evidence. The accused charged of a major offence can be punished of a minor offence under sections 221 and 222 of the Cr.PC. We are, for the reasons discussed above, of the opinion that the highest punishment provided under section 304B I.P.C. should be awarded to the appellants.

36. Mr. Basu contended, that his client is entitled to an outright acquittal, in answer to the rule issued by this Court. We already have dealt with all his submissions. We are unable to agree with him. For the reasons already have discussed which we need not reiterate.

37. The conviction both under section 304B and 498A IPC is thus upheld. The appellants are sentenced to rigorous imprisonment for life for the offence punishable under section 304B of the IPC. The punishment for the offence punishable under section 498A of the IPC shall remain unchanged and shall run concurrently. The appellants are directed to surrender forthwith to serve out the sentence. The bail bond furnished by them is forfeited. The Trial Court is directed to use coercive measures if the appellants do not surrender within a fortnight.

38. The appeal is thus disposed of. Lower Court Records with a copy of this judgment be sent down to the learned Trial Court forthwith for information and necessary action.

Urgent Xerox certified copy of this judgment, be delivered to the learned Advocates for the parties, if applied for, upon compliance for all formalities.

Indira Banerjee, J.

I agree.

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