

MANU/WB/0057/2014

IN THE HIGH COURT OF CALCUTTA

CRA 616 of 2005

Decided On: 13.02.2014

Appellants: **Sujoy Sarkar and Ors.**
Vs.

Respondent: **The State of West Bengal and Ors.**

Hon'ble Judges/Coram:

Toufique Uddin, J.

Counsels:

For Appellant/Petitioner/Plaintiff: Mr. Sekhar Bose, Mr. Sourav Chatterjee and Mr. Abhijit Ganguly

For Respondents/Defendant: Mr. Pawan Kumar Gupta

JUDGMENT

Toufique Uddin, J.

1 . This appeal arose out of judgment and order dated 30.8.2005 passed by the learned Additional Sessions Judge, Fast Track Court, III, Purulia, in Sessions Trial No. 81 of 2004 convicting the appellants for commission of offence under Sections 498A/304B/34 of the Indian Penal Code. In the background of this appeal, the fact in a nutshell is as follows:-

One Sipra Sarkar sister of the complainant got married to one Sujoy Sarkar of village Parui under P.S. Pancha, district Purulia and the said marriage took place on 27th April, 2001. She died under suspicious circumstances at her in-laws' place on 2.8.2002. On 2.8.2002 the complainant received a telephonic information from his sister at about 11 a.m. to the effect that she was being extremely harassed by the members of her in-laws' family and she should be rescued immediately. The complainant conveyed his sister that he will arrange to bring her back on 3.8.2002. On the same day at 5 P.M. the husband of Sipra Sarkar conveyed that his sister was suffering coronary thrombosis. On receipt of such information the informant along with others rushed to the matrimonial home of his sister and found there his sister dead.

2. Sensing a foul play a complaint was lodged with the Police Station.

3 . After investigation, the police has submitted charge sheet under Sections 498A/304B/34 of the Indian Penal Code read with Section 3 and 4 of the Dowry Prohibition Act.

4 . The case was committed by the learned Magistrate to the Court of Sessions, Purulia.

5 . On hearing of both sides, the learned Trial Court framed charge against the accused persons under Section 498A/304B/34 of the Indian Penal Code.

6 . The contents of the charge were read over and explained to the accused person, who pleaded not guilty and claimed to be tried.

7. To contest this case, the prosecution examined as many as 15 witnesses, while three witnesses were examined on the side of the defence.

8. The accused persons were examined under Section 313 of the Code of Criminal Procedure. The defence case, as appeared from the trend of cross-examination of the witnesses as well as the replies given by the accused persons at the time of examination under Section 313 of the Code of Criminal Procedure and their D.Ws. is denial of offence with a plea of innocence.

9. On trial, the learned trial court below convicted the present appellants by the impugned judgment.

10. It is to be seen if the impugned judgment suffers from any infirmity and calls for any interference or not.

11. Section 498A/304B/34 of the Indian Penal Code read as under:

A. Husband or relative of husband of a woman subjecting her to cruelty. - Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.- For the purpose of this section, "cruelty" means-

(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

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.

34. Acts done by several persons in furtherance of common intention.-When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.

12. To appreciate the case in a better way some pieces of evidence are required to be considered.

13. The complaint lodged by one Rabindra Nath Ghosh on 2.8.2002 showed that day at about 11 a.m. his younger sister Sipra Sarkar informed over telephone at Purulia "unbearable tortures have been inflicted upon me and I cannot stay here more. Please make arrangement to take me from here". Her sister also stated that her husband, brother-in-law, sister-in-law, one Munmun Das wife of Pradip Das and her father-in-law, Kalipada Sarkar all were torturing her severally from morning and assaulted her both physically and mentally. Thereafter at about 5 P.M. Sujoy Sarkar informed over telephone that the condition of her sister had worsened and she was suffering from

coronary thrombosis. Getting the news, the complainant went to the house of her in-laws' place and saw her lying dead. On query the members therein could not give any satisfactory answer. The accused persons created mental pressure on his younger sister by demanding more money. His sister informed over telephone. They have conspired and strangled his younger sister to death with cool brain.

14. Exhibit 2 is the investigation report under Section 174 of the Code of Criminal Procedure conducted by one S.I. Anil Charan Banerjee. From that report, it appears injuries were found on her body. There was a lot of bruise on the skin of the chin and bleeding marks are found there. There is also injury on the right side of the forehead. Due to scuffling, the skin at the lower portion of the chin has been bruised. Bleeding injury on the lower portion of the chin and a sign of peeling of skin are also found. A sign of wound on the right side of the forehead was apparent. The report shows that it was suspicious death due to strangulation.

15. The inquest report under Section 176 of the Code of Criminal Procedure submitted by the learned Magistrate shows that the Magistrate found one black spot just below and mark of injury on the upper side of the head of the deceased. The opinion given by the parents of the deceased indicates that this is a case of murder.

16. P.W. 1 is the de-facto complainant. He stated the marriage between his sister and Sujoy Sarkar of Village of Parui took place in April, 2001. His sister was an Arts Graduate. She died within one year three months after her marriage. He stated that on the fateful day his sister made contact with him in the morning over phone and told that all the members of in-laws' place started hurling abusive language and also assaulted, when she requested P.W. 1 to take her back. But the same day at 5 P.M. Sujoy made contact over phone requesting him to take his sister as she had an attack of coronary thrombosis. The complainant went there and found his sister dead. On his query Sujoy stated that his sister hanged herself with the help of rope from the ceiling fan. He proved the F.I.R. Exhibit 1. He has stated that the victim told him that the in laws' members were demanding money from her parents although Rs. 60,000/- in cash and eight bhories of gold and other ornaments were given. Further he stated that their house was sold for the purpose of meeting the unwarranted demand made by the accused persons.

17. P.W. 2 is the Medical Officer. He was one of the members of Medical Board, constituted for holding Post Mortem examination. He held Post Mortem examination. He found small elliptical abrasion $\hat{A}\frac{1}{2}' \times \hat{A}\frac{1}{2}' \times \hat{A}\frac{1}{4}'$ just below left chin. The doctor opined that the marks of injuries which they noticed may be due to fall on any hard substances but certainly the deceased was assaulted prior to her death. This Doctor further stated that he found congestion which occurs to accumulation of excess bleeding and such type of congestion may occur to anybody. He further stated that hyoid bone was found intact. So the Doctor's evidence suggests that the victim was assaulted prior to her death.

18. P.W. 3 is the Pharmacist. On 2.8.2002 Sujoy Sarkar called him and thereafter when he examined the victim, he found that the victim already expired. This witness was declared hostile.

19. The P.W. 4 is the friend of the deceased. The deceased told her that she was tortured by other members of in-laws' place. She further stated that Sipra used to tell her woes and she used to burst into tears in front of her. Sipra also told her that the inmates of her husband used to pressure upon her to bring money and also divulged to him that she would not be allowed to remain alive. She further told that Sipra was asked to bring Rs. 1,00,000/- from her parents.

20. P.W. 5 was declared hostile.

21. P.W. 6 is an Executive Magistrate. He stated that at the time of holding investigation, he noticed that the deceased had injuries on her chin and upper side of head.

22. P.W. 7 is the friend of the deceased by village courtesy. He corroborated the prosecution case. This witness stated that he saw Sipra lying on cot and she had injuries on her forehead and also on chin. This witness also said that Sipra divulged the demand of Rs. 1,00,000/-.

23. P.W. 8 is the uncle of Sipra. He stated that Sipra was asked to bring Rs. 1,00,000/- from her parent's house for developing of stationary shop of her husband, treatment of Munmun and also opening of beauty parlour in the name of her sister-in-law Soma Sarkar. Munmun is the sister of Sujay. He signed the inquest report.

24. P.W. 9 is the sister of the deceased. She stated that Sipra was her sister. She corroborated the prosecution case and found marks of injury on the forehead and chin of the deceased. He stated about the claim of demand followed by disposal of property to meet the demand of dowry.

24. P.W. 10 is the brother-in-law of Sipra. He corroborated the prosecution story. He wrote of the F.I.R. as per instruction of Rabindra Nath Ghosh marked as Exhibit 1.

25. P.W. 11 is a Driver. He was declared hostile.

26. P.W. 12 is the another Doctor. He held Post Mortem Examination. He also found small abrasion $\hat{A}1\frac{1}{2}' \times \hat{A}1\frac{1}{2}' \times \hat{A}1\frac{1}{2}'$ just below left chin. He stated that his opinion is that the cause of death was due to administering of endosulfan.

27. P.W. 13 is one of the Doctors of the Medical Board constituted for holding Post Mortem report over the dead body of the deceased Sipra Sarkar. He also spoke about the injury.

28. P.W. 14 is the Scientific Officer. The viscera was examined by him. He submitted report accordingly.

29. P.W. 15 is the police officer. After investigation, he submitted a charge sheet.

30. D.W. 1 and D.W. 2 are two Doctors who claimed that they examined the victim Sipra at certain point of time. Further the D.W. 1 stated that on examination on 14.5.2002 in his chamber it was found that Sipra had problem of not giving birth of any child though she was married for one year. There is no cross-examination of on this point at that time by the prosecution. D.W. 2 another doctor issued prescription Exhibit "C". D.W. 3 is the brother-in-law of the deceased. He stated that Jyotsna Sen one of the accused persons is his wife. He was married in 1981. He further stated during the time of his marriage his wife used to reside in Jamshedpur and the said marriage took place there. His father-in-law is one Kalipada Sarkar, an employee of Postal Department posted in Tata. All the children of his father-in-law were staying at Tata. He also stated that Sipra and Sujoy had cordial relationship with each other and Sipra had cordial relationship with other accused persons. D.W. 3 stated that Sipra used to tell him that she had mental depression, high pressure, chest pain etc. She further told him that the Doctor gave opinion that Sipra would not have the capacity to give birth to any child. D.W. 3 stated that Sipra did not make any allegation against her husband and other inmates of her husband's house.

31. In cross-examination, D.W. 3 stated that he requested the Investigating Officer

to record his statement as well as that of his wife but the Investigating Officer did not record the statement.

32. The learned Advocate of the appellants argued in regard to Section 498A that who caused alleged injury (which is otherwise possible by other means except assault as appeared from the cross-examination of the Doctor) has not been cleared. There were so many convicts. But the evidence is silent about who inflicted the injuries so called. The nature of injury cannot be such if six convicts assault at a time. If all the accused persons assault the victim, the injuries expected to be more and even vital.

33. In MANU/SC/0361/2002 : 2002 SCC (Cri) 971 (Girdhar Shankar Tawade vs. State of Maharashtra) the Hon'ble Court propounded that in absence of evidence regarding demand of dowry, harassment by itself would not constitute cruelty within the meaning of Explanation (b) and there must be some cogent evidence under Section 498A of the Indian Penal Code otherwise the conviction cannot be upheld.

34. In MANU/SC/0499/2012 : (2012) 3 SCC (Cri) 146 (Sahadevan & Anr. Vs. State of Tamil Nadu) the Hon'ble Apex Court propounded that if the entire prosecution case has been found to be unreliable and the prosecution as a whole has not been able to prove its case beyond reasonable doubt, then benefit should accrue to all accused persons and not merely to accused who have preferred an appeal against conviction.

35. MANU/SC/1820/2009 : 2011 (1) SCC (Cri) 244 (Pashaura Singh Vs. State of Punjab & Anr.) wherein the Supreme Court found that only allegation made in FIR was that appellant-accused and his family members started harassing appellant's wife for not bringing more dowry. But there was no demand for dowry, nor was there any specific entrustment of dowry articles to accused as alleged in FIR. Held, offence under Section 498-A not made out.

36. MANU/SC/7821/2007 : (2010) 1 SCC (Cri) 1247 (Hazarilal Vs. State of Madhya Pradesh) wherein conviction under Section 498A reversed - Need for material to establish harassment or subjection to cruelty - Merely on surmises and conjectures, conviction could not have been recorded - There is a vast difference between 'could have been', 'must have been' and 'has been' - in the absence of any material, the case falls in the first category and as such conviction is impermissible.

37. In MANU/SC/0908/2009 : (2010) 1 SCC (Cri) 955 (Bhairon Singh Vs. State of Madhya Pradesh) the Hon'ble Apex Court while dealing with the case under Section 498A held that the statement of dead persons is admissible in law if the statement is as to cause of death or as to any circumstance of transactions which resulted in her death in a case in which cause of death comes into question and in case where the deceased had told the witnesses against the accused person about torture and harassment, is inadmissible under Section 32(1) and such evidence cannot be looked into for any purpose.

38. The careful scrutiny of the evidence at least does not show that "x" hit the victim by such and such or "y" inflicted the injury or so. The omnibus allegation of torture is not sufficient.

39. Contradiction was taken from the cross-examination of the investigating officer P.W. 15 with reference to some of witnesses. The Investigating Officer stated in respect of P.W. 1, 7, 8, 9 and 10 that they actually did not state vital facts as regards telephonic message, demand of dowry or so. The F.I.R. itself though not an encyclopedia yet lacks in mention of substantial pieces of evidence regarding dowry death. There appears to be much improvement in the evidence given in dock from the

statement given at earlier stage before the Investigating Officer under Section 161 of the Code of Criminal Procedure. It is correct that minor variation is permissible but if largely there appears development of incident or embellishment at subsequent stage the court will be loathe in accepting such evidence.

40. There is no dying declaration in this case nor is there any written letter exchanged between the victim and the relations of the deceased to show that there was close proximity between torture and the death.

41. It is correct that if any incident occurs soon before her death and the transaction shows close proximity with the death, the evidence may be admissible otherwise not.

42. There appears to be no link of evidence of viscera "sent" and viscera "examined". Whose viscera was examined is doubtful as appears from the sifting of evidence of the Investigating Officer.

43. The persons remaining present at the time of surathal report done by the police, did not ventilate any grievance of torture or ill-treatment or demand of dowry against the present appellants.

44. P.W. 1 and 8 alleged murder of the deceased but they could not prove it.

45. P.W. 1 did not see marks of injury on Sipra's person though he alleged in FIR that the death was by strangulation. The Doctor did not say so.

46. P.W. 10 stated that P.W. 9 received phone call from the deceased. The receipt of the phone call by wife of P.W. 10 was omitted in the statement made to the investigating officer under Section 161 of the Code of Criminal Procedure.

47. The Medical Officer, P.W. 12 opined that the death was due to administering of poison but the evidence of P.W. 13 did not find the effects of poisoning on the person of Shipra, rendering the case of administration of poison highly unsafe to act or rely upon.

48. P.W. 13 another doctor being a member of Medical Board for holding Post Mortem examination could not say the cause of death.

49. The evidence of P.W. 14, the Scientific Officer generates doubt about chemical examination of viscera. The victim died on 2.8.2002. Viscera was received at the office of P.W. 14 on 13.9.2004. Colour, nature of viscera have not mentioned.

50. According to P.W. 15 he sent the viscera to FSL on 12.9.2002 with the impression of a seal through a constable by ordinary post. He did not send any impression of the seal to FSL subsequently for identification of the viscera signed by him.

51. Another aspect comes injuries found on the person of the victim could not be explained at the time of 313 examination of the husband by him. He all along was with the deceased. So regarding injuries on the victim lady presumption can be drawn against the husband only because other appellants appear to be residing at different other places. Presumption of assault cannot be drawn against the present appellants. The husband of the deceased has already served out the sentence.

52. The learned trial judge took much efforts and pain to arrive at his conclusion in the form of conviction of the accused persons but the loopholes as pointed out above poses a big question mark of doubt the benefit of which should go to the appellants.

53. This being the position, the judgment and sentence passed by the learned court below are not sustainable. Accordingly, the appeal succeeds and stands allowed.

54. The judgment and order of sentence are set aside.

55. The appellants be released from bail bond and set free at once.

56. The lower court record be sent down immediately to the learned court below. Urgent certified copy of this judgment and order, if applied for, is given to the parties on priority basis.

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