

GAHC010054392024



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : I.A.(CrI.)/264/2024

JAHAR ALI SHEIKH @ JAHAR ALI S.K AND 2 ORS.
S/O JELHAQUE ALI, R/O SILPAT, P.S.- BASUGAON, DIST.- CHIRANG,
ASSAM.

2: JELHAQUE ALI
S/O LATE JASMAT ALI

R/O SILPAT
P.S.- BASUGAON
DIST.- CHIRANG
ASSAM.

3: SALEMA BIBI
W/O JELHAQUE ALI

R/O SILPAT
P.S.- BASUGAON
DIST.- CHIRANG
ASSAM

VERSUS

THE STATE OF ASSAM AND ANR.
TO BE REP. BY THE P.P., ASSAM.

2:SEKENDER ALI
S/O LATE MOSARAF ALI

R/O GHILAGURI
P.S.- BONGAIGAON
DIST.- BONGAIGAON (ASSAM)
PIN

Advocate for the Petitioner : MR H R A CHOUDHURY

Advocate for the Respondent : PP, ASSAM

In

Crl.A. 75/2024

BEFORE

HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

21.03.2024

1. Heard Mr. A. Ahmed, learned counsel for the applicants. Also heard Ms. N. Das. Das, learned Additional Public Prosecutor, Assam.

2. This Interlocutory Application under Section 389 of the Code of Criminal Procedure, 1973 has been preferred by the present applicants, who are the appellants in the connected appeal, which has been registered as Criminal Appeal No. 75/2024.

3. In this Interlocutory Application, the applicants have prayed for suspension of the sentence imposed on the present applicants by the impugned Judgment and Order dated 20.02.2024, passed by the learned Sessions Judge, Chirang, Kajalgaon in Sessions Case No. 41/2022, whereby, all the applicants, namely, 1. Jahar Ali Sheikh@Jahar Ali S.k., 2. Jelhaque Ali and 3. Salema Bibi are convicted under Section 304B of the Indian Penal Code and have been sentenced to undergo rigorous imprisonment for 7(seven) years and to pay a fine of Rs. 10,000 each and in default of payment of fine to undergo further rigorous imprisonment for 1(one) year.

4. Learned counsel for the applicants has submitted that on the basis of an FIR lodged by one Sekender Ali, the brother of the deceased,

Jasmina Khatun, on 07.08.2022, before the Officer-In-Charge of Basugaon Police Station, Basugaon P.S. Case No. 46/2022 was registered under Section 498A/304B of the Indian Penal Code and investigation was initiated. Ultimately, after completion of the investigation, charge-sheet was laid against the above named applicants under Section 304B of the Indian Penal Code. The applicants faced trial before the court of the learned Sessions Judge, Chirang, Baksa, wherein, charges under Section 498A/304B/34 were framed against the above named applicants and when the said charges were read over and explained to them, they pleaded not guilty and claimed to be tried.

5. The prosecution side examined 14(fourteen) numbers of witnesses to bring home the charges against the present applicants. All the applicants were examined under Section 313 of the Code of Criminal Procedure, 1973, during which they pleaded their innocence and denied the truthfulness of the testimony of prosecution witnesses. However, they declined to adduce any evidence in defence. Ultimately, by the judgment and order which has been impugned in the connected appeal, the applicants were convicted and sentenced in the manner as already described hereinabove.

6. Learned counsel for the applicants has submitted that in the instant case, the ingredients of offence under Section 304B were not proved and trial court had erred in coming to the conclusion of the finding of guilt under Section 304B/498A against the present applicants on the basis of the testimony of PW-5 as well as on the basis of presumption which the trial court had drawn under Section 8A of the Dowry Prohibition Act, 1961.

7. It is submitted by the learned counsel for the applicants that no charges were framed under any provision of the Dowry Prohibition Act, 1961 against the present applicants and therefore, the trial court was wrong in taking

recourse to the provision under Section 8A of the said Act, arriving at the finding of the guilt of the present applicants.

8. It is submitted by the learned counsel for the applicants that only Section 2 of the Dowry Prohibition Act, 1961 can be taken recourse in an offence under Section 304B of the Indian Penal Code as same has been incorporated in the explanation under Section 304B of the Indian Penal Code.

9. Learned counsel for the applicants has also submitted that for coming to a finding of conviction under Section 304B of the Indian Penal Code, following essential ingredients are to be established:-

i. The death of a woman should be caused by burns or bodily injury or otherwise than under a 'normal circumstance';

ii. such a death should have occurred within seven years of her marriage;

iii. she must have been subjected to cruelty or harassment by her husband or any relative of her husband;

iv. such cruelty or harassment should be for or in connection with demand of dowry; and

v. such cruelty or harassment is shown to have been meted out to the woman soon before her death."

10. Learned counsel for the applicants has also submitted that mere demand of dowry is not sufficient to convict a person Section 304B of the Indian Penal Code as in addition to the demand of dowry the victim must be subjected to cruelty or harassment for or in connection with demand of dowry. However, it is submitted that in the instant case, the trial court, in the impugned judgment

implied the existence of harassment only on the ground that there was a demand for dowry and in absence of any proof of cruelty or harassment meted on the victim, the trial court came to the conclusion that there was harassment and physical torture on the victim woman.

11. In support of the above submissions, the learned counsel for the applicants has cited a judgment of the Apex Court of India in ***Charan Singh @ Charanjit Singh Vs. The State of Uttarakhand***, wherein it was observed in paragraph Nos. 21 and 23 as follows:-

"21. In the aforesaid evidence led by the prosecution, none of the witnesses stated about the cruelty or harassment to the deceased by the appellant or any of his family members on account of demand of dowry soon before the death or otherwise. Rather harassment has not been narrated by anyone. It is only certain oral averments regarding demand of motorcycle and land which is also much prior to the incident. The aforesaid evidence led by the prosecution does not fulfil the pre-requisites to invoke presumption under [Section 304B IPC](#) or [Section 113B](#) of the Indian Evidence Act. Even the ingredients of [Section 498A IPC](#) are not made out for the same reason as there is no evidence of cruelty and harassment to the deceased soon before her death."

23. On a collective appreciation of the evidence led by the prosecution, we are of the considered view that the pre-requisites to raise presumption under [Section 304B IPC](#) and [Section 113B](#) of the Indian Evidence Act having not been fulfilled, the conviction of the appellant cannot be justified. Mere death of the deceased being unnatural in the matrimonial Criminal Appeal No. 447 of 2012 home

within seven years of marriage will not be sufficient to convict the accused under Section 304B and 498A IPC. The cause of death as such is not known."

12. Learned counsel for the applicants has also submitted that the applicants have a fair case to argue in the connected appeal and they have a fair chance of getting a verdict of acquittal in the connected appeal and as the applicants are sentenced to a short period of 7 years only, they should be allowed to go on bail after suspension of the sentence imposed on them during the pendency of the connected appeal.

13. In support of said submissions, learned counsel for the applicants has cited a ruling of the Supreme Court of India in the case of "***Kiran Kumar Vs. State of M.P.*** reported in (2001)9 SCC 211," wherein, it was observed as follows:-

"3. This Court has held in Bhagwan Rama Shinde Gosai v. State of Gujarat [(1999) 4 SCC 421: 1999 SCC (Cri) 553] that when a person is convicted and sentenced to a short-term imprisonment the normal rule is that when his appeal is pending the sentence should be suspended and rejection is only by way of exception and be put forward for such rejection. In such case also every endeavour should be made to have the appeal posted for early hearing and disposal. If the short-term sentence is allowed to run out during the pendency of the appeal, the appeal itself will become, for all practical purposes, infructuous so far as the appellant is concerned. It does not mean that the appellate court should suspend the sentence, if its consequence would be a danger to the society or any other similar difficulties."

14. Learned counsel for the applicants has also submitted that though

PW-5, who is the mother of the deceased, had deposed that the deceased was subjected to cruelty and was beaten up before her death, however, it was submitted that the post-mortem report falsifies the testimony of PW-5 in this regard as no injury and sign of beating have been found on the body of the deceased.

15. On the learned Additional Public Prosecutor, Assam, Ms. N. Das, has vehemently opposed the grant of bail to the applicants and suspension of the sentence imposed on them during the pendency of the connected criminal appeal. She has submitted that the testimony of PW-5, is very categorical regarding the fact that the present applicants had subjected the daughter of the PW-5 to cruelty and harassment for dowry and she was also beaten by them before her death.

16. It is also submitted by the learned counsel for the applicants that the post-mortem report also shows that the deceased had bite marks on her neck.

17. I have considered the submissions made by the learned counsel for both the sides and have perused the materials available on record, including the judgment cited by the learned counsel for the parties.

18. At the stage of consideration of an application under Section 389 of the Code of Criminal Procedure, 1973, the court is not supposed to deal in detail and consider the evidence on record, however, it appears that though the case of the prosecution side is mainly based on the testimony of PW-5, the trial court had taken recourse of invoking the provision of Section 8A of the Dowry Prohibition Act, 1961 to draw a presumption against the present applicants, even though no charges were framed against the applicants under the provision

of the Dowry Prohibition Act, 1961.

19. It also appears that the submissions made by the learned counsel for the applicants that the prosecution side has to prove separately the components of cruelty and harassment in addition to the demand of dowry, which according to the learned counsel for the applicants has not been done in the instant case.

20. Considering the submissions made by the learned counsel for the applicants, it appears that the applicants have a fair arguable case in the connected appeal and if the execution of the sentence against the present applicants is not stayed during the pendency of the connected appeal, they would suffer great prejudice. Moreover, the ruling cited by learned counsel for the applicants in *Kiran Kumar Vs. State of M.P.* (supra) shows that when a person is convicted and sentenced to a short term imprisonment, the normal rule is that when the appeal is pending the sentence should be suspended and the rejection is only by way of an exception.

21. In the instant case no such exceptional cause to reject the prayer for the suspension of sentence could be shown by the prosecution side.

22. In view of the aforesaid reasons, the application is allowed and the operation of the sentence imposed on the above named applicants is hereby suspended during the pendency of the Criminal Appeal No. 75/ 2024.

23. The above named applicants are also allowed to go on bail for Rs. 30,000/- each with a suitable surety of like amount to the satisfaction of learned Sessions Judge, Chirang, during the pendency of the connected appeal, i.e. Criminal Appeal No. 75/ 2024, wherein, the judgment that has been passed in Sessions Case No. 41/2022 has been impugned.

24. With the above observations, this interlocutory application is hereby disposed of.

JUDGE

Comparing Assistant