
(2015) 05 OHC CK 0044
In the Orissa High Court
Case No : Criminal Appeal No. 327 of 1992

Amar Jena

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 13-05-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Dowry Prohibition Act, 1961 — Section 2, 3, 4, 8A
Evidence Act, 1872 — Section 134, 138, 146
Penal Code, 1860 (IPC) — Section 304B, 306, 498A

Citation : (2015) 120 CLT 765 : (2015) 2 ILR Ori 410

Hon'ble Judges : Durga Prasanna Choudhury, J

Bench : Single Bench

Advocate : K.N. Jena, A.K. Mohapatra, P.K. Jena, D.K. Mohapatra and R. Rath,
for the Appellant

Final Decision : Allowed

Judgement

Dr. Durga Prasanna Choudhury, J—This appeal is directed against the judgment of conviction and order of sentence dated 14.09.1992 passed by the learned Addl. Sessions Judge, Bhadrak in S.T. Case No. 26/12 of 1992, whereby the appellant (hereinafter called the "accused") was convicted under section 4 of the Dowry Prohibition Act, 1961 (hereinafter referred to as the "Act") and sentenced to undergo Rigorous Imprisonment for one year. The factual matrix leading to the case of the prosecution is that in June, 1990, the accused had married to deceased Basanti Jena, the daughter of the informant, according to Hindu rites and customs. It is alleged, inter alia, that before the marriage, the elder brother of the accused had demanded cash of Rs. 2,000/- and a bicycle towards dowry. At the time of marriage, dowry amount of Rs. 1,500/- was paid by the informant with an assurance to pay the rest amount of Rs. 500/- and a bicycle to the accused later on. Since the said amount of Rs. 500/- and the bicycle were not delivered within one year of marriage, the accused and his relatives started torturing the deceased, both mentally and physically. On many occasions, the

deceased informed her parents about the torture meted out to her by the accused and his relatives on the demand of dowry. On 24.03.1991, Kalandi Jena, the elder brother of the deceased, visited the house of the accused and, during his stay, witnessing the assault inflicted by the accused to the deceased, he interfered. On 28.03.1991, Binod Jena, the elder brother of the accused, asked the informant to visit their house as the deceased was not well. On 29.03.1991 at 8 A.M., when the elder brother of the deceased reached the house of the accused, found the deceased dead. Marks of injuries were noticed on her dead body. Thereafter, on 30.03.1991, F.I.R. was lodged by the informant alleging dowry death against the accused. The concerned O.I.C. registered a case under sections 498A/304B of the I.P.C. read with section 4 of the Act. During investigation, inquest over the dead body was made, post-mortem examination was conducted and material witnesses were examined under section 161 of the Cr.P.C. After due investigation, charge-sheet under section 306 of the I.P.C. was submitted by the police against the accused. But, it is found that charges have been framed under sections 498A/304B of the I.P.C. read with section 4 of the Act against the accused by the learned Addl. Sessions Judge. The order-sheet dated 29.04.1992 shows that charge under section 306 of the I.P.C. has been framed against the accused, perhaps due to typographical error. When the charge form vide separate sheet denotes framing of charges under sections 498A/304B of the I.P.C. read with section 4 of the Act, the contents thereof were read over and explained to the accused by the learned Addl. Sessions Judge and the accused pleaded not guilty and claimed trial, the typographical mistake appearing in the order-sheet cannot be pressed into service. However, the accused faced his trial for the commission of the offences punishable under sections 498A/304B of the I.P.C. read with section 4 of the Act. Hence, the case of the prosecution.

2. The plea of the accused, as revealed from the cross-examination made to the prosecution witnesses and his examination made under section 313 of the Cr.P.C., is that he is innocent and the allegations made against him are false. The specific plea taken by him is that his wife, who was suffering from stomach upset, was taking medicines and, at the time of her death, he was serving at Rourkela and was not present in his house. On the other hand, he has taken a plea of alibi.

3. The learned Addl. Sessions Judge, after considering the evidence of five witnesses examined from the side of prosecution, two witnesses examined on behalf of defence and the documents available on record, acquitted the accused of the offences punishable under sections 498A/304B of the I.P.C., but convicted him for the offence punishable under section 4 of the Act and sentenced him thereunder to undergo Rigorous Imprisonment for one year.

4. Learned counsel appearing for the appellant submitted that cognizance of the offence under the Act has been taken although being barred by limitation for which the entire proceeding is illegal. He further submitted that since previous

sanction of the State Government is necessary for proceeding against the accused under the provisions of the Act, the proceeding for the offence punishable under section 4 of the Act is not maintainable due to lack of such sanction. Submission was further advanced that there is neither evidence to show the demand of dowry by the accused, nor there is any sort of evidence indicating payment of any dowry amount to the accused for which the order of conviction and sentence under the Act is vulnerable and liable to be interfered with. During course of argument, learned counsel for the appellant did not emphasize on the point of limitation or on the question of sanction, but strenuously submitted that in the absence of evidence as to the demand of dowry by the accused and payment thereof, the conviction and sentence recorded by the learned Addl. Sessions Judge should be set aside and the accused should be acquitted.

5. Learned Addl. Standing Counsel appearing for the State Government submitted that there are evidences of prosecution witnesses showing the demand of dowry of Rs. 2,000/-, payment of cash of Rs. 1,500/- to the accused and his relatives and demand of rest of dowry amount of Rs. 500/- and a bicycle. He also submitted that even if this is an appeal of the year 1992, but since the allegation of demand of dowry is on the rise in society, no leniency should be extended to acquit the accused.

6. Since the State Government has not preferred appeal against the order of acquittal, this Court is only concerned with the appeal against the conviction and sentence under section 4 of the Act against the accused. So, the sole point for consideration is whether the accused demanded cash of Rs. 2,000/- or any amount thereof and a bicycle, directly or indirectly, from the parents or other relatives or guardian of the deceased?

7. Section 4 of the Act states as follows:

"4. Penalty for demanding dowry.--If any person demands, directly or indirectly, from the parents or other relatives or guardian of a bride or bridegroom, as the case may be, any dowry shall be punishable with imprisonment for a term which shall not be less than six months, but which may extend to two years and with fine which may extend to ten thousand rupees;

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for term of less than six months".

8. The definition of "dowry" as per section 2 of the Act is as under:

"In this Act, "dowry" means any property or valuable security given or agreed to be given either directly or indirectly -

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parents of either party to a marriage or by any other person, to either

party to the marriage or to any other person, at or before (or any time after the marriage) (in connection with the marriage of the said parties but does not include) dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies."

9. From the above provisions of law, it is construed that the demand of dowry can be made before the marriage, during the marriage and after the marriage, although the same does not include dower or mahr in case of persons to whom Muslim Personal Law applies. It is further found from the provisions of law that dowry means any property, including valuables or valuable security, given or agreed to be given either directly to the party concerned by one party or indirectly to the party concerned by one party. But the crucial question is that such give and take should be connected with the marriage of the said parties. In the case of State of Himachal Pradesh Vs. Nikku Ram and others, AIR 1996 SC 67 : AIR 1995 SC 67 : (1995) CriLJ 4184 : (1996) 1 DMC 131 : (1995) 5 SCALE 94 : (1995) 6 SCC 219 : (1995) 3 SCR 177 Supp , Their Lordships have been pleased to observe as under:

"Dowry, dowry and dowry. This is the painful repetition which confronts, and at times haunts, many parents of a girl child in this holy land of ours where, in good old days the belief was : "Yatra Naryastu Pujyante ramente tetra dewatah" (where woman is worshipped, there is abode of God). We have mentioned about dowry thrice, because this demand is made on three occasions : (i) before marriage; (ii) at the time of marriage; and (iii) after the marriage. Greed being limitless, the demands become insatiable in many cases, followed by torture on the girl, leading to either suicide in some cases or murder in some."

The aforesaid authority has also been followed by Their Lordships of the Hon'ble Apex Court in the case of Bhim Singh and Others Vs. State of Uttarakhand(2015) 2 AD 610 : (2015) CriLJ 1428 : (2015) 2 JCC 1011 : (2015) 2 RCR(Criminal) 22 : (2015) 2 SCALE 280 : (2015) 4 SCC 281 : (2015) 2 SCJ 589 .

10. With due respect to the said decision, it is found that demand of dowry can be made at any stage, but that must be related to the marriage between the parties. Whenever any person is prosecuted for taking dowry under section 3 of the Act or demanding dowry under section 4 of the Act, the burden of proof lies on that person to the effect that he has not committed such offence. So, undoubtedly, onus lies on the accused to prove that he has neither demanded dowry nor received any dowry either directly or indirectly. In addition to this, in the present case, the accused has taken the plea of alibi to the effect that during the death of the deceased, he was living at Rourkela. Since the appeal is concerned with demand of dowry, the plea of alibi by the accused is of no help. Now, the question arises as to how the accused has discharged the onus under section 8A of the Act. At the same time, it is the initial burden on the prosecution to prove that there was demand of dowry by the accused, either directly or indirectly and receipt of the same from bride or on her behalf, after which the

same will be shifted to the accused to discharge onus under section 8A of the Act.

11. Before going to discuss on the evidences of prosecution witnesses, the principle of appreciation of evidence of a witness must be considered. In the case of Vadivelu Thevar v. State of Madras (Vadivelu Thevar Vs. The State of Madras, AIR 1957 SC 614 : (1957) CriLJ 1000 : (1957) 1 SCR 981 , Their Lordships have been pleased to observe at paras-11 & 12 that:

"Hence, in our opinion, it is a sound and well-established rule of law that the Court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable.

In the first category of proof, the Court should have no difficulty in coming to its conclusion either way it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the Court equally has no difficulty in coming to its conclusion. It is in this third category of cases, that the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if Courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses."

12. With due respect to the said decision, I find that it is not necessary that the evidences of witnesses should be rejected in toto, but the same should be scrutinized with caution to find out how far the statements of witnesses can be reliable and acceptable. If it is totally unreliable, then the same should be rejected; but if it is reliable, then the same should be accepted in toto. In the third category, the evidence of a witness may be partly reliable and partly unreliable. Moreover, in the decision reported in Kunju @ Balachandran Vs. State of Tamil Nadu, AIR 2008 SC 1381 : (2008) 105 CLT 513 : (2008) CriLJ 1804 : (2008) 1 JT 450 : (2008) 1 SCALE 479 : (2008) 2 SCC 151 : (2008) AIRSCW 835 : (2008) 1 Supreme 253 (Kunju @ Balachandran v. State of Tamil Nadu), Their Lordships have been pleased to observe at para-10 that:

"xxx xxx xxx

It is for the Court to act upon the testimony of witnesses. It is not the number, the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. On this principle stands the edifice of Section 134 of the Evidence Act. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy, or otherwise."

With due respect to the said decision, I find that a duty is cast on the Court to find out how far the evidence of a single witness passed the test of credibility for its acceptance. On the other hand for such acceptance cross-examination of witnesses must be taken into consideration. Section 138 of the Evidence Act has to be gone through to find out the purpose of cross-examination of the witnesses.

13. The examination in chief and cross-examination of a witness must relate to the relevant facts, but the cross-examination need not be confined to the facts elicited in examination in chief. A witness must be asked the questions to test his veracity to discover who he is and what his position in life is and to ask his credibility by injuring his character. Cross-examination is an important purpose to achieve that has exposed the truth. Full opportunity should be given for the same. It should not be curtailed on one pretext or the other. He should not be cross-examined as to any collateral independent fact, irrelevant to the fact in issue ("Lecturers on the Indian Evidence Act, 1872" written by Justice U.L. Bhat), 2015 Edition at page 337). In the case of Gopal Saran Vs. Satyanarayana, AIR 1989 SC 1141 : (1989) JT 21 Supp : (1989) 1 SCALE 497 : (1989) 3 SCC 56 : (1989) 1 SCR 767 : (1989) 2 UJ 1 , Their Lordships have been pleased to observe at paragraph-5:

".... Therefore, it would not be safe to rely on the Examination-in-chief recorded which was not subjected to cross-examination....."

14. With due respect to the said decision, I find that the evidence is substantive one if a person is given full opportunity to cross-examine a witness of the opponent. In addition to the provision of section 138 of the Evidence Act, section 146 of the Evidence Act can be pressed into service - (i) to test the veracity of a witness; (ii) to discover who he is and what is his position in life; or (iii) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him or might expose or tend directly or indirectly to expose him to a penalty or forfeiture. Of course, there is a provision, which has been recently added by way of amendment for the witnesses to be cross-examined in cases of sexual offences. Be that as it may, the evidence of a witness can be a substantive piece of evidence provided he is tested during cross-examination, otherwise the evidence without cross-examination cannot be legally admissible as per the decision in the case of Gopal Saran v. Satyanarayan (supra).

15. Bearing in mind the settled principles, as discussed above, let me find out if at all the evidences of the witnesses examined from the side of the prosecution have proved the offence under section 4 of the Act against the accused.

16. P.W.1, who is none other than the unfortunate father of the deceased, has stated in examination-in-chief that he had given cash of Rs. 1,500/-, along with other articles, and cash of Rs. 500/- and a bicycle were to be given to the accused after the marriage. Due to paucity of funds, he could not give the cash of Rs. 500/- and the bicycle to the accused. In further examination-in-chief, he

revealed that his son had gone to the house of his deceased daughter and after return suggested to give the cash and the bicycle. In cross-examination at para-4, he revealed that the entire talk of marriage, including "Daba Neba" (give and take), was with Binod in presence of two others from their side and one of them was the brother-in-law of the accused, but he did not utter the name of other one. Further, he has stated in para-5 that they gave articles as per their sweet will; but pursuant to the demand, cash of Rs. 1,500/- was given and the rest amount of Rs. 500/- and a bicycle could not be given. They assured the accused side to give the bicycle and money afterwards. But, it is not revealed from his evidence that if the accused had demanded any cash of Rs. 500/- or the bicycle, either directly or indirectly, as "Daba Neba" was only made by Binod, who is said to be the elder brother of the accused, and other relatives of the accused. It is not forthcoming from his evidence as to whom he gave the demanded cash of Rs. 1,500/-. So, the evidence of P.W.1 after cross-examination does not prove any demand of dowry by the accused or payment of dowry to the accused.

17. P.W.2 is not a witness to the demand of dowry or receipt of the dowry amount by the accused, although he is a witness to the rest of the allegations made against the accused. P.W.3, who is the mediator in the marriage, revealed that the accused side had demanded Rs. 2,000/- and a bicycle; but, at the time of marriage, Rs. 1,500/- with other articles were given. Again he has stated that after the marriage, the accused side created problem and demanded the residue amount of Rs. 500/- and the bicycle from the bride side; but, he has not spelt out who demanded the dowry of Rs. 2,000/- and the bicycle, to whom part amount towards dowry was paid and who demanded the residue amount of Rs. 500/- and the bicycle. He has been cross-examined at length. Even if the statement of the witness does not spell out the material facts in examination-in-chief, but his cross-examination can be taken into consideration so as to evaluate his evidence as per the discussions made in the above paragraphs. In para-3 of his cross-examination, P.W.3 revealed that the marriage was finalized four days prior to its solemnization. Besides him, Bijay Jena & Binod Jena from Nandigaon, Jogi Naik & Narana Das from Nandapur and some others were present when the marriage was finalised. He further revealed that he himself had given Rs. 700/- on the date of "Lagna" and Rs. 800/- on the date of marriage after "Hastabandhana" by bringing the same from P.W.1. In para-4 of his cross-examination, it is revealed by him that P.W.1 expressed his ability to give Rs. 1,500/- and, if possible, to give the residue amount of Rs. 500/- and the bicycle afterwards. In further cross-examination, he revealed that he had talked with accused Amara and his brother Binod for their unjust demand of Rs. 500/- and a bicycle, but he has not told anyone about the residue demand from the accused side. Thus, he revealed such fact for the first time. He also revealed in the same para of cross-examination that the accused and Binod demanded Rs. 500/- and a bicycle on the date of marriage for the first time to which P.W.1 agreed to give the same afterwards, if possible. Thus, the statement of P.W.3 has varied from

stage to stage while he was grilled during cross-examination. If at all there was demand of Rs. 2,000/- and a bicycle as dowry from the beginning and after the marriage, there was demand of Rs. 500/- and a bicycle; but, subsequently, in cross-examination he stated that for the first time at the time of marriage Rs. 500/- and a bicycle were demanded by the accused and his brother Binod Jena. So, the varied statement of P.W.3 lacks credibility being inconsistent. His statement is not cogent to show as to when and where such amount and the bicycle were demanded by the accused and his brother from P.W.1. Moreover, P.W.1 has not expressed in his evidence, as discussed, that the accused and his brother demanded Rs. 500/- and a bicycle. So, the evidence of P.W.3 after vivid cross-examination is found to be not consistent, clear and trustworthy to prove that the accused had demanded Rs. 2,000/- and a bicycle, received Rs. 1,500/- and further demanded Rs. 500/- and bicycle. The learned trial Court has failed to appreciate the evidence of P.W.3 properly, as transpired from the impugned judgment, and, consequently, the learned trial Court has erred in law by observing that "Daba Neba", demand of cash of Rs. 500/- and a bicycle have been proved by P.W.3.

18. P.W.4 is none other than the brother of the deceased. So, being the brother of the deceased, his evidence requires close scrutiny. In the case of State of Rajasthan Vs. Chandgi Ram, (2014) AIRSCW 5253 : (2014) 10 SCALE 352 , Their Lordships have been pleased to observe at para-18 that:

"Reliance can also be placed upon Dinesh Kumar Vs. State of Rajasthan, AIR 2008 SC 3259 : (2008) 106 CLT 691 : (2008) CriLJ 4311 : (2008) 9 JT 148 : (2008) 11 SCALE 108 : (2008) 8 SCC 270 : (2008) AIRSCW 5512 , wherein in paragraph 12, the law has been succinctly laid down as under:

12. In law, testimony of an injured witness is given importance. When the eye witnesses are stated to be interested and inimically disposed towards the accused, it has to be noted that it would not be proper to conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically. The court would be required to analyse the evidence of related witnesses and those witnesses who are inimically disposed towards the accused. But if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same. Conviction can be made on the basis of such evidence."

19. With due respect to the said decision, I find that the evidences of related witnesses cannot be thrown out outright, but their evidences should be scrutinized with caution. At times, the evidences of related witnesses carry much weight because in a family dispute it is the relatives who can speak the ring of truth and it is the duty of the Court to separate the grain from the chaff. At the same time, the Court is required to scrutinize the evidences of such related witnesses very carefully before placing reliance upon the same, not necessarily that corroboration to the evidences of related witnesses is always desirable. On

the other hand, the evidences of related witnesses can be accepted subject to the facts and circumstances of each case. Keeping in mind these principles, the evidence of P.W.4 can be scrutinized to find out if at all he has proved the demand of dowry by the accused and receipt of dowry by the accused.

20. P.W.4 revealed in examination-in-chief that Rs. 1,500/- was given to the accused side i.e. Rs. 700/- on the date of "Lagna" and Rs. 800/- on the date of the marriage. According to him, he had been to the house of his sister on 24.03.1991 and found the accused beating her. On query, his sister informed that she was being beaten up and tortured for not giving cash of Rs. 500/- and a bicycle. Thus, his evidence does not spell out the demand of dowry by the accused from him or from his father. In para-4 of his cross-examination, he revealed that he himself had not given the money nor he had seen it being given. So, he is not an witness to the payment of Rs. 1,500/- to the accused side, as revealed from his evidence in cross-examination. In para-6 of cross-examination, denying the suggestion of defence, he stated to have mentioned before the Investigating Officer that his sister told that she was being beaten up and tortured for not giving cash of Rs. 500/- and a bicycle; but P.W.5, the Investigating Officer, when was confronted with the same, denied about such statement made by P.W.4 before him. Thus, he has contradicted his earlier statement about the allegation of his sister before him for not giving cash of Rs. 500/- and a bicycle. So, the evidence of P.W.4, after proper scrutiny, does not inspire confidence to prove that the accused had received Rs. 1,500/- as dowry amount and made further demand of cash of Rs. 500/- and a bicycle from the bride side.

21. Now, after going through the impugned judgment, it appears from para-10 that the learned trial Court believed from the evidence of P.Ws. 1 & 3 that there was demand of Rs. 1,500/- and the same was paid to the accused; but the learned trial Court has lost sight of appreciation of their evidence, as discussed above, for which landed in a wrong conclusion that the offence punishable under section 4 of the Act has been established. On the other hand, the evidence of prosecution witnesses, as discussed in the foregoing paragraphs, did not establish by consistent, clear and cogent evidence that the accused had demanded Rs. 2,000/- and a bicycle, received Rs. 1,500/- and further demanded Rs. 500/- and a bicycle from the deceased or her father. So, the initial burden on the prosecution has not been discharged for which the question of shifting the burden to the accused to prove his innocence does not arise. In view of the discussions indicated above, the order of conviction and sentence cannot be sustained and is liable to be set aside. In the result, the appeal is allowed and the order of conviction and sentence is set aside. The appellant is acquitted of the charge of the offence under section 4 of the Dowry Prohibition Act, 1961 and the bail-bonds furnished by him stand discharged.