

(2019) 05 GAU CK 0099
In the Gauhati High Court
Case No : Criminal Appeal No. 259 Of 2015

Kabul Hussain Choudhury

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 27-05-2019

Acts Referred:

Indian Penal Code, 1860 — Section 304(B), 498(A)
Code Of Criminal Procedure, 1973 — Section 313
Evidence Act, 1872 — Section 106, 113, 113(B)

Citation : (2019) 05 GAU CK 0099

Hon'ble Judges : Rumi Kumari Phukan, J

Bench : Single Bench

Advocate : H.R.A. Choudhury, I.A. Hazarika, N.H. Laskar, A. Ahmed, M.P. Goswami

Final Decision : Partly Allowed

Judgement

1. Heard the Mr. HRA Choudhury, learned senior counsel appearing for the accused/appellant as well as Mr. MP Goswami, learned Addl. P.P., Assam for the State respondent.
2. This appeal is preferred against the judgment and order dated 28.07.2015, passed by the learned Addl. Sessions Judge (FTC), Cachar at Silchar in Sessions Case No.64/2014, whereby the accused/appellant has been convicted u/s.304 (B) IPC and sentenced him to suffer rigorous imprisonment for 10 years and to pay fine of Rs.5,000/-, in default simple imprisonment for six months.
3. Cousin of informant, Abdul Haque, Smt. Lilima Begum was given in marriage with the accused about 1 and half months ago. Prior to date of occurrence on 15.04.2009 at 7-30 pm, the informant received information over phone that Lilima has died. Hearing the news he along with others went to the house of the accused and witnessed marks of wound on the head, face, neck and other parts of her body, which had given rise to suspicion that Lilima was killed by the accused and his family members.

4. Alleging as above the informant lodged the ejahar, Ext.1 on 15.04.2009 before the officer-in-charge of Sonai P.S, on that basis of which the Sonai P.S. Case No.91/2009, u/s.302 IPC was registered and investigated into by the police and upon completion of the investigation, the I.O. submitted charge sheet against the present accused u/s. 304-B IPC. On appearance of the accused and after perusal of the materials available before the learned trial Court and hearing the learned counsels for the prosecution as well as the defence, framed the charge u/s.302/304-B of the IPC against the accused and the same were read over and explained to him, to which he pleaded not guilty and claimed to be tried.

5. During the trial, the prosecution examined as many as eleven witnesses including the M.O and the I.O. and also exhibited some documents and the defence cross-examined the prosecution witnesses. Upon closure of the prosecution evidence, the statements of the accused u/s.313 CrPC was recorded wherein he denied the charges leveled against him. The accused however declined to adduce any evidence in his defence.

6. Upon conclusion of the trial, the learned Addl. Sessions Judge (FTC), Cachar at Silchar, by its judgment and order dated 28.07.2015, convicted and sentenced the accused as stated above.

7. Being aggrieved and dissatisfied with the impugned judgment and conviction, the present appeal has been preferred by the accused/convict on the ground, inter alia that the learned Sessions Judge committed grave error in law as well as of facts in convicting the accused u/s. 304-B IPC and the same is liable to be set aside and quashed, the learned Trial Court erred in convicting and sentencing the appellant on the basis of evidence on record in as much as there was no corroborating evidence to disclose the fact of torture meted out to the deceased by the accused, there was no evidence to show that soon before her death, the deceased was subjected to cruelty and harassment, etc. and accordingly prayed for setting aside and quashing the conviction and sentence and to acquit the accused/appellant from the charge.

8. I have heard the learned counsel for the parties and also gone through the evidence on record and perused the materials available before me.

9. The evidence of the Doctor being crucial in the instant case, let us peruse the evidence of the Medical Officer (PW. 9), Dr. Gunojit Das who conducted the post mortem examination. In his evidence he has deposed that on 16.04.09, he was attached with the Silchar Medical College Hospital and performed the post mortem examination over the dead body of deceased Lilima Begum, in connection with Sonai P.S. Case No. 91/2009 and found the following injuries:-

"(i) Reddish brown of size 10 x 8 c.m. over sterna area in middle part.

(ii) Bluish bruise of 6 x 5 c.m. at the upper lateral thigh surrounded by diffuse swelling.

(iii) Contusion of left parietal scalp 10 x 8 c.m. found on reflection.

(iv) Soft tissue contused under injury No (i).

(v) Contusion of soft tissues on right side upper part found on reflection.

(vi) Laceration in the middle part of liver interiorly (slit laceration) 7 x 0.5 x 1.5 c.m size.

Brain membranes found congested. Brain also found congested. In the Thorax-Pleurae found congested. Larynx-Mucosa found congested, filled with froth mixed with blood. Both the lungs found congested and oedematous. On cut, frothy oedema fluid mixed with blood exude from cut surfaces (pulmonary oedema).

In the abdomen - there was approximate one litre of liquid blood in peritoneal cavity. Stomach found congested externally. On cut, mucosa found congested and showed multiple palely ulcerated appearance containing 200 ml of thick cream coloured fluidly material mixed with rice food rendering kerosene like smell. Large intestine congested externally contained digested food materials. Stomach with its contents- Approximately 500 grams of liver tissue and one kidney preserved in saturated solution of common salt. Investigating officer was advised to collect the same from the department for onwards submission to the Forensic Science Laboratory, Guwahati for chemical analysis."

10. Ext.3 is the post mortem report and Ext. 3(1) is the signature of PW.9. According to the Doctor, the approximate time since death was 16 to 24 hours and all the injuries were ante mortem in nature, caused by blunt trauma and the injury No.(vi) is homicidal in nature. Opinion regarding cause of death was kept pending till receipt of viscera report from the Forensic Science Laboratory, Guwahati and after going through the report of the Forensic Science Laboratory (Ext.5), the PW.9 opined that the cause of death of the deceased was due to shock following injuries sustained in the abdomen which was ante mortem, caused by blunt trauma superadded by poisoning with organochloride insecticide.

11. The report from the Forensic Science Laboratory, Guwahati (Ext.5) reveals that after examining the viscera of the deceased it gave positive tests for Organochloride Insecticide. In cross-examination, the PW.9 denied the defence suggestion that because of taking pesticide, the injury Nos.(i) to (vi) mentioned in the Ext.3 were sustained by the deceased.

12. The informant Abdul Hoque Barbhuiyan as PW.1 stated in his evidence that on 15.04.09, hearing the news of death of the deceased at her matrimonial home by telephone, who was his cousin sister, he along with Abdul Hoque, Rafiquddin, Najrul Islam, mother of the deceased Ayar Un Nessa went to the house of the accused and found the dead body lying on a bed with multiple injuries on the dead body of the deceased. None of the family members and the accused were present in the house. Then the PW.1 lodged the FIR Ext.1 and Ext.1(1) is his signature. The marriage between the accused and the deceased took place about 1½ months prior to the occurrence. Two days before the incident i.e. on 13.04.2009, the accused and deceased came to the house of her

mother and left on 14.04.2009 and on 15.04.2009, the news of death of the deceased was received. The mother of the deceased informed the PW.1 that the accused used to demand one bike and a fridge from her and even on 13.04.2009, he made those demands. He has denied the suggestion of the defence side that they have forcibly gave marriage of the deceased sister to the accused for which the girl come back to her parental house right after the marriage.

13. The mother of the deceased Ayar Un Nessa is examined as PW.5 and the brother of the deceased Nazrul Islam Barbhuiyan examined as PW.4 and both of them have given similar statement in their evidence that deceased Lilima Begum was married to the accused and after the marriage, when she came to their house, she informed that her husband and in-laws were torturing her on the demand of fridge and bike etc. The deceased came to their house two/three times and narrated the matter of demand and torture to her. For the last time on 13.04.2009, when the deceased and the accused came to their house, PW.5 assured the accused person that she will give him the bike and fridge within two months, as she had shortage of money at that time. On 14.04.2009 both the accused and deceased left their house in the evening and on the following day i.e. on 15.04.2009 at about 7/7:30 P.M., they got the information that Lilima had expired in her matrimonial house. On receiving the information, both of them along with other relatives and villagers went to the house of the accused and found Lilima lying dead on bed. They noticed several injury marks on her body and the accused and other family members were absent from their house. The matter was informed to the police. They stated that the deceased was given marriage with the accused 1½ months prior to the occurrence and the accused remarried after three months of the occurrence.

14. PW.2 Rafiquddin Barbhuiyan also accompanied the informant and the mother of the deceased to the house of the accused after receiving the information regarding the death of the deceased and he was present at the time of doing inquest on the dead body. Ext.2 is the inquest report prepared by the Magistrate and Ext.2(1) is his signature thereon. This witness also saw injury marks on the body of the deceased.

15. PW.3 Moina Mia Barbhuiyan also went to the house of the accused along with others after receiving the information regarding the death of the deceased.

16. Sister-in-law of the deceased namely Sayna Begum/PW.6 and the younger sister of the deceased Rina Begum Choudhury/PW.7 also stated that Lilima was married to the accused about 1½ months of the occurrence and during her marital life, the deceased came to her parental house for 2/3 times and she complained that her husband and in-laws harassed her demanding freeze and bike and they used to console her to remain cool and not to quarrel.

17. PW.8 Azmal Hussain Laskar was declared hostile by the prosecution and his evidence has no bearing.

18. After receipt of the FIR, the O/C. of the Sonai P.S., entrusted PW.10 Rakesh Nath, ASI of Police to do the investigation of the case. Accordingly he visited the place of occurrence, drew up the sketch map, arranged for inquest of the dead body and sent the dead body of post mortem examination and recorded the statement of witnesses. He also sent the viscera for chemical examination to the Forensic Science Laboratory, Guwahati and after completion of the preliminary investigation, handed over the case diary to the O/C. of the Sonai P.S. PW.10 has proved certain contradiction of witness PW.1 and PW.2 that they did not state before him that on the day of occurrence while they arrived, they did not find any person near the deceased Lilima. The PW.5 and PW.6 also did not state before him that the deceased was tortured by the accused due to non-fulfillment of his demand of dowry.

19. PW.11, Someswar Konwar, SI of Police submitted the charge sheet of the case. Ext.7 is the charge sheet and Ext.7(1) is his signature. He has proved the statement of PW.8 that he did not state before him that the accused tortured his wife Lilima for non-fulfillment of demand of dowry.

20. Primarily the prosecution case has been assailed by the learned counsel for the appellant that there being no evidence to show that the deceased was subjected to cruelty soon before her death, the conviction u/s. 304-B IPC is not sustainable. Moreover it is contended that there is lack of evidence to prove the offence of cruelty within the meaning of Section 498(A) IPC against the accused/appellant which is one of the component of the offence u/s. 304-B IPC, the accused/appellant cannot be roped with the alleged offence.

21. Per contra, according to the learned Addl. P.P., the evidence on record is sufficient to hold that the victim was subjected to cruelty on the demand of dowry and prior to one day of the incident also, the mother of the victim assured the accused to provide him the demanded articles, which itself indicates that there was a demand for dowry. On the next, it is submitted that during the short span of marriage, there was demand of dowry with torture to the victim and the same is sufficient to hold that soon before her death, she was subjected to cruelty.

22. In view of such rival submission, let us appreciate the matters on record on proper perspective of facts and law.

23. So far as the facts of the case, it emerges that the deceased died after small span of marital life of 1½ months and during this period, she used to visit her parental house two/three times and complained her family members about such dowry demand made by the accused coupled with torture. Now one and half month period is itself a very small duration and in that period itself, deceased complained of torture by her husband on the demand of dowry. On the other hand, even prior to the day of occurrence when she went to her parental home, her mother had to assure the accused that his demands will be fulfilled within two months. That being so, it can be safely held that soon before her death, she

was subjected to cruelty.

24. The words "soon before her death" as defined u/s. 304-B IPC, does not postulate any specific period. The definition of Section 304-B of the IPC reads as follows: 304B. Dowry death.-

(1) Where the death of a woman is caused by any burn 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.

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

When the above ingredients are fulfilled, the husband or his relatives, who subjected to such cruelty or harassment, can be presumed to be guilty of offence u/s.304-B IPC. In order to see conviction u/s.304-B IPC against a person for the offence of dowry death, the prosecution is obliged to prove that: 'the death of a woman was caused by burns or bodily injury or had occurred otherwise than under normal circumstances; the death should have occurred within seven years of marriage; the deceased was subjected to cruelty or harassment by her husband or by any relative of the husband; such cruelty or harassment should be for or in connection with demand of dowry; and to such cruelty or harassment the deceased should have been subjected soon before her death'.

The word dowry means any property or valuable security given or agreed to be given in connection with the marriage.

Dowry death means death caused "otherwise than under normal circumstances" and such death means not in the usual course but apparently under suspicious circumstances.

25. In the instant case, as we have found that the victim complained torture on the demand of dowry prior to her death and the victim was found dead in her matrimonial house under suspicious circumstances with bodily injuries. The witnesses have marked several injuries on the deceased and the post mortem report also supported such contention. Finding of several injuries on the body of the deceased and nobody was found near the dead body of the deceased while the witnesses arrived, is a clear indicative of torture meted upon the deceased prior to her death. Such a finding in the post mortem report even without narrating all details about the torture by the witnesses, speaks a lot about the torture inflicted upon the deceased. On the other hand, it is also noted that the accused person raised no any specific plea as regard the death of his wife and chose to remain mum while giving statement u/s.313 CrPC, without explaining the reason/cause of death of his wife. Being the husband, he is to explain all the

circumstances properly and failure on his part itself indicates the blameworthy conduct of the accused, to necessarily hold him guilty u/s. 304-B IPC.

26. The accused is under an obligation to give plausible answer to the questions put to him under Section 313 Cr.P.C. to explain the circumstances appearing against him in a given case and he cannot be excused for his irresponsible answer. In *State of Madhya Pradesh vs Ramesh and another* (2011) 4 SCC 786, *Sunil Mahadeo Yadav vs State of Maharashtra* reported in (2013) 15 SCC 177 and *Ashok Debbarma Alias Achak Debbarma* reported in (2014) 4 SCC 747, it has been categorically held that for silence of accused and failure to specific denial the incriminating circumstances, an adverse reference can be drawn against the accused. It is also held that inference of guilt can be drawn for the failure to explain the incriminating material while examining the accused under Section 313 of the Code of Criminal Procedure and it would provide as a missing link to prosecution case. In paragraph 36 of the case of *Sunil Mahadeo Jadhav* (supra), it has been held that "Section 106 of the Evidence Act states that when any fact is especially within the knowledge of any person, the burden of providing that fact is upon him."

The accused/appellant in the present case being the husband of the deceased remained silent as to the cause of death of his wife and under what circumstances she sustained such serious injuries in his house. For his conduct and silence on the entire issue an adverse inference can be drawn against him.

27. Under the provision of Section 113, Evidence Act the Court is bound to raise certain presumption about the guilt of commission of dowry death by any person who has been proved to have subjected the women concerned to cruelty soon before her death, when a dowry death occurred. The Section 113(B) Evidence Act read as follows:

Section 113(B): Presumption as to dowry death- when the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person has caused the dowry death.

Explanation- For the purpose of this section, "dowry death" shall have the same meaning as in Section 304(B) of Indian Penal Code (45 of 1860).

Under the provision of Section 113 Evidence Act if a dowry death occurs and the husband or her relative of the deceased who subjected her to such cruelty on the demand of dowry, a legal presumption shall be drawn against the husband for causing dowry death. In such matter burden shift to the accused to prove his innocence by rebuttal evidence. Apparently, in the instant case the accused appellant has failed to rebut the legal presumption.

Section 498A. 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.

28. The explanation (b) indicates that such a harassment of a woman with a view to coercing the deceased and her relatives to meet any unlawful demand for any property amounts cruelty. As has been discussed above the deceased was subjected to such harassment with a view to procure illegally certain article as dowry like scooter, refrigerator etc. Both physical and mental harassment on the demand of dowry or injury to the health amounts to cruelty. Now it is the case of prosecution that by demanding certain articles in dowry, the deceased wife was tortured/ harassed by the accused appellant. The accused/appellant never tried to book the real culprit, if any, rather his conduct reveals that he is quite indifferent for death of his wife and he entered into marriage again after three months.

29. In view of all above, the prosecution has been able to prove the charge under Section 304(B) IPC and the learned trial court has rightly convicted the accused under said section of law. However, considering all entirety of the matter, the sentence is found to be on higher side. Accordingly, while maintaining the conviction under Section 304(B) IPC the sentence is reduced to seven years and the fine amount will remain the same.

30. Appeal is partly allowed to the extent as indicated above.

31. Send down the LCR along with a copy of this order.