
(2012) 06 CHH CK 0031
In the Chhattisgarh High Court
Case No : Criminal Appeal No. 1006 of 1997

Lala Prasad @ Lokeshwar Kesarwani and Others	APPELLANT
Vs	
State of M.P.	RESPONDENT

Date of Decision : 18-06-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Dowry Prohibition Act, 1961 — Section 2, 3, 4
Evidence Act, 1872 — Section 113B
Penal Code, 1860 (IPC) — Section 120B, 201, 302, 304B, 34

Citation : (2012) 3 CGBCLJ 495

Hon'ble Judges : Pritinker Diwaker, J

Bench : Division Bench

Advocate : H.S. Dubey and Mr. Avinash Mishra, for the Appellant; Vaibhav Goverdan, P.L. for the State, for the Respondent

Judgement

Pritinker Diwaker, J.—This appeal arises out of judgment and order dated 06.05.1997 passed by the Second Additional Sessions Judge, Raigarh in Sessions Trial No. 224/1995 convicting the accused/appellant No. 1 under Sections 304B, 201, 498A, 120B IPC and Section 4 of the Dowry Prohibition Act and appellants No. 2 and 3 under Sections 304B/34, 201/34, 498A/34, 120B IPC and Section 4/34 of the Dowry Prohibition Act and sentencing them to undergo rigorous imprisonment for ten years, four years, two years, two years and three months respectively. Brief facts of the case are that marriage of accused/appellant No. 1 Lala Prasad Kesarwani was solemnized with deceased Seema sometime in the year 1992 and she died on 18.06.1995 in her matrimonial house after suffering 95% burn injuries. Merg intimation (Ex. P/27) was given on 18.06.95 itself at 9.00 p.m. by appellant No. 1 and after merg enquiry, on 20.06.95, FIR (Ex. P/19) was registered against the accused persons under sections 302, 201/34 IPC and 3 and 4 of the Dowry Prohibition Act. After investigation, challan was filed on 05.09.95 under Sections 302, 201, 120B, 498A IPC and 3 & 4 of the Dowry prohibition Act. However, learned trial Judge has framed charges under

Sections 302, 201 and 304B IPC.

2. In order to establish the guilt of the accused persons, the prosecution has examined 19 witnesses. Statements of the accused/appellants were also recorded u/s 313 of the Cr. P.C. in which they denied the charges leveled against them and pleaded their innocence and false implication in the case. Three defence witnesses have also been examined.

3. After hearing counsel for the parties, the trial court has acquitted the accused/appellants u/s 302 IPC but has convicted and sentenced them as mentioned above. Hence this appeal.

4. Contention of Shri Dubey, counsel for the appellants is that even if the entire case of prosecution is taken as it is, offence u/s 304B is not made out against the accused/appellants because the basic ingredients of the said section are completely missing. He further submits that none of the witnesses has stated about the demand of dowry made by the accused/appellants. He further argued that the accused/appellants can not be convicted u/s 201 IPC because the charge under the said Section was made against the accused/appellants with the aid of Section 302 and once they are acquitted u/s 302 IPC they cannot be convicted separately under the said Section. He further submits that present is a case where while saving his wife, accused/appellant No. 1 also suffered burn injuries and this shows that he had made all the efforts to save the life of his wife. It has been argued that at best accused/appellants can be convicted u/s 498A IPC for which appellant No. 1 has already remained in jail for about two years and three months, appellant No. 2 for ten months whereas appellant No. 3 for seven months.

5. On the other hand, supporting the impugned judgment it has been argued by Shri Goverdhan, State counsel that the conviction of the accused/appellants is strictly in accordance with law. He submits that there is sufficient evidence on record to confirm the conviction of accused/appellants u/s 304B IPC.

6. Lakhan Lal Yadav (PW-1) witness of memorandum seizure and inquest, has supported the prosecution case. He has also stated that appellant No. 1 had suffered burn injuries and remained hospitalized for 2-3 days. Nanki Bai (PW-2) was working as sweeper in the Primary Health Centre, Sarangarh is a witness of seizure and Visra. Shesh Dev Singh Thakur (PW-3) neighbour of accused/appellants has not deposed anything against accused/appellants. Mahadev (PW-4) has stated that on the date of incident, he heard someone shouting "Bachao" from the house of accused/appellants and after he saw accused/appellants shouting "aag laga liya, aag laga liya". He has stated that there used to be some quarrel between appellant No. 1 deceased and other accused persons but he could not tell the reason as to why they used to quarrel and he was also not aware about the behavior of accused/appellants with deceased. He has stated that for the first time he has disclosed the fact of quarrel in the court. Ram Prasad (PW-5) has not stated anything against the accused/appellants.

Khamman Prasad Kesarwani (PW-6) is father of deceased has stated that appellant No. 1 is husband of the deceased, appellant No. 2 Kaushalya Bai is mother in law of the deceased whereas accused/appellant No. 3 Gopal is brother in law of the deceased. He has stated that marriage of the deceased was solemnized with accused/appellant No. 1 in the year 1992 and dowry was given as per his capacity. He has stated that after about 4-5 months of the marriage when he went to the house of deceased she did not disclose anything to him but thereafter she went back to her maternal house and subsequently she informed him that the accused/appellants used to harass her for demand of dowry. He has stated that when for the second time he went to bring his daughter, accused/appellants 2 & 3 quarreled with him by saying that less dowry was given and that he used to take the deceased time and again and on that day also accused/appellant No. 1 had quarreled with him. He has stated that after 1.5 years when the deceased was in her maternal house, accused/appellant No. 1 came to take her with him he demanded Rs. 10,000/- from him by saying that his business was not well established and then he gave Rs. 10,000 but till date the said amount was not returned by the accused/appellant No. 1, He has stated that about 6 months prior thereto accused/appellant came to his house to take the deceased with him and made a demand of Rs. 15,000 for his business and he gave Rs. 8,000 from his side and remaining Rs. 7, 000 was arranged by him from his neighbour Lakhan but even the said amount of Rs. 15,000 was not returned by the accused/appellant. He has stated that after receiving the information about illness of his daughter when he reached Sarangarh, dead body of the deceased was being taken to the cremation ground. He has stated that whenever deceased used to visit his house, she informed that she was harassed for demand of dowry and that he had a talk with accused/appellant in this respect he has stated that once he had gone along with one Bal Govind to the house of accused/appellant. He has stated that younger brother of one Ganesh had informed him and his brother that deceased was weeping and that the appellants were quarreling with her and therefore he made a request to him to bring back his daughter. He has also stated that one half torn letter of his daughter (Ex. P/9) was seized by the police. In cross examination, he has stated that he had not kept any record so far as the amount which was given by him to the accused/appellant No. 1 for his business. He has further stated that even after receiving-the information from the deceased about the fact of cruelty he had not lodged any report. In para 18 of his statement he has stated that the victim had given Rs. 10,000 and 15,000 to the accused/appellant and the statement to this effect is being made by him for the first time in the Court. Bal Govind (PW-7) has stated that marriage of deceased Seema was solemnized with accused/appellant No. 1 in the year 1992 and he was informed by father of the deceased namely Khamman (PW-6) that his daughter is being harassed by accused persons. He has stated that he had gone along with Khamman to the house of accused/appellants and had a talk with them. Girja Bai (Pw-8) grand mother of deceased has made general allegation against the accused/appellants by saying that deceased had informed her that accused/appellants used to beat

her on the pretext of demand of dowry. She too has however admitted that for the first time she is making allegation in the Court. Shambhu Kesarwani (PW-9) is a local resident of village Saragaon where father of the deceased resides, has stated that one year back when he had gone to the house of deceased she was all alone, crying and she informed him that she was being subjected to harassment by accused/appellants.

Dr. S.K. Tiwari (PW-10) conducted the post mortem of deceased vide Ex. P/11 has stated that on seeing the dead body it appears that she was burnt after being killed and the burn injury was superficial, he was further found fracture of thyroid cartilage and both the lungs were congested. He has stated that cause of death was asphyxia due to obstruction of air passage by mechanical violence over the neck. However, in cross examination he has stated that cause of death was asphyxia and this could be on account of suffocation because of smoke. The doctor has also stated that he had examined the accused/appellant vide Ex. P/12 and found burn injuries.

Shivnath Tandon (PW-11) is the Constable who took the body of deceased for post mortem and after postmortem handed over the same to the relatives. Abhiraj Singh (PW-12) is the Constable who took the articles for FSL. Ravi Shankar Pandey (PW-13) is the neighbour of Khamman (PW-6) i.e. father of deceased has stated that once he had gone to the house of deceased and saw her weeping and she informed him that the accused persons do not talk to her and she further asked him not to disclose this fact to her father. Lakhan Lal (PW-14) has stated that he gave Rs. 7,000 to Khamman (PW-6), he has stated that deceased informed him that accused/appellants use to harass her. Sanjay Kesarwani (PW-15) took the photographs of the dead body of the deceased. Damodar Prasad Guru (P W-16) is the Patwari who prepared spot map Ex. P. 26. M.S. Parihar (PW-17) recorded the merger intimation Ex. 27 and helped in the investigation, Bahuran Ali (PW-18) has not stated anything against the appellants. S.S. Shukla (PW-19) is the Investigating Officer.

Dharam Pal (DW-1) is neighbour of the accused/appellants has stated that when he came to know that wife of appellant No. 1 was burnt, he went to his house, saw the dead body of deceased and then asked the accused/appellants to lodge the report. He has stated that accused/appellant No. 1 was also taken to hospital as he suffered burn injuries. He has further stated that after sometime he could hear the noise of father in law of accused/appellant No. 1 and some other persons who had come from village Saragaon and they were threatening appellant No. 1 by saying that they are the people of "Mahant".

Ram Lal (DW-2) is also the neighbour of accused/appellants has stated that after coming to know that wife of the accused/appellant No. 1 was burnt, he went to the house of accused/appellant and saw the dead body of the deceased. Likewise, Naresh Kumar Kesarwani (DW-3) also went to the house of accused/appellants after the incident and saw the dead body.

Section 304B IPC deals with dowry death which reads as follows:

304-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.

Explanation-For the purposes of this sub section, "dowry" shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(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.

7. The provision has application when 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 the demand for dowry. In order to attract the application of Section 304B IPC, the essential ingredients are as follows:

- i. The death of a woman should be caused by burns or bodily injury or otherwise than under normal circumstances.
- 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.
- v. Such cruelty or harassment is shown to have been meted out to the woman soon before her death.

Section 113B of the Indian Evidence Act, 1872 (in short "the Evidence Act") is also relevant for the case at hand. Both Section 304B IPC and Section 113B of the Evidence Act were inserted by the Dowry Prohibition (Amendment) Act 43 of 1986 with a view to combat the increasing menace of dowry death. Section 113B reads as follows:

113-B. Presumption as to dowry death-when the question is whether a person has committed the dowry death of a woman and it 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 had caused the dowry death.

Explanation-For the purposes of this section, "dowry death" shall have the same

meaning as in Section 304B of the Indian Penal Code (45 of 1860).

Presumption u/s 113B is a presumption of law. On proof of the essentials mentioned therein, it becomes obligatory on the court to raise a presumption that the accused caused the dowry death. The presumption shall be raised only on proof of the following essentials:

1. The question before the Court must be whether the accused has committed the dowry death of a woman. (This means that the presumption can be raised only if the accused is being tried for the offence u/s 304B IPC).
2. The woman was subjected to cruelty or harassment by her husband or his relatives.
3. Such cruelty or harassment was for, or in connection with any demand for dowry.
4. Such cruelty or harassment was soon before her death.

8. A conjoint reading of Section 113B of the Evidence Act and Section 304B of IPC shows that there must be material to show that at soon before her death the victim was subjected to cruelty or harassment. Prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of "death occurring otherwise than in normal circumstances". The expression "soon before" is very relevant where Section 113B of the Evidence Act and section 304B IPC are pressed into service. The prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case the presumption operates. Evidence in that regard has to be led by the prosecution "soon before" is a relative term and it would depend upon circumstances of each case and no strait jacket formulae can be laid down as to what would constitute a period of soon before the occurrence.

9. When the aforesaid legal position as applied in the present case, this court find it difficult to uphold the conviction of the accused/appellants u/s 304B IPC. Khamman Prasad Kesarwani (PW-6) father of the deceased has not made any specific allegation against the appellants for demand of dowry. He has made only general allegations to the effect that the appellants used to harass the deceased for demand of dowry. According to him, there used to be some quarrel between the accused/appellants and his daughter and that accused/appellant No. 1, husband of the deceased made a demand of Rs. 10,000 for his business and at the later stage also demand of Rs. 15,000 was made for his business. Likewise, from the statement of Girija Bai (PW-8) grand mother of the deceased and Bal Govind (PW-7) it cannot be held that the deceased was subjected to cruelty for demand of dowry. Further, there is no evidence on record to show that soon before the death of the deceased she was subjected to cruelty or harassment by the accused/appellants. The evidence adduced by the prosecution in respect of so called demand of dowry does not inspire full confidence of this court to uphold the conviction of the appellants under sections 304B and 120B IPC. Likewise,

there is no evidence to convict the accused/appellants u/s 120B IPC. However, considering the material available on record, the fact that the deceased was harassed up to some extent by the accused/appellants, they are liable to be convicted u/s 498A and 498A/34 IPC. In conclusion, the appeal is partly allowed. Impugned judgment convicting and sentencing the accused/appellant No. 1 under sections 304B, 201 and 120B of IPC and section 4 of Dowry Prohibition Act and appellant No. 2 & 3 under Sections 304B/34, 201/34, 120B IPC and Section 4/34 of the Dowry Prohibition Act, is set aside. They are acquitted of the charges levelled against them. However, their conviction u/s 498A and 498A/34 of the IPC is concerned, same is maintained. So far as the sentence part is concerned, appellant No. 1 has already remained in jail for about two years and three months, appellant No. 2 for ten months whereas appellant No. 3 for seven months, considering their detention period, the fact that the incident had taken place in the year 1995, appellant No. 1 and 3 might be more than 50 years of age whereas appellant No. 2 might be aged about 75 years of age, their sentence is reduced to the period already undergone by them. Accused/appellants are reported to be on bail.

Their bail bonds stand discharged.