

(2013) 04 OHC CK 0022

In the Orissa High Court

Case No : Criminal Revision No. 126 of 2013

Mir Masuk Alli and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 17-04-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 216, 228

Dowry Prohibition Act, 1961 — Section 4

Penal Code, 1860 (IPC) — Section 302, 304, 34, 406, 498(A)

Citation : (2013) CriLJ 3427 : (2013) 2 OLR 24

Hon'ble Judges : B.K. Nayak, J

Bench : Single Bench

Advocate : M.B. Das, L. Pradhan, Sk. Akhmal, B.C. Sahoo, D. Mohanty, B. Roy, K. Vicky and L. Sahoo, for the Appellant;

Judgement

B.K. Nayak, J.—Order dated 22.1.2013 passed by the 2nd Additional Sessions Judge, Cuttack, in ST Case No. 432/2011 directing framing of additional charges under Sections 304-B, IPC and 4 of D.P. Act against the petitioners is challenged in this Criminal Revision. The petitioners were facing trial in the sessions case for charges under Sections 498(A), 302, 406 and 34 of IPC, for which Police had filed charge sheet even though FIR was lodged for commission of offences under those sections along with Sections 304-B, IPC and 4 of D.P. Act. The Investigating Officer however did not submit charge sheet for the offences under Sections 304-B, IPC and 4 of D.P. Act. At the stage of argument in the sessions case, a petition was filed on behalf of the prosecution u/s 216, Cr.P.C. for addition of charges under Sections 304-B, IPC and 4 of D.P. Act. The impugned order has been passed accepting the prayer of the prosecutor and directing for addition of charges under Sections 304-B, IPC and 4 of D.P. Act by the Court below on the basis of statements given by P.Ws. 1 and 9, the father and mother of the deceased respectively.

2. Learned counsel for the petitioners submits that the statements of P.Ws. 1 and 9, which were taken into consideration by the Court below, only relate to a bald

statement by them to the effect that three months before the death, the deceased had made a phone call to her mother stating that the accused persons were demanding a sum of Rs. 3.00 lakhs from her and that she was not being provided with food. It is also his submission that FIR was lodged by P.W.1 on 5.6.2011, i.e., one day after the death of the victim, though on the previous date, i.e., on the date of death of the victim, P.Ws. 1 and 9 have furnished their opinion in the inquest report that the death of the deceased occurred due to accidental burn while cooking food. It is also his submission that the main ingredient of the offence u/s 304-B, IPC that the deceased was subjected to cruelty soon before her death on the ground of demand of dowry is wanting as there is absolutely no evidence in support thereof, and therefore, framing of additional charges is bad in law.

3. Learned Additional Standing Counsel contents that in view of the evidence of P.Ws. 1 and 9 to the effect that three months before of her death, the deceased made a phone call to her father (PW.1) and intimated about the demand of dowry by the petitioners, there is nothing wrong in the impugned order framing additional charges.

4. The admitted prosecution case is that the deceased eloped with a Muslim boy on 14.12.2010 with a cash of Rs. 2.00 lakhs and some gold ornaments from the house and later she married the said boy and continued to stay in the house of the in-laws. The evidence of P.Ws. 1 and 9 reveal that they never lodged report before the Police about the elopement or kidnapping of the deceased. It only transpires from their evidence that on 9.3.2011 the deceased informed P.W.1 over telephone that her husband and in-laws were demanding a sum of Rs. 3.00 lakhs. Neither P.W.1 nor any of his family members ever visited the deceased in her matrimonial home nor did the deceased ever come to the house of her parents after elopement. The evidence reveals that the deceased died on 4.6.2011 in the hospital for burn injuries after four days of hospitalization and on that day P.W.1 and his family members came to the hospital knowing about her death and in their presence, inquest was held by the Mangalabag Police, who recorded the statements of P.Ws.1 and 9. In the inquest report as well as their statements the said P.Ws. stated that while engaged in cooking the deceased caught fire on her wearing apparel accidentally and received burn injuries. It also transpires from the evidence of P.W.1 that except on 9.3.2011 on no other occasion they received any call or information from the deceased. P.W.9 has stated that three months after her elopement, the deceased had made a phone call and informed that her husband and in-laws were demanding Rs. 3.00 lakhs and were not providing food to her. P.W.1 does not state that during phone call on 9.3.2011 the deceased informed that her in-laws were not providing food to her.

5. It is thus clear that only on one occasion, i.e., three months before her death and about four months after her elopement, the deceased had made a solitary phone call to her parents when she disclosed that the petitioners were

demanding Rs. 3.00 lakhs. There is no material to the effect that any torture or ill-treatment was meted out to the deceased within three months between 9.3.2011 and the date of her death. Ill-treatment to a married lady by the in-laws or husband soon before her death for demand for dowry is the essential ingredient of the offence of dowry death. Of course, the expression "soon before her death" is not susceptible to precise definition. It varies from case to case depending upon the peculiar facts and circumstances of the case. Admittedly it was a love marriage of the deceased with petitioner No. 1 and she eloped with him and married him without the knowledge of her parents. Except the solitary statement of P.W.9 that during phone call on 9.3.2011 the deceased stated that the petitioners were not providing food to her, which is also not supported by P.W. 1, there is no allegation of any other cruelty or ill-treatment or harassment of the deceased in connection with demand of dowry. Considering the facts and circumstances of the case, the alleged harassment in the form of not providing food three months before the death cannot be said to be "soon before death". The other witnesses, who were neighbours, do not depose any sort of ill-treatment meted out to the deceased by the petitioners. On the contrary, the day before lodging FIR, P.Ws. 1 and 9 have stated before Police and in the inquest report that the deceased died due to accidental fire while cooking food.

6. While framing charge u/s 228, Cr.P.C. the Court is to take into consideration the record of the case and the documents submitted therewith, which essentially includes the statement of witnesses recorded by the Investigator, so as to find out whether there is sufficient ground for proceeding against the accused. But at a stage when prosecution evidence has already been recorded and the Court is called upon to consider framing of additional charges, it is the totality of the evidence under oath available on record, which is to be taken into consideration and not the statements of witnesses recorded by the investigator during investigation to find out whether there is justification for framing additional charges. The evidence on record does not make out a prima facie case that soon before her death the deceased was subjected to cruelty and harassment in connection with demand of dowry. Therefore, no additional charge u/s 304-B, IPC could be framed against the petitioners. However, in view of the consistent statements of P.Ws. 1 and 9 that the deceased during her phone call intimated that the petitioners were demanding dowry, no exception to the framing of additional charge under 4 of D.P. Act can be taken. In the result, this Criminal Revision is partly allowed and the impugned order insofar as it relates to framing of additional charge u/s 304-B, IPC is concerned, is set aside.