
(2013) 10 GAU CK 0021
In the Gauhati High Court
Case No : Criminal Appeal No. 212 of 2012

Sajal Kanti Dutta and Others

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 31-10-2013

Acts Referred:

Citation : (2014) 1 DMC 817 : (2013) 5 GLT 767

Hon'ble Judges : P.K. Saikia, J; Anima Hazarika, J

Bench : Division Bench

Advocate : S.K. Medhi, Mr. J. Das and Mr. A. Das, for the Appellant; B. Bhuyan, Addl. PP, for the Respondent

Judgement

Anima Hazarika, J.—The three appellants herein called in question the legality of the judgment and order dated 7.9.2012 passed by the learned Additional Sessions Judge, (FTC), Karimganj in Sessions Case No. 39/2010, convicting the appellants u/s 304B/302 IPC and sentencing them to undergo imprisonment for life and to pay a fine of Rs. 2,000/- each, in default, simple imprisonment for further period of 3 months. Heard Mr. S.K. Medhi, learned counsel appearing for the appellants. Also heard Ms. B. Bhuyan, learned Addl. Public Prosecutor, Assam appearing for the State respondent.

2. The prosecution case in brief is that an FIR was lodged by Sri Subhendu Sekhar Das on 24.10.2006 before the Officer-in-Charge (O/C for short), Badarpur Police Station, Badarpur alleging that on that day itself at about 6-30 PM, accused Manna Dutta informed his maternal aunt Sathi Suklabaidya over phone that if they wanted to see his sister Ruma Dutta alive, they should go to the Civil Hospital forthwith. After getting the information, the informant along with his parents, his maternal uncle and aunt and other neighbours rushed to the civil hospital and found his sister dead. He believed that the accused persons named in the FIR had killed his sister and took her to the civil hospital. Since the solemnization of marriage, the accused persons had been torturing his sister for dowry. She had continued to tolerate such torture for the last 3-4 years and was

maintaining her family life. She gave birth to a male child who has attained the age of 27 years. During her occasional visit to her parental house, his sister used to tell them that the accused persons had tortured her on the ground that inadequate dowry had been given at her marriage.

3. Upon receipt of the FIR so lodged, police registered a case being Badarpur PS Case No. 151/2006 u/s 304(B) IPC and started investigation. On completion of investigation, charge sheet was submitted u/s 304(B) IPC against the accused appellants for their trial.

4. The learned Additional Sessions Judge, (FTC), Karimganj framed charge u/s 304(B) IPC. However, the learned trial Court later on framed a new charge u/s 302 IPC also. The charges so framed being read over and explained to the accused persons, they pleaded not guilty and claimed to be tried. During trial, prosecution examined eight witnesses in all including the informant, the doctor and the Investigating Officer (I/O for short); Defence case is of complete denial. Defence did not adduce any evidence.

5. Upon completion of the trial and on perusal of the materials on record including the evidence of the prosecution witnesses, learned trial Court convicted and sentenced the accused persons as indicated hereinabove. Hence, being aggrieved, all the three accused persons have preferred the instant appeal challenging the legality of the same.

6. Only point for consideration in this appeal is whether the prosecution has established its case against the accused appellants beyond all reasonable doubt that the deceased was subjected to cruelty immediately after her marriage and whether soon before her death, the deceased had been subjected to cruelty or harassment by the accused appellants in connection with demand of dowry and that the trial Court was justified in convicting them u/s 304(B)/302 IPC and sentencing them to undergo imprisonment for life as indicated hereinabove.

7. Admittedly there is no eyewitness to the occurrence and the learned trial Court convicted the appellants solely on presumption by invoking Section 113B of the Evidence Act.

8. It is a case of unnatural death, which was committed in her matrimonial house within a period of seven years of marriage of the deceased with the accused.

9. Mr. Medhi, learned counsel appearing for the appellants contended that the learned trial Court erred in drawing a presumption u/s 113B of the Evidence Act and shifting the onus of proof on the accused without the prosecution having proved the basic requirement under the said section. He has further contended that the evidence led on behalf of the prosecution to establish either the demand of dowry or harassment meted out to the deceased cannot be accepted at all because the FIR was lodged by PW 1, i.e. the brother of the deceased to harass the appellants as well as their family members after his sister committed suicide. The learned counsel has further contended that PW 1, the brother of the

deceased as well as the accused, i.e. husband of the deceased were all along present together at the time of inquest held over the dead body of the deceased, postmortem examination done by the doctor in the Civil Hospital at Karimganj and the accused appellants never tried to abscond from the scene. Mr. Medhi has further contended that the learned trial Court ought not to have convicted the accused appellants u/s 304(B) IPC drawing presumption u/s 113B of the Evidence Act considering the evidence adduced by the prosecution, who could not prove the basic requirement as laid down u/s 113B. Hence, submitted Mr. Medhi that the appellants are entitled to be acquitted of the charges framed against them.

10. Per contra, Ms. B. Bhuyan, learned Addl. PP, Assam appearing for the respondent State has contended that the learned trial Court was justified in drawing presumption against the accused; because the death of the deceased caused within seven years of her marriage and that too it was an unnatural death. Learned Addl. PP has further contended that primarily from the evidence of the prosecution witnesses it is clear that there was a demand of dowry and for not getting the dowry they asked for, the deceased was harassed mentally and physically. Thus learned trial Court was justified in coming to the conclusion that the prosecution has established its case against the accused appellants beyond reasonable doubt and therefore, the judgment of conviction may not be interfered with.

11. Perusal of the judgment of the learned trial Court below clearly shows that the learned trial Court relying upon Section 113B of the Evidence Act with regard to presumption had shifted the onus to the defence to prove their innocence in the case. Section 304B of the IPC defines dowry death which reads as follows:

304-8. 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.

12. A perusal of this section clearly shows that the basic ingredients to attract the provisions of Section 304(B) are;

(1) The death of a woman should be caused by burns or fatal injuries or otherwise than under normal circumstances;

- (2) such death should have occurred within 7 years of her marriage;
- (3) she must have been subjected to cruelty or harassment by her husband or any relatives of her husband and
- (4) such cruelty or harassment should be for or in connection with demand for dowry.

13. Along side or insertion of Section 304(B) in Indian Penal Code, legislature also introduced Section 113B of the Evidence Act, which lays down when the question as to 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 had caused the dowry death.

14. Explanation appended to Section 113B lays down:-

for the purpose of this Section "dowry death" shall have the same meaning as in Section 304(B) of Indian Penal Code.

15. On a conjoint reading of these two sections, it is clear that for drawing presumption u/s 113B of the Evidence Act, firstly, there should be death of woman otherwise than in normal circumstances, within 7 years of marriage and the prosecution is to show that soon before her death, she was subjected to cruelty or harassment in connection with any demand for dowry by persons accused of having committed the offence. Unless or until these preliminary facts are established by the prosecution, it is not open to the Court to draw a presumption against the accused invoking section 113B of the Evidence Act.

In a similar situation, Hon''ble Apex Court in the case of Tirath Kumar @ Raj Rani and Another Vs. State of Haryana, wherein in a similar situation the Hon''ble Apex Court while allowing the appeal acquitted the accused appellants of all the charges. Relevant paragraphs 3, 4, 5 and 6 of Tirath Kumari (supra) are quoted hereunder:

3. It is not disputed that the incident had taken place within seven years of marriage. Section 304B IPC requires the following ingredients to be established before the presumption can be drawn u/s 113B of the Evidence Act: (a) 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; (b) it must be shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative; (c) such cruelty or harassment must be in connection with the demand of dowry.

4. If the aforesaid ingredients are established then the death shall be called as dowry death. Once the aforesaid ingredients are established by the prosecution the presumption u/s 113B of the Evidence Act shall be drawn.

5. It is contended by Mr. Jaspal Singh, learned Senior Counsel appearing for the appellants that in the present case both the trial Court and the High Court have

committed an error in law as well as in fact for recording the conviction of the appellants u/s 304B as no demand of dowry or ill-treatment in regard to the demand of dowry has been established soon before her death. We have been taken through the evidence of PW 4 Om Prakash, PW 5 Sham Lal Datta, PW 7 Raj Rani and PW 10 Baldev Raj on which reliance has been placed by both the trial Court and the High Court for recording the convictions of the appellants. Going through the evidence threadbare, we do not find any evidence to show that soon before her death she was subjected to cruelty by the husband or in-laws in connection with a demand of dowry.

6. The aforesaid ingredients having not been established, the appellants are entitled to the benefit of doubt. The conviction and sentence recorded by the trial Court and affirmed by the High Court are set aside. They are acquitted of all the charges. Accused 4 Tirath Kumari is on bail, her bail bond and surety shall stand discharged. Accused 1 Vimal Kumar is in custody, he shall be set at liberty forthwith if not required in connection with any other case.

16. In view of the above, we will now examine the evidence adduced by the prosecution to see as to whether the prosecution has been able to discharge its initial burden so as to attract the presumption u/s 113B of the Evidence Act and whether the learned trial Court has correctly applied that law to the facts of this case.

17. In the case in hand, there is admittedly no direct evidence or circumstantial evidence and the judgment of conviction was passed solely on presumption.

18. PW 1 is the informant who is the elder brother of the deceased. He has stated that the marriage of the deceased with the accused No. 1, Sajal Kanti Dutta was solemnized about 3-4 years prior to the death of the deceased. Jharna Dutta, sister of Sajal lived jointly with the family of Sajal. After the marriage, the accused appellants assaulted and tortured the deceased on the ground that at the time of her marriage less quantity of dowry had been given. The deceased made complaint about the same while visiting her paternal house occasionally. On the day of occurrence, in the evening, after receiving the information from accused Manna Dutta over phone that his sister had been taken to the hospital and if they wanted to see her they should go there, they rushed to the hospital and saw her lying on a stretcher at the verandah of the hospital. Her body was covered with a cloth. PW 1 asked Sajal (husband of the deceased Ruma Dutta) about the death of his sister and he said that she died by consuming poison. PW 1 has further stated that, in his opinion, Ruma did not die on her own will but she was murdered. So he immediately lodged the ejahar at Badarpur Police Station vide Ext. 1. Ext. 1(1) is his signature thereon. Police seized the ornaments, Ruma had on her person. Ext. 2 is the said seizure list wherein Ext. 2(1) is his signature. He has further stated that he was the first to rush to the hospital and thereafter on receipt of phone call from him, his father, mother, maternal uncle and aunt and others came to the hospital.

In cross-examination, PW 1 has stated that his family consists of him and two sisters as well as their parents. The incident occurred on the day of "bhaiphota". He lodged the FIR in the morning of the next day of the incident. He did not lodge any FIR on the night of the incident. On the next day, at about 9-9:30. He lodged the FIR. From Karimganj Civil Hospital the distance of the Karimganj Police Station is about ? K.M. He also stated that he told police that on being asked by him the accused appellant had said that his sister wanted to go to her parental house on the occasion of bhaiphota ceremony. When they had not taken her there, his sister had consumed poison. Other suggestions put to him have been denied.

19. PW 2, Sathi Suklabaidya is the aunt of the deceased. She had stated that marriage of Ruma and Sajal was solemnized in the Siddheswar Temple of Badarpur. The marriage was solemnized with their help as well as their relatives. She was present at the marriage. As a proof of marriage a certificate was issued by the Siddheswar Temple authority. When Ruma met her during her visit, she used to tell her that she did not have peace. Ruma also told her mother, father and brother that torture being inflicted upon her because of non-delivery of articles. Around 6-00 to 6-30 PM, on the day of bhaiphota, Manna Dutta informed over phone that if she wanted to see Ruma she should come to the hospital. At that time, the brother of Ruma was present at her house. On receiving information, he rushed to the hospital. When PW 2 reached the hospital, she saw Ruma dead. When she asked Sajal (husband of Ruma) about the same, he said that Ruma had died by consuming poison. However, she suspected that Ruma had not consumed poison of her own.

In cross-examination, PW 2 has stated that Ruma's father's family and she belong to different communities. PW 2 is not related to them. She has also stated that Manna Dutta does not reside at Ruma's husband's house. He stayed in a separate house. Manna maintains a garage and he maintains relation with the family of Sajal Kanti Dutta. When the deceased's husband (Sajal) had not telephonically informed about the incident but Manna did so, they became suspicious about the incident.

20. PW 3 is related to the victim who was his cousin (paternal uncle's daughter). He has stated that in the year 2003, marriage of Ruma was solemnized with Sajal. She died in the year 2006. On the day of incident, Sajal's brother Manna telephonically informed his adjacent neighbour Sathi (PW 2) that the condition of Ruma was not good and that she was in Karimganj hospital, adding that if they wanted to see her they should go there. They went to the hospital accordingly and found Ruma lying dead on the floor of the hospital. When he enquired Sajal (Ruma's husband) and Jharna Dutta (sister-in-law of Ruma) about the incident, they stated that Ruma had died by consuming poison. But PW 3 suspected that they had killed Ruma. In the past, Ruma had informed on a few occasions that she had been tortured by the accused persons in connection with dowry and for this reason they suspected that the accused persons had killed Ruma-The

inquest on the dead body of Ruma was done in his presence and he put his signature in the inquest report. Police also recorded his statements.

In cross-examination, PW 3 has stated that Ruma died before the day of the bhaiphota. He has denied the suggestion that he stated before the police that Ruma wanted to go to Karimganj for bhaiphota, but as nobody had taken her there, she had committed suicide out of obstinacy. The other suggestions put to him have been denied.

21. PW 4, Rama Kanta Suklabaidy has stated that deceased Ruma was his related niece. He has also deposed in the same tune as that of PWs 2 and 3.

In cross-examination, he has stated that he is not related to Ruma's mother and that he did not attend Ruma's marriage function. He has further stated that Sajal and Manna are not uterine brother. Their houses are also separate. They reside in separate houses. The suggestions put to him have been denied including the suggestion that he had managed the witnesses of the complainants' side and that he had adduced evidence as tutored.

22. PW 5 is the doctor who held autopsy on the dead body of deceased Ruma. On examination, he found the following;

External appearance:

A dead body of Hindu female, age 26 years, rigor mortis present, eyes closed, mouth closed, blood stain forth coming out through mouth. No external injury is detected over her person.

In the opinion of the doctor, as the cause of death could not be ascertained so viscera are kept for forensic and chemical examination.

were sent for forensic and chemical examination. Ext. 3 is P.M. report and Ext. 3(1) is my signature."

In the cross-examination, the doctor, PW 5 has stated that cardiac failure is the ultimate cause of death in all cases. Cardiac failure may be caused due to high blood pressure. Because of high irritation, emotions and other factors may cause high blood pressure. But this happens in rare cases. Doctor has further stated that no external injury was found in the dead body. Forensic and chemical report was not produced before him.

23. PW 6, Sankar Lal Purkayastha has stated that on 10.8.2007 he was in-charge of Badarpur ghat P.P. On that day, he received the case diary from S.I., P. Nath. On perusal of the case diary, he saw that the earlier Investigating Officer had already completed the investigation. Accordingly, he submitted the charge sheet against the accused persons. Ext. 4 is the charge sheet and Ext. 4(1) is his signature.

Defence declined to cross examine this witness.

24. PW 7, Sri Parimal Nath has stated that on 7.7.2007 he was attached to

Badarpur police station as A.S.I. of police. On that day, as per direction of the Circle Inspector of police, he had submitted a written requisition to the Superintendent of Karimganj Civil Hospital through Superintendent of Police, Karimganj district to furnish a report regarding actual cause of death of the deceased in connection with the case. As PW 7 was transferred in the meantime, he handed over the case diary to the Officer-in-Charge of Badarpur Police Station to complete the investigation of the case and later on, S.I. Sankar Lal Purkayastha, PW 6 had submitted the charge sheet in this case.

In the cross-examination, PW 7 has stated that to ascertain the actual cause of death the viscera of the deceased was sent to FSL, Guwahati for examination as to whether the death was caused due to consumption of poison or not.

25. PW 8, Sri Khitish Ch. Das has stated that on 25.10.2006 he was an attached Officer at the Badarpur Police Station. The O/C of Badarpur Police Station had received the FIR lodged by one Subhendu Sekhar Das and registered a case. PW 8 was entrusted with the investigation. During preliminary enquiry, he went to Karimganj Civil Hospital and conducted inquest on the dead body. Ext. 5 is the inquest report and Ext. 5(1) is his signature. He sent the dead body to Karimganj Civil Hospital for post mortem examination. As the actual cause of death could not be ascertained, the viscera of the deceased was sent to FSL for analysis. Ext. 6 is the FSL report. Thereafter, during investigation, he visited the place of occurrence and prepared a sketch map of the place of occurrence. Ext. 7 is the sketch map and Ext. 7(1) is his signature thereon. During investigation, he arrested the accused persons, namely, Sajal Kanti Dutta, Jharna Dutta, Tanmoy Dutta and forwarded them to the Court. During investigation, he seized the wearing apparels and ornaments of the deceased. Ext. 2 is the seizure list and Ext. 2(3) is his signature. As he got transferred in the meantime, he handed over the case diary to the O/C of Badarpur Police Station. Later on, S.I. Sankar Lal Purkayastha submitted the charge sheet.

In the cross-examination, PW 8 has stated that FSL report was negative. He has further stated that during his enquiry, he had interrogated Sashdhar Dutta and Dinesh Dutta and recorded their statements. Both of them are cited witnesses in the charge sheet. He has also stated that in the hospital he met the deceased's husband and Jharna Dutta.

26. On closure of the prosecution witnesses, the statements of the accused appellants were recorded u/s 313 Cr.P.C. wherein all the accused appellants denied their involvement in the offence alleged against them.

27. Admittedly, except the abovementioned witnesses, the prosecution has not pressed into service any other witness to prove the demand of dowry, harassment and maltreatment. Even parents of the deceased, before whom Ruma said to have divulged about the torture being inflicted upon her for non-delivery of articles (i.e. dowry) have not been examined as witness, save and except the brother, PW 1, the informant, others all are reported witnesses.

28. Because of the fact that there is, if we may repeat, no cogent evidence on record showing that the accused appellants had killed the deceased by administering poison to her, it will be extremely unsafe and hazardous to maintain the conviction of the appellants on such evidence.

29. The prosecution is, thus, required to prove convincingly that the appellants used to torture the deceased mentally and physically for non-delivery of the demanded articles and that for the same, the deceased consumed poison. But the prosecution has failed to prove the same, which is also supported by the evidence of PW 5, the doctor, more so, as per FSL report (Ext-6) also, the viscera gave negative tests for common poison. The evidence adduced in this regard, as has already been observed, inadequate and inconclusive in nature. The death of the deceased in the present case is undoubtedly a tragic incident. But under our system of justice, no one can be punished unless legal proof is adduced in a Court of law to establish that he has committed the offence for which he has been charged. Suspicion, howsoever, strong does not amount to legal proof. In the absence of legal proof that the appellants had committed the offence under Sections 304(B)/302 IPC, this Court has no option but to give the benefit of doubt to the appellant.

30. Another relevant aspects to be noted is that it was the appellant No. 1 (husband of the deceased), who along with others took the deceased to the hospital. He was all along with the deceased. It is also brought to our notice that he did not make any attempt to run away from the place of occurrence.

31. Under the circumstances, having given a careful consideration to the submissions made by the learned counsel appearing for the parties and in the light of the evidence discussed above, in the background of the principles laid down by the Hon"ble Apex Court as highlighted hereinabove, this Court is of the view that the prosecution has failed to prove beyond reasonable doubt that the accused appellants are guilty of committing the offence under Sections 304(B)/302 IPC. The appellants are therefore entitled to the benefit of doubt.

32. In the result and for the reasons stated, the appeal is allowed. The impugned judgment and order of conviction and sentence passed against the accused appellants is set aside. It is stated at the Bar that the appellant Nos. 1 and 2 are in custody. They are directed to be set at liberty forthwith unless they are required to be detained in connection with any other case. It is submitted by Mr. Medhi, learned counsel appearing for the appellants that this Court vide order dated 21.1.2013 passed in CrI. Misc. Case No. 836/2012 has granted bail in favour of the appellant No. 3, namely, Sri Tanmay Dutta @ Manna Dutta. His bail bond shall stand discharged. Send down the lower Court records.