

(2015) 12 CAL CK 0010
In the Calcutta High Court
Case No : C.R.A. 166 and 163 of 2012

Saminath Roy and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 03-12-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 313, 313(1)(b)
Dowry Prohibition Act, 1961 — Section 3, 4
Penal Code, 1860 (IPC) — Section 302, 34, 498A

Citation : (2015) 12 CAL CK 0010

Hon'ble Judges : Nadira Patherya and Asha Arora, JJ.

Bench : Division Bench

Advocate : Milon Mukherjee, Senior Advocate, Kaji M. Rahaman and Subhashis Dasgupta, for the Appellant; Ranabir Roy Chowdhury, for the Respondent

Final Decision : Disposed Off

Judgement

Asha Arora, J.—The appellants have challenged the judgment and order of conviction and sentence dated 27th February, 2012 and 29th February, 2012 passed by the Additional Sessions Judge, Fast Track 4th Court, Malda in Sessions Trial No. 21 of 2011 arising out of Sessions Case No. 175 of 2011. By the impugned judgment and order the appellants being the husband, parents-in law, brothers-in law and sister-in law of the deceased victim have been convicted for the offences punishable under Sections 498A /34 and 302 /34 of the Indian Penal Code (for brevity referred to as the I.P.C) and sentenced to suffer rigorous imprisonment for two years and to pay fine of Rs. 500/- each in default of which to suffer simple imprisonment for three months each for the offence under Section 498A /34 of the I.P.C and they have also been sentenced to suffer imprisonment for life and to pay fine of Rs. 1000/- each in default of which to suffer simple imprisonment for six months each for the offence punishable under Section 302 /34 of the I.P.C.

2. Bereft of unnecessary details, the prosecution case is that on 22/8/2009 the

defacto complainant Meghnath Singh, brother of the deceased victim made a written complaint at Harishchandrapur Police Station stating that his sister (deceased Nirmala Roy) was given in marriage to the appellant No. 1 about eight years ago in accordance with the Hindu rites and customs. Out of the wedlock she gave birth to two children. Soon after the marriage the husband (appellant No. 1) and his family members (appellant Nos. 2 to 6) started torturing the deceased physically and mentally over the demand for money, ornaments and landed property. Village "Salish" was held several times regarding the matter but the torture upon the deceased victim continued unabated. On 18/8/2009 the defacto complainant went to his sister's house on being informed of her death and found her dead body lying in the verandah of the house with marks of injury. The complainant was informed by the neighbours that his sister was severely assaulted by the accused persons in the morning of 18/8/2009.

3. On the basis of the aforesaid written complaint (exhibit 1), Harishchandra P.S Case No. 200/2009 dated 22/8/2009 under Section 498A /302 I.P.C read with Section 3 /4 of the Dowry Prohibition Act was initiated against the accused/appellants. Investigation into the case culminated in the submission of the charge-sheet under Sections 498A /302 /34 of the I.P.C and under Section 3 /4 of the Dowry Prohibition Act against the accused/appellants.

4. The case being a sessions triable one was committed to the Court of the Sessions Judge Malda wherefrom it was transferred to the Additional Sessions Judge, Fast Track 4th Court Malda for trial and disposal.

5. The Trial Court framed the charges under Sections 498A /302 /34 of the I.P.C and under Section 3 /4 of the Dowry Prohibition Act against the accused persons/appellants who pleaded not guilty to the indictment and claimed to be tried.

6. Prosecution endeavoured to prove its case by examining ten witnesses namely, P.W 1 Santosh Kumar Das the scribe of the FIR, P.W 2 Raghunath Mondal is the Constable who identified the dead body of deceased to the Autopsy Surgeon. He also witnessed the inquest over the dead body and the seizure of the wearing apparels of the deceased by the Investigating Officer S.I Swapan Kumar Sarkar. P.W 3 Dr. Ajoy Kumar Das is the Medical Officer who held post mortem examination on the dead body of deceased. P.W 4 S.I Tamal Das drew up the formal FIR on the basis of the written complaint and endorsed the case for investigation to S.I Swapan Kumar Sarkar. P.W 5 Kishan Roy is the son of deceased who witnessed the incident. P.W 6 Meghnath Singh is the defacto complainant and the brother of deceased. P.W 7 Balaram Roy heard about the incident from P.W 5. He is related to the deceased. P.W 8 Rabi Roy and P.W 9 Ekramul Haque are the co-villagers of the accused who for obvious reasons turned hostile during the trial and P.W 10 Samina Nasrin is the Lady Constable who brought and identified witness Kishan Roy (P.W 5) before the Judicial Magistrate for recording his statement under Section 164 of the Cr.P.C. Besides the evidence of the witnesses referred, prosecution relied on some documents which were marked as exhibits 1 to 6.

7. Defence version is complete innocence and outright denial of the prosecution story.

8. Upon consideration of the evidence on record as well as after hearing the learned Counsel for the parties the Trial Court passed the impugned judgment and order of conviction and sentence as aforesaid.

9. Aggrieved, the convicted accused/appellants preferred the present appeal.

10. The crucial point for determination is whether the conviction of the accused/appellants for the offences punishable under Sections 498A /302 /34 of the I.P.C is sustainable.

11. Mr. Mukherjee, learned Counsel appearing for the appellants, while assailing the conviction and sentence on manifold counts strenuously argued that the evidence of P.W 5 the sole eyewitness to the incident cannot be relied upon. It has been contended that as P.W 5 was placed in the custody of P.W 6, his evidence is not free from tutoring. It has also been submitted that the name of P.W 5 does not find place in the FIR or in the inquest report. Learned Counsel for the appellants further contended that the evidence of P.W 5 is not in conformity with his statement under Section 164 of the Cr.P.C on the point of the cause of death of the deceased. It has also been canvassed that in the context of the evidence of P.W 6 and P.W 7 the evidence of P.W 5 is totally falsified. Referring to the decision reported in AIR 2003 Supreme Court 1088 in the case of Bhagwan Singh and others versus State of Madhya Pradesh, learned Counsel for the appellants argued that the evidence of P.W 5 is not worthy of credence. Further submission on behalf of the appellants is that the medical evidence of P.W 3 Dr. Ajoy Kumar Das, who held post mortem examination on the dead body of deceased, though relied on to convict the accused/appellants was not put to them during their examination under Section 313 of the Cr.P.C. It has been contended that such omission to question the accused/appellants regarding a vital piece of evidence has occasioned failure of justice. Learned Counsel for the appellants submitted that the statement of P.W 5 recorded under Section 164 of the Cr.P.C was also not put to the accused/appellants in their examination under Section 313 Cr.P.C. Therefore neither the medical evidence nor the statement of P.W 5 recorded under Section 164 Cr.P.C can be used against the accused/appellants and have to be excluded from consideration.

12. Without adverting to the merits of the matter, Mr. Ranabir Roy Chowdhury, Learned Counsel for the State contended that the accused/appellants cannot be acquitted on the ground of non-compliance of the mandatory provisions of Section 313 Cr.P.C. However, in his usual fairness Mr. Roy Chowdhury conceded that as the medical evidence of the post mortem doctor was not put to the accused/appellants in their examination under Section 313 Cr.P.C conviction cannot be sustained and the case may be remanded to the Trial Court for proceeding with the matter from the stage of examination of the accused/appellants under Section 313 Cr.P.C. In support of such submission reliance has

been placed on the decision reported in *Nar Singh Vs. State of Haryana*, . On the other hand, learned Counsel for the appellants countered by referring to the case of *Nagaraj versus State Represented by Inspector of Police, Salem Town, Tamil Nadu* reported in (2015) 2 Supreme Court Cases (Cri) 724.

13. In *Nagaraj's* case the Supreme Court held that when the evidence did not inspire confidence an adverse inference against the accused/appellant cannot be drawn because of what he stated or what he failed to state in his examination under Section 313 Cr.P.C. The aforesaid case law relied on by the appellants is clearly distinguishable on facts from our case in hand wherein the medical evidence of the autopsy surgeon which was used against the accused/appellants was not put to them in their examination under Section 313 Cr.P.C. The accused/appellants were therefore not given the opportunity to explain the aforesaid incriminating evidence against them. The object of Section 313(1)(b) Cr.P.C is to enable the accused to explain each and every circumstance appearing in evidence against him. The provisions of this section are mandatory and it is the bounden duty of the Court to afford to the accused an opportunity to explain each and every circumstance appearing in evidence against him. In *Nar Singh's* case the Apex Court held that the real importance of Section 313 Cr.P.C lies in that, it imposes a duty on the Court to question the accused properly and fairly so as to bring home to him the exact case he will have to meet and thereby, an opportunity is given to him to explain any such point. In the context of our present case it is pertinent to refer to paragraph 12 of the judgment which reads thus:

"12. Elaborating upon the importance of a statement under Section 313 Cr.P.C., in *Paramjeet Singh @ Pamma Vs. State of Uttarakhand*, , this Court has held as under:

"Section 313 Cr.P.C is based on the fundamental principle of fairness. The attention of the accused must specifically be brought to inculpatory pieces of evidence to give him an opportunity to offer an explanation if he chooses to do so. Therefore, the Court is under a legal obligation to put the incriminating circumstances before the accused and solicit his response. This provision is mandatory in nature and casts an imperative duty on the Court and confers a corresponding right on the accused to have an opportunity to offer an explanation for such incriminatory material appearing against him. Circumstances which were not put to the accused in his examination under Section 313 Cr.P.C cannot be used against him and have to be excluded from consideration." (Vide *Sharad Birdhichand Sarda Vs. State of Maharashtra*, and *State of Maharashtra Vs. Sukhdeo Singh and another Vs. State of Maharashtra Through C.B.I. Vs. Sukhdev Singh alias Sukha and others*, ."

14. It is abundantly clear from the judgment of the Trial Court (page 77 to 79) that the medical evidence of P.W 3 Dr. Ajoy Kumar Das has been relied on and used against the accused/appellants without affording them the opportunity to explain the same in their examination under Section 313 Cr.P.C by putting

specific questions regarding this vital piece of incriminating circumstance. Evidently such omission has occasioned prejudice to the accused/appellants. In Paragraph 30 of the judgment in Nar Singh's case the Apex Court succinctly summarised the courses available to the appellate Court in such cases which is quoted thus:

"30. Whenever a plea of omission to put a question to the accused on vital piece of evidence is raised in the appellate Court, courses available to the appellate Court can be briefly summarised as under:--

(i) Whenever a plea of non-compliance of Section 313 Cr.P.C is raised, it is within the powers of the appellate Court to examine and further examine the convict or the counsel appearing for the accused and the said answers shall be taken into consideration for deciding the matter. If the accused is unable to offer the appellate Court any reasonable explanation of such circumstance, the Court may assume that the accused has no acceptable explanation to offer;

(ii) In the facts and circumstances of the case, if the appellate Court comes to the conclusion that no prejudice was caused or no failure of justice was occasioned, the appellate Court will hear and decide the matter upon merits.

(iii) If the appellate Court is of the opinion that non-compliance with the provisions of Section 313 Cr.P.C has occasioned or is likely to have occasioned prejudice to the accused, the appellate Court may direct retrial from the stage of recording the statements of the accused from the point where the irregularity occurred, that is, from the stage of questioning the accused under Section 313 Cr.P.C. and the trial Judge may be directed to examine the accused afresh and defence witness if any and dispose of the matter afresh;

(iv) The appellate Court may decline to remit the matter to the trial Court for retrial on account of long time already spent in the trial of the case and the period of sentence already undergone by the convict and in the facts and circumstances of the case, may decide the appeal on its own merits, keeping in view the prejudice caused to the accused."

15. For the purpose of our present case the appropriate remedy lies in the third option referred to hereinabove. When there is omission to put material evidence to the accused in the course of examination under Section 313 Cr.P.C it is nothing short of lapse on the part of the Trial Court for which the accused/appellants are not entitled to acquittal. In the circumstances of the case we are of the view that the interest of justice will be subserved if the matter is remanded to the Trial Court for proceeding afresh from the stage of examination of the accused/appellants under Section 313 Cr.P.C.

16. Consequently the conviction of the appellants and the sentence imposed on them by the Trial Court in Sessions Case No. 175 of 2011/Sessions Trial No. 21 of 2011 is set aside. The matter is remanded to the Trial Court for proceeding afresh from the stage of examination of the accused under Section 313 Cr.P.C.

The Trial Court shall examine the accused under Section 313 Cr.P.C in accordance with law and in the light of the observations made hereinabove. The Trial Court shall also afford an opportunity to the accused to examine defence witnesses, if any, and proceed with the matter. Since the incident dates back to the year 2009, We direct the Trial Court to expedite the matter and dispose of the same in accordance with law on priority basis preferably within three months from the date of communication of this judgment.

17. Learned Counsel for the appellants submitted that the appellant Nos. 2 and 3 being senior citizens may be granted bail. The appellants/accused are at liberty to apply for bail before the Trial Court. On such application being moved by the appellants/accused, the Trial Court shall consider the same in accordance with law.

18. It is made clear that we have not expressed any opinion touching the merits of the case.

19. Both the appeals are thus disposed of.

20. L.C.R along with a copy of this judgment shall be sent to the Trial Court forthwith.

21. Urgent photostat certified copy of the judgment, if applied for, shall be given to the parties subject to compliance of requisite formalities.

Nadira Patherya, J.

I agree.