
(2013) 01 OHC CK 0028

In the Orissa High Court

Case No : Jail Criminal Appeal No. 38 of 1997

Sri Dhadia @ Gopal Chandra Mishra

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 16-01-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 216, 217, 313, 465

Dowry Prohibition Act, 1961 — Section 4

Penal Code, 1860 (IPC) — Section 201, 302, 304B, 34, 498A

Citation : (2013) 2 Crimes 704 : (2013) 3 DMC 322 : (2013) 1 OLR 783

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

Bench : Single Bench

Advocate : D.P. Dhal, for the Appellant;

Final Decision : Allowed

Judgement

B.K. Nayak, J.—This appeal from the jail has been preferred by the appellant-Dhadia @ Gopal Chandra Mishra challenging the judgment dated 18.12.1996 passed by the 1st Additional Sessions Judge, Puri in S.T. Case No. 39/324 of 1994 convicting the appellant and the co-accused under Sections 498-A/ 304-B of the IPC and Section 4 of the D.P. Act and sentencing him to undergo R.I. for seven years u/s 304-B of the IPC and R.1. for one year u/s 498-A of the IPC and S.I. for three months for the offence u/s 4 of the D.P. Act, while acquitting the accused persons of the charges under Sections 302/ 201/ 34 of the IPC. The prosecution case as revealed from the FIR lodged by one Golekha Ch. Praharaj is that on 30.11.1993 he came to the house of his sister, Kalpana, the wife of appellant to see her and her young son in village-Parajapada, but he found his sister, nephew and the appellant absent in the house. The appellant's father, who was available in the house on being asked, could not say their whereabouts. Thereafter, he learnt from some co-villagers of the appellant that the appellant along with some of his family members and the co-accused, Rajendra Mishra have killed the informant's sister and nephew and concealed the dead bodies. It was further alleged that four years before the informant's sister was given her

marriage to the present appellant and that the appellant and the co-accused, who happens to be the husband of the sister of the appellant, were demanding dowry and torturing the deceased lady on that ground. It is alleged that during course of investigation the appellant confessed to have killed his wife and child and concealed the dead bodies before the police and gave recovery of the said bodies. On the basis of the FIR the police registered the case under Sections 498-A/ 304-B/ 201/ 34 of the IPC read with Section 4 of the D.P. Act. On completion of investigation, the police however did not find a case under Sections 498-A/ 304-B of the IPC and instead filed charge-sheet against the appellant and the co-accused under Sections 302/ 201/ 34 of the IPC for which charges were framed and trial proceeded against the accused persons.

2. The defence plea was a complete denial of the complicity of the accused persons. The further plea of the present appellant was that his wife, Kalpana had some education and she was older to the appellant and that the appellant himself was completely illiterate and deaf and therefore she could not pull on well with him and they were in quarrelling terms. The deceased used to leave the house of the accused very often, even during night and that on one such occasion the body of the deceased lady and the child were found in different places and he was in no way connected with their death.

3. Altogether, eleven witnesses were examined on behalf of the prosecution to prove the charges and the defence examined none. On consideration of evidence, the Trial Court found the accused persons not guilty of the charges under Sections 302/ 201/ 34 of the IPC. But the judgment reveals that the Trial Court being satisfied that offences under Sections 498-A/ 304-B of the IPC and Section 4 of the D.P. Act were established, added those charges. The order sheet of the date of the judgment, i.e., 18.12.1996 in the Sessions case record however reveals that the Trial Court found both the accused persons including the appellant guilty under Sections 498-A/ 304-B of the IPC and Section 4 of the D.P. Act and thereafter framed charges for those offences and read over and explained the charges to them, who pleaded not guilty and therefore sentenced them.

4. It is submitted by the learned counsel appearing for the appellant that P.Ws. 1, 7 and 10 are the material witnesses on whose evidence the Trial Court has relied upon and recorded the judgment of conviction and that their evidence does not in any manner prove the charges under Sections 498-A/ 304-B of the IPC and Section 4 of the D.P. Act against the appellant. It is his further submission that the co-convict-Rajendra Mishra had filed Criminal Appeal No. 15 of 1997 before this Court against the very same judgment, which was allowed and his conviction and sentence were set aside vide judgment dated 11.12.2008 with the finding that there was no sufficient material to prove the charges and therefore, applying the same standard of appreciation of evidence, it can be said that the charges against the appellant also do not stand substantiated by such evidence. It is his further submission that the offence under Sections 498-A/ 304-B of the

IPC are not cognate offences with the offence of murder punishable u/s 302 of the IPC and that the ingredients of the offences are completely different than the ingredients of offence of murder and that in case the Trial Court came to the conclusion that there are materials with regard to commission of offences under Sections 498-A/ 304-B of the IPC and Section 4 of the D.P. Act, instead of convicting outright the appellant for those offences by adding new charges on the date of the judgment without giving any opportunity to the appellant to enter upon his defence to such charges, it should have directed a de novo trial. It is his submission that the Trial Court has committed an illegality by finding the accused persons guilty of the offence under Sections 498-A/ 304-B of the IPC and Section 4 of the D.P. Act in the judgment and thereafter adding those charges in exercise of power u/s 216 of the Cr.P.C.

The learned State Counsel, on the other hand, submits that the judgment passed in favour of the co-convict in Criminal Appeal No. 15 of 1997 shall not be binding on this Court as the present appellant being the husband of the deceased lady, stands on a different footing.

5. Admittedly, the charges under Sections 498-A/ 304-B of the IPC and Section 4 of the D.P. Act have been added on the date of delivery of the judgment and such fact even forms part of the judgment itself. The order sheet of the date of the judgment of the Sessions case reveals that before addition of such charges the accused persons have already been found guilty of those charges and subsequently such additional charges were framed and read over and explained to the accused persons.

6. Section 216 of the Cr.P.C. which empowers the Court to alter or add to any charge provides as under:

216. Court may alter charge -

(1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with

until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.

7. Section 217, Cr.P.C. which has direct nexus with Section 216 of the Cr.P.C. and is relevant for our purpose provides as under;

217. Recall of witnesses when charge altered -

Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed-

(a) to recall or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, unless the Court, for reasons to be recorded in writing, considers that the prosecutor or the accused, as the case may be, desires to recall or re-examine such witness for the purpose of vexation or delay or for defeating the ends of justice;

(b) also to call any further witness whom the Court may think to be material.

8. Offences punishable under Sections 498-A/ 304-B of the IPC and Section 4 of the D.P. Act and u/s 302 of the IPC are not cognate offences as because though murder of a woman which amounts to causing unnatural death may constitute one of the ingredients of the offence of causing dowry death u/s 304-B of the IPC, the latter offence however have other ingredients which are not common to the ingredients of the offence of murder. The appellant was charge-sheeted by the police and also charged by the Court during trial for the offences under Sections 302/ 201/ 34 of the IPC. He did not have the notice that he has also to face the charges under Sections 498-A/ 304-B of the IPC and Section 4 of the D.P. Act and therefore his defence was not directed against such charges which were added by the Trial Court in the impugned judgment itself. Evidently, the appellant's examination under Sections 313, Cr.P.C. has not been directed in that light and, therefore, the appellant had no opportunity to explain any incriminating evidence/circumstances in relation to such new charges. The appellant, therefore, must be said to have been prejudiced due to such addition of charges at the time of delivery of judgment, particularly when the Trial Court did not proceed to conduct a de novo trial for the newly added charges and this has definitely occasioned a failure of justice as envisaged u/s 465 of the Cr.P.C. On this ground alone the conviction of the appellant is liable to be set aside.

9. With regard to the merits of the case, it is necessary to assess the evidence of the P.Ws 1, 7 and 10 on which reliance has been placed by the Trial Court. P.W.1 is the informant, who is the brother of the deceased lady. P.W.7 is the elder sister and P.W. 10 is the mother of the deceased. Their evidence reveal that the time of negotiation of marriage of the appellant with the deceased there was demand of dowry of Rs. 10,000/- but the evidence of P.W.1 clearly reveals that the demand was made by the co-accused and not by the present appellant. P.W.7 in her testimony states that she does not have the direct knowledge about the demand

of dowry and the ill-treatment of the deceased for non-fulfilment of the demand. With regard to demand and torture to the victim evidence of P.W.1 further reveals that it was the co-accused, who whenever came to the house of the deceased was demanding the balance dowry amount of Rs. 5,000/- and at his behest she was being tortured. Although P.W.10 stated in her evidence in an omnibus manner that for non-payment of balance amount of dowry the in-laws tortured the victim, it is apparent that she stated before the Investigating Officer that she gave the victim in marriage with the appellant without any talk of dowry. The evidence of the I.O., P.W.11 clearly reveals that his investigation did not disclose commission of offences under Sections 498-A/ 304-B of the IPC and Section 4 of the D.P. Act for which he did not submit charge-sheet. There is also absolutely no evidence on record that soon before her death the deceased was subjected to cruelty on the ground of demand of dowry. In the judgment passed by this Court in connected Criminal Appeal No. 15 of 1997 filed by the co-convict it is found that there is no evidence whatsoever with regard to torture of the deceased on the ground of demand of dowry just before her unnatural death. I am also fully in agreement with the findings of this Court given in the said appeal and come to hold that there is absolutely no acceptable evidence against the appellant for commission of offences under Sections 498-A/ 304-B of the IPC and Section 4 of the D.P. Act. Accordingly, the conviction and sentence of the appellant for the said offences cannot be sustained. The Jail Criminal Appeal is therefore allowed and the impugned judgment is set aside and the accused-appellant is acquitted of the charges under Sections 498-A/ 304-B of the IPC and Section 4 of the D.P. Act. It appears from the record that during this appeal the appellant has not been released on bail. He has already suffered the sentence imposed by the Trial Court and it is not known whether he is released or not. In case he is still in jail, he shall be released forthwith, Unless his custody is required in any other case.