
(2009) 03 PAT CK 0094

In the Patna High Court

Case No : Criminal Appeal Nos. 33 and 52 of 1998

Sumant Ojha, Paramhans Ojha, Ajanta Devi and Tuntun Ojha APPELLANT
Vs

The State of Bihar RESPONDENT

Date of Decision : 26-03-2009

Acts Referred:

Citation : (2011) 7 RCR(Criminal) 1220

Final Decision : Allowed

Judgement

Sheema Ali Khan, J.—Criminal Appeal No. 33 of 1998 has been filed by the husband of the victim lady. The appellant has been convicted to undergo rigorous imprisonment for seven years u/s 304B of the Indian Penal Code along with the appellants of Criminal Appeal No. 52 of 1998 Paramhans Ojha, Sumant Ojha and Ajanta Devi. Paramhans Ojha and Sumant Ojha are further sentenced to undergo rigorous imprisonment for three months for offence u/s 201 of the Indian Penal Code. Both the appeals have been disposed of by a common judgment and order of conviction passed on 16th January, 1998 and 21st January, 1998 respectively in Sessions Trial No. 158 of 1995.

2. The prosecution case in brief is that Shashi Shankar Tiwary, PW 12 who is the brother of the deceased lady, Sandhya Devi instituted First Information Report on 24.09.1994 alleging therein that his sister Sandhya Devi was married to Tuntun Ojha on 13.07.1994 and was living in her matrimonial house. The informant claims that he used to visit his sister regularly. On 21.09.1994, when he went to visit his sister, he was told by her that the appellants were torturing her and were making a demand of a motorcycle or Rs. 30,000/- in lieu of dowry. It is further alleged that the father-in-law Paramhans Ojha refused to allow Sandhya Devi to go to her village. The informant claims that he heard rumors on 24.09.1994 at about 7 AM that his sister had been killed in the previous night and her dead body was being cremated at the ghat. The informant names several persons, 11 in numbers, who were supposedly present at the ghat.

3. To support the allegation contained in the First Information Report, 12

witnesses were examined by the prosecution. It may be mentioned here that the First Information Report was lodged in the presence of Kameshwar Nath Tiwary, PW 11 who is the father of the deceased Sandhya Devi and PW 10 Shiv Kumar Singh. PWs 1 and 2 have been declared as hostile. PWs 3 and 5 have deposed that they were the persons who gave information regarding the death of the deceased to the informant. PW 4 is the witness who has made no contribution in establishing the prosecution case. PW 6 claims that he saw the cremation taking place but has not made any statement with respect to the circumstances under which the cremation had taken place. PWs 7 and 9 have been tendered. PW 8 has been declared hostile witness. PW 10 was the person who accompany the brother of the deceased to Husaipur, the matrimonial village of Sandhya Devi, the deceased. PWs 11 and 12 however are the important witnesses in these cases. The Investigating Officer of this case could not be examined, and therefore, the entire case diary has been exhibited and marked as Exhibit-5 which was objected by the Public Prosecutor conducting the trial before the Trial Court.

4. The Trial Court has relied on the evidence of PWs 3 and 5 who may be termed as chance witnesses as well as the evidence of PWs 11 and 12 for the purpose of convicting the appellants. In this case, the defence had led evidence to show that the appellants were red-card holders and they were below the poverty line, and therefore, the question that there would be a demand from them seems to be unrealistic. The defence has also proved Exhibits X to X/3 which are the prescriptions of Sandhya Devi showing that she was keeping unwell even before her marriage. A letter written by the Sister of Sandhya Devi to her brother-in-law Tuntun Ojha has also been brought on record to substantiate the defence version in this case.

5. In order to attract the application of Section 304B of the Indian Penal Code, the principles that have emerged in various decisions of the Courts are that (i) the death of the woman should be caused by burns or bodily injuries or otherwise than in normal circumstances, (ii) such a death should have occurred within seven years of marriage, (iii) she must have been subjected to cruelty and harassment by her husband or by any relative of the husband (iv) such cruelty or harassment should be made for/or in connection with the demand of dowry. The initial burden lies on the prosecution to prove the basic ingredients of Section 304B of the Indian Penal Code. If the prosecution succeeds in discharging the initial burden, then the provision of Section 113B of the Indian Evidence Act shall come into play and can be pressed into service for drawing the presumption as against the accused person/persons that he caused the dowry death.

6. So, this Court has to examine whether there was a demand of dowry from the informant and his father. The only evidence in this regard is the statement of PW 12, the informant of this case. He states that he had gone to visit his sister on 21.09.1994 when her sister has disclosed that there was a demand of a motorcycle or Rs. 30,000/-. This witness in his examination-in-chief has stated

that the demand was made by the father-in-law of Sandhya Devi. There is no allegation that the demand was made by the husband of the deceased lady infact it appears from his evidence that Tuntun Ojha, the husband of the deceased lady, was not present on 21.09.1994 in the village when he went to visit his sister. Strangely enough, this demand by the father-in-law of the victim was not disclosed by PW 12, the brother of the deceased to his father which seems to be unnatural in view of the fact that it would be the liability of the father to fulfill any demand made by the In-Laws of Sandhya Devi. The attention of this Court has been drawn to another aspect of the prosecution case which according to learned Counsel for the appellants creates doubt with respect to the manner in which the occurrence has taken place as according to the learned Counsel, it is a major anomaly in the evidence of the witnesses. The First Information Report discloses that on the basis of rumors that this sister had been killed by her in-laws, Shashi Kant Tiwary visited the village and found that the body of his sister was being cremated near the Pokhar. Surprisingly, PW 11 does not raise any hulla or seek the support of any other villagers but returned to his own village, collected his father and P.W. 10 and went to the Police Station along with his father to lodge the First Information Report at Ekma Police Station. The prosecution introduced two witnesses, PWs 3 and 5, who claim to have been drinking tea in the village of the appellants and it is stated that they informed PW 12 with respect to burning of the victim at the ghat. After pointing out this discrepancy, learned Counsel has referred to the supervision note of the Deputy Superintendent of Police wherein a query was made with respect to the source of information to the informant regarding the death of the deceased. It has been submitted that on the query of the Deputy Superintendent of Police, the police diary has been prepared and PW 3 and 5 have been introduced as witnesses after two months of the alleged occurrence at paragraphs 43 and 44 of the case diary and in this manner, PWs 3 and 5 became the prosecution witnesses to cover the lacunae in the investigation. PW 11 has been cross-examined on the point whether Sandhya Devi was keeping bad health which he has denied.

7. PW 11, Kameshwar Nath Tiwary, the father of Sandhya Devi, is the another important witness of this case who has tried to establish that Sandhya Devi was killed within seven years of her marriage because of the demand of dowry. According to this witness, there was no demand of dowry or any unpleasant incident during the actual wedding. PW 11 deposed before the Trial Court on 05.10.1996 and was cross-examined on 08.10.1996. Thereafter, he disappeared and did not turn up for further cross-examination until there was an order of this Court for his production by the Police. The evidence of PW 11 then commenced on 09.08.1997. During his cross-examination, he states that he did not visit his daughter's sasural after he heard about the occurrence but went with his son to the Police Station to lodge the First Information Report. He also disclosed that he had never met with PWs 3 and 5 prior to the alleged incident. Surprisingly, he mentions that his brother was married in the same village as his daughter and, therefore, the families were not unknown to each other. In the same breathe, he

has tried to say that he does not have good relationship with his brother, it may be significant to note that the brother of PW 11 is in the police services. This witness does not give any evidence on the point of demand of dowry and infact is completely silent regarding this aspect rather the father has stated that there was no demand of dowry prior to the marriage or at the time of marriage.

8. Although it has been argued that this Court should not look into the case diary but in view of the fact that it has been marked as an exhibit, this Court can take the help of the case diary because of the fact that both the prosecution and the defence have relied on it while making arguments before the Trial Court and also before this Court. The prosecution has relied on the case diary to show that the place of occurrence would indicate that the lady was burnt inside the house whereas the defence has pointed out that the latch of the room was broken from outside. Learned Counsel for the appellants has also relied on paragraphs 43 and 44 referred to above and has also pointed out that the Investigating Officer has reported that the husband was not present at the time when the occurrence had taken place.

9. Before coming to any conclusion, it would be relevant to refer to Exhibit-C which is a letter written by the elder sister of Sandhya Devi to Tuntun Ojha, the husband, in which she has said "...MERI PYARI BEHAN MUNNA KO ACCHE SE RAKHANA JYADA RONE MAT DENA KYONKI WHO BAHUT ROTI HAI MUNNA KOI GALATI BHI KARE TO USKO SAMAJHA DENA.... MUNNA BAHUT SHARMATI HAI ISLIYE USKO JO BAT NAHIN BUJHAIYE WE BAAT SAMAJHA DENA MUNNA KI TABIYAT KHARAB SUNKAR KAFI MAN DUKHIT HAI, MUNNA SE PATRA LIKHENE KO BOL DENA".

10. Another letter has been produced which indicates that Tuntun Ojha was residing at Benaras which is supported by the fact that he was not present at the place of occurrence at the time when the alleged occurrence had taken place. To support the prosecution version that Sandhya Devi was keeping unwell, defence witnesses have been examined.

11. This Court has to consider the evidence that has come on record to substantiate whether the offence is made out u/s 304B of the Indian Penal Code. It has been argued by the learned Counsel for the appellants that apart from the statement made by the brother of the deceased that there was a complaint four days prior to the occurrence, there is no other material to support the case of the demand. It is submitted that even the evidence of the informant regarding the demand remains uncorroborated by the father of the victim lady or any other witnesses. Moreover, it is submitted that the demand was allegedly made by the father-in-law of the deceased lady. It has also been pointed out that since the in-laws of the brother of Kameshwar Nath Tiwary were living in the same village, it would be quite natural for them to inform Kameshwar Nath Tiwary regarding any ill-treatment meted out to Sandhya Devi. The fact that the brother or the in-laws of Kameshwar Nath Tiwary have not been examined or have not come forward to support the prosecution version indicates that there was no demand of dowry

rather it appears that the victim lady was unwell, suffering from certain mental ailments. The explanation given by the prosecution that Kameshwar Nath Tiwary was not on good terms with his brother, is weak in view of the fact that there are certain issues such as death where the family comes together to support a common cause. Once, this Court finds that the evidence of PW 12 with regard to the demand of dowry is doubtful, then the question would arise as to whether a conviction would be sustainable u/s 304B of the Indian Penal Code.

12. An important aspect of the case is that the informant or the witnesses, PWs 3 and 5 have not named the husband as being present at the place of occurrence and the subsequent introduction of his name is on the basis of the fact that he is the husband of the deceased lady Sandhya Devi which would not by itself indicate that he was responsible for the occurrence, much less, for the demand, which would be apparent from the evidence led by PW 12, therefore, the appellants including Tuntun Ojha would not be liable to be punished for the offence u/s 304B of the Indian Penal Code.

13. Learned Counsel for the State relies on the decision rendered in the case of Inder Raj Vs. State of Rajasthan, by which the Bench of the Rajasthan High Court while considering whether the offence u/s 304B of the Indian Penal Code has been made out in the facts of the case has considered the provisions of Section 304B of the Indian Penal Code which states that where the death of a woman is caused by any burn or bodily injury or occurs otherwise than 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". Dowry has been defined in the Dowry (Prohibition of Atrocities) Act. Dowry means any property or valuable securities given or agreed to be given either directly or indirectly by one party to the marriage to the other to the marriage; or by the parent or other relatives of the parties concerned. It is also envisaged that the demand should be made before or soon after the marriage. The presumption is that if a woman dies soon after her marriage and she has been subjected to cruelty or harassment in connection with demand of dowry, the Court shall presume that such person had caused dowry death. Therefore, Section 304B of the Indian Penal Code and Section 113B of the Indian Evidence Act envisages that there should be a demand for dowry soon before the death and secondly the person concerned is subjected to cruelty or harassment.

14. From the facts of the present case, it would appear that as far as the husband is concerned, there is no evidence to show that there was a demand by him or that he had subjected his wife to cruelty or harassment, whereas the only piece of evidence which has come on record is doubted for the reasons mentioned in the order is the statement made by the brother of the deceased lady, PW 12 that a demand was made by the father-in-law of the deceased lady just four days prior to the death. If a demand is made for a dowry, it is expected

that the demand would be communicated to the person from whom the dowry is expected i.e. the father or the guardian of the woman in question. No such communication has been made to the father in the present case and even the evidence of PW 11 does not disclose that the demand was communicated to him by his son. It would also be presumed that once having made a demand, sometime would lapse before any follow up action would be taken by the erring party. It can not be said that having made a demand four days prior to the death, the victim would be subjected to cruelty by her in-laws. Therefore, in my opinion, the appellants have wrongly been convicted u/s 304B of the Indian Penal Code. To be convicted u/s 304B of the Indian Penal Code, there should also be, in my opinion, a conviction u/s 498A of the Indian Penal Code.

15. In the case of Inder Raj, charges were also framed u/s 498A of the Indian Penal Code and the Court found that there were repeated demands made by the parties for payment of dowry and, therefore, upheld the conviction u/s 498A of the Indian Penal Code but reduce the sentence.

16. Since, in this case, the evidence with respect to the demand of dowry remains weak and uncorroborative as discussed in details above, the conviction u/s 304B of the Indian Penal Code would not be justified and, therefore, I set aside the judgment of conviction and order of sentence passed in Sessions Trial No. 158 of 1995 and the above named four appellants are acquitted of the charges leveled against them and are also discharged from the liabilities of the bail bonds furnished before the Trial Court in this case.

17. In the result, these two appeals are allowed.