

(2018) 07 CAL CK 0074
In the Calcutta High Court
Case No : C.R.A. 182 of 2014

Swapan Bairagya & Ors.

APPELLANT

Vs

State Of West Bengal Ors.

RESPONDENT

Date of Decision : 12-07-2018

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302, 304B, 498A
Indian Evidence Act, 1872 — Section 113B

Citation : (2018) 07 CAL CK 0074

Hon'ble Judges : JOYMALYA BAGCHI, J;RAVI KRISHAN KAPUR, J

Bench : Single Bench

Advocate : Moinak Bakshi, Saswata Gopal Mukherjee, Parth Pratim Das

Final Decision : Disposed Of

Judgement

Joymalya Bagchi, J.

The Appeal is directed against judgment and order dated 3.2.2014 passed by learned Additional Sessions Judge, Bishnupur, Bankura in Sessions Trial

No. 01(03) 09 arising out of Sessions Case No. 16(02)13 convicting the appellants for commission of offence punishable under Sections 498A/304B of

the Indian Penal Code and sentencing them to suffer rigorous imprisonment for life and to pay a fine of Rs.5,000/- each, in default to suffer

imprisonment for six months more each for the offence punishable under Section 304B of the Indian Penal Code and to suffer simple imprisonment for

three years and to pay a fine of Rs.2,000/-, in default to suffer imprisonment for one month more each for the offence punishable under Section 498A

of the Indian Penal Code. Both the sentences to run concurrently. The fine amount, if realised, shall be paid to the mother of the victim (P.W.8).

The prosecution case, as alleged against the appellants, is to the effect that on

9.12.2010 Poulami @ Rama was married to appellant no.2, Raj Kumar

Bairagya according to Hindu rites and customs. As per the demands of the appellants, father of the victim housewife, Swapan Das (P.W.5) gave

Rs.10,000/in cash, gold earrings for both ears, wearing apparels, boxes etc. as dowry. Due to economic constraints he was unable to give two gold

bangles, money, beddings at that time. After a few days the appellants started physical and mental torture on the victim on further demands of dowry.

The appellants used to abuse her in filthy language and assaulted her. Despite several requests torture upon the victim did not subside. In the month of

October, the victim gave birth to a minor daughter.

Subsequently the torture increased upon the victim. On 10.9.2012 around 11.30 at night appellant no.1 Swapan Bairagya, father-inlaw of the victim

informed over phone to P.W.5, Swapan Das that his daughter was missing from her matrimonial home. P.W.5 advised the appellants to inform the

matter to the local police. On the next day around 5 a.m. P.W.5 was informed over phone that the dead body of the victim was lying in the pond. He

rushed to the place of occurrence. He believed that the victim had been murdered on further demands of dowry and her body was thrown into the

pond. Over the incident he lodged complaint with Patrasayer Police Station resulting in the registration of Patrasayer P.S. Case No. 102 of 2012 dated

11.9.2012 under Sections 498A/302/304B/34 of the Indian Penal Code.

In conclusion of investigation, charge sheet was filed against the appellants and the case was committed to the Court of Sessions and thereafter

transferred to the court of Additional Sessions Judge, Bishnupur, Bankura, for trial and disposal. Charges were framed under Sections

498A/304B/302/34 of the Indian Penal Code against the appellants. The appellants pleaded not guilty and claimed to be tried. In the course of trial,

prosecution examined 16 witnesses and exhibited a number of documents. It was the specific defence of the appellants that the appellant nos.2 and 3

were not present at the place of occurrence. They, however, did not examine any witness to probabalize such fact. In conclusion of trial, the Trial

Judge by the impugned judgement and order dated 3.2.2014 convicted and sentenced the appellants, as aforesaid.

Mr. Bakshi, learned counsel appearing for the appellants argued that the prosecution has not been able to prove the torture upon the victim over

demands of dowry beyond reasonable doubt. Apart from the relatives of the victim no other witness has spoken of the demand of dowry by the

appellants. Evidence with regard to torture upon the victim are also general and omnibus. P.Ws.1, 3 and 4 did not state that the torture on the victim

was over demands of dowry. Hence, there is no evidence to show that the victim was tortured over further demands of dowry soon before her death.

Essential prerequisites for attracting the statutory presumption under Section 113B of the Evidence Act have not been established. On the other hand,

there is evidence on record that appellant no.1 was at the market place at the time of occurrence and that the appellant no.2 was at his place of work

which was far away from the place of occurrence. In the light of the aforesaid evidence on record, it cannot be said that the prosecution has been

able to prove its case beyond reasonable doubt. Hence, the appellants are entitled to an order of acquittal.

Â Learned Public Prosecutor argued that the evidence on record shows that the victim was subjected to continuous torture over further demands of

dowry. Torture on the victim with regard to further demands of dowry is reflected in the first information report itself. Evidence of torture on the

victim is corroborated by the local witnesses, P.Ws. 1, 3 and 4. Hence, it is evident that the victim was subject to torture at her matrimonial home over

further demands of dowry soon before her unnatural death within two years of marriage. Accordingly, conviction and sentence of the appellants may

be upheld and the appeal be dismissed.

P.Ws.1 to 4 are the neighbours of the appellants. P.W.1, Ashok Kaibarta deposed that Poulami was married to Raj Kumar Bairagya @ Bapi Das. In

her marriage dowry was given. After the marriage she started residing at her matrimonial home. There were disturbances at the matrimonial home in

connection with further dues of dowry. On 10.9.2012 Poulami's mother-in-law came to their house and asked him to call her husband

(Poulami's father in law) as Poulami could not be found anywhere. Next morning dead body of Poulami was found floating in the doba in front of

his house. He heard that Poulami was killed and thrown into the doba. In cross-examination, he stated that Patrasayer market is about 35 km from

Bishnupur Town. There are 3 / 4 houses adjoining the doba. Around 6 a.m. he saw the dead body floating on the southern side of the doba.

P.W.2, Chandan Das Kaibarta deposed that Poulami was married to Raj Kumar Bairagya. He heard that she was missing on 10.9.2012. On

11.9.2012 her dead body was found floating in the doba. P.W.3, Abhoy Kaibarta deposed that Poulami was married to Bapi Bairagya. She was

residing at her father-in-law's house. Her husband used to assault her and the neighbours used to tell them not to assault her. On 10.9.2012 Kush

(P.W.4) went to search for Poulami around 7 p.m. She could not be found. Next morning many people gathered at Heli's small pond. Dead body

of Poulami was found floating there. He heard that she had been murdered.

P.W.4, Kush Kaibarta deposed that Poulami was married to Rajkumar @ Bapi Bairagya. After marriage she was residing at her in-laws' house.

There were quarrels and fights. On 10.9.2012 Swapan came at Patrasayer Bazar and told him that Poulami could not be found and requested him to

search for her. They searched for Poulami but could not find her. He advised Swapan to inform the matter to police, but he said that he will inform

later on. He was examined by police after 22-23 days. Deadbody of Poulami was found floating on the doba. In cross-examination, he stated that his

house on the west side of the pukur. He was not there when the dead body was brought out.

P.W.5, Swapan Das is the father of the victim and the informant in the instant case. He stated that Poulami was married to Raj Kumar Bairagya on

9.12.2010. At the time of marriage, Rs.10,000/-, two gold ear rings, one gold finger ring, 7 utensils and other articles and wearing apparels were given

as dowry. Almost 10,000/- in cash, two bangles, and beddings were due as those articles could not be given due to economic constraints. After three

months of marriage, the appellants started inflicting torture on Poulami and abused her over demands of dowry. She gave birth to a daughter. Torture

increased thereafter. On 10.9.2012 Swapan Bairagya called him over phone at 11.30 p.m. and told him that his daughter could not be traced. He

advised Swapan to inform the police. Next morning at about 5/5.30 a.m. Swapan again called him and informed his daughter was found floating in

water in the pond nearby her in-laws' house. He rushed to the place of occurrence and found the dead body of his daughter floating in the pond.

He informed the matter to the police.

Dhananjay wrote the complaint as per his instruction. He signed the complaint

(Ext.1). He saw marks of injury on the right cheek. The appellants killed his daughter and threw her in the water. Police prepared a report. He signed on it (Ext.2/1). In cross-examination, he stated that marriage of daughter and Raj Kumar was held at Ekteswar Temple, Bankura. At that time Rajkumar was working a waiter at Madhuban lodge at Heavy more.

The distance between Heavy more and village Patrasayer is 130 km. The Lagna Patra with regard to the marriage is with the groomsâ?? family.

P.W.6, Dhananjay Mahato is the maternal grandfather of the victim and the scribe of the first information report. He corroborated the evidence of P.W.5 and deposed that he wrote the first information report as per his instructions.

P.W.7, Debjeet Gasnguli held inquest over the dead body of the victim. He proved the inquest report (Ext.3).

P.W.8, Suchitra Das is the mother of the victim. She deposed that Poulami was married to Rajkumar. She also corroborated the evidence of her husband (P.W.5) with regard to the torture on her daughter over further demands of dowry and her death on 11.9.2012. In cross-examination, she stated that her daughter was married on 9.12.2010 at Ekteswar Temple, Bankura. The marriage was conducted at about 12.00 / 1.00 mid night.

P.W.9, Kousick Chatterjee deposed that he was present at the time of marriage between the couple which was held at Ekteswar Temple, Bankura.

P.W.10, Rakesh Das is the brother of Poulami. He deposed that Poulami was married with Rajkumar Bairagya on 9.12.2010 at Ekteswar Temple, Bankura. At the time of marriage Rs.10,000/- cash, 2 gold ear rings, one gold finger ring, 7 utensils and other articles and wearing apparels were given as per the demand of the appellants. Dowry to the tune of Rs.10,000/- was due. After 2/3 months of marriage, the appellants started physical and mental torture on the victim. Parents used to tell the victim to adjust and live at her matrimonial home. She had a daughter. In August, 2012 he went to keep his sister back at the matrimonial home. Her in-laws did not permit him to enter the house and told him to sit in front of the house. They also threatened him that political party people will come and would prepare written document and thereafter he would be allowed to go. On 10.09.2012 around 11.30 P.M. they received phone call informing that his sister could not be traced and they told the appellants to inform Patrasayer P.S. They

went to Bankura P.S. but Bankura P.S did not do anything. They came back home. On 11.09.12, the next morning at 5.30 A.M. they again received a phone call informing them that his sister's dead body was floating in a pond near her in-laws house. They rushed there and reached the place of occurrence at 7.30 A.M. Police prepared inquest report. He signed on the inquest report. They went to Patrasayer P.S. Her sister's dead body was sent to Bishnupur Hospital for Post Mortem examination.

P.W.11, Dr. Tarik Kanti Pal conducted post mortem over the dead body of the victim. He found the following injuries:

Abrasion on left shoulder region (scattered abrasion), Haematoma over the scalp, Sub dural and extra dural haematoma noted, haematoma over brain matter, multiple haemorrhage spots on both lungs.

In his opinion, the death was due to shock in a case of head injury, ante mortem and homicidal in nature. He proved the report (Ext.4). He deposed

that abrasion may occur due to assault and multiple haemorrhage spots on both lungs may be caused if the person is assaulted by kicks on lungs. He

further deposed that Sub dural and extra dural haematoma and haematoma over brain matter may be caused by forceful banging of head against any

hard substance or surface. Death could not have occurred after drowning as no mud or sand was found in the stomach. There was no mud or sand on

the body of the victim.

P.W.12, Mahdusudan Chowdhury and P.W. 13, Dilip Kumar Das were constables attached to Patrasayer P.S. They were present at the time of

seizure of wearing apparels of the victims as well as photographs of her marriage. They proved their signatures on the seizure list.

P.W.15, Manabendranath Pal received complaint of Swapan Das. He prepared formal FIR (Ext.8).

P.W.16, Sd. Abdul Ashan, is the investigating officer in the instant case. He visited Place of Occurrence. He drew up rough sketch map with index (Ext.9).

He recorded statements of witnesses. He collected Post Mortem report. He proved the inquest report (Ext.2/2). He seized the photograph of

marriage of the couple under a seizure list (Ext.7). He identified the photograph (Mat Ext.I). He seized wearing apparels under a seizure list (Ext.6).

He arrested the accused persons and interrogated them. He also prepared a

hand sketch map of the matrimonial home of the victim (Ext.10). He submitted charge sheet.

From the evidence on record, it appears that the victim was married to appellant no.2 on 09.12.2010. Evidence of her parents, P.W.s 5 and 8 and her relations, that is, her grandfather, P.W.6 and her brother, P.W.10 established that at the time of marriage some dowries were given as per demands of the appellants. There were outstanding dowry demands which could not be met due to economic constraints. 2/3 months after marriage, appellants started inflicting torture to the victim over further demands of dowry. She was assaulted and illtreated by the appellants.

It has been argued that the evidence of relatives relating to torture over demands of dowry are not corroborated by independent witnesses. I am unable to accept such contention. Evidence of P.W.1, a neighbor of the appellants, deposed that the victim was subjected to torture over further demands of dowry. Evidence of P.W.3 and 4 also speak of torture upon the victim housewife during her lifetime. Hence, it appears that the prosecution has been able to prove that the victim had been subjected to torture at her matrimonial home over further demands of dowry which could not be paid due to economic constraints of her father, P.W.5. Admittedly, the victim suffered unnatural death on 11.9.12. Evidence of P.W.11, Post Mortem doctor unequivocally states that the victim had suffered a number of injuries which were ante mortem and homicidal in nature.

Evidence of P.W.10, brother of the victim, established that in August, 2012 (that is, soon before the death of the victim on 11.09.2012) when he had gone to keep the victim at her matrimonial home, he was detained outside the house and was threatened that he would not be allowed to go until and unless a written documents was prepared in presence of political persons of the locality. The aforesaid facts establishes beyond doubt the primary ingredients of the offence punishable under Section 304B of the IPC, namely,

- A) Appellants demanded dowry from the family of the victim which remain unpaid;
- B) Over such issue, victim was subjected to torture;
- C) Victim suffered unnatural death within two years of her marriage;
- D) Soon before the death, victim was subjected to torture over demands of dowry.

Proof of the aforesaid circumstances, in the factual matrix of the case, shifts the onus on the appellants in terms of Section 113B of the Evidence Act

to establish that they are not guilty. Learned counsel appearing on behalf of the appellants submitted that there is evidence on record that appellant

no.2, the husband of the victim, was working at Madhuban Lodge which is situated far away from the place of occurrence and that appellant no.1, her

father-in-law, was in the market which is at a distance of 35 kms from the matrimonial home of the victim when she was murdered.

I am unimpressed by such submission. Firstly, apart from vague suggestions that the appellant no.2 used to work in the lodge, there is no evidence on

record that on the date of occurrence he was not at his home but was working in the said lodge. It is trite law that any plea of alibi is to be proved by

the defence. Appellants have not led any evidence whatsoever to show that on the date of occurrence appellant no.2 was at Madhuban Lodge, as

argued. Defence plea that the appellant no.1 was at the market at the time of occurrence has also not been proved. Moreover such plea, even if

proved, does not wholly improbabilise presence of appellant no. 1 at the place of occurrence. The alibi pleaded by the appellants not only remains

unproved but in my considered opinion is of little consequence when one considers the legality of their conviction under Section 304B of the IPC.

Offence under Section 304B of the IPC does not cast a burden on the prosecution to show that it was the appellants who had murdered the victim.

On the other hand, it is the duty of the accused persons to rebut the statutory presumption under Section 113B of the Evidence Act if the prosecution

is able to establish that the victim was subjected to torture over demands of dowry soon before her unnatural death within seven years of marriage. In

the light of the aforesaid discussion, I have no doubt in my mind that the prosecution has proved the aforesaid facts beyond doubt in this case. Vague

and fanciful plea of alibi by the defence are unconvincing and insufficient to rebut the aforesaid legal presumption. Accordingly, I uphold the

convictions recorded against the appellants under sections 304B and 498A of the Indian Penal Code.

Coming to issue of sentence, I find that appellant no.1 and 3 are aged persons and appellant no.3 was taking care of the child of the couple. In view of

the aforesaid fact, I reduce the sentences imposed on appellant no. 1 and 3 on the count of the offence under section 304B of the Indian Penal Code

and I direct that appellant no.1 shall suffer rigorous imprisonment for 10 years and shall pay a fine of Rs.5,000/- in default to suffer rigorous

imprisonment for six months more and appellant no.3 shall suffer rigorous imprisonment for 7 years and to pay a fine of Rs.5,000/- in default to suffer

rigorous imprisonment for six months more. Sentences imposed upon them on score of offence punishable under section 498A of the Indian Penal

Code are upheld.

Sentences imposed upon appellant no.2 shall remain unaltered. Both the sentences shall run concurrently. Period of detention suffered by the

appellants during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon them in terms of 428 of the Code of

Criminal Procedure. With the aforesaid modifications as to sentence, the appeal is disposed of. Copy of the judgment along with L.C.R. be sent down

to the trial court at once. Urgent Photostat Certified copy of this order, if applied for, be supplied expeditiously after complying with all necessary legal

formalities.