

GAHC010233402013



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.A./142/2013

AKKAS ALI
S/O LATE MOIJUDDIN, VILL. LALUNGGAON, P.S. JURIA, P.O. KASHORI,
DIST. NAGAON, ASSAM.

VERSUS

STATE OF ASSAM

Advocate for the Petitioner : MR. M A SHEIKH, MS.A BEGUM,MD.M H CHOUDHURY

Advocate for the Respondent : , MR. B BARMA(ADDL.PP, ASSAM),

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

Date of hearing : **01.08.2024**
Date of Judgment/ Order : **14.08.2024**

JUDGMENT & ORDER (CAV)

Heard Ms. A. Begum, learned counsel for the accused/ appellant. Also heard Mr. B. Sharma, learned Additional Public Prosecutor for the State

respondent.

2. This appeal has been preferred by the accused appellant against the impugned Judgment dated 13/05/2013 passed by the learned Additional Sessions Judge, FTC, Nagaon in Sessions case no. 18/2009, whereby the accused/ appellant was convicted u/s 498 A IPC and sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs. 1000/- in default RI for two months.

3. The prosecution case, in brief, is that the deceased Manjila Khatoon got married to the accused/appellant and after their marriage, they lived together as husband and wife. During their conjugal life, the appellant used to torture his wife both physically as well as mentally. The further allegation is that on 25/05/2009 at about 8 AM, the accused forcibly administered poison to Manjila. Though she was taken for treatment but ultimately she died.

4. Regarding the incident, an FIR had been lodged by father of the deceased before the officer-in-charge of Juria PS and a case was registered vide Juria PS case No. 100/2009 u/s 304B/34 IPC and the investigation was initiated. During investigation, the investigating officer visited the place of occurrence, recorded the statement of the witnesses, prepared the sketch map and inquest was done on the dead body of the deceased and thereafter, the dead body was sent for postmortem examination. On receipt of the post mortem examination report and FSL report, charge sheet had been laid against the appellant u/s 304 B of the IPC. As the offence u/s 304 B of the IPC is exclusively triable by the court of Sessions, the case was committed accordingly.

5. During trial, charge was framed u/s 304 B of the IPC which was read over and explained to the accused/ appellant to which he pleaded not guilty and

claimed to be tried. To prove the guilt of the accused, prosecution examined nine witnesses but the appellant did not adduce any witness in support of his case. After completion of the trial, the statement of the appellant was recorded u/s 313 Cr.PC, wherein the incriminating material found in the evidence of the witnesses were put to the appellant to which he denied the same. After hearing the learned counsel for the parties, the trial court convicted the accused/appellant as aforesaid.

6. It was urged by the learned counsel for the appellant that there was no cogent evidence of torture on the alleged victim by the appellant. As such the impugned Judgment and order is bad in law and is liable to be set aside.

7. It is further submitted that charge was framed u/s 304 B of the IPC, but the appellant was convicted u/s 498 A of the IPC, though no separate charge was framed under the said section of law which is illegal. It is also the submission of learned counsel for the appellant that there is no eye witness in the case regarding torture on the victim. Alleged torture was stated only by interested witnesses. The question of torture is to be decided only on circumstantial evidence when conviction is to be given on the fact in issue. As such, the trial court should be cautious. In the present case, there is lack of propriety on the part of the trial court. Apart from that, the doctor who examined the victim did not find any mark of injury on the body of the victim. As such, the conviction u/s 498 A of the IPC is not based on evidence and is liable to be set aside.

8. Learned counsel for the appellant has also contended that most of the witnesses are relative of the deceased and accordingly the learned trial court has not scrutinized the evidences of the prosecution witnesses properly. PW 6, who is the medical officer has stated that there was no any internal/ external

injury noticed on the body of the deceased. Although, there is an allegation of harassment but the demand of dowry has not been proved before the learned trial court. As the demand of dowry was not been proved, therefore, the offence u/s 498 A IPC is not made out. It is further submitted that there is no specific date of incident mentioned in the evidence.

9. In support of his submission, learned counsel has placed reliance on the following case laws –

a. (2012) 4 GLT 80 (State of Assam vs. Kailash Talukdar)

b. AIR 1984 SC 1622 (Sharad Birdhi Chand Sarda vs. State of Maharashtra)

10. *Per contra*, it is the submission of the learned Additional Public prosecutor that non-framing of charge is not fatal to the prosecution case. Though, charge was framed under Section 304B of the IPC which relates to dowry death, the appellant was convicted under Section 498A IPC which is a similar offence and as such, there is no bar to convict the appellant under minor Section i.e. Section 498A IPC though separate charge was not framed.

11. It is further submitted that as per Section 222 Cr.P.C. , when offence proved is included in the offence charged, consisting of several particulars, combination of some of which constitutes a complete minor offence and such combination is proved but the remaining particulars are not proved, then he may be convicted of the minor offence though he was not charged with it.

12. According to learned Additional P.P, the accused appellant has not raised the said issue at an earlier point of time. If the matter is remanded to the trial court, then again it may take some more time and it is a herculean task to get all the witnesses and to have a retrial of the case once again. On these grounds,

the learned Additional Public Prosecutor has prayed to dismiss the appeal.

13. Coming to the witnesses adduced in the case, PW-1, is the father, PW-2, is the mother and PW-3 is the grandfather of the deceased. It is an admitted fact that the wife of the appellant, Manjila died in his house. The allegation against the appellant is that he administered poison to his wife for which she died but the FSL report did not show any poison in the viscera sent for chemical examination. The medical officer also opined that the cause of death of the deceased could not be ascertained and during examination of the deceased, no injury marks was found on the body of the deceased.

14. Regarding demand of dowry, PW-2 has stated that prior to 4/5 months of her death, Manjila came to their house one day and informed that Akkas Ali and his mother used to torture her to meet demand of dowry but the fact that he did not state the same before the police when his statement was recorded under Section 161 Cr.P.C.

15. PW-2, who is the mother of the deceased deposed in her evidence that the accused appellant and his mother used to torture Manjila on demand of dowry articles. As the appellant kept demanding of dowry articles, they gave one cycle to the accused. In spite of that the appellant continued to torture her daughter both physically as well as mentally. They brought back her daughter to their house and she stayed in their house for three months. Subsequently, the appellant came to their house and promised them that he would not torture further and took back Manjila to his house. But again Manjila informed them that the accused used to torture her physically by demanding dowry articles.

16. PW-3 who is the grandfather of the deceased simply stated that he came to know that the appellant used to torture the deceased on demand of dowry

articles.

17. PW-6 stated something different who is the sister of the accused appellant. According to her, on the date of incident she was along with the deceased. On that day she was along with Manjila on the paddy field. Subsequently, she saw that Manjila was lying on the ground. Manjila told her that she consumed poison. She immediately raised alarm and informed the accused and they took Manjila in the hospital wherein, Manjila died.

18. Though the appellant was convicted under Section 498A of the IPC but from the evidence of the witnesses it cannot be ascertained which are those articles demanded by the appellants and on her failure to meet such demand, she had been tortured. Apart from the evidence of PW-1, 2 and 3, there is nothing on record to establish *prima facie* that the appellant had committed the offence under Section 498A of the IPC. It is also not in dispute that though it was alleged that the appellant used to torture the deceased on demand of dowry articles but no any case has been instituted against the appellant or his family members. After the death of the deceased, the FIR had been lodged against the appellant. Had it been a case of cruelty or a case of abatement to commit suicide, nothing prevented the parents of the victim or other relatives to lodge an FIR since she was being tortured in the house of her husband. Though PW-2 and 3 stated that they had noticed some injuries on the person of the deceased but the medical officer who performed autopsy on the dead body of the deceased did not support their contention. The medical officer opined that no injuries were found on the body of the deceased.

19. The Hon'ble Supreme court in the case of ***Girdhar Shankar Tawade vs. State of Maharashtra reported in (2002) 0 AIR (SC) 2078*** in paragraphs No.3, 14 and 18 has held as under:-

"3. The basic purport of the statutory provision is to avoid 'cruelty' which stands defined by attributing a specific statutory meaning attached thereto as noticed herein before. Two specific instances have been taken note of in order to ascribe a meaning to the word 'cruelty' as is expressed by the legislatures :

Whereas explanation (a) involves three specific situations viz., (i) to drive the woman to commit suicide or (ii) to cause grave injury or (iii) danger to life, limb or health, both mental and physical, and thus involving a physical torture or atrocity, in explanation

(b) there is absence of physical injury but the legislature thought it fit to include only coercive harassment which obviously as the legislative intent expressed is equally heinous to match the physical injury : whereas one is patent, the other one is latent but equally serious in terms of the provisions of the statute since the same would also embrace the attributes of 'cruelty' in terms of [Section 498-A](#).

14. Presently, we have on record a statement before the Executive Magistrate was of a declaration which however does not lend any assistance in the matter in issue and as such we need not dilate thereon further.

18. A faint attempt has been made during the course of submissions that explanation (a) to the Section stands attracted and as such no fault can be attributed to the judgment. This, in our view, is a wholly fallacious approach to the matter by reason of the specific finding of the trial Court and the High Court concurred therewith

that the death unfortunately was an accidental death and not suicide. If suicide is left out, then in that event question of applicability of explanation (a) would not arise - neither the second limb to cause injury and danger to life or limb or health would be attracted. In any event the willful act or conduct ought to be the proximate cause in order to bring home the charge under [Section 498- A](#) and not de hors the same. To have an event sometime back cannot be termed to be a factum taken note of in the matter of a charge under [Section 498-A](#). The legislative intent is clear enough to indicate in particular reference to explanation (b) that there shall have to be a series of acts in order to be a harassment within the meaning of explanation (b). The letters by itself though may depict a reprehensible conduct, would not, however, bring home the charge of [Section 498-A](#) against the accused. Acquittal of a charge under [Section 306](#), as noticed hereinbefore, though not by itself a ground for acquittal under [Section 498-A](#), but some cogent evidence is required to bring home the charge of [Section 498-A](#) as well, without which the charge cannot be said to be maintained. Presently, we have no such evidence available on record."

20. Keeping in view the aforesaid judgment, by no stretch of imagination, it can be held that even *prima-facie* offence under [Section 498-A](#) of the IPC has been committed by the accused/ appellant.

21. The apex Court in the case of **Vipin Jaiswal vs. State of Andhra Pradesh, reported in (2013) 3 SCC 684**, in paragraphs No.4, 8, 13, 14 and 16 has held as under:-

"4. At the trial, besides other witnesses, the prosecution examined

the father of the deceased (informant) as PW 1, the cousin of PW 1 as PW 2 and the mother of the deceased as PW 4. The appellant volunteered to be a witness and got examined himself as DW 1 and took the defence that the deceased had left behind a suicide note written by her one day before her death in which she has stated that she had committed suicide not on account of any harassment by the appellant and her family members but due to the harassment by her own parents.

8. The learned counsel further submitted that so far as the suicide note (Ext. D-19) is concerned, the same cannot be believed to have been written by the deceased who was only a matriculate and the High Court has given good reasons in the impugned judgment why the suicide note cannot be believed to have been written by the deceased. He argued that in any case only on the basis of the evidence given by DW1, the Court cannot hold that the suicide note had been written by the deceased and not by someone else. He submitted that since the prosecution has been able to prove that the deceased had been subjected to not only a demand of dowry but also cruelty soon before her death, the Trial Court and the High Court have rightly held the appellant guilty both under [Sections 304B](#) and [498A](#), IPC.

13. What DW1 has further stated is relevant for the purpose of his defence and is quoted herein below:

"While cleaning our house we found a chit on our dressing table. The said chit was written by my wife and it is in her handwriting and it also contains her signature. Ex. D 19 is the said chit. I identified

the handwriting of my wife in Ex.D19 because my wife used to write chits for purchasing of monthly provisions as such on tallying the said chit and Ex. D19 I came to know that it was written by my wife only. Immediately I took the Ex. D19 to the P.S. Mangalhat and asked them to receive but they refused to take the same. From the aforesaid evidence, it is clear that while cleaning the house the appellant came across a chit written in the handwriting of his wife and containing her signature. This chit has been marked as Ext. D-19 and the appellant has identified the handwriting and signature of the deceased in Ext. D19 which is written in Hindi.

14. The English translation of Ext.D19 reproduced in the impugned judgment of the High Court is extracted herein below:

"I, Meenakshi W/o Vipin Kumar, do hereby execute and commit to writing this in my sound mind, consciousness and senses and with my free will and violation to the effect that nobody is responsible for my death. My parents family members have harassed much to my husband. I am taking this step as I have fed up with his life. Due to me the quarrels are taking place here, as such I want to end my life and I beg to pardon by all."

It appears from Ext. D19 that the deceased has written the chit

according to her free will saying that nobody was responsible for her death and that her parents and family members have harassed her husband and she was taking the step as she was fed up with her life and because of her quarrels were taking place.

16. In our considered opinion, the evidence of DW1 (the appellant)

and Ext.D19 cast a reasonable doubt on the prosecution story that the deceased was subjected to harassment or cruelty in connection with demand of dowry. In our view, onus was on the prosecution to prove beyond reasonable doubt the ingredient of [Section 498A](#), IPC and the essential ingredient of offence under [Section 498A](#) is that the accused, as the husband of the deceased, has subjected her to cruelty as defined in the Explanation to [Section 498A](#), IPC. Similarly, for the Court to draw the presumption under [Section 113B](#) of the Evidence Act that the appellant had caused dowry death as defined in [Section 304B](#), IPC, the prosecution has to prove besides the demand of dowry, harassment or cruelty caused by the accused to the deceased soon before her death. Since the prosecution has not been able to prove beyond reasonable doubt this ingredient of harassment or cruelty, neither of the offences under [Sections 498A](#) and [304B](#), IPC has been made out by the prosecution."

22. Keeping in view the aforesaid Judgment and by taking into account the statement of the family members as well as the post mortem report of the deceased, this court is of the view that ingredients of harassment or cruelty u/s 498 A IPC has not been made out by the prosecution.

23. Coming to the question of non framing of charge, a charge under the code of criminal procedure is required to be framed to give clear notice to the accused person about the definite charges under which he is going to be tried by the court.

24. Now we have to consider as to what is the effect of omission to frame the charge? In order to see the same, I feel it just and proper to refer to Section 464 of Cr.P.C. which reads as under:

“464. Effect of omission to frame, or absence of, or error in, charge –

(1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.”

25. On a careful perusal of the above said Section, mere non framing of charge would not vitiate the judgment of conviction, if no prejudice has been caused to the accused and there is no failure of justice. If the Appellate Court is of the opinion that failure of justice has in fact been occasioned, it may order for framing the charge and for re-trial. To judge whether there is failure of justice or not, the Court has to examine whether the accused was aware of the

basic ingredients of the offence for which he has been convicted and whether the relevant facts have been explained to the accused to defend himself.

26. This proposition of law has been laid down by the Hon'ble Apex Court in the case of ***DALBIR SINGH VS. STATE OF UTTAR PRADESH*** reported in **AIR 2004 SC 1990** wherein at paragraph 17 it has been held as under:

“17. There are a catena of decisions of this Court on the same lines and it is not necessary to burden this judgment by making reference to each one of them. Therefore, in view of Section 464 Cr.P.C., it is possible for the appellate or revisional Court to convict an accused for an offence for which no charge was framed unless the Court is of the opinion that a failure of justice would in fact occasion. In order to judge whether a failure of justice has been occasioned, it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself. ”

27. Keeping in view the above said ratio, it reveals that the learned trial court has referred a case law vide ***Kaliyaperumal and other vs. State of Tamil Nadu*** reported in **(2003) 3 Crimes (SC) 374**, wherein it was held that –

“A person charged and acquitted u/s 304 B IPC can be convicted u/s 498 A IPC without that charge being there, if such a case is made out. If the case is established, there can be conviction under both the sections.”

28. Taking into consideration, the above said facts and circumstances as discussed above, this court is of the opinion that though charge was framed by the trial court u/s 304 B IPC but there cannot be any failure of justice when appellant was convicted u/s 498 A IPC. However, as the allegation made against the accused/ appellant is not proved beyond all reasonable doubt, he cannot be convicted u/s 498 A IPC.

29. In the result, appeal is allowed. The accused/ appellant is acquitted on benefit of doubt. The Judgment and Order dated 13/05/2013 passed by the learned Additional Sessions Judge, FTC, Nagaon, in connection with Sessions Case No. 18/2009, is hereby set aside.

Send back the trial court record.

JUDGE

Comparing Assistant