

GAHC010278132019



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

Case No. : CRL.A(J)/104/2019

UTTAM SUTRADHAR
S/O. SRI BHABESH SUTRADHAR, R/O. KALAHBHANGA, BARPETA ROAD,
WARD NO.4, DIST. BARPETA, ASSAM.

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

Advocate for the Petitioner : MR. A BHATTACHARYA, LEGAL AID COUNSEL
Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

JUDGMENT & ORDER (CAV)

Date : 03.05.2024

Heard Mr. A. Bhattacharya, learned Legal Aid counsel for the appellant. Also heard Mr. B. B. Gogoi, learned Additional Public Prosecutor, Assam.

2. This appeal has been preferred by the accused appellant from jail against the judgment and order dated 24.05.2019 passed by the learned Sessions Judge, Barpeta in Sessions Case No. 128/2014 whereby the

accused appellant was convicted and sentenced to undergo rigorous imprisonment for ten years with fine of Rs.20,000/- in default of payment of fine, to undergo simple imprisonment for six months under Section 304 B IPC.

3. The brief facts of the case is that the informant, who is the brother of the deceased lodged an FIR on 09.04.2009 before the officer in-charge, Barpeta road police station stating *inter alia* that it has been more than seven years since the marriage of his younger sister Lakhi Saha (Sutradhar) with the appellant Uttam Kumar Sutradhar, the appellant used to torture his sister in various ways by demanding dowry articles since their marriage. On 08.04.2009, at about 9.30 pm, the appellant along with his family members poured kerosene oil on his younger sister and set fire to her inside the room of the appellant and locked the door from outside. Having heard the scream of his sister, someone entered the room by breaking the wall and rescued his sister and took her to Barpeta Road Civil Hospital. Then, she was referred to Gauhati Medical College Hospital and she was brought to GMCH in critical condition and she died on the next morning i.e. on 09.04.2009.
4. On receipt of the complaint, a case was registered vide Barpeta Road PS Case No. 57/09 under Section 304B/34 IPC and the investigation has been initiated. During investigation, the Investigating Officer visited the place of occurrence, recorded the statement of the witnesses. The inquest was done on the dead body of the deceased and thereafter, the dead body was forwarded to the civil hospital Barpeta for post mortem examination. After completion of investigation, charge-sheet was submitted against the appellant under Section 304 B IPC before the

SDJM(S), Barpeta. As the offence under Section 304(B) IPC is exclusively triable by the court of Sessions, the case was committed accordingly.

5. During trial, charge was framed against the accused appellant under Section 302/304B IPC which was read over and explained to the accused appellant to which he pleaded not guilty and claimed to be tried.
6. To prove the case against the accused appellant, the prosecution has examined nine witnesses and exhibited seven documents. The defence also examined one witness i.e. son of the appellant and the deceased. After completion of trial, the statement of the appellant was recorded under Section 313 Cr.P.C. wherein incriminating material found in the evidence of the witnesses were put to him to which he denied the same. According to the appellant, he has been falsely implicated in this case. After hearing the arguments advanced by the learned counsel for the parties, the appellant was convicted as aforesaid. Hence, this appeal.
7. It was urged by the learned counsel for the petitioner that there is one eye witness to the incident i.e. DW-1, who is the son of the deceased and the appellant. If the court considers the evidence of DW-1, there is no case against the appellant that he had committed murder of his wife. Though the informant has alleged that since after the marriage between the appellant and the deceased there was allegation of demand of dowry and assault towards his deceased sister but it is not specifically stated by the informant and other witnesses that when the demand was made by the appellant, payment of such dowry articles and the deceased has been tortured both physically and mentally.
8. Per contra, learned Additional Public Prosecutor has supported the

conviction of the appellant and submits that though the charge was framed under Section 302/304B IPC however, the learned Sessions Judge, Barpeta has convicted the accused/appellant under Section 304B IPC by discussing all the relevant points involved in the alleged offence. Under such backdrop, the judgment and order of the learned trial court needs no interference by this Court.

9. Before further proceeding with the case it is apt to ponder over the evidence of the witnesses recorded by the trial court.
10. PW-1 is the informant, brother of the deceased. From his deposition, it reveals that his sister got married to accused appellant four years prior to the incident. They started their conjugal life after their marriage and out of their wedlock, one male child was born. It is reported that the accused appellant used to assault his sister on demand of money. They provided a jewellery shop to the accused appellant for his livelihood. On the date of incident at about 9.30 pm, the accused appellant poured kerosene oil on his sister and got her ablaze. After locking the door from outside, the accused himself came to their house to call them and informed that his younger sister had caught fire. Then they went to the house of the accused and found that the entire body of his younger sister was burnt down. They immediately shifted her sister to Barpeta Road hospital and therefrom she was referred to GMCH, Guwahati. On the next day morning, her sister died. PW-1 also stated that after giving them the information, the accused appellant fled away. Thereafter, he lodged the FIR vide Ext-1.
11. In his cross-examination, PW-1 replied that the marriage between the accused and his sister was solemnized following a love affair between them. He did not file any case either in the police station or in the court

with regard to the torture meted out to his diseased sister by the accused appellant. When they reached the house of the accused, the room was found locked from outside. Her sister was inside the room.

12. PW-2 is the neighbour of the accused and the deceased. From his deposition, it discloses that the house of the accused is adjacent to his house. The deceased was the wife of the accused/appellant. Since after their marriage, the accused appellant used to torture the deceased on demand of money. The complainant provided a jewellery shop to the accused to meet such demand. This witness also stated that on the date of incident, at about 9 pm, they have noticed fire broke out in the house of the accused and the door of the room was found locked from outside. The deceased got burnt inside the room and her two brothers came and brought her out from the said room. Though the deceased was taken for her treatment but subsequently she died.

13. In his cross-examination PW-2 replied that the informant called him to the place of occurrence. He did not know how his sister had caught fire and he did not know how the incident took place.

14. PW-3 is also another neighbour of the accused. He deposed in his evidence that the deceased got married to accused appellant and the appellant used to torture her on demand of money since after the marriage. On the date of incident, the accused locked his house from outside confining his wife inside and fled away after setting fire to his house. Coming there they extinguished the fire and recovered the deceased. By that time, the entire body of the deceased got burnt. Though she was taken to the hospital for treatment, but she died.

15. In his cross-examination, PW-3 replied that his house is about 200 meters away from the house of the accused. He came to the spot after 15/20 minutes to the incident and he heard the screaming of the deceased 'bachao' 'bachao' (help help). This witness further stated that she did not remember if he stated to police that he had seen the incident.
16. PW- 4 and 5 are also the neighbours of the accused appellant. According to PW-4, the accused appellant and the deceased are the husband and wife. The accused appellant used to torture the deceased on demand of money. The brother of the deceased gave money and a shop to the appellant. The deceased told him in tears many times about the torture meted out to her. Since there was hue and cry in the house of the appellant on the date of incident, she went there and found the deceased inside the house and the door was locked from outside and the deceased was in flame. They recovered the deceased and brought her to hospital but subsequently, she died.
17. In her cross-examination, PW-4 replied that she did not know if there was any case filed against the appellant with regard to demand of money. The deceased has a son aged about eight years.
18. PW-5 deposed in his evidence that on the previous night of incident, a quarrel took place between the deceased and the appellant. Having heard the commotion in the house of the appellant on the date of the incident they went there. He heard the screaming of the deceased 'bachao' 'bachao' (help help) from inside the house. A large number of people gathered there. The villagers entered into the house of the appellant by breaking the bamboo wall and recovered the deceased. Thereafter, she was sent to hospital but on the following day he came to know that the

deceased had expired.

19. In his cross examination, PW-5 replied that he did not know how the incident took place.
20. PW-6 is the Circle officer, who conducted inquest on the dead body of the deceased. He deposed in his evidence that on 09.04.2009, he was working as Executive Magistrate and on that day he conducted inquest on the dead of one Lakhi Sutradhar wife of Uttam Sutradhar who was admitted to GMCH, Guwahati. At the time of inquest, she noticed the dead body had 90% burn injuries. The body was wrapped with bandage from neck to the leg till the ankle. P.W.6 proved the inquest report vide Ext-2.
21. PW-7 is another witness who has also supported the case of the prosecution by stating that on the date of incident having heard the sounds of fire breaking out in the house of the appellant, she came out of her house with water and tried to extinguish the fire. The incident took place at about 9.30 to 10 pm. A large number of people gathered there. When she arrived on the spot, she found Uttam's wife in flame inside the house. The house was found locked from outside.
22. In her cross-examination, PW-7 replied the house of the appellant is about 10 cubit away from their house. The walls of the house of the appellant was made of split bamboo (tarza). Sometimes quarrel took place between the deceased and the appellant. She did not know how the incident took place.
23. PW-8 is the Investigating Officer. He deposed in his evidence that on 09.04.2009 he was serving as attached officer in Barpeta Road police station. On that day the informant lodged an FIR before the O/C of

Barpeta Road police station. Accordingly a case was registered vide Barpeta Road PS Case No. 57/2009 under Section 304B/34 IPC and entrusted him to investigate the case. During investigation, he visited the place of occurrence, drew the sketch map vide Ext-4 and recorded the statement of the witnesses. The victim was sent to GMCH in the previous night and he went to GMCH and by that time, the victim had expired. Thereafter, inquest was done on the dead body of the deceased and forwarded the dead body for post-mortem examination. He collected the inquest report and post-mortem report. Having found material for committing the offence under Section 304B of IPC, he submitted charge-sheet vide Ext-5. During investigation he seized a table lamp with chimney and a match box vide Ext-6. He also seized a six feet long bamboo pole, eight feet long split bamboo and a lock vide Ext-7. The witnesses stated that the accused used these materials in confining the deceased.

24. PW-9 is the medical officer who conducted autopsy on the dead body of the deceased. He deposed in his evidence that on 09.04.2009 he conducted post-mortem on the dead body of the deceased Lakhi Sutradhar on police requisition. On examination, he found the following:

“External appearance:

A female dead body of average built, swarthy complexion wrapped in yellow-blue saree. Bandage all over the body except legs, scalp and face. Burnt areas are blackened. Eyes partially open. Mouth is closed. Vagina is healthy. Rigor mortis present all over the body.

Injuries:- (1) A stitched wound 2cm. Long with 2 stitches present on medialmalioli of left leg.(surgical intervention). (2) Burn injuris are present on face, neck, front and back of chest, front of abdomen, front and back of thighs, whole of right upper limb except posterolateral aspect of hand, arm and forearm and front of left leg (upper part). Burns are epidermal to dermoepidermal in nature. Line

of redness present between burnt and healthy areas. Burns covers 90% of body surface area.

All thoracic organs are congested.

Abdominal organs are congested.

Stomach mucosa is congested. Stomach contains 150ml of watery liquid.

Uterus- Healthy and empty.

Rest of the organs are healthy.

Cranium and spinal canal, Membrane and brain are congested.

Rest of the organs are healthy.

The doctor opined that death was due to shock as a result of burn injuries sustained which were ante-mortem and cover approximately 90% of body surface area."

25. The son of the accused appellant and the deceased was examined as DW-1. He deposed before the court that he was at home on the date of incident. He could not say at what time the incident occurred. He was asleep along with his father at night. His mother was in the kitchen. All of a sudden he saw a fire. his mother caught fire. The heat of the fire woke his father up. His father tried to put out the fire with a sack. His mother set fire to herself. His father intended to purchase a bike but his mother forbade him. Owing to that reason his mother set fire to herself. His father went to the house of his maternal uncle to give information about the incident. Thereafter, his father took his mother to the hospital. After the death of his mother, he was taken to the house of his maternal uncle. His maternal uncle told him that his father has burnt down his mother but he did not believe it. He has been staying with his father since he was released from jail.

26. In his cross examination, DW-1 replied that the incident took place

about seven years back when he was only four years of age. His father was asleep at the time of occurrence but he was awake. The incident took place after they had taken meal at night.

27. From the evidence of DW-1, it reveals that he was the eye witness to the incident. According to him, at the relevant time of incident her father was sleeping and his mother was in the kitchen. All of a sudden his mother caught fire but subsequently, he also stated that his mother set fire to herself. Apparently, the DW-1 could not say how his mother caught fire on the night of the incident. Admittedly, the son of the victim was very tender age when the incident occurred. Neither his statement under Section 161 and 164 Cr.P.C. is available in the record.

28. The trial court has disbelieved the evidence of DW-1 and convicted the appellant under Section 304B IPC on the basis of the evidence of other witnesses. No any discussion was rendered by the trial court on the statement given by DW-1 before the trial court. Though DW-1 was projected in this case to be eye witness to the incident but none of the witnesses examined by the prosecution has stated that the son of the victim and accused had seen the incident on that date. Not even the appellant has made any whisper in his statement under Section 313 Cr.P.C. that his son had seen the incident.

29. The Investigating Officer i.e PW-8 also did not say anything that during investigation either the accused or any of the witnesses examined by him has informed that there was an eye witness to the incident i.e. the son of the victim as well as the deceased.

30. There is no dispute that in view of Section 118 of the Evidence Act, all

persons are competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions due to tender years etc. No particular age has been prescribed as a demarcating line for treating a witness competent to testify by reason of his/her tender age. Competent to testify depends on ability to understand questions and to give rational answers. It depends on the capacity and intelligence of the child witness, his appreciation of evidence between the truth and falsehood as well as his duty to speak truth. When a witness is called upon to give evidence and there is reason to suspect that he/she may not be capable of giving rational answers to the questions put to him/her, it is but necessary for the court to put some questions to such witness with a view to ascertain whether he/she is a competent witness to give evidence or not. There is no dispute that since a child witness is prone to tutoring, his/her evidence should be scanned carefully and preliminarily questions are required to be put to such witness to ascertain as to whether he/she has intellectual capacity to understand the questions and give rational answers thereto. The preliminary examination of a child witness is nothing but rule of caution.

31. In *Dattu Ramrao Sakhare vs. State of Maharashtra* it was held as follows:

“5..... A child witness if found competent to dispose of the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to

give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

32. Subsequently, in *Ratansingh Dalsukhbhai Nayak v. State of Gujrat*.

"the decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath."

33. The Bench further held as under:

"This precaution is necessary because child witnesses are amenable to torturing and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witness as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

34. Reverting to the facts of the case, after having discussed the relevant provision of law, it is necessary to recapitulate the evidence of DW-1 the child witness, son of both the appellant and the deceased. According to DW-1 he was present when the incident occurred. Though he stated that his mother caught fire when she was in the kitchen but it is not reflected how the fire was engulfed over the whole body of his mother. As per doctor's report, the deceased sustained 90% of burn injuries on her body. It is interesting to note that the statement of DW-1 was not recorded during investigation. He was also not produced before the Magistrate to record his statement under Section 164 Cr.P.C. It appears from the record

that DW-1 was only 4 years of age when the incident occurred. The Investigating Officer did not say anything that DW-1 had seen the incident and in spite of that he did not record his statement. The appellant also was silent regarding presence of his son at the time of incident and he had seen the incident when his statement was recorded under Section 313 Cr.P.C. Suddenly, after closure of the evidence of the prosecution witnesses, the DW-1 was brought before the court to support the defence story.

35. In the light of the aforesaid legal proposition regarding child witness the Hon'ble Supreme Court clearly observed that the testimony of a child witness must find adequate corroboration before it is relied on. The law is that the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey of tutoring.
36. In the case in hand, it appears from the evidence of DW-1 that after the death of his mother he used to stay with the appellant. It is quite natural that after 6/7 years of incident, he could say before the court whatever stated by his father regarding the incident. He was about 4 years of age when the incident took place. Due to his tender age he was not examined during investigation. It also appears from the record that though other witnesses PW-1 to 7 when examined and cross-examined before the trial court, they had implicated the appellant to be involved in the case. Subsequently, they were further cross-examined wherein they denied of any allegation against the appellant. PW-1 stated that the ejahar was lodged as per suggestion of the public. It transpires that after closure of the evidence of the witnesses, the appellant has felt that he might be

convicted and thereafter, the matter has been settled between the parties and accordingly the DW-1 was examined to support the case of the appellant.

37. It is pertinent to note that the DW-1 has flatly denied the suggestion that he has been tutored.

38. The accused has been convicted under Section 304(B) IPC . the main ingredients of the offence under Section 304 B IPC required to be established are determined by the Hon'ble Apex court in catena of decisions and recently in Devender Singh and others vs State of Uttarakhand, reported in AIR (2022) SC 2965 which has been reiterated as follows:

- (i) That, the deceased was subjected to cruelty and harassment in connection with the demand of dowry.
- (ii) The death of the deceased was caused by any burn or bodily injury or some other circumstance which were not normal.
- (iii) Such a death has occurred within seven years from the date of her marriage.
- (iv) That the victim was subjected to cruelty or harassment by her husband or any relative of her husband.
- (v) Such a cruelty or harassment should be for or in connection with the demand of dowry and it should be established that such cruelty and harassment were made soon before her death.

39. In the aforesaid matter, the Hon'ble Apex court explaining the provision of Section 113(B) of Indian Evidence Act, has laid down that - "Section 304B IPC read along with Section 113(B) of the Indian Evidence Act, 1872 makes it clear that once the prosecution has succeeded in demonstrating that a woman has been subjected to cruelty or harassment for or in connection with any demand for dowry soon before her death, a presumption shall be drawn against the said persons that they have caused dowry death as contemplated under Section 304(B) IPC. The said presumption comes with a rider in as much as this presumption can be rebutted by the accused on demonstrating during the trial that all the ingredients of Section 304B IPC have not been satisfied (*Ref Bansilal vs State of Haryana (2011) 11 SCC 359, Mayadevi and another vs State of Haryana (2015) 17 SCC 405, G.V.Siddaramash vs State of Karnataka (2010) 3 SCC 152 and Ashok Kr. Vs State of Haryana (2010) 12 SCC 350*)".

40. In the light of the relevant provisions, the ingredients of the offence and the evidence adduced, this case has to be scrutinized. I have already discussed the evidence of the witnesses, which reveals that victim was harassed by the appellant prior to her death on demand of dowry articles and money. Accordingly, the family members of the victim provided a jewellery shop to the appellant. In spite of that on the date of incident, the victim sustained burn injury inside the house of the accused. All the witnesses examined by the prosecution has clearly stated that on hearing the screaming of the deceased from the house of the accused, they rushed to the place and found the victim inside the room which was locked from outside. They opened the room and found that the victim was in flame. Under such circumstances, the appellant being the custodian of

his wife, he has to offer an explanation for the burn injuries suffered by his wife in his house. Except denial in Section 313 Cr.P.C. there is practically no explanation in his statement. A false explanation was pleaded that his wife had committed suicide. On being asked, she replied that since other woman made phone call to him, she set fire to herself.

41. Admittedly, the occurrence took place in the house of the accused. The deceased/wife received fatal injuries in the said house. There is no other defence raised by the appellant in the trial court nor any plea of alibi has been taken recourse to. Therefore, failing to offer any explanation for the unnatural death of the deceased inside the house of the appellant, provisions under Section 8 as well as Section 106 of Indian Evidence Act both come into play. Therefore, there are strong incriminating circumstances coupled with post-mortem examination of the deceased, confirming the culpability of the appellant.

42. I have examined the impugned judgment under challenge. The learned trial court has appreciated the evidence of the witnesses, more importantly disbelieved the child witness i.e. DW-1 and has committed no error in accepting the testimony of other witnesses and other circumstances which are sufficient to record the guilt of the appellant. No perversity is brought to the notice of this Court in the appeal in the manner of appreciation. Hence, this Court refrains from interfering in the judgment. However, it is noticed that the accused has been sentenced to undergo RI for 10 years with fine of Rs. 20,000/- under Section 304 B IPC which reads as follows:

“....304B(2) whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life”.

43. On a bare look at the provision, it reveals that in the Section there is no reflection of imposing fine amount. Hence, fine of Rs.20,000/- is set aside. However, sentence to undergo RI for ten years is affirmed. Fine if paid, be returned to the appellant.

44. In the result, the appeal is dismissed and disposed of accordingly.

45. Trial Court record be returned back.

JUDGE

Comparing Assistant