

Court No. - 45

Case :- CRIMINAL APPEAL No. - 2993 of 2019

Appellant :- Amit Kumar

Respondent :- State of U.P.

Counsel for Appellant :- Abhishek Mayank, Abhishek Srivastava, Anand Kumar Pandey, Kamini Pandey (Dubey), Ram Bahadur, Sunil Kumar Singh

Counsel for Respondent :- G.A.

Hon'ble Saumitra Dayal Singh, J.

Hon'ble Dr. Gautam Chowdhary, J.

1. Heard Sri Abhishek Mayank, learned counsel for the appellant and Sri Vikas Goswami, learned AGA for the State.

2. Present appeal arises from the judgment and order dated 16.02.2019 passed by Additional Sessions Judge (FTC), Lalitpur in Sessions Trial No.26 of 2017 (State Vs. Amit Kumar), arising out of Case Crime No.397 of 2016 under Section 302 IPC. The appellant has been convicted and sentenced to undergo life imprisonment for the offence under Section 302 IPC and fine Rs. 10,000/- and in case of default of payment of fine to further undergo imprisonment of six months.

3. Trial arose of the FIR lodged on 22.12.2016 by the first informant Kamal (PW-1) in Case Crime No.397/2016 at P.S.- Saujana, district- Lalitpur. In that Kamal (PW-1), who is the father of the deceased, reported that the deceased was married to the appellant about three years prior to the occurrence. He further alleged that the appellant was demanding Rs.2 lakhs by way of additional dowry. For reason of non fulfillment of that demand, appellant used to assault the deceased. In that, the first informant (PW-1) learnt on 21.12.2016 that the appellant had assaulted the deceased and lit her up, after pouring kerosene oil. On

21.12.2016 a dying declaration of the deceased was recorded wherein she stated that at the time of occurrence, the appellant had a quarrel with her with respect to certain ornaments with a further allegation that the deceased had concealed them. She further stated that her mother-in-law accused her of having committed theft. Immediately thereafter, she stated that the appellant poured kerosene oil from a can and lit her up. She further stated that appellant thereafter poured water over her and at the time of occurrence and that no one else was present. She specifically stated that she was brought to the hospital by her father-in-law and that no one else was involved in the occurrence. The deceased died on 22.12.2016. The panchayatnama was prepared on 22.12.2016. Autopsy (on the dead body) was conducted on 23.12.2016 wherein the following ante-mortem injuries were noted:

-Superficial to deep burn over all body except part of abdomen B/L sole 90%.

-Lines of redness and burnt at places.

-Blisters are present at places.

-Singeing of the hair at hair sites. peeling of the skin at places.

4. As to the cause of death, it was recorded "shock due to ante-mortem burn injuries". The Investigating Officer recovered a half burnt plastic bottle and broken matchbox. Upon Investigation, charge-sheet was submitted on 01.02.2017. Upon case being committed for trial by the Court of Session, three charges (in all) were framed. The second charge in the alternative. Those charges are as below:

"1- यह कि शादी दिनांक 18-11-2013 से 21-12-2016 के मध्य समय अदम तहरीर ब स्थान आप अभियुक्त का मकान स्थित ग्राम गुढ़ा थाना सौजना जिला ललितपुर में आपने वादी कमल की पुत्री श्रीमती पूजा से अतिरिक्त दहेज में दो लाख रुपये नकद की लगातार माँग करते हुये उसे शारीरिक एवं मानसिक रूप से बार-बार प्रताड़ित किया। इस प्रकार आपने एक ऐसा अपराध कारित किया है, जो भा०दं०सं०

की धारा 498-क के तहत दण्डनीय है तथा जिसके प्रसंज्ञान लेने की अधिकारिता इस न्यायालय को प्राप्तव्य है।

2- यह कि घटना दिनांक 21-12-2016 को मृतिका श्रीमती पूजा की शादी के बाद से शादी के सात साल के अंदर आपने श्रीमती पूजा से अतिरिक्त दहेज में दो लाख रुपये नकद की माँग करते हुये उसे तरह - तरह से प्रताड़ित कर मारपीट की और दिनांक 21-12-2016 को श्रीमती पूजा पर मिट्टी का तेल डालकर आग लगा दिया , जिससे उसकी दिनांक 22-12-2016 को मृत्यु हो गयी , जो दहेज हत्या की श्रेणी में आने वाला अपराध है। इस प्रकार आपने एक ऐसा अपराध कारित किया है, जो भा०दं०सं० की धारा 304-बी के तहत दण्डनीय है तथा जिसके प्रसंज्ञान लेने की अधिकारिता इस न्यायालय को प्राप्तव्य है।

विकल्प में-

यह कि दिनांक 21-12-2016 को ब स्थान आप अभियुक्त का मकान स्थित ग्राम गुढ़ा थाना सौजना व जिला ललितपुर में आपने श्रीमती पूजा पर मिट्टी का तेल डालकर आग लगा दिया , जिससे उसकी दिनांक 22-12-2016 को मृत्यु हो गयी। इस प्रकार आपने एक ऐसा अपराध कारित किया है जो भा०दं०सं० की धारा 302 के तहत दण्डनीय है, जिसके प्रसंज्ञान लेने की अधिकारिता इस न्यायालय को प्राप्तव्य है।

3- यह कि मृतिका श्रीमती पूजा की शादी से 21-12-2016 के मध्य उसकी शादी के सात साल के अंदर मृतिका से अतिरिक्त दहेज में दो लाख रुपये नकद की नाजायज माँग करते हुये बार-बार परेशान करते रहे। इस प्रकार आपने एक ऐसा अपराध कारित किया है जो दहेज प्रतिषेध अधिनियम की धारा 4 के तहत दण्डनीय है, जिसके प्रसंज्ञान लेने की अधिकारिता इस न्यायालय को प्राप्तव्य है।"

5. At the trial, besides the documentary evidence noted above, the prosecution relied on oral evidence led by Kamal (PW-1), the first informant; Santosh Kumar (PW-2), chik writer; Smt. Rati (PW-3), the mother of the deceased; Kailash Narayan (PW-4), the brother of the deceased; Dr. Sandeep Chaudhary (PW-5), who conducted the autopsy; Sri Anand Kumar Nayak (PW-6), the Naib Tehsildar who recorded the dying declaration of the deceased; Sri Baldev Singh Khaneda (PW-7), the

Investigating Officer; and Sri Krishna Rayakvar (PW-8), the retired Tehsildar who prepared the panchayatnama.

6. Thereafter, statement of the accused was recorded under Section 313 Cr.P.C. The defence also led evidence in the shape of Janki, the maternal aunt of the appellant. She tried to prove that the occurrence was accidental.

7. In such circumstances, the learned court below held the appellant guilty of the alternative charge under Section 302 IPC and sentenced him with life imprisonment.

8. Submission of learned counsel for the appellant is that at the first place, charge under Section 302 IPC being a heavier charge than that under Section 304-B IPC, it may not have been framed by way of an alternative charge. That defect in the proceedings is fatal. He has relied upon a decision of the Supreme Court in ***Jasvinder Saini & ors v. State (Govt. of NCT of Delhi) (2013 7 SCC 256)***, wherein vide paragraphs 14 & 15, it has been observed as below:

"Be that as it may the common thread running through both the orders is that this Court had in Rajbir's case (supra) directed the addition of a charge under Section 302 IPC to every case in which the accused are charged with Section 304-B. That was not, in our opinion, the true purport of the order passed by this Court. The direction was not meant to be followed mechanically and without due regard to the nature of the evidence available in the case. All that this Court meant to say was that in a case where a charge alleging dowry death is framed, a charge under Section 302 can also be framed if the evidence otherwise permits. No other meaning could be deduced from the order of this Court. It is common ground that a charge under Section 304B IPC is not a substitute for a charge of murder punishable

under Section 302. As in the case of murder in every case under Section 304B also there is a death involved. The question whether it is murder punishable under Section 302 IPC or a dowry death punishable under Section 304B IPC depends upon the fact situation and the evidence in the case. If there is evidence whether direct or circumstantial to prima facie support a charge under Section 302 IPC the trial Court can and indeed ought to frame a charge of murder punishable under Section 302 IPC, which would then be the main charge and not an alternative charge as is erroneously assumed in some quarters. If the main charge of murder is not proved against the accused at the trial, the Court can look into the evidence to determine whether the alternative charge of dowry death punishable under Section 304B is established. The ingredients constituting the two offences are different, thereby demanding appreciation of evidence from the perspective relevant to such ingredients. The trial Court in that view of the matter acted mechanically for it framed an additional charge under Section 302 IPC without adverting to the evidence adduced in the case and simply on the basis of the direction issued in Rajbir's case (supra). The High Court no doubt made a half hearted attempt to justify the framing of the charge independent of the directions in Rajbir's case (supra), but it would have been more appropriate to remit the matter back to the trial Court for fresh orders rather than lending support to it in the manner done by the High Court."

Second, it has been submitted that all evidence led at the trial was to prove the charge framed under Section 304-B. Documentary evidence both dying declaration as also the oral evidence only sought to establish demand of dowry. Therefore, it had not become open for the learned court below to proceed to convict the appellant under Section 302 IPC, outside the evidence led by the prosecution.

Third, it has been submitted that in any case after the prosecution

evidence was over, the appellant was not confronted with any adverse circumstance relevant to alternative charge framed under Section 302 IPC. Therefore, the appellant has been seriously prejudiced at the stage of conviction and sentence. In that regard he has relied upon the recent decision of the Supreme Court in ***Raj Kumar @ Suman v. State (NCT of Delhi)***; 2023 SCC OnLine SC 609, wherein it has been observed as below:

"In paragraph 7 of the High Court Judgment, it is noted that a separate charge under Section 452 read with 120B of IPC was framed against all accused except the present appellant. Thus, the charge as framed against the appellant was of being a party to criminal conspiracy. There is also a charge that all the accused fired bullets from their revolver. Only based on the version of PW-5 regarding the appellant's presence with a weapon outside the premises where the offence took place, the involvement of the appellant has been held as proved. There is absolutely no other evidence against him. This is not a case where there are several incriminating circumstances appearing against the appellant in the evidence adduced by the prosecution. This is a case where there is only a solitary circumstance appearing in the evidence against the appellant. The prosecution examined 37 witnesses. The material against the appellant is in the form of one sentence in the evidence of PW5. As mentioned earlier, if we read 42 questions put to the appellant in his statement under Section 313 of CrPC, any accused having ordinary intelligence will carry an impression that there is absolutely no material against him. The appellant was not confronted during his examination under Section 313 of CrPC with the only allegation of the prosecution against him. This is how, on facts, we find that a serious prejudice was caused to the appellant."

(emphasis applied)

Last, it has been submitted that in similar circumstances, a co-ordinate bench of this Court in ***Smt. Kalawati Devi v. State of UP (NC No.-2018:AHC-LKO:12931-DB)*** altered the charge from 302 IPC to 304-B IPC.

9. On the other hand, learned AGA would submit that the dying declaration is clear. It makes no allegation of demand of dowry. The dying declaration was proven by the Naib Teshildar both with respect to the deposing state of the deceased as certified by the doctor and also as to the contents of the dying declaration recorded by him. Therefore, the learned court below has not erred in convicting the appellant under Section 302 IPC, inasmuch, it is further undisputed to the defence that occurrence was caused inside the dwelling house of the appellant. Alternatively, it has been submitted that present is a case where the deceased was done to death by her husband within three years of her marriage. Therefore, it may admit no leniency either as to convict in or sentence the appellant either under Section 302 IPC or under Section 304-B.

10. Having heard learned counsel for the respective parties and having perused the record, this Court finds that in the first place, the place and manner of occurrence is undisputed to the defence. Thus, it is proven beyond reasonable doubt that kerosene was poured on the deceased and fire was lit. That led to extensive burn injuries suffered by her on her upper torso. That fact is clearly recorded in the autopsy report. It is also not disputed that the death was caused within three years of the marriage of the deceased. There is also no dispute that other than against the appellant, no accusation was made against any other family member of the appellant.

11. As to the dying declaration, learned AGA is right in his submission

that though doctor who had certified the deposing state of the deceased was not examined at the trial yet the dying declaration cannot be disbelieved in face of material facts being proven by the Naib Tehsildar, Anand Kumar Nayak (PW-6). We have perused the deposition made by the said witness. He clearly proved two facts- one, of the doctor having certified the deposing state of the deceased at the time of her dying declaration being recorded and second, the statement made by her as was recorded by the said witness. Therefore, the dying declaration of the deceased is an admissible piece of evidence.

12. As to whether evidence exists of offence under Section 302 IPC, doubt persists. In the dying declaration, the deceased did not make any statement as may leave the Court to infer from that statement that she was clearly indicating that there was no demand of dowry. On the contrary, her statement is with respect to items received by her in her marriage from her parents. Neither any further direct question was put to her at that time by PW-6 answer to which may rule out demand of dowry, nor (unfortunately) we have the statement of the victim. It is in that context we have examined the statements made by her father Kamal (PW-1), mother Smt. Rati (PW-3) and Kailash Narayan (PW-4). All have alleged demand of dowry. They have specified the demand of dowry made of Rs.2 lakhs. However, neither of the three witnesses established any prior occurrence reported to the police or any earlier serious assault may have reported with respect to which any credible evidence may exist, in the shape of injury report etc.

13. Also, the last time, when the demand of dowry may have been made, could not be established. Therefore, it is not a case where the occurrence was preceded by any earlier incident of like nature or of any assault made on the victim in near past, or of any factor as may lead us to infer that the occurrence was one of the aggravated dowry death.

14. Here, we are also aware that in the statement recorded of appellant under Section 313 Cr.P.C., no adverse circumstance was confronted to him as may have indicated to the defence in any visible manner that such adverse circumstance had been found existing in the context of the alternate charge under Section 302 IPC.

15. Thus, in the first place, keeping in mind the principle laid down by the Supreme Court in **Jasvinder Saini** (*supra*), the prosecution may not be allowed to press the heavier charge under Section 302 IPC. Second, for reason of adverse circumstance indicating the murder not confronted to the appellant, the appellant had been prejudiced at the trial. To this extent, we find that the occurrence deserves alteration from Section 302 IPC to 304-B IPC in light of the evidence led by the prosecution, especially the oral evidence.

16. In view of the discussions made above, we find that the appellant is guilty of offence under Section 304-B IPC.

17. Further, as to the modification of sentence of the applicant, learned counsel for the appellant has relied upon a judgment of the Apex Court in the case of **Hem Chand v. State of Haryana; (1994) 6 SCC 727** wherein while confirming the conviction of the appellant under Section 304-B IPC, reduced the sentence of imprisonment for life to 10 years' rigorous imprisonment.

18. Thus, in view of the fact that the occurrence was not preceded by any other prior incidents of involving assault etc. and relying upon **Hem Chand's** case (*supra*), interest of justice would be served if the sentence is modified to ten years.

19. We, accordingly, while modifying the conviction under Section 302 IPC, we confirm the conviction of the appellant under Section 304-B IPC

and reduce the sentence of imprisonment for life to 10 years' rigorous imprisonment.

20. The appeal is *partly allowed*.

21. The appellant is in jail. He has already remained confined for approximately eight years and two months. He may be released forthwith after completing the modified sentence of ten years.

22. Registry shall intimate to the concerned Superintendent Jail and the court concerned regarding the modification of sentence.

Order Date :- 11.3.2025

P Kesari

(Dr. Gautam Chowdhary, J.)

(S.D. Singh, J.)