

HON'BLE SRI JUSTICE G.CHANDRAIAH

AND

HON'BLE SRI JUSTICE M.S.K.JAISWAL

Criminal Appeal No. 694 of 2014

Date: 28..04..2015

Between :-

Jameelullah Patel @ Fatheullah Patel

@ Jameel Patel.

.. Appellant/Accused

And

The State of Telangana,

Rep.by Public Prosecutor,

High Court, Hyderabad.

.. Respondent/Complainant.

HON'BLE SRI JUSTICE G.CHANDRAIAH

AND

HON'BLE SRI JUSTICE M.S.K.JAISWAL

Criminal Appeal No. 694 of 2014

JUDGMENT: (*Per Hon'ble Sri Justice G.Chandraiah*)

This appeal is filed by the appellant/accused, aggrieved by the conviction and sentence imposed by the VII Additional District and Sessions Judge at Bodhan in S.C.No.233 of 2010 dated 27.06.2014, arising out of PRC No.16 of 2010 on the file of Judicial First Class Magistrate, Bodhan, and Crime No.83/2010 of Bodhan Police Station.

2. The case of prosecution is that on 19.3.2010, Sri Khaji Khaja Anwarullah (PW-1), brother of the deceased, by name Smt. Safia Banu, lodged a complaint

before the Police, Bodhan PS., alleging that about six months prior thereto, the accused has forcibly taken away his sister i.e., the deceased, and forcibly married her. Thereafter they were residing at Shakkarnagar X Road, Bodhan. It is alleged that three months prior thereto, the accused started demanding an amount of Rs.50,000/- and some agricultural land towards dowry, and whenever the deceased refused to bring the same, the accused used to beat her mercilessly and threatened to kill her. While so, on 16.03.2010, a panchayat was also held in his house in the presence of his mother (PW-2) and others, wherein the accused again demanded for money and land towards dowry and in case of failure, he has threatened to kill the deceased. On the intervening night of 18/19.03.2010, when the deceased was in their house with the accused, it is alleged that the accused beat her to death. Further, on 19.03.2010 at about 9.00 a.m., the accused brought the dead body of the deceased to the house of PW-1, situated at Old City, Bodhan and ran away. At that time, himself (complainant), his mother-PW-2, brother, Mateen and Mohd Abdul Khadeer and others were present.

3. On the basis of the above report, the S.I. of Police registered a case in Cr.No.83 of 2010 against the accused for the offence under Sec.304-B IPC, took up the investigation, recorded the statement of PW-1, visited his house and found the dead body of the deceased, and made a requisition to Tahsildar, Bodhan to conduct inquest panchanama, who visited and conducted inquest panchanama over the dead body of the deceased, got photographed the same, in the presence of mediators, and sent the dead body for post-mortem examination. Thereafter, the S.I. of police, visited the scene of offence at Shakkarnagar Cross Road, Bodhan, conducted scene of offence panchanama, prepared rough sketch, seized the material objects in the presence of the panchas. Subsequently, the Sub-Divisional Police Officer, Bodhan (PW.13) took up the case for further investigation, recorded statements of LWs.2 to 9, arrested the accused on 22.3.2010 and sent him to judicial custody. On 8.4.2010, PW.13 filed a requisition before the JFCM, Banswada to record statements of LWs.1 to 5 under Sec.164 Cr.P.C. On 8.5.2010 the doctors conducted post mortem examination over the dead body and preserved the viscera for expert's opinion. The learned JFCM, Banswada, recorded the statements of the witnesses under Sec.164 Cr.P.C., wherein the witnesses have stated that the accused brought the dead body of the deceased in a Car,

bearing No. Andhra Pradesh-25/V-4477 to the house of PW1. On examination of viscera, the Regional Forensic Laboratory, Kamareddy, has opined that the cause of death is strangulation. Therefore, after completion of the investigation, the police filed charge sheet against the accused for the offences under Sections 304-B, 302, 201 and 498-A IPC, stating that the accused killed the deceased by strangulation, created scene as suicidal death by hanging and later shifted the scene of offence to the house of the parents of the deceased, with an intention to screen off the evidence of murder.

4. The learned Judicial First Class Magistrate, Bodhan took cognizance of the offence, and registered the case as PRC No.16 of 2010. After complying with the mandatory provisions of Cr.P.C., the learned Magistrate committed the case to the Court of Sessions, Nizamabad, whereat it was registered as S.C.No.233 of 2010, and made over to the trial Court for disposal according to law.

5. On appearance of the accused, charges referable to Sections 498-A, 304-B, 302 and 201 IPC are framed against the accused, read over and explained to him to which the accused pleaded not guilty and claimed to be tried. In order to prove its case, the prosecution examined PWs.1 to 14, got marked Ex.P.1 to Ex.P.14 and produced M.Os. 1 to 3. After completion of the evidence, the accused was examined under Section 313 Cr.P.C., where he denied the incriminating evidence appearing against him. On behalf of the accused, he himself examined as DW.1 and got marked Exs.D.1 to D.3, in support of his defence.

6. After hearing the arguments and perusing the material on record, by the impugned Judgment, the trial Court found the appellant/accused guilty of all the four offences charged, and sentenced him (i) to undergo rigorous imprisonment for a period of three years and pay fine of Rs.1,000/-, in default to undergo simple imprisonment for one month for the offence under Sec.498-A IPC; (ii) to undergo rigorous imprisonment for a period of seven years for the offence under Sec.304-B IPC; (iii) to undergo rigorous imprisonment for life and pay fine of Rs.1,000/- in default to undergo simple imprisonment for two months for the offence under Sec.302 IPC; and (iv) to undergo rigorous imprisonment for a period of three years and pay fine of Rs.1,000/- in default to undergo simple imprisonment for one month for the offence under Sec.201 IPC. The trial court

further ordered that all the substantive sentences imposed on the accused shall run concurrently, and given set off of the remand period already undergone by the accused.

7. Aggrieved by the same, the appellant/accused has preferred the present appeal.

8. The contention of the learned Counsel appearing for the appellants/accused is that the trial Court erred in appreciating the material evidence on record in proper perspective and has erroneously found the accused guilty. It is his further contention that the prosecution failed to explain the delay in lodging the report. The learned counsel further submits that except PWs.1 and 2, the other independent material witnesses, have not supported the prosecution case, with regard to demand of dowry by the appellant at any point of time before the death of the deceased, and the same is not taken into consideration by the learned trial Judge. The learned trial Judge ought to have seen that the marriage of the accused with the deceased is not an arranged one, and therefore the question of the appellant demanding for any dowry will not arise. The learned counsel submits that it is the case of the prosecution that apart from the appellant, some other persons were present in getting the dead body of the deceased to the house of PWs. 1 And 2, and in such case, the non-examination of the said persons is a fatal to the prosecution and it is to be presumed that the death of the deceased was at the house of PWs.1 and 2 only. Therefore, the conviction of the accused is not proper and justifiable. Thus, the learned counsel for the appellants/accused, by placing reliance on the decision of the Apex Court in ***Tomaso Bruno Vs. State of U.P.*** { 2015 (1) ALD (Crl.) 663 (SC)} and the decision of the division Bench of this Court in ***Vaddi Nagaiah Vs. State of AP*** {2015 (1) ALD (Crl.) 580}, sought for acquittal of the accused:

9. On the other hand, learned Public Prosecutor submits that PWs.1 and 2 are the important witnesses to speak about the demands made by the accused for dowry, who have narrated the incident properly, and there is no discrepancy in their evidence. All the relevant prosecution witnesses have clearly spoken about the involvement of the accused in killing the deceased. Drawing our attention to Sections 113 and 106 of the Evidence Act, he submits that the prosecution successfully proved the guilt of the accused. The learned Public

Prosecutor further submits that the trial Court has taken into consideration the evidence on record in proper perspective and believing the same, found the accused guilty. Therefore, the appeal does not merit any consideration and hence the same is liable to be dismissed. He also placed reliance on the decisions of the Apex Court in **Ramakanth Mishra @ Lalu Vs. State of UP** (2015 AIR SCW 1674), **Rajinder Singh Vs. State of Punjab** (2015 AIR SCW 1663) and **Bhim Singh Vs. State of Uttarkhand** (2015 SCW 1118)

10. The point for consideration is as to whether the prosecution proved its case against the accused beyond reasonable doubt, so as to sustain their conviction and sentence, or whether it needs to be modified, set aside or varied?

11. The appellant-accused and the deceased – Safiya Banu are said to be the husband and wife. The appellant already had a wife through whom he had 5 daughters and 2 sons. About six months prior to the date of incident viz., 19-03-2010, the appellant is said to have forcibly taken away the deceased – Safiya Banu and got married and started living with her. After about two months of their elopement, the deceased and the accused shifted their abode to Shakkarnagar, Bodhan, which is nearer to the house of PWs.1 and 2 who are the brother and mother respectively of the deceased. The allegation is that the appellant-accused started harassing the deceased wife demanding money and also transfer of certain agricultural lands belonging to the parental family of the deceased. When the demands were not being fully met, the accused is said to have killed the deceased in the intervening night of 18/19-03-2010 by strangulating her and in the early morning of 19-03-2010 brought the dead body of the deceased in a car helped by Kaleel Patel, Hazar Patel, Hasad Patel, Intiyaz and others and dropped it at the house of PWs.1 and 2 and absconded. The further case of the prosecution is that at about 03.30 p.m., in the afternoon, the complaint was lodged by PW.1 and on its basis, a case was registered and investigation was taken up and it being a suspicious death of a woman having been committed within a period of six months of marriage, the investigation was taken up by the Sub-Divisional Police Officer who has been examined as PW.13. Initial investigation was done by PW.14, the then Sub-Inspector of Police, who registered the complaint, issued the F.I.R., recorded the statements, got conducted inquest panchanama by PW.12 – the Tahasildar, prepared scene of offence panchanama – Ex.P.13, got the photographs taken

and thereafter handed over the investigation to the senior Officer.

12. The accused while admitting the factum of his living with the deceased at Shakkarnagar, however, denied the other allegations. In his defence by invoking the provisions of Section 315 Cr.P.C., the appellant examined himself as DW.1 and produced Ex.D.3, which is a copy of a Writ Petition filed by the *de facto* complainant – PW.1 in the High Court of Andhra Pradesh alleging that the investigation is not being done on proper lines and even though there are specific allegations against several persons, the police have registered the crime only against the appellant-accused. As a witness, the appellant-accused deposed only to the extent of PW.1 filing a writ petition and got Ex.D.3 marked, but did not say anything about the substantive allegations levelled against him either by the investigating agency or the prosecution witnesses.

13. As against the general immunity provided to a person charged with a criminal offence of maintaining stoick silence, law mandates that such of the facts and circumstances revolving round the incident proper which are exclusively within the special knowledge of the person charged should be explained by him. In order to over come the ever increasing menace of young-woman meeting unnatural and untimely death, provisions have been incorporated both in the Penal Code and the Evidence Act, the sole object of bringing to justice the perpetrators of such crimes in its different manifestations. Inspite of this, the initial presumption of proving certain basic facts rests on the prosecution.

14. With regard to the applicability of Sections 113A and 113B of the Indian Evidence Act, the object of bringing about the amendment by the legislature is clear to curb the menace of dowry deaths with a firm hand. The need for this legislation arose in view of the fact that crimes of this nature are generally committed in the privacy of residential homes where it is not easy to gather direct evidence. Therefore, presumption is provided subject to however condition that certain foundational facts are to be established by the prosecution.

15. In the instant case, before proceeding further, we are constrained to place on record the lopsided and perfunctory investigation done by both P.Ws.13 and 14 even though they are senior Police Officers. It is significant to note that their

acts of omissions and commissions were brought to the notice of the High Court by PW.1 by filing W.P.No.11307 of 2010, within two months from the date of incident i.e., on 10-05-2010, with a pointed allegation that the investigating agency has firstly refused to register the crime when it was lodged at about 12.00 in the afternoon and delayed it by about 3 hours and thereafter the crime was registered only after the kith and kin of the deceased staged *dharna* in protest. It was also alleged in the affidavit filed by PW.1 which curiously is produced by the accused himself and marked as Ex.D.3 that the investigation be entrusted to an impartial and independent investigating agency for rendering justice. In the complaint – Ex.P.1, it was specifically alleged that after killing the deceased, the dead body was brought to the house of PWs.1 and 2 in a car with the help of 5 other persons. In the Writ Petition also there are specific allegations that the investigation is not being proceeded against those 5 persons named in the F.I.R. In the charge-sheet filed by the Investigating Officer-PW.13, being the Sub-Divisional Police Officer, nothing is mentioned about their involvement or otherwise of the persons named by PW.1.

16. The other aspect of the matter is the conduct of the accused during the course of trial. The defence of the accused can be brought on record by way of cross-examining the prosecution witnesses and also during the course of the examination of an accused under Section 313 Cr.P.C. Such of the aspects which are within the knowledge of the accused, are required to be explained by him when he is examined under Section 313 Cr.P.C. In the instant case, except for denying the entire evidence on record by giving one word answer as “false” or “not known”, nothing specific is stated by the accused. Even when a question is put to the accused as to whether he has got anything to say about this case, his only answer is “nothing”. The only specific denial by the accused during the course of his Section 313 Cr.P.C. examination is that he was not preventing the deceased from talking with others, while admitting the fact that himself and the deceased stayed in a rented house at Shakkarnagar.

17. As already stated, nobody can compel the accused to be a witness against himself. However, as per Section 315 Cr.P.C., the person accused of an offence shall be a competent witness for the defence and may give evidence on oath to disprove the charges made against him at the trial. It further provides that such a person cannot be called as a witness except on his own request in writing.

18. In the instant case, during the trial, the appellant-accused filed Criminal Miscellaneous Petition under Section 315 (1)(a) Cr.P.C. seeking permission to adduce evidence by examining himself as witness and also to mark certified copy of W.P.No.11037 of 2010 on the file of the High Court of Andhra Pradesh. The trial Court allowed the said petition on 12-05-2014 and consequently the accused entered the witness box and gave evidence as DW.1. It may be apposite to re-produce the entire statement of DW.1 which he gave during the course of trial on 14-05-2014.

“Examination in chief by defence counsel: I am resident of Bodhan town and mandal, Nizamabad District. I am accused in this case. I have obtained certified copy of affidavit in Writ Petition No.11307 of 2010 and I have filed the said affidavit in the Court. The certified copy of affidavit in Writ Petition No.11307 of 2010 is Ex.D.3.

Cross-examination by A.P.P.:- I cannot identify Khaza Kazi Jalaluddin-PW.4. It is true PW.4 is paternal uncle of my deceased wife –Shafia Banu and the house of PW.4 is situated by the side of the house of mother of deceased – Shafia Banu. I do not know about land disputes between PW.4 and mother of the deceased – Shafia Banu. It is not true to suggest that I know about land disputes between PW.4 and mother of the deceased and I am deposing false.

Re-Examination: NIL”

19. What is noticed from the above evidence of DW.1 is that even though he invoked the provisions of Section 315 Cr.P.C., and entered the witness box as a witness competent to deny the accusations made against him, he is conspicuously silent about the allegations made against him either by the prosecuting agency or the prosecution witnesses. When PWs.1 and 2 gave evidence pointing towards the culpability of the accused in the death of his wife and when he thought it proper to examine himself as a defence witness, it is obligatory on his part to explain the circumstances which led to the death of his wife. Absolutely nothing is said by the accused either in his examination under Section 313 Cr.P.C., or even when he opted to examine himself as a defence witness.

20. It shall now be seen as to whether the prosecution has discharged the initial onus of proving the circumstances in which the deceased died and as to whether the accused is responsible for it.

21. Insofar as the offence punishable under Section 304-B IPC., is concerned, the cause of death as to whether it is homicidal or suicidal gets diluted. However, what is required to be seen is as to whether the deceased was subjected to harassment soon before her death and whether the prosecution established that there was cruelty and harassment in connection with demand for dowry soon before her death.

22. PWs.1 and 2 are the brother and mother of the deceased. It is in the evidence of PW.1 – the brother that the accused used to lock the house from outside by keeping the deceased inside the house and was never allowing them to meet her. He further deposed that subsequently the accused demanded money and Ac.10-00 of land, that his mother-PW.2 gave Rs.50,000/- to the accused on two occasions, that on 16-03-2010 the accused brought the deceased to his house and demanded Rs.50,000/- and Ac.10-00 of land, that as such a panchayat was held in the presence of his uncle by name Sami, a resident of Hyderabad, that they convinced and sent the accused and deceased to their house, that on 19-03-2010 the accused called his mother – PW.2 on phone and demanded Rs.50,000/- and Ac.10-00 of land and thereafter informed that the deceased died. In the cross-examination, he admitted that the fact that the accused demanded money and land has not been mentioned by him either in the complaint – Ex.P.1 or in the statement recorded by the Tahasildar. He also admits that the fact that a panchayat was held has also not been stated by him before the police and the Tahasildar in the previous statements, so also, the demand of the accused said to have been made on 19-03-2010.

23. The evidence of PW.2 on this aspect is to the effect that her deceased daughter informed her that the accused is harassing her for money and land, that she gave Rs.50,000/- and subsequently again gave Rs.50,000/-, that thereafter when she went to the house of the deceased and came to know that the accused is not even allowing the deceased to take meals, that about eight days prior to the death of the deceased, the accused brought the deceased to her house and demanded Rs.50,000/- and papers of the land, that at that time her relations also came from Hyderabad and they were present, that thereafter she went to Hyderabad to arrange money and the accused and deceased went away to their house, that two days thereafter, the accused called her on phone and asked about the money and thereafter informed her that the deceased died.

She also admits in the cross-examination that she did not state in her previous statements before the police or the Tahasildar about her giving Rs.50,000/- to the accused on two occasions.

24. Even though panchayat is said to have taken place in the presence of other relatives, absolutely there is no evidence on that aspect. None of the neighbours have supported the case of the prosecution that the accused subjecting the deceased to harassment either by keeping her locked inside the house or denying her of taking food. On the other hand, the evidence of PW.2 clearly shows that even prior to the so-called forcible taking away of the deceased by the accused about six months prior to the death and getting her married and as a matter of fact, even prior to the said elopement, the deceased, the accused, PW.2 and other relations went to Bada Pahad Dargah and this was prior to the marriage. It is also admitted by PW.2 that even after the marriage, the deceased and the accused were taken by her to Karnataka State for seeing a girl to be married to PW.1. The evidence of PWs.1 and 2 do not establish conclusively that the deceased was being subjected to cruelty and harassment by the accused for failure to fulfil the demands of the accused. No satisfactory evidence is placed on record to show that PW.2 paid Rs.1,00,000/- to the accused in two instalments subsequent to the marriage and just prior to the death of the deceased. We have gone through the decisions (supra) relied on by the learned Public Prosecutor. There is no dispute with regard to the *ratio decidendi* in the judgments relied on by the appellants. The fact however remains that none of the judgments relied on by them are applicable to the facts of the case on hand. Prima facie it makes clear that they do not clinch the issue involved in this appeal. The judgments are rendered in different context. Having considered the evidence on this aspect, therefore, it is difficult to hold that the prosecution could prove its case against the accused for the offence punishable under Section 304-B IPC. The aforesaid view of ours is supported by the decision relied on by the learned Counsel for the appellant in the case of Vaddi nagaiah (supra)

25. The other aspect of the matter is that as to whether the prosecution could establish that the death of the deceased was homicidal and that it is the accused who has caused her death. As already stated, it is suggested to PW.1

that the deceased committed suicide while in the house of PWs.1 and 2 on being told that she cannot conceive and beget children, due to which out of frustration, the deceased committed suicide. When this is the plea taken by the accused, absolutely no evidence has been produced in that direction. As already stated, even when the accused examined himself as DW.1, he did not even say that the deceased committed suicide out of frustration upon being told about her inability to beget children. Even though it is suggested that the accused himself took the deceased to a hospital at Hyderabad for her treatment, absolutely neither oral nor documentary evidence is produced to show that the Doctor declared before the accused and deceased that the deceased cannot conceive. This defence of the accused is also difficult to be countenanced for the reason that the accused and the deceased who was hardly aged 25 years and were in marriage not even for a period of six months. Within that short period, if the wife do not conceive, usually there will not be any consultation with the Doctors and there is no question of there being a declaration from a Doctor that the deceased is incapable of conception led to frustration of such a degree leading to the wife taking the extreme steps of suicide. Therefore, we find it difficult to accept the contention of the accused that the deceased committed suicide out of frustration on being told by the Doctor within six months of her marriage that she cannot conceive.

26. As noticed above, the death of the deceased being unnatural is not in dispute. As per the medical evidence on record which comprised of the Doctor-PW.10 and the post-mortem report Ex.P.9, the Forensic Science Laboratory report-ex.P.10, the expert opinion – Ex.P.11, and the final opinion – Ex.P.12, it is borne out that the cause of death of the deceased is due to strangulation. The medical officer found the following three injuries on the deceased:-

1. Ligature mark present at the back of the neck, at the level of C-6, extending from 3 inches below the angle of the left mandible measuring about 13 x 4 inches margins irregular, base contuse, black in colour.
2. Contusion over chin 2 x 1 inches.
3. Contusion over left forearm 4 x 3 inches and contusion over right forearm 6 x 2 inches, both hands are bluish in colour,

distal to the contusion.

The injury No.1 is decisive. It is a ligature mark on the backside of the neck. The photographs of the deceased, which are part of the record, clearly show that there are injuries around the neck of the deceased. The back side portion of the nighty, which was on the body of the deceased, was torn. If the post-mortem report and the evidence of the medical officer is carefully perused, we have no doubt in observing that it is clearly not a case of suicide but it is due to strangulation, as asserted by the Doctor – PW.10. If a person commits suicide by hanging, there is no scope for injury No.1 being caused, which is on the backside of the neck. The evidence on record falsifies the contention of the accused that the deceased committed suicide out of frustration and on the other hand, it is established beyond doubt that the death of the deceased is homicidal due to strangulation.

27. The specific case of PWs.1 and 2 is that after having killed the deceased in his house, the accused brought the dead body and after dropping it at the house of PWs.1 and 2, he along with others disappeared. It is no doubt true that the investigating agency has failed to gather the evidence on this aspect of the dead body being shifted from the house of the accused to the house of PWs.1 and 2. However, that lapse on the part of the investigating agency do not enure to the benefit of the accused, for the reason that when he examined himself as a witness, he did not even whisper a single word as to the allegation that the deceased was done to death in his house and thereafter the dead body was shifted to the house of PWs.1 and 2. The evidence of PWs.1 and 2 is consistent and convincing insofar as it relates to the factum of the dead body being brought by the accused and others and dropping it at their house in the morning of 19-03-2010. The evidence of PWs.1 and 2 coupled with the evidence of the accused himself as DW.1 leaves no room for doubt that it is the accused who has caused the death of the deceased by strangulation. In view of the foregoing discussion, the reliance placed on by the learned Counsel for the appellant in the case of Tomaso Bruno (supra) has no help to the case of the appellant.

28. We are, therefore, of the opinion that when there is no legally acceptable evidence insofar as the charges punishable under Sections 304-B, 498-A and 201 IPC., are concerned, the prosecution could establish by the evidence of

PWs.1 and 2, the Doctor-PW.10 and the medical record that the accused has caused the death of the deceased by strangulation and therefore he is liable to be convicted for the offence under Section 302 IPC. The point is accordingly answered.

29. For the foregoing discussion and in the result, the Criminal Appeal is partly allowed and the conviction and sentence imposed by the learned VII Additional Sessions Judge, Bodhan, in S.C.No. 233 of 2010 against the sole accused/appellant for the offences punishable under Sections 498-A, 304-B and 201 IPC are hereby set aside and the appellant-accused is acquitted of the said offences. However, the conviction and sentence imposed by the learned VII Additional Sessions Judge, Bodhan, in S.C.No. 233 of 2010 against the sole accused/appellant for the offence punishable under Section 302 IPC is hereby upheld and affirmed accordingly.

30. The material objects shall be destroyed after the appeal time is over.

G. CHANDRAIAH, J.

M.S.K.JAISWAL, J.

Dt:28.04.2015

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HON'BLE SRI JUSTICE G.CHANDRAIAH

AND

HON'BLE SRI JUSTICE M.S.K.JAISWAL

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Physics

Date: 28..04..2015

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