

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on :18.8.2015*
Judgment delivered on : 21.8.2015

+ CRL.A. 372/2013 & CrI.M.A.No.9590/2015

AJAY PATHAK Appellant

Through Mr.Sheikh Issar Ahmed,
Advocate.

versus

STATE Respondent

Through Mr.Tarang Srivastava, Advocate.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 This appeal is directed against the impugned judgment and order of sentence dated 19.02.2013 and 23.02.2013 wherein the appellant Ajay Pathak (husband of the victim) stood convicted under Sections 498A/304 B of the IPC. He was sentenced to undergo RI for a period of 2 years and to pay a fine of Rs.10,000/- in default of payment of fine to undergo SI for a period of 3 years for his conviction under Section 498A of the IPC. For his conviction under Section 304B he had been sentenced to undergo RI for a period of 7 years. Both the sentences

were to run concurrently. Benefit of Section 428 of the Cr.P.C. had been granted to him.

2 The version of the prosecution was unfolded in the testimony of father of the victim namely Rajender Prasad Mishra. He was examined as PW-1. His statement was recorded by the SDM. His version was that his daughter after her marriage was continuously harassed for dowry and in particular for a four wheeler vehicle (car) which the appellant and his family were demanding to which he had expressed inability to fulfill, for which the victim had been penalized and had been killed by the appellant and his family members. Apart from the version of PW-1 statement of the uncles of the victim i.e. PW-2 and PW-3 had also been recorded. The medical evidence which was the post mortem report of the victim (Ex.PW-6/A) proved through Dr.Santosh Kumar (PW-6) evidenced that the victim had died by hanging. She had died in the mid-afternoon in her matrimonial home. Version of the prosecution being that it was for the accused to have explained the circumstances in which she had died but they have failed to do so. It was on the basis of the aforementioned evidence collected by the prosecution that the appellant was convicted and sentenced. This Court notes that the other family

members who were charge sheeted i.e. father-in-law, mother-in-law and sister-in-law of the appellant stood acquitted.

3 On behalf of the appellant arguments have been addressed in detail. The first submission made by the learned counsel for the appellant is that on the same set of evidence three other persons namely father-in-law, mother-in-law and the sister-in-law of the victim stood acquitted as the Trial Court was of the view that the testimony of the witnesses of the prosecution was not inspiring; yet on the same uninspiring evidence the appellant had been convicted merely because he was the husband of the victim. The judgment is liable to be set aside on this count alone. It is further submitted that the ingredients of offence under Section 304 B of the IPC in which the cruelty / harassment has to be meted out to the victim “soon before” her death is an ingredient which is missing. Even as per the version of the prosecution the demand for a four wheeler vehicle (car) was made by the appellant on 16.6.2009; the incident of the death of the victim had occurred on 01.8.2009 i.e. after a gap of 1½ months and there being no other intervening circumstance having been detailed. It is a clear case where there can be no connection of the death of the victim with the

Crl. Appeal No. 372/2013

alleged demand of 16.6.2009. The defence set up by the appellant all along has been that he was not in the matrimonial home at that point of time; he had gone to attend his grandfather who was ailing in the Saroj Hospital which is evident from the discharge summary of his grandfather proved as Ex.DW-1/A. Learned counsel for the appellant to support his submission has placed reliance upon a judgment of the Apex Court reported as 2006 CrL.L.J. 4250 Anandmay Ghosh and Ors. Vs. State of West Bengal as also JT 2010 (8) SC 228 Durga Prasad & Anr. Vs. State of M.P. . Submission being that to establish the essential element “soon before death” the prosecution must prove that the cruelty and harassment suffered by the victim was just prior to her death. Where this prima facie evidence has not been established as so in this case, the presumption contained in Section 113 B of the Indian Evidence Act could not have been invoked and for this proposition reliance has been placed upon 2002 (1) JCC 87 Ramesh Kumar Vs. State of Chhatisgarh. Submission being that the Court cannot mechanically draw the presumption but must have regard to the circumstances of the case before this presumption can be invoked. Attention has also been drawn to the version of PW-1; submission being that there were vital

CrL. Appeal No. 372/2013

Page 4 of 18

improvements in the version of PW-1 on oath in Court qua his statement which he had given before the SDM (Ex.PW-1/B). Version of such a witness who has made substantial improvements in his testimony has to be necessarily discarded. For this proposition reliance has been upon J.T. 2010 (2) SC 287 Dr.Sunl Kumar Sambhudayal Gupta & Ors. Vs. State of Maharashtra.

4 Needless to state that these arguments have been refuted. Learned counsel for the State submits that the testimony of the father of the victim (PW-1) was cogent and coherent and the version of her uncles who were examined as PW-2 and PW-3 fully corroborated the statement of PW-1 wherein it stands proved that the victim was harassed for dowry i.e. for not bringing a four wheeler vehicle (car) and this was the reason which had led to her untimely and unfortunate death which was in less than 1½ months of her joining her husband in the matrimonial home. The medical evidence also supports the case of the prosecution. On no count does the impugned judgment call for any interference.

5 Arguments have been heard and record has been perused.

6 The version of the prosecution was unfolded in the testimony of father of the victim examined as PW-1. He was a resident of Ghonda,

Uttar Pradesh. He was a businessman and also used to work as an agriculturist. He has three daughters and one son. The victim Vinita was his eldest daughter. She was married to appellant on 12.5.2007. Gona ceremony took place on 25.4.2008. It is admitted case of the prosecution that the victim had joined the company of her husband in her matrimonial home in Delhi on 16.6.2009. Further deposition of PW-1 was that the accused persons were not satisfied with the dowry given by PW-1; his daughter was mentally and physically harassed on account of more dowry. On 15.6.2009 the appellant had come to his house and taken his daughter to Delhi on 16.6.2009. On that date also he had made a strong demand of a four wheeler vehicle. PW-1 told him that he was not in a position to arrange for money for buying the vehicle. The victim was taken to her matrimonial home. Even there cruelty was meted upon her as this demand was not fulfilled by PW-1. Whenever telephonic calls were made to her she told PW-1 that the accused were demanding a four wheeler vehicle in dowry. On 30.7.2009 PW-1 received a telephonic message from Prem Tiwari (brother-in-law of the victim) asking him about the arrangement of the car to which PW-1 expressed his inability. The phone was handed over to the father-in-

law of the victim namely Mata Badal Pathak who again insisted for fulfillment of the demand of the car within a period of 15 days and in case the demand was not fulfilled severe consequences would follow. On 31.7.2009 PW-1 requested the accused to let him talk to his daughter. The phone was picked up by her sister-in-law Sandhya, her daughter spoke to him. She was crying on phone. She was under great fear. She stated that the accused persons would kill her for not fulfilling the aforementioned demand. Her father-in-law refused to talk to PW-1. PW-1 spoke to her mother-in-law to whom he again expressed his helplessness in not fulfilling this demand of the accused. He was threatened that in case this demand would not be fulfilled serious consequences would follow. PW-1 decided to go to Delhi. On 31.7.2009 at about 4.00 p.m. PW-1 made a telephonic call to the appellant who told him that the car should be arranged within 15 days or else PW-1 should not come Delhi. PW-1 cancelled his programme. On 01.8.2009 at about 3.00 p.m. PW-1 received a call from the appellant who informed him that the deceased was serious and he should reach Delhi. PW-1 reached Delhi in the morning. In the intervening period while he was waiting at the railway station he was informed that his

CrI. Appeal No. 372/2013

daughter had died. On reaching Delhi PW-1 straightway went to police station Dabri and from there he came to know that the dead body of his daughter was lying in the DDU hospital and he reached DDU Hospital. He identified the dead body of his daughter. His statement was recorded by the SDM on the following day i.e. 03.8.2009 (Ex.PW-1/B); 02.8.2009 was a Sunday. His other family members namely Badri Nath Mishra (PW-2) and Durga Prasad (PW-3) also reached Delhi. The appellant was arrested.

7 In his cross-examination, PW-1 has admitted that he was running a chemist shop and he was earning about Rs.20,000/- to Rs.22,000/- per month. He admitted that after her marriage the deceased had come twice to stay with them for her examination. On one occasion she stayed with them for a period of three months and on the other occasion she stayed with them for about four months. During that period she told them about the conduct of the accused. No complaint was made by him because of the sensitive relationship hoping that good sense would prevail and the matrimonial life of his daughter would become satisfactory. He admitted that because of his shocked mental state he could not give the entire details to the SDM at the time of

Crl. Appeal No. 372/2013

recording of his statement (Ex.PW-1/B) by the SDM. He was confronted with a portion of his statement (Ex.PW-1/B) wherein it had been stated that a demand of a four wheeler vehicle had been made by the appellant. However, those portions of his statement on oath wherein he had stated that on 30.7.2009 he had received a phone call from Prem Tiwari, brother-in-law of his daughter asking him to make arrangement for a car and he expressed his inability to do so did not find mention in Ex.PW-1/B. The telephonic call of 31.7.2009 exchanged between the victim and her father was also not mentioned in Ex. PW-1/B.

8 This part of the deposition of PW-1 has been vehemently highlighted by the learned counsel for the appellant to substantiate his argument that the testimony of PW-1 has material improvements and it cannot be relied upon. In another part of his cross-examination PW-1 denied the suggestion that his daughter had not secured good marks in her B.E.D and M.A. examination which had led her to commit this act. He also denied the suggestion that no cruelty or harassment was meted out by the accused to the victim on the account of dowry.

9 Relevant would it be to note that in this cross-examination of PW-1 there was no mention of the defence now sought to be projected

before this Court which is the plea of alibi of the appellant which is to the effect that the appellant was not in the matrimonial home at the relevant time and in fact had gone to attend his grandfather who was admitted in the Saroj Hospital. This line of defence did not emanate in the cross-examination of PW-1 and it was obviously for the reason that this was not an honest defence.

10 The uncles of the victim Badri Nath Mishra (PW-2) and Durga Prasad (PW-3) were also examined on oath. PW-2 was a teacher by profession; the victim was his niece; he deposed that the deceased used to be very sad and troubled because of the conduct of the accused persons as they were continuously harassing her on account of dowry. On 16.6.2009 the appellant had taken the victim to her matrimonial home. On 01.8.2009 he learnt that Vinita had been killed and he identified her dead body. In his cross-examination he admitted that his statement was recorded by the police. He denied the suggestion that he is deposing falsely at the instance of his brother.

11 PW-3 was another uncle of the deceased. He deposed that Vinita, daughter of his brother-in-law, used to remain sad as she had been harassed for dowry as a car had been demanded. On 01.8.2009 he

came to know that the victim had died. He also denied the suggestion that the victim because of her less marks in her B.Ed. examination was depressed on this.

12 Learned trial Judge has discarded the testimony of PW-2 and PW-3 noting that they were only witnesses to the identity of the dead body (as per their statement recorded under Section 161 Cr.P.C.) and they giving a version beyond that cannot be read.

13 This Court notes that although PW-2 and PW-3 have been examined by the Investigating Officer only for the purpose of identification of the dead body but the fact remains that both PW-2 and PW-3 were close relations of the victim being uncles of the victim and were aware of what was going on in the matrimonial life of their niece. Both of them knew that the victim was married to the appellant; the date of the gona ceremony and the date of her going to her matrimonial home with her husband; they were aware of the fact that their niece was unhappy in her matrimonial home because a demand of a four wheeler vehicle was being made by the appellant and her in-laws. They were also not confronted with her earlier statements recorded under Section 161 of the Cr.P.C.

14 Testimonies of PW-2 and PW-3 may not be a substantive piece of evidence but this Court has no hesitation in using them to corroborate the version of PW-1 which was to the extent that his daughter was unhappy in her matrimonial home because of a demand of dowry which was for a four wheeler vehicle (car). To that extent versions of PW-2 and PW-3 is being read.

15 The medical evidence is relevant. Her post mortem report Ex.PW-6/A shows that the cause of death was hanging and the weapon was the 'chunni'. The ligature mark was found around her neck which was measured at about 3 cm. The incident had taken place in the matrimonial home of the parties on 01.8.2009 in the afternoon. The post mortem which was conducted on 03.8.2009 was concluded at 3.30 p.m. suggesting that the approximate time of death was 51 hours from that time meaning thereby it was middle of afternoon of 01.8.2009.

16 The matrimonial home of the victim was House No.RZ-2/75, Gali No.5, Mohan Block, West Sagar Pur, Delhi. Site plan Ex.PW-12/A has also been perused. As per the version of SI Gyanender member of the Investigating Team who was examined as PW-7 the dead body of the victim was found lying on the ground floor and there was a ligature

mark which was found around her neck. On inquiry, it was revealed that the victim had died by hanging from a ceiling fan in a room on the first floor of the house. A chunni was lying on the bed of the first floor. Photographs were taken. The dead body had been removed from the first floor to the ground floor. Both the floors were in the occupation of the appellant and his family. At the cost of repetition, it was the mid-afternoon of 01.8.2009 when the incident had occurred in the matrimonial home. It is also admitted fact that the incident had occurred within less than 7 years of marriage of the appellant with the victim. It was an unnatural and unfortunate death. The burden was on the appellant to have explained how and in what circumstances the victim had died.

17 Section 304B of the IPC entails certain essential ingredients before a conviction can follow under the said provisions of law; which are as under:

- i. The incident should be within less than 7 years of marriage;
- ii. It must be unnatural death;
- ii. There should have been a dowry demand.
- iv. Soon before her death the victim must have been meted out

cruelty or harassment of such a nature which has led to her death.

18 As noted supra the vehement submission of the learned counsel for the appellant is that even presuming that there was a demand made by the appellant on 16.6.2009 but the incident having been occurred 1½ months later the last essential ingredient of “soon before” death was not met.

19 This argument has to be examined on the touchstone of the evidence which had been brought before this Court. The Trial Judge had noted that there were four separate instances of demand made by the appellant upon the family of the victim. They were on 15.6.2009, 30.7.2009 and again on 30.7.2009 and 31.7.2009. He had rightly discarded all the later three incidents but had relied upon the demand made on 15.6.2009 when the appellant had gone to the house of his in-laws to bring his wife back. Version of PW-1 on this count is that on that date also a demand of a four wheeler vehicle (car) had been made. The victim had died within a period of less than 1½ months. Further version of PW-1 is that in this intervening period whenever telephonic calls were exchanged between PW-1 and his daughter she was under

CrI. Appeal No. 372/2013 Page 14 of 18

threat and fear and stated that her in-laws were making a demand for a car and if the same is not fulfilled she would be met with dire consequences.

20 Ex.PW-1/B was the first statement which was given by PW-1 to the SDM on 03.8.2009. At that point of time PW-1 was in a state of shock and trauma; he had detailed all essential facts, the demand of a four wheeler made upon him which was a cause of harassment to the victim and her unfortunate death which has been caused by the appellant and his family. The Court thus notes that there is no material improvement in the version of PW-1 on oath in Court qua his statement (Ex.PW-1/B) recorded before SDM.

21 Submission of the learned counsel for the appellant that this statement was recorded at a later point of time i.e. on 03.7.2010 is answered by the fact that admittedly the father of the victim had come to Delhi on 02.8.2009 where after the last rites of his daughter had been performed and 02.8.2009 admittedly being a Sunday, his statement was recorded by the SDM on 03.8.2009. Even presuming that there was a slight delay as rightly noted by the Trial Judge it was not for the witness to go hunting in the SDM officer to get his statement recorded. A lay

person would not know the intricacies of the law. It was for the Investigating Officer to have taken PW-1 at the opportune moment before the SDM which he done on 03.8.2009. There is no untimely delay. Benefit of this lapse even otherwise if treated as a lapse cannot accrue to the accused. The ingredients of “soon before death” are wholly met with in this factual narration. As noted supra by the Apex Court in various judgments, the words “soon before” are not synonymous with the word “immediate”. It is the live link which has to be seen between the alleged harassment and cruelty qua the incident. It was wholly in connection with the demand of dowry i.e. for the four wheeler vehicle which was made on 16.06.2009 and thereafter repeated in the phone conversations between PW-1 and the victim while she was at her matrimonial home. This ingredient stands fulfilled.

22 The role of the present appellant qua the other family members is distinct and different. He was the husband of the victim and was presumed to be the closest care-provider for her. He was living in the matrimonial home on the first floor with her. The onus under Section 106 of the Evidence Act was upon him to discharge the burden and explain as to how the victim had succumbed to an unnatural death; as

the actual burden had been discharged by the prosecution. Thus the submission of the learned counsel for the appellant that on the same set of evidence the appellant could not have been convicted when the other family members have been acquitted is again an argument noted to be rejected.

23 Death had occurred in the mid-afternoon on 01.8.2009. This Court notes that it was a Saturday. Thus defence that he was not present in the home did not emanate in the cross-examination of the witnesses of the prosecution. It was only at a later point of time i.e. in his statement under Section 313 Cr.P.C. that he set up a plea of alibi stating that he was not at home at the time when the incident had occurred for which he had produced a witness DW-1 along with document Ex.DW-1/A. Ex.DW-1/A evidenced that his grandfather was admitted in the Saroj Hospital and he was attending to him. Had this been an honest evidence it would have been definitely found mention in the cross-examination of the witness of the prosecution as this was the first thing which would have come in the mind of the appellant but obviously it was not for that reason thus this was a dishonest defence which was hence rightly discarded by the Trial Judge.

24 The presumption contained in Section 113 B of the Indian Evidence Act was rightly invoked. It was for the appellant to have rebutted this presumption which was in favour of the prosecution in view of the evidence led before the Trial Judge. This presumption was not rebutted.

25 The conviction of the appellant under Section 304B of the IPC and Section 498A of the IPC calls for no interference. The sentence is also the minimum which has been imposed upon the appellant. On no count does the impugned judgment call for any interference. Appeal is without any merit. Dismissed.

INDERMEET KAUR, J

21ST AUGUST, 2015
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