

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

RESERVED ON : 15th NOVEMBER, 2016
DECIDED ON : 20th FEBRUARY, 2017

+ CRL.A. 662/2014
PARVEEN KUMAR Appellant
Through : Mr.Ramesh Gupta, Sr.Advocate with
Mr.Bharat Sharma, Mr.Avinish Rana
& Mr.Ajay P.Tushir, Advocates.

VERSUS

STATE Respondent
Through : Ms.Meenakshi Dahiya, APP.

+ CRL.A. 841/2014
RAMESH CHANDER Appellant
Through : Mr.Ramesh Gupta, Sr.Advocate with
Mr.Bharat Sharma, Mr.Avinish Rana
& Mr.Ajay P.Tushir, Advocates.

VERSUS

STATE (NCT OF DELHI) Respondent
Through : Ms.Meenakshi Dahiya, APP.

AND

+ CRL.A. 847/2014
AJAY KUMAR Appellant
Through : Mr.N.Hariharan, Sr.Advocate with
Mr.Vaibhav Sharma, Mr.Avnish
Rana, Mr.Siddharth S.Yadav &
Mr.Aditya Vaibhav Singh,
Advocates.

VERSUS

STATE (NCT OF DELHI)

..... Respondent

Through : Ms.Meenakshi Dahiya, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. The instant appeals have been preferred by the appellants – Parveen Kumar, Ramesh Chander and Ajay Kumar to challenge the legality and correctness of a judgment dated 30.04.2014 of learned Addl. Sessions Judge in Sessions Case No.23/2013 arising out of FIR No.88/2011 PS BHD Nagar by which they were held guilty for committing offences punishable under Sections 304B/498A/34 IPC. By an order dated 05.05.2014, they were sentenced to undergo RI for ten years with fine ₹10,000/- each under Section 304B/34 IPC and RI for three years with fine ₹2,000/- each under Section 498A/34 IPC. Both the sentences were to operate concurrently.

2. Briefly stated, the prosecution case as reflected in the charge-sheet was that Meenakshi (since deceased) was married to Ajay on 19.04.2010. Her death took place in the matrimonial home on 16.05.2011. In her statement (Ex.PW-3/A) Laxmi – victim's mother informed that on 16.05.2011 at around 08.00 p.m. she got a telephone call from Ajay, her son-in-law, informing that Meenakshi had fallen from the stairs. Before their reaching the hospital i.e. Ortho Hospital, Gopal Nagar, Meenakshi had already expired. She levelled allegations of harassment on account of dowry demands against the appellants. In his statement (Ex.PW-5/A) Sunil –

victim's brother alleged that his sister used to be given beatings during her stay in the matrimonial home.

3. During investigation, post-mortem examination of the body was conducted. As per post-mortem report (Ex.PW-6/A) dated 17.05.2011 prepared by PW-6 (Dr.Pervinder Singh) external injuries numbering 19 in all were found on the victim's various body organs, including vital ones. On internal examination, it was observed :

“(1) Peritoneal cavity contained clotted blood.

(2) Left lobe of liver was lacerated.

(3) Effusion of blood present under the scalp over frontal region of skull. Sub dural and sub arachnoid haemorrhage present over left temporal lobe of brain in an area of 4.5 X 4.5 c.m. Contusion present over left temporal lobe of brain in an area of 4.5 X 4.5 c.m.”

Death was opined due to haemorrhage and shock along with cranio cerebral damage (head injury) consequent to multiple injuries described. All the injuries were opined ante-mortem caused by hard blunt force impact (object). These were found collectively sufficient to cause death in the ordinary course of nature.

4. Upon completion of investigation, a charge-sheet was filed against the appellants for commission of offences punishable under Sections 498A/302/304B/34 IPC. By an order dated 15.09.2011, charge under Sections 498A/304B/302/34 IPC was ordered to be framed against the appellants.

5. Charge framed on 19.10.2011 against the appellants reads as under :

“That on or before 16.05.2011, at your house at RZ-B 204, Gopal Nagar Delhi, within the jurisdiction of PS Baba Haridas Nagar, you all the accused, subjected Smt. Meenakshi (deceased) w/o accused Ajay Kumar, to cruelty on account of demand of dowry and you all thereby committed an offence punishable U/s 498A IPC read with Section 34 IPC and within the cognizance of this court.

Secondly on 16.05.2011 at about 11.00 p.m., at RZ-B 204, Gopal Nagar Delhi, within the jurisdiction of PS Baba Haridass Nagar, Smt. Meenakshi (since deceased) was found dead otherwise than under normal circumstances within the span of seven years of her marriage and soon before her death she was subjected to cruelty or harassment in connection with the demands of dowry by you, in furtherance of common intention of you all and you all thereby committed an offence punishable U/s 304-B/34 IPC and within the cognizance of this court.

Or in alternative, on the aforesaid date and place, you all, in furtherance of your common intention committed murder of Smt. Meenakshi (deceased) W/o accused Ajay Kumar and thereby committed an offence of murder punishable U/s 302/34 IPC and within the cognizance of this court.

And I hereby direct that you all be tried for the aforesaid offences.”

6. To substantiate its case, the prosecution examined thirty-five witnesses. In 313 Cr.P.C. statements, the appellants denied their involvement in the crime and pleaded false implication. During arguments, learned counsel for the appellants urged that there was no demand of dowry it being a dowry-less marriage. The deceased was suffering from various diseases including epilepsi and menorrhagia and her death was due to excessive bleeding. She was provided with due treatment but she did not recover and collapsed.

7. By the judgment dated 30.04.2014, the learned Trial Court found the appellants guilty for commission of offence under Sections 498A/304B/34 IPC. By the same judgment, however, the learned Trial Court did not give any findings about commission of offence punishable under Section 302/34 IPC and simply “dropped it”. The relevant para 98 of the conclusion reads as under :

“98. From the above discussion, I am of the opinion that prosecution has been successful in proving that deceased died unnatural death within seven years of her marriage and she was being harassed and tortured by the accused persons for demand of dowry so soon before her death and the presumption available to the prosecution under section 113-B of the Indian Evidence Act has been raised against the accused persons which accused failed to rebut. Therefore, the prosecution has been successful in bring home the guilt of the accused persons under section 498A/304-B/34 IPC and accused persons are hereby

convicted under section 498A/304-B/34 IPC and alternative charge under section 302/34 IPC against the accused persons is hereby dropped. ”

8. In my considered view, the Trial Court fell in grave error in not returning findings on the alternative charge framed under Section 302/34 IPC. The impugned order ‘dropping’ the charge under Section 302 IPC is manifestly illegal and against the accepted procedure. No reasons whatsoever have been given by the Trial Court for ‘dropping’ the charge under Section 302/34 IPC. It has neither convicted the appellants nor acquitted them for commission of offence under Section 302/34 IPC.

9. In similar circumstances, in case ‘*Tapas Kumar Ghosh vs. State of West Bengal*’, 2011 (15) SCC 354, the Trial Court had framed alternative charge under Sections 302/34 IPC, besides charges under Sections 498A/304B/34 IPC. Convicting the accused under Sections 498A/304B IPC, the Trial Court specifically recorded in its judgment that the Court was not considering the alternative charge under Section 302 IPC. The said judgment was confirmed by the High Court, reducing the period of sentence.

10. Observations of the Supreme Court are relevant to note :

“4. The question raised before us is that having framed an alternative charge under Section 302 of the Indian Penal Code, the Appellant could not have been held to be guilty of an offence under Section 304B IPC inasmuch as the essential ingredients of both the offences are distinct and different. The

onus in the case of Section 304B IPC shifts to the accused, unlike under Section 302 IPC where the onus continues to be on the prosecution and it is expected to prove the case beyond any reasonable doubt.

5. Having examined the evidence on record, we do not propose to deal with this legal issue at any greater length. Suffice it to note that no prejudice had been caused to the present Appellant inasmuch as the trial court neither considered the alternative charge nor punished the accused for that offence. Thus, we leave this question open.”

11. This Court in ‘*Prakash Chander vs. The State*’, 1995 CrL.L.J. 368 had the occasion to deal with such a situation. In that proceedings also, the accused persons therein were charged for the offence under Section 302 IPC read with Section 34 IPC for intentionally or knowingly in furtherance of their common intention causing the death of one Swaran Kanta. In the alternative, they were charged for the offence of dowry death punishable under Section 304 B IPC. The learned Addl. Sessions Judge acquitted Pyare Lal, Usha, Praveen Kumar and Lila Wanti of the charge under Sections 302/34 IPC. Prakash Chander was, however, found guilty of offence of murder of his wife and was convicted under Section 302 IPC modifying the charge from Section 302/34 IPC to Section 302 IPC. The alternative charge under Section 304B IPC against Lila Wanti was modified and she was convicted under Section 498A IPC. Regarding Prakash Chander, the learned Addl. Sessions Judge held that the ‘alternative charge did not survive and it was cancelled’.

12. This Court observed :

“26. Our aforesaid conclusion on offence under section 302 IPC, however, does not conclude the entire matter as there was also an alternate charge against accused Prakash Chand and other accused for having caused death of Mrs. Swaran Kanta by burn or otherwise than normal circumstances, within seven years of her marriage and they having subjected her to cruelty and harassment for and in connection with demand of dowry and thereby having committed an offence of "Dowry Death" punishable under Section 304-B IPC.

27. On charge under section 304B, learned Additional Sessions Judge has held that "it does not survive and it is cancelled."

28. On the aspect of offence under section 304B, IPC, the questions which fall for determination are :-

1. Whether the order cancelling charge under section 304-B IPC is legal ?

2. If answer to question No. 1 is in negative, does the cancellation of charge on the facts and circumstances of the case, amount to an order of acquittal and, if so, what is the effect of State not having filed an appeal ?

3. Whether evidence establishes or not the commission of offence under section 304-B, IPC by the accused Prakash Chander ?

29. Cancellation of the charge after the evidence has been led is unknown to the

criminal jurisprudence. Before a charge is framed an accused may be discharged if the facts and circumstances so justify. After the charge is framed the accused has either to be found guilty or not guilty of the charge. Mr. Sud also did not dispute that the order cancelling the charge is not legal. The learned trial court committed manifest error by holding that the alternate charge does not survive and is cancelled. The first question is, Therefore, answered in negative.”

13. This Court further held :

“38. The present case, in our view, is on much stronger footing. The accused has not been acquitted of offence under section 304B, IPC but only charge has been cancelled which is not permissible in law. That does not, on the facts and circumstances of the case as already noticed above, amount to acquittal. Assuming, however, that tantamounts to an implied acquittal, it would only show that the said acquittal was for the reason that he was held guilty of the main offence of murder and not independently. Our conclusion that in view of two reasonable views it would not be safe to hold Prakash Chander guilty of offence under section 302 IPC, is not an impediment for his conviction under section 304-B, IPC. In our view the point in issue is squarely covered by Kalawati's case.

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40. The High Court cannot be a silent spectator when it finds that the trial court has committed a manifest error and has a duty to correct the said error. That manifest error is the order for cancellation of a charge under section 304B, IPC. The interest of the accused is, of course, paramount but at the same time the court has also to keep in view the compelling public interest to see that because of a manifest error the administration of criminal jurisprudence is not reduced to total ineffectiveness which will breed dissatisfaction amongst the public. Like all procedural laws Code of Criminal Procedure is also designed to subserve the ends of justice and not to frustrate them by mere technicalities. Viewed from this angle too it would be our duty to find out whether the accused is guilty of the charge under section 304B, IPC or not.

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43. We also find that Sections 302 and 304B, IPC are not mutually exclusive. If in a case material on record suggest commission of offence under section 302, IPC and also commission of offence under Section 304B, IPC, the proper course would be to frame charges under both these sections and if the case is established then accused can be convicted under both the sections but no separate sentence need be awarded under section 304B, in view substantive sentence being awarded for the higher offence under Section 302, IPC. In the present case though court rightly framed charge also under section 304B, IPC and also in the course of

judgment came to the conclusion that cruelty, demand of dowry and death within seven years of marriage had been established but ultimately proceeded to cancel the challan on the wrong assumption that the two offences are mutually exclusive. In the facts and circumstances of the case we do not think that any prejudice would be caused to the accused by examination of the case from the point of view of offence under section 304-B, IPC. In our view the learned Additional Sessions Judge, for the conclusion reached by him, after holding Prakash Chander guilty of offence under section 304B need not have awarded any separate sentence in respect of the said offence.

44. In view of aforesaid discussion our answer to the second question is that cancellation of charge for offence under Section 304-B, IPC does not amount to an order of acquittal and the setting aside of the order of conviction for the offence under Section 302, IPC is not an impediment in this court examining whether commission of offence under section 304-B, IPC stands established or not. The State not having filed any appeal against the order cancelling charge is of no effect.”

14. In the instant case, a prejudice has been caused by not giving any finding on the alternative charge framed under Sections 302/34 IPC. It deprived the State to take any steps in challenging ‘acquittal’ under Section 302 IPC. In case of conviction under Sections 302/34 IPC, it would have given a right to the appellants to challenge conviction under Sections 302/34

IPC before the Division Bench of this Court. It was imperative for the Trial Court to give a positive finding whether the prosecution was able to establish the commission of the offence under Sections 302/34 IPC or not. The impugned judgment merely ‘dropping’ the charge under Section 302/34 IPC, thus, cannot be sustained.

15. In the light of above discussion without commenting upon the findings recorded under Sections 304B/34 IPC, the matter is sent back to the Trial Court for disposal on merits and to give findings on the alternative charge framed under Sections 302/34 IPC too.

16. The appeals stand disposed of accordingly. The appellants (if in custody) shall be produced before the Trial Court on 28.02.2017.

17. Trial Court record be sent back forthwith with the copy of the order.

18. Copy of the order be sent to Superintendent Jail for information.

19. Observation in the order shall have no impact on the merits of the case.

(S.P.GARG)
JUDGE

FEBRUARY 20, 2017 / tr