

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

CRA/147/2017

Netai Ghosh & Anr.

-Vs-

State of West Bengal

For the Petitioner: Mr. Younush Mondal, Adv.

For the State: Mr. Swapan Banerjee, Adv.,
 Mr. Suman De, Adv.

Heard on: April 08, 2021.

Judgment on: June 21, 2021.

BIBEK CHAUDHURI, J. : –

1. The appellants being aggrieved against the judgment and order of conviction and sentence dated 8th December, 2016 passed by the learned Additional Sessions Judge, 5th Court at Barasat, North 24 Parganas in Sessions Case No.19(12)12 corresponding to Sessions Trial No.2(5)13 has preferred the instant appeal under the provision of Section 374 of the Code of Criminal Procedure.

2. The appellants were convicted for committing offence under Section 498A and 304B of the Indian Penal Code and they were sentenced simple

imprisonment for two years and fine of Rs.1000/- for offence punishable under Section 498A of the India Penal Code (for short, IPC) and rigorous imprisonment for seven years for offence punishable under Section 304B of the Indian Penal Code.

3. On 5th August, 2011, one Nirmal Ghosh lodged a written complaint before the Officer-in-Charge Ashokenagar P.S stating, inter alia, that marriage of his daughter Soma was solemnized with Netai Ghosh (appellant No.1) on 5th Ashar 1417 B.S corresponding to 20th June, 2011. At the time of marriage the defacto complainant gave bridal presents as per his financial capacity. It was decided before marriage that the defacto complainant would give a gold chain to the appellants within six months of the said marriage. However, immediately after marriage, appellant No.1, his mother Smt. Kali Ghosh (appellant No.2) and the husband of the sister of appellant No.1 namely, Shankar Ghosh used to abuse her with filthy language. Soma used to inform the said incident over phone to the defacto complainant and other paternal relations. The husband of Soma also used to assault her physically. Shankar used to give indecent proposal to her. On 4th August, 2011 at about 7 pm the defacto complainant came to know that his daughter Soma died consuming poison. According to him Soma committed suicide failing to bear physical and mental torture on demand of dowry inflicted upon her by her husband, mother-in-law and the said Shankar Ghosh.

4. On the basis of the said complaint, Ashokenagar P.S Case No.328 dated 5.8.2011 under Section 498/304B/34 of the IPC and Sections 3/4

of the Dowry Prohibition Act was registered by police and the case was taken up for investigation.

5. On completion of investigation police submitted charge sheet against the above named three accused persons. The case was committed to the learned Sessions Judge, North 24 Parganas who in turn transferred the case to the learned Additional Sessions Judge, 5th Court at Barasat for trial.

6. The learned trial judge framed charge against the accused persons under Section 498A/304B of the IPC. As the accused persons pleaded not guilty, trial of the case commenced.

7. During trial prosecution examined eight witnesses. Amongst them PW1 is the defacto complainant and father of the deceased. PW2 and PW4 to PW6 are the near relative of the deceased. PW3 is the scribe who wrote the FIR under the dictation of the defacto complainant. PW7 Dr. Shakti Pada Sardar is the Autopsy Surgeon. PW8 Md. Imran Hossain, S.I of the Police is the Investigating Officer of the case.

8. The accused persons took specific denial of the case. It is specifically stated that appellant No.1, Netai Ghosh used to work in a printing press at Kolkata and he visited his native house only in the weekend. The relation between the deceased and her husband was very cordial and there was no occasion to treat her with cruelty within the meaning of Section 498A of the Indian Penal Code. The accused persons also took defence to the effect that deceased Soma was very ill tempered

lady and she had illicit relation with the husband of his another sister. These might be reasons for her unnatural death.

9. The learned trial judge held the appellant guilty for committing offence under Section 498A and 304B of the Indian Penal Code mainly on the following grounds, viz, first, the witnesses on behalf of the prosecution cannot be disbelieved only because they are closely related with deceased. All the witnesses stated that deceased Soma was tortured by the appellants both physically and mentally on demand of a gold chain. Secondly, the deceased had met with an unnatural death within 44 days of marriage. And thirdly, the defence failed to prove its case.

10. Learned Advocate for the appellant has assailed the impugned judgment on the following grounds.

11. At the outset it is submitted by him drawing my attention to the FIR that in the FIR the defacto complainant never stated that the accused persons demanded any dowry before marriage of his daughter with appellant No.1. It is stated by the defacto complainant that in the said marriage he gave bridal presents as per his capacity. If the parents of the bride give some presents at the time of marriage the same do not come within the definition of dowry. The defacto complainant also agreed to give a gold chain within six months of marriage. According to the learned Advocate for the appellants the said bridal presents cannot be treated to be dowry in view of the definition of dowry contained in Dowry Prohibition Act, 1961. He refers to Section 2 of Dowry Prohibition Act which runs thus:

“2. Definition of “dowry”.—In this Act, “dowry” means any property or valuable security given or agreed to be given either directly or indirectly—

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person;

at or before [or any time after the marriage][in connection with the marriage of the said parties, but does not include] dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.”

12. It is submitted by him that though the prosecution failed to prove that the defacto complainant gave some bridal presents to the appellants at the time of marriage, such presents were not given in connections with marriage between the daughter of the defacto complainant and Netai Ghosh.

13. Secondly, it is urged by the learned Advocate for the appellant that the defacto complainant alleged that after marriage the appellants used to abuse her with filthy language and appellant No.1 used to assault her on demand of the said gold chain. In order to prove such allegation prosecution examined the defacto complainant who is the father of the deceased. PW2, Parimal Ghosh is the uncle of the deceased and PW5, Suman Ghosh and PW6, Paran Ghosh are the cousin brothers of

deceased Soma. PW4, Bholanath Ghosh is the husband of the elder sister of deceased Soma. From the evidence of above witnesses it is ascertained that the deceased committed suicide after 44 days of marriage. All the above named witnesses stated that she was subjected to torture on demand of a gold chain. The deceased used to narrate those incidents of torture and harassment to her father over phone. According to the learned Advocate for the appellant, the father and other paternal relations of the deceased never thought to visit the matrimonial home of the deceased to settle the matrimonial dispute. Except the evidence of the defacto complainant, testimony of PW2, PW4, PW5 and PW6 are in the nature of hearsay. They also did not take any attempt to settle the alleged dispute between the deceased and her matrimonial relations amicably during her life time. Infact, after the unfortunate death of the deceased, the defacto complainant has alleged this complaint stating, inter alia, that the appellants used to torture her both physically and mentally. According to the learned Advocate for the appellant, when the witnesses on behalf of the prosecution are closely related with deceased and very much interested to see the appellants convicted and sentenced, examination of independent witnesses was absolutely necessary. If a married lady is tortured both physically and mentally at her matrimonial home the neighbours residing around the house of the accused persons are natural witnesses who would know about the incident. The prosecution failed to bring any neighbour of the matrimonial home of the deceased. On the other hand, the defence has examined four neighbouring persons who

stated on oath that relation between Netai and Soma was cordial. They never saw Netai assaulting his wife. Netai used to work in a printing press in Kolkata and he used to come to his native village at the weekend. They never saw any dispute between deceased and her matrimonial relations. Coupled with the said evidence on record adduced by the witnesses on behalf of the defence, the learned Advocate for the appellants invites the attention of this Court to consider the cross examination of the defacto complainant where he admitted that this daughter. Soma was ill tempered.

14. Thus it is submitted by the learned Advocate for the prosecution that the learned trial court failed to appreciate the evidence of the witnesses on behalf of the prosecution and defence and the finding with regard to the charge under Section 498A IPC against the appellants is erroneous and liable to be set aside.

15. On the question of conviction under Section 304B of the IPC, it is submitted by the learned Advocate for the appellant that the learned trial judge held the accused persons guilty for committing offence under Section 304B of the IPC only because she had met with the unnatural death after 44 days of her marriage. It is submitted by him that the learned judge did not even consider the PM report where autopsy surgeon clearly opined that the cause of the death of the deceased could only be ascertained on receipt of chemical examination report of the viscera. At the time of postmortem, the autopsy surgeon found 200 ml. of liquid in the stomach of the deceased with pungent smell. Whether the said liquid

was really poisonous and even if the said liquid is poison, whether it was so poisonous to cause death of a person are the relevant factors which the prosecution was under obligation to prove. During trial the prosecution failed to produce such evidence.

16. It is further submitted by the learned Advocate for the appellants that the main ingredients of Section 304B IPC are:-

- a) Death of a woman.
- b) By burns or bodily injure or occurrence otherwise than under normal circumstances.
- c) Within seven years of her marriage.
- d) Soon before her death the victim was subjected to cruelty or harassment of her husband or any relative of her husband in connections with demand of dowry.

17. In the instant case according to the learned Advocate for the appellant, prosecution failed to prove the circumstances under which the daughter of the defacto complainant died. There is absolutely no evidence that soon before her death, Soma was subjected to cruelty or harassment by the appellants in connection with demand of dowry.

18. Under such circumstances presumption of Section 113B of the Evidence Act is also not available to the prosecution.

19. Mr. Swapan Banerjee, learned Advocate for the State, on the other hand, submits that in most of the matrimonial cases the incidents happening between the married lady and her matrimonial relations are only known to the close relatives of the lady and her husband. Such

torture and harassment are generally committed in complete secrecy inside the house and it becomes very difficult for the prosecution to lead the evidence. No other member of the family, even if he is a witness of the crime, would come forward to depose against another family member. The neighbours whose evidence may be of some assistance, are generally reluctant to depose in Court as they do not want to antagonize a neighbourhood family. The parents or other family members of the bride being away from scene of commission of crime are not in a position to give direct evidence which may inculcate the real accused except regarding demand of money or dowry and harassment caused to the bride. Therefore, it is not the rule of evidence as well as prudence to reject the testimony of close relative of deceased married lady on the ground of interestedness. On the other hand, their evidence ought to be considered as the best evidence because they are the persons who naturally come to know about the incident that took place inside the close door of the matrimonial home of a married lady. If a woman, after her marriage is tortured, humiliated and harassed on demand of dowry the lady will naturally narrate such incident to her parents and other close relations. The learned P.P-in-Charge invites this court to consider the evidence of PW1 to PW6 keeping in mind the above proposition of appreciation of evidence adduced by related witnesses in a case under Section 498A/304B of the Indian Penal Code.

20. It is submitted by the learned Advocate for the state respondent that marriage of the deceased was solemnized with appellant No.1 on 20th

June, 2011. The wife of the appellant died in unnatural circumstances at her matrimonial home only after 44 days of marriage. The father of the deceased is a cultivator it was not possible for him to satisfy the demand of a gold chain made by the side of bride groom at the time of marriage. He promised to give the said gold chain within six months of marriage. The accused persons however was not agreeable to wait for six months. Immediately after marriage they started torturing the petitioner both mentally and physically on demand of the said gold chain. Failing to bear such torture the wife of appellant No.1 committed suicide by consuming poison.

21. With regard to charge under Section 304B/34 of the IPC, it is submitted by the learned P.P-in-Charge that the victim died in unnatural circumstances within one and half years of marriage and soon before her death she was subjected to physical and mental torture on demand of dowry. According to the learned P.P-in-Charge, the prosecution, in the instant case was able to prove that the victim was subjected to cruelty or harassment by the appellants for or in connection with demand of dowry, soon before her death. The term "soon before" is not synonymous with the term "immediately before". The said term would normally imply that the gap should not be large between the cruelty or harassment and the death in question, i.e there must be existence of proximity and live link between the two. The determination of the period which can come within the term "soon before" is a matter for the court, depending upon the facts and circumstances of the case.

22. In the instant case marriage of Soma was solemnized only before 44 days of her unnatural death. Prior to her death she informed her parents and other matrimonial relations that she was subjected to physical and mental torture for a gold chain which was decided to be given by her father. Considering the time gap between solemnization of marriage and date of death, the learned trial court rightly applied the presumption of law contained in Section 113B of the Indian Evidence Act. For the reasons stated above, the learned PP-in-Charge submits that there is no scope for interference and the instant appeal should fail.

23. It is needless to say that in a case of cruelty and dowry death, direct evidence is hardly available. It is the circumstantial evidence and the conduct of the accused persons which are to be taken into consideration for adjudicating upon the truthfulness or otherwise of the prosecution case. In the instant case it is alleged in the FIR that the mother-in-law of the deceased (appellant No.2) used to abuse the deceased with filthy language as her father failed to give a gold chain at the time of marriage. The defacto complainant also alleged that the husband of the deceased (appellant No.1) used to assault her physically. It is not disputed that the witnesses on behalf of the prosecution did not see the occurrence. Allegation of cruelty and unnatural death of the deceased was made by the defacto complainant only after the death of the deceased. It is important to note that the defacto complainant did not state in the FIR as well as in course of his evidence that the accused persons demanded dowry as a consequence of marriage. The definition of the expression

“dowry” contained in Section 2 of the Dowry Prohibition Act, 1961 cannot be applied merely to the “demand” of money, property or valuable security made at or after the performance of marriage.

24. The legislature has in its wisdom while providing for the definition of “dowry” emphasized that any money, property or valuable security given, as a consideration for marriage, before, at or after the marriage would be covered by the expression “dowry” and this definition as contained in Section 2 has to be read wherever the expression “dowry” occurs in the Act

25. Under Section 4 of the Act, mere demand of dowry is not sufficient to bring home the offence to an accused. Thus, any demand of money, property or valuable security made from the bride or her parents or other relatives by the bridegroom or his parents or other relatives or vice versa would fall within the mischief of “dowry” under the Act where such demand is not properly referable to any legally recognized claim and is relatable only to the consideration of marriage. Dowry as a *quid pro quo* for marriage is prohibited and not the giving of traditional presents to the bride or the bride groom by friends and relatives. Thus, voluntary presents given at or before or after the marriage to the bride or the bridegroom, as the case may be, of a traditional nature, which are given not as a consideration for marriage but out of love, affection or regard, would not fall within the mischief of the expression 'dowry' made punishable under the Act. The decision of the Hon'ble Supreme Court in

the case of **S. Gopal Reddy vs. State of Andhra Pradesh** reported in **AIR 1996 SC 2084** may be relied on in support of the above observation.

26. Coming to the instant case it is ascertained that the defacto complainant as stated in his FIR that he voluntarily gave bridal presents according to his capacity. It was decided that he would give a gold chain after six months of marriage between the appellant No.1 and his daughter. The said six months was not over and within 44 days after her marriage the deceased met with unnatural death.

27. Under the facts and circumstances of the case it is absolutely natural and probable that if a married lady is tortured at her matrimonial home immediately after marriage, the near relatives of the lady would intervene and try to settle the dispute. There is absolutely no evidence that prior to her death the witnesses being PW1, PW2, PW4 and PW5 and others try to settle the alleged dispute between the parties during the life time of Soma. It is in the evidence that Soma was ill tempered. Therefore if at all any incident of quarrel broke out between the appellants and Soma here the nature of Soma was not such that she would silently digest the allegations made against her.

28. The learned trial judge failed to consider the above circumstances while holding the accused persons guilty for committing offence. Last but not the least, prosecution failed to prove the cause of death of the deceased because the report of the autopsy surgeon shows that she was not in a position to give his final opinion as to the cause of death before receiving the chemical examiner's report of the viscera of the deceased.

29. In view of the above discussion I have no other alternative but to hold that the impugned judgment and order of conviction and sentence passed in Session Case No.19(12)12 corresponding to ST No.2(5)13 by Additional Sessions Judge, 5th Court at Barasat, North 24 Parganas is liable to be set aside.

30. Accordingly, the instant appeal is allowed on contest, however without cost.

31. The appellants be acquitted from the charge set at liberty and released at once.

32. Let a copy of this order be sent to the learned court below for information and compliance.

(Bibek Chaudhuri, J.)