

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRR 1704 of 2000

Insar Khan @ Ensar Khan
-vs.-
State of West Bengal.

For the Petitioner : Mr. Satadru Lahiri
Mr. Amit Banerjee

For the State : Ms. Faria Hossain,
Ms. Sujata Das

Heard on : 10.06.2021 & 16.06.2021

Judgment on : 17.08.2021

Tirthankar Ghosh, J:-

The present revisional application has been preferred against the judgment and order dated 16th May, 2000 passed by the Learned Additional Sessions Judge, Midnapore in Criminal Appeal No. 30 of 1998 wherein the Learned Appellate Court affirmed the order of conviction and sentence dated 20.05.1998, passed by the Learned Assistant Sessions Judge, 2nd Court, Contai in S.T Case No. VIII/January/1997.

The Learned Trial Court convicted the present petitioner and sentenced him to suffer rigorous imprisonment for two years and to pay a fine of Rs. 500/- in default to suffer rigorous imprisonment for three months for commission of offence under Section 498A of the Indian Penal Code.

The prosecution case in brief is that one Arjuman Bibi was married to Insar Khan alias Ensar Khan on or about 1396 B.S. according to Muslim Rites & Customs and after marriage the deceased went to her matrimonial home and during the subsistence of their wed-lock a daughter was born. The present petitioner and his father was involved in the profession of fishing for which they required boat and net and the petitioner and his father demanded from the victim a sum of Rs. 10,000/- to be paid by her father for installation of an engine at the boat. The deceased expressed her incapability of demanding such money from her father. As a result she was assaulted, tortured and neglected. The petitioner expressed his intention to marry again, however, the father of the deceased went to her house to settle the dispute and requested the petitioner and his family members to live peacefully. On or about 28.03.1991 the petitioner and his family members attempted to kill the deceased by setting fire on her after pouring kerosene oil but the neighbours saved her, however, she was driven out of the matrimonial house on 29.03.1991. She was also treated at hospital and two criminal cases were filed at the instance of the deceased, one for maintenance and the other for torturing her. However, the said cases were compromised and the deceased returned to her matrimonial home. After two months of her return the petitioner and her family members again

demanded a sum of Rs. 10,000/- to which the deceased protested, when she was abused and asked to commit suicide. The said dispute was settled at a salish on 12.04.1993 and on 10.05.1993 the deceased met with an unnatural death.

Pursuant to an application under Section 156(3) of the Code of Criminal Procedure filed at the instance of the father of the deceased, namely, Sk. Mainuddin, Ramnagar Police Station Case No. 53/1993 was registered for investigation and on completion of investigation charge-sheet was submitted under Section 498A/304B/306/34 of the Indian Penal Code and Section 3/4 of D.P. Act. On receipt of charge-sheet the Learned S.D.J.M., Contai, took cognizance of the offence and committed the case to the Learned Sessions Judge Midnapore and the Learned Sessions Judge by an order 30.01.1997 transferred the case to the Learned Assistant Sessions Judge, 2nd Court, Contai, for trial and disposal.

On perusal of the documents relied upon by the prosecution and after affording opportunity to the accused persons charge was framed under Section 498A/34 IPC, Section 304B/34 IPC alternatively under Section 306/34 IPC.

The prosecution in order to prove its case relied upon 16 witnesses and about 7 documents which included the written complaint as Ext.1, the Inquest Report as Ext. 2, signature of PW7 on the resolution dated 12.04.1993 marked as Ext. 3/1, post-mortem report marked as Ext.4, formal FIR marked as Ext. 5, challan of the dead body of deceased Arjuman

Bibi marked as Ext. 6, sketch map with index which was prepared by the Investigating Officer of the case marked as Ext. 7.

Learned Trial Court on an assessment of the evidence adduced on behalf of the prosecution observed that PW2 to PW5 and PW8 turned hostile. According to the Learned Trial Court PW2 to PW4 are resident of village Shilampur (village of matrimonial home), PW5 was resident of village Sonamui and PW8 is a resident of village Kalindi. The learned Court held that all these witnesses were interested witnesses and as such they have deposed falsely. Learned Court, thereafter, proceeded to analyse the evidence and observed that these witnesses have purposely misrepresented before the Court and deviated from their earlier statements and as such are not at all believable. Although the Court was aware regarding the provisions of law that the evidence of hostile witnesses can also be taken into consideration while arriving at a conclusion. The Learned Trial Court relied upon the evidence of PW1, PW6, PW9, PW10 and PW11 and on an analysis of their evidence was of the opinion that so far as the issue of demand of Rs. 10,000/- for purchasing of boat and net for fishing and the infliction of torture/neglect upon the deceased for inability of her father to meet such demand is concerned the same is consistent in the version of all these witnesses and as such the Court cannot throw away such evidence. Additionally, the Learned Court observed that the two criminal cases which were filed at the instance of the deceased which were subsequently compromised would definitely support the factum of torture, added with the fact of a salish being held on or about 12.04.1993 and the unnatural death

of the victim/deceased on 10.05.1993 is sufficient to arrive regarding the factum of cruelty being of continuous nature. So far as the delay in lodging FIR is concerned, the Learned Trial Court was of the opinion that only there were 4 days delay in reporting the incident and as such the same is of no consequence. The Learned Trial Court by its judgment was pleased to exonerate all the inmates of the matrimonial home except the present petitioner from the charges under Section 498A/304B and/or Section 306 of the Indian Penal Code. However, the present petitioner was held guilty, only for the offence under Section 498A of the Indian Penal Code but was acquitted under Section 304B and/or Section 306 of the Indian Penal Code. The Appellate Court also dealt with the issue of delay wherein the Appellate Court after analyzing the evidence of PW1 categorically held that the circumstances under which delay has occurred in initiation of the case has been properly explained and as such the same is not fatal to the prosecution case. The Appellate Court also took into consideration the evidences of PW1 and PW6 and observed that in the inquest report it has been mentioned as U.D. Case No. 19/1993 dated 10.05.1993 so the recording of some of the dates by the Learned Trial Court are minor typographical errors which should be ignored. The Appellate Court was also pleased to take into account the close proximity of time of salish held on 12.04.1993 and the unnatural death of the victim on 10.05.1993 and came to a similar finding that there has been torture of continuous nature which points to the guilt of the present petitioner and as such was of the opinion that the finding arrived at by the Learned Trial Court cannot be interfered with, thereby dismissing the appeal.

Mr. Satadru Lahiri, Learned Advocate, appearing for the appellant submitted that there was manifest error, gross illegality and total non-appreciation of evidence by both the Courts below which calls for interference by this Court. Learned Advocate also submitted that the prosecution has withheld best evidence which disproves the allegation of torture due to dowry or subjecting the deceased to 'Cruelty' which is without any foundation. The birth of the daughter raises a presumption that there was no dispute so far as the conjugal relationship is concerned. Further, he submitted that no document were there regarding the earlier two cases which were registered at the instance of the victim. The learned Trial Court emphasized that as there is no intention of any cruelty upon the deceased, the conviction under Section 498A of the Indian Penal Code is unwarranted, more so, because of the fact that both the courts below could not find any material for convicting the petitioner either under Section 304B of the Indian Penal Code or Section 306 of the Indian Penal Code. The Learned Advocate relied upon the following judgments: Kantilal Martaji Pandor -Vs.- State of Gujarat & Anr., (2013) 8 SCC 781; Atmaram -Vs.- State of Maharashtra, (2013) 12 SCC 286; Anil Kumar Choulia -Vs.- State of West Bengal, (2003) 3 CHN 276; Bhaskar Ramappa Madar & Ors. -Vs.- State of Karnataka, (2009) 11 SCC 690; Sakharam and Anr. -Vs.- State of Maharashtra, (2003) 12 SCC 368; Jagdishraj Khatta -Vs.- State of Himachal Pradesh, (2019) 9 SCC 248; Govindaraju alias Govinda -Vs.- State, (2012) 4 SCC 722; Anil Phukan -Vs.- State of Assam, (1993) 3 SCC 282; Govindaraju alias Govinda -Vs.- State (2012) 4 SCC 722; Mohd. Hoshan, A.P. and Anr. -Vs.- State of A.P., (2002) 7 SCC 414; Gulmahmad

Abdulla Dall –Vs.– State of Gujarat, (2015) 15 SCC 506 and Tomaso Bruno & Anr. –Vs.– State of Uttar Pradesh, (2015) 7 SCC 178.

Learned Advocate, Ms. Faria Hossain, appearing for the State supports the judgment delivered by the Trial Court being affirmed by the Appellate Court and submitted that the close proximity within which the salish had taken place and there was unnatural death of the victim/deceased unerringly points to the guilt of the present petitioner. She further submitted that the judgment delivered by the Learned Trial Court as also the Appellate Court are on foundation of factual appreciation and no manifest error from the evidence could be pointed out by the petitioner calling for interference of this Court calling in order to invoke revisional jurisdiction.

The Learned Advocate relies upon the following judgments: Surinder Singh –Vs.– State of Haryana (2014) 4 SCC 129 and Harish Kumar –Vs.– State of Haryana, (2015) 2 SCC 601.

In the case of **Kantilal Martaji Pandor Vs. State of Gujarat & Anr.** reported in **(2013) 8 SCC 781**, relied upon by the Learned Advocate appearing for the petitioner, the Hon'ble Apex Court was dealing with a case where no evidence surfaced regarding harassment being inflicted by the husband with a view to meet any unlawful demand of any property or valuable security or on account of failure to meet such demand. This is a distinguishable fact which is appearing in paragraph 13 of the said judgment and in paragraph 19 and 20 of the said judgment it has been categorically observed by the Hon'ble Apex Court that from the deposition of

mother of the victim it has been found, the deceased was neither subjected to any financial exploitation nor she was facing food problem or any mental cruelty have been inflicted upon her.

In **Atmaram Vs. State of Maharashtra** reported in **(2013) 12 SCC 286**, the fact of the case is distinguishable as in paragraph 12 of the said judgment it has been categorically observed that there was no demand for any property or valuable security and for the said purpose the victim was subjected to harassment. Further, a reference to paragraphs 16, 17 and 18 of the said judgment reflects that there was a factual variation between the deposition of the father of the deceased and the documentary evidence relied by the prosecution, as the allegation of starvation was contrary to the post-mortem report, which reflected that the deceased at the time of post-mortem examination was found to be 'well nourished'.

In **Anil Kumar Choulia Vs. State of West Bengal** reported in **(2003) 3 CHN 276**. The Court was of the view that the charge, which was framed, was defective and according to the opinion of the Court it was because of frail health, the mental set up of the victim was disturbed and the prosecution could not properly explain the fact of suicide. In the present case, demand for dowry has been well established and corroborated by different witnesses.

In **Bhaskar Ramappa Madar & Ors. Vs. State of Karnataka** reported in **(2009) 11 SCC 690**, the Hon'ble Apex Court was dealing with a case where the Trial Court on materials acquitted the accused persons and the

High Court in an appeal by the State reversed the order of acquittal. Paragraph 21 of the said judgment categorically states that there was no analysis of the conclusion arrived at by the Trial Court, and as such the interference with an order of acquittal by the High Court was held to be bad in law.

In **Sakharam and Anr. Vs. State of Maharashtra** reported in **(2003) 12 SCC 368**, the Hon'ble Supreme Court in fact appreciated the evidence in the facts of the said case and was of the opinion that there was a tendency to rope in all relations of the in-laws of the deceased/wife in the matters of dowry death, this feature is clearly distinguishable in the present case as in the instant case only the conviction and sentence of the husband is under consideration.

In **Jagdishraj Khatta Vs. State of Himachal Pradesh** reported in **(2019) 9 SCC 248**, the Hon'ble Apex Court was dealing with a case wherein the appellant was acquitted by the Trial Court and the High Court on the re-appreciation of the evidence was pleased to convict and sentence the appellant. The Hon'ble Supreme Court while coming to its own findings mainly made factual appreciation to the extent that the case rested on the version of the witnesses wherein the allegations were made before the Court and were never raised by the family of the deceased when they were present at the time of preparation of the inquest report or to the Investigating Officer. The other point in which the Hon'ble Apex Court refused to accept the view of the High Court is regarding the letter which was accepted by the High Court to be sacrosanct and which was never proved before the learned

Trial Court. The aforesaid two issues are distinguishable from the facts of the present case and as such cannot be relied upon.

In **Govindaraju alias Govinda Vs. State** reported in **(2012) 4 SCC 722** and **Anil Phukan Vs. State of Assam** reported in **(1993) 3 SCC 282**, the Learned Advocate for the petitioner relied upon the same in order to emphasize regarding the conduct of the witnesses. The conduct of the witnesses so far as the present case is concerned has been dealt with by the Trial Court and this Court finds no anomaly to such finding. The learned Advocate has also tried to stress upon the issue of withholding of the best witness. However, if the materials which have been placed before the Court are sufficient enough to come to a finding then in that case it was incumbent upon the accused at the trial to show that the non-production of a particular witness has prejudiced the accused.

In **Tomaso Bruno & Anr. Vs. State of Uttar Pradesh** reported in **(2015) 7 SCC 178** relied upon by the learned Advocate for the petitioner, the Hon'ble Apex Court was appreciating a case of circumstantial evidence, but the question arose whether the assailant and the victim were staying at the hotel room, under such circumstances the availability of CCTV footage was an issue and omission to produce the same was held to be vital to the prosecution case on the principle of withholding of the best evidence and the prosecution case was held to be un-reliable. The factual circumstances in this case are completely different as there is no issue whether the husband and the deceased/wife were staying at the matrimonial home and also whether the other evidences so available in the case are sufficient enough to

arrive at a finding of guilt so far as the present petitioner is concerned. The applicability of the aforesaid case as such did not appear to be relevant so far as the present case is concerned.

The learned Advocate for the petitioner thereafter, referred to **Mohd. Hoshan, A.P. and Anr. Vs. State of A.P.** reported in **(2002) 7 SCC 414** and **Gulmahmad Abdulla Dall Vs. State of Gujarat** reported in **(2015) 15 SCC 506**, for relying upon the issue of sentencing. This would be considered later on once this Court arrives at a finding whether the courts below were correct while arriving at their conclusion and whether the sentence was excessive.

In **Surinder Singh Vs. State of Haryana** reported in **(2014) 4 SCC 129**, the facts of the case reflect that the wife died within a period of 94 days of marriage. The Hon'ble Apex Court was pleased to affirm the order of conviction under Section 498A of the IPC as well as under Section 304B of the Indian Penal Code and the same was based on the evidence of the brother of the deceased, which were found to be reliable and which corroborated the factum of dowry demand. Although, this case was initiated Under Section 498A and 304B of the Indian Penal code but the learned Courts below have been pleased to convict the present petitioner only under Section 498A of the Indian Penal Code and the State has not approached this Court in appeal against the order of acquittal so far as the offence under Section 304B of the Indian Penal Code is concerned or the alternative charge which was framed under Section 306 of IPC, as such the manner in

which the Hon'ble Apex Court arrived at its finding on the factual matrix of the said case is difficult to be applied in the present case.

In **Harish Kumar Vs. State of Haryana** reported in **(2015) 2 SCC 601**, the Hon'ble Apex Court by relying upon the dying declaration of the deceased was pleased to acquit the accused persons from the charges under Section 304B of the Indian Penal Code. In this case, the Court after acquitting the accused under Section 304B of the Indian Penal Code opined that the offence under Section 498A of IPC has been proved and as such convicted the accused/appellant therein for the said offence. As such the applicability of the said case is also not relevant so far as the present case is concerned.

In course of argument, the learned Advocate for the petitioner tried to emphasize on the issue that as the petitioner was acquitted from the charges under Section 304B of the Indian Penal Code (as also the alternative charge under Section 306 of the Indian Penal Code), the allegation of 'cruelty' no longer existed and as such the conviction under Section 498A of the Indian Penal Code is not maintainable. Such proposition is countered by the learned Advocate appearing for the State. Here it would be pertinent to refer to the decision of the Hon'ble Supreme Court in **Gurmeet Singh -Vs.- State of Punjab** reported in **2021 SCC OnLine SC 403** wherein reference has been made to the earlier judgment of the Hon'ble Supreme Court in **Kamesh Panjiyar V. State of Bihar, (2005) 2 SCC 388** for the purpose of the present case the relevant part which has been relied upon is set out as follows:-

“.....It is to be noted that Sections 304-B and 498-A IPC cannot be held to be mutually inclusive. These provisions deal with two distinct offences. It is true that cruelty is a common essential to both the sections and that has to be proved.”

Thus, it was held that although cruelty is a common thread existing in both the offences; however the ingredients of each offence are distinct and must be proved separately by the prosecution. The argument so advanced by the petitioner to this effect as such is not acceptable to this Court.

On an overall appreciation of the judgments so delivered by the learned Trial Court as also that of the Appellate Court in my considered view so far as the appreciation of facts of the case is concerned, the learned courts below did not commit any illegality and has scrupulously adhered to the basic principles of evidence while arriving at their conclusion. In this case, there has been consistent and corroborating evidence regarding the demand of Rs. 10,000/- for the purchase of materials relating to purchase of fishing boat/net/engine and such demand was made from the father of the deceased through the deceased and which on appreciation of evidence reflects the infliction of torture (be it physical or mental). So far as the time period is concerned relating to the existence of demand of dowry and the term “soon before her death” it has been settled by the Hon’ble Supreme Court in a series of decision that the term “soon before” cannot be interpreted to mean “immediately before”. The duty of the prosecution is only to establish that there existed “proximate and live link” between the

cruelty and consequential death of the victim. The aforesaid factor being established in the present case upon appreciation of evidence by the learned courts below, I am of the opinion that no interference is called for regarding the finding of the guilt.

The only issue now left is regarding the question of sentence, records reflect that the incident is of the year 1993 i.e. more than 28 years ago and the sentence so imposed by the learned Trial Court was in the year 1998 for a period of 2 years and fine of Rs. 500/-. Needless to state that the pendency of the criminal case has definitely added to the mental agony of the present petitioner for almost three decades. Having regard to the same, the sentence so imposed by the learned Trial Court and affirmed by the Appellate Court is reduced to the sentence which he has already undergone and suffered in the instant case.

Accordingly, the revisional application being CRR 1704 of 2000 is allowed in part.

Department is directed to communicate this order to the learned court below.

L.C.R., if any, be sent back to the learned court below forthwith.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(Tirthankar Ghosh, J.)