

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

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Bivas Pattanayak

C.R.A. 683 of 2012

***Sambhunath Maity @ Sambhu
-Vs-
State of West Bengal***

For the Appellant : Mr. Mainak Bakshi, Adv.

For the State : Mr. Sudip Ghosh, Adv.
Mr. Apurba Kumar Datta, Adv.

Heard on : 29.11.2021

Judgment on: 29.11.2021

Joymalya Bagchi, J. :-

The appeal is directed against the judgment and order dated 27th August, 2010/31st August, 2010 passed by the learned Additional District & Sessions Judge, 1st Court, Tamluk, Purba Medinipur in Sessions Trial No. 01(1)10 (Sessions Case No. 288(12)09) convicting the appellant for

commission of offence punishable under Sections 498A/302 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for three years and to pay fine of Rs.5,000/-, in default, to suffer simple imprisonment for six months more for the offence punishable under Section 498A IPC and to suffer imprisonment for life and to pay fine of Rs.5,000/, in default, to suffer rigorous imprisonment for six months more for the offence punishable under Section 302 of the Indian Penal Code; both the sentences to run concurrently.

The prosecution case as alleged against the appellant is the effect that he married the deceased namely, Kajal Dandapat 8-9 years ago. The appellant used to regularly assault his wife. On 03.09.2009, the appellant had a quarrel with his wife and assaulted her with a *boti* and smothered her resulting in her death. Written complaint was lodged by the father of the deceased namely, Kanai Dandapat (PW1) resulting in registration of Chandipur Police Station Case No. 180 of 2009 dated 03.09.2009 under Sections 498A/302 IPC against the appellant and other in-laws. In course of investigation, PW15 went to the place of occurrence and seized a *boti*, a wooden battam as well as blood stained soil under seizure list. Appellant and other accused persons were arrested and charge-sheet was filed. The case was committed to the Court of Sessions and transferred to the Court of the learned Additional Sessions Judge, 1st Court, Tamluk, Purba Medinipur for trial and disposal. Charges were framed under Sections 498A/302 IPC against the appellant and other in-laws. The accused persons pleaded not guilty and claimed to be tried. In the course of trial, prosecution examined

17 witnesses and exhibited a number of documents. The defence of the accused persons was one of innocence and false implication. In conclusion of trial, the trial Judge by the impugned judgment and order dated 27th August, 2010/31st August, 2010 convicted and sentenced the appellant, as aforesaid. By the selfsame judgement and order, other accused persons were acquitted.

Mr. Mainak Bakshi, learned counsel appearing for the appellant submits that the evidence of the minor son (PW5) is unreliable as he is a tutored witness. Appellant was not present at the place of occurrence and the opinion of the doctor with regard to the cause of death is unclear. Without prejudice to the aforesaid, learned counsel argued the incident occurred in the course of a quarrel and the appellant had no intention to murder his wife. Hence, the conviction may be altered from one under Section 302 IPC to Section 304 Part I of the Indian Penal Code.

Mr. Apurba Kumar Datta, learned advocate appearing for the State, argues that the appellant regularly tortured his wife. On the fateful night, he had not only throttled his wife but cut her throat with a boti clearly showing his intention to murder her. Evidence of PW5 is most natural and trustworthy. Post-mortem doctor has corroborated the ocular evidence of PW5. Hence, appeal is liable to be dismissed.

P.Ws. 1, 4 and 6 are the relations of the deceased.

P.W. 1 is her father and first informant in the present case. He deposed that the marriage between the couple took place ten years ago. On 17th bhadra at 1.30 a.m. the appellant had struck his daughter with a banti

on her throat. On hearing the news, he went to the place of occurrence and found that her daughter was lying in the mud in front of her house. His grandson (P.W. 5) narrated the incident to him. He lodged written complaint. He also signed in the inquest report. P.W. 1 is corroborated by his son (P.W. 2), his wife (P.W. 3) and his brother (P.W. 4). P.W. 6 is another son-in-law of P.W. 1 also corroborated the latter version. The evidence of the aforesaid witnesses, however, are hearsay as they were not present at the place of occurrence. They came to know of the said incident from P.W. 5, minor son of the couple.

PW5 was six years of age at the time of the incident. Consequently, the trial court, upon assessing his competence, recorded his deposition. He deposed that on the fateful night his father had struck her mother with a banti and also pressed a pillow on the mouth of her mother. He narrated the incident to his grandfather and maternal uncle. He also made a statement before the police. In cross-examination he stated that he did not know the reason of the quarrel between his father and mother. He narrated the incident before the learned Magistrate (P.W. 13) and the Court as per directions of his grandfather and grandmother.

P.Ws. 7 to 11 are the neighbours of the couple. They are uninterested witnesses and have consistently stated that the appellant was a habitual drunkard and used to regularly assault the deceased. They, however, did not witness the incident.

P.W. 12 is the postmortem doctor. He proved the postmortem report as exhibit – 5. He opined that cause of death is due to combined effect of

injuries, smothering and throttling – all are ante mortem and homicidal in nature. In cross-examination, he stated that death was caused either by throttling or by cutting or by any other means. P.Ws. 15 and 16 are the investigating officers in the instant case.

It has been argued that P.W. 5 is a tutored witness. It is emphasized in cross-examination, the witness admitted he made statement before the learned Magistrate and Court as per directions of his grandparents.

I have assessed the evidence of P.W. 5 in the light of the aforesaid submission. It is true that a child witness is ordinarily prone to tutoring. However, in the present case, I note that the narration made by P.W. 5 in Court was reflected in the first information report lodged by P.W. 1, immediately after the incident. It is nobody's case that the first information report is concocted or a manufactured one. Hence, I am of the opinion that the minor who was the most natural witness had, in fact, seen the assault upon his mother and soon thereafter narrated the incident to his grandfather (P.W. 1) who narrated such fact in the reflection of this circumstance, at FIR. The earliest opportunity, in the first information report rules out any possibility of embellishment or tutoring. On the other hand, if the evidence of the minor is read as a whole then his response in the course of cross-examination would mean he had been instructed by his grandparents to make the statement which he disclosed to them at the first instance before the learned Magistrate or in Court.

In such view of the matter it cannot be said that the said witness is a tutored one.

Even if the argument of the appellant is accepted, there is no escape from the conclusion that the incident occurred at mid-night at the matrimonial home of the deceased wherein couple resided with the minor child. Presence of any other person has not been probalised in the instant case. On the other hand, the appellant took a desperate plea in the course of his examination under Section 313 of the Code of Criminal Procedure that he was not at home. However, such plea has not been probalised by leading defence evidence.

Under such circumstances, there is no escape from the conclusion that the appellant was present at his home when the deceased suffered homicidal death. No explanation is forthcoming from the appellant with regard to the circumstances leading to the homicidal death of his wife. Postmortem doctor deposed that death was due to combined effect of the injuries, smothering and throttling – all being ante mortem and homicidal in nature. Medical opinion squarely corroborates ocular evidence of P.W. 5 that the appellant had cut the neck of the victim and pushed a pillow on her face.

Hence, I am unable to accept the submission of the learned Counsel appearing for the appellant that the cause of death as narrated by the postmortem doctor is inconsistent with the prosecution case. There is no doubt in my mind that due to the assault perpetrated on the victim she had suffered injuries and died due to such injuries and smothering by the appellant.

Lastly it has been argued that the conviction may be altered from the Sections 302 to one 304 Part I of IPC. Learned Counsel submits that the

incident occurred in the course of a quarrel and on the spur of the moment. He relies on ***State of Madhya Pradesh Vs. Abdul Latif***¹ in support of his contention. I am unable to accept his submission on this score also. The appellant was a habitual wife beater as would appear from the evidence of P.W.7 and P.W. 11. On the fateful night the appellant had not only struck the victim mercilessly with a banti on her neck but had also smothered her with a pillow. Conduct of the appellant in assaulting the victim on a vital part of the body and thereafter smothering her, leaves no doubt in my mind that he had intended to kill her. In the cited decision the accused had not been acted in a cruel manner as in the present case wherein the appellant after assaulting his wife with a banti on the neck had smothered her. Moreover, the fatal incident was preceded by regular violent behaviour and assault on the victim. Hence, I am of the opinion that the conduct of the appellant proves that he intended to murder his wife and the case does not fall within the exceptions of section 300 IPC justifying modification of conviction.

In the light of the aforesaid discussions, conviction and sentence of the appellant is upheld and accordingly, the appeal is dismissed.

From the facts of the case it appears that the appellant has no criminal antecedent. In the event the conduct of the appellant in jail is satisfactory, upon completion of fourteen years of actual imprisonment it shall be open to him to make a prayer for premature release under Section 433A of the Code of Criminal Procedure. If the prayer is made, the

¹ (2018) 5 SCC 456

appropriate authority may consider the prayer in the light of the aforesaid circumstances and other relevant factors.

Copy of the judgment along with lower court records be sent down to the trial court at once for necessary compliance.

Urgent photostat certified copy of this order, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

I agree.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)