

Form J(2)

**IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side**

**Present :
The Hon'ble Justice Bibek Chaudhuri**

**IA No.:CRAN/3/2020
in
C.R.A. 65 of 2016**

**Biswanath Das
Vs.
State of West Bengal & Anr.**

**For the Appellant : Mr. Debapratim Guha, Adv.,
Mrs. Anasuya Sinha, Adv.**

**For the State : Mr. S. G. Mukherjee, Ld. P.P.,
Mr. Z. N. Khan, Adv.,
Mr. N. P. Agarwala, Adv.,
Mr. Ashok Dey, Adv.,
Mrs. S. Patel, Adv.**

Heard on : 16.02.2022, 17.02.2022

Judgment on : 17.02.2022.

Bibek Chaudhuri, J.

Judicial precedents does not follow the facts, on the contrary, facts follow the judicial precedents. Now a days, a trend is visible that the Judicial Officers have the tendency to set out number of judgments of the higher Courts before appreciating and scanning the factual evidence

and try to fit in the facts with the precedent. This trend is not only dangerous, but also leads a person to take a wrong decision under particular facts and circumstances of a case.

I like to elaborate the above-noted prologue subsequently while discussing the judgment delivered by the Learned Judge in the Trial Court.

In the instant case, married daughter of the *de facto* complainant died at her matrimonial home after about six years of marriage. On 26th April, 2000, the father of the deceased lodged a complaint before the Learned S.D.J.M., Berhampore alleging, *inter alia*, that marriage of his daughter, Jyotsna was solemnized with the appellant, named Biswanath Das about six years before the death of the said Jyotsna. It is also alleged by the complainant that at the time of marriage as per the demand of the accused he gave a sum of Rs.30,000/- in cash and gold ornaments weighing about 2.5 'bhoris' to the bride and bridegroom. However, after marriage Jyotsna was subjected to torture by her husband and other matrimonial relations on illegal demand of a sum of Rs. 20,000/-. On 8th April, 2000, she was severely assaulted by the appellant and failing to bear such torture she consumed poison. Jyotsna was taken to hospital by her matrimonial relations. The *de facto* complainant got the said information from the son of his another daughter, named Sandhya (P.W. 2) whose marriage was also solemnized

in the same village. Immediately, he rushed to Beldanga hospital and came to know that his daughter, Jyotsna was referred to Berhampore hospital. He went to Berhampore and found his daughter lying in senseless condition with bruise mark on her right jaw and her face swelling. On 12th April, 2000, Jyotsna expired.

The Learned S.D.J.M., Berhampore sent the written complaint to Beldanga Police Station with a direction to the Officer-in-Charge of the said Police Station to treat the same as FIR and start investigation of the case. From the endorsement made by the Officer-in-Charge of Beldanga Police Station, it is ascertained that the said complaint was received by the Police Station on 10th May, 2000 and on the basis of the said complaint a case under Sections 498A/304B/34 of the Indian Penal Code was registered against the appellant and other matrimonial relations of the deceased.

Investigation of the case culminated in filing charge-sheet against the appellant and other matrimonial relations of the deceased. Since the offence under Section 304B of the Indian Penal Code is triable exclusively by the Court of Sessions, the case was committed to the Learned Sessions Judge. Subsequently, it was transferred to the 4th Court of the Learned Additional Sessions Judge, Berhampore at Murshidabad for trial and disposal.

The Learned Trial Judge framed charge against six accused persons under Sections 498A/304B of the Indian Penal Code though in the charge it was stated that the accused persons in pursuance of their common intention committed the above offence, but no charge under Section 34 of the Indian Penal Code was added with the charge under Section 498A or 304B of the Indian Penal Code.

It is pertinent to mention at the outset that during trial accused no. 1, Rajendra Das and accused no. 2, Saraswati Das had expired and the case against the above-named two accused persons was filed forever.

Mrs. Anasuya Sinha, Learned Advocate for the appellant at the outset draws my attention about the inconsistency in the charge framed by the Learned Court below. In the charge, it is specifically mentioned that the appellant along with other accused persons who acquitted by the Learned Court below after trial on or about the 8th day of April, 2000 subjected Jyotsna Das to cruelty by torturing her both physically and mentally with common intention of each other. It is submitted by Mrs. Sinha that the charge refers to a solitary incident of 8th April, 2000 though in the written complaint, it was stated that the deceased was subjected to torture after few days of her marriage. It is submitted by the Learned Advocate for the appellant that under Section 464 of the Code of Criminal Procedure the effect of omission or error in the charge

may not be fatal for the prosecution and in certain cases such omission or error will not vitiate the trial. However, the purpose of framing charge is to make the accused persons aware about the offence specifically what they have committed in order to defend themselves. In the instant case, if the charge is concerned it will clearly reveal that the accused persons were charged for defending an incident that incident of cruelty that took place on 8th day of April, 2000.

In view of such circumstances, the error in the charge is incurable and it adversely affected the entire prosecution case.

It is further pointed out by the learned Counsel for the appellant that as per prosecution case and the evidence adduced by the witnesses on behalf of the prosecution, deceased Jyotsna Das was subjected to torture long 6 years before her unnatural death at her matrimonial home by the accused persons on demand of Rs.20,000/-. She asked her father to give her a sum of Rs.20,000/- to satisfy the demand of her husband and other matrimonial relations but the *de facto* complainant failed to satisfy their demand due to sheer poverty. As a result, the deceased was subjected to torture and ultimately, failing to bear such torture, consumed poison on 8th April, 2000.

It is urged by the learned Advocate for the appellant that during the long 6 years of marital life of Jyotsna, the *de facto* complainant did not lodge any complaint before any authority. P.W.2, Sandhya Rani Das,

who is the elder sister of the deceased stated in her cross-examination that occasionally she lodged the complaint against the appellant and other matrimonial relations about such torture to the Pradhan and members of Local Panchayat and also to the villagers orally. But she failed to disclose the names of the persons to whom she informed the incident of torture by the appellant and other matrimonial relations of Jyotsna during her lifetime. In order to prove the said claim, the prosecution failed to examine any member of local Panchayat or any neighbour around the matrimonial home of the deceased to prove the said fact.

It is further urged by Ms. Sinha, learned Advocate for the appellant that P.W.3, Kush Das who is the son of P.W.2, Sandhya Rani Das stated in her evidence that his maternal aunt Jyotsna was tortured by the accused persons over further demand of money. He claimed himself to be an eyewitness of an incident when the appellant was assaulting Jyotsna under the influence of liquor. It is also stated by P.W.3 that since Jyotsna was assaulted by the appellant, she had to terminate her life by consuming poison at her matrimonial home.

The learned Advocate for the appellant next draws my attention to the evidence of P.W.9, Arup Roy Chowdhury, who is the Investigating Officer of the case. In his cross-examination, he stated that Sandhya Rani did not state to him that Biswanath demanded Rs.20,000/- and her

father could not meet such demand. He also did not state to the Investigating Officer that on 8th April, 2000 in the afternoon, before taking poison Jyotsna was beaten mercilessly by Biswanath.

Learned Advocate for the appellant next draws my attention to the evidence of P.W.5, Sasti Das, who is the elder brother of the deceased. It is rightly pointed out by the learned Counsel for the appellant that P.W.5 has introduced a new case in his evidence. According to him, Jyotsna did not consume poison on 8th April, 2000. On the contrary, Biswanath forcibly administered poison in her mouth. Thus, the deceased was forced to consume poison as a result of which she became unconscious and subsequently died in the hospital. He also stated that Jyotsna disclosed the said fact in the hospital. The said evidence is absolutely inconsistent with the prosecution case because according to the prosecution, Jyotsna remained unconscious after consuming poison till her death and she never regained her sense. The learned Advocate for the appellant has raised a pertinent question that P.W.5 claimed that he was present at the time of inquest over the dead body of his sister. Surprisingly enough, the said P.W.5 did not make any statement before S.I. Ajoy Sankar Roy (P.W.7) who held inquest in connection with Berhampore Police Station U.D. Case No. 199 of 2000 dated 13th April, 2000. The carbon copy of the Inquest Report was marked as Exbt.2 at the instance of P.W.7. In the said inquest report, it is recorded by P.W.7

that during initial inquiry, it was ascertained that the deceased consumed poison on 9th April, 2000 at about 7 a.m. and she was admitted to Berhampore District Hospital where she died on 12th April, 2000 at 2 p.m. It is also recorded by P.W.7 that the death of the deceased was not natural. It is submitted by the learned Advocate for the appellant that when the Inquest Officer found that a lady died unnaturally, the concerned police station ought to have started a *suo moto* case to unearth the truth behind the death of the deceased. However, the police authority did not discharge their official duty in the instant case. There is also no record as to whether the enquiry report of the said U.D. case was tagged with the case diary of the instant case.

It is submitted by the learned Advocate for the appellant that the provision of Section 304B of the Indian Penal Code is to be read in conjunction with 113B of the Evidence Act. Section 113B is the rule of presumption in dowry death. In order to find out whether a person caused dowry death of a woman, two conditions are necessarily to be proved:-

1. soon before her death such woman had been subjected to cruelty or harassment by such person; and
2. the cruelty of her husband was for or in connection with any demand for dowry.

It is submitted by the learned Advocate for the appellant that the prosecution has failed to prove that soon before her death, Jyotsna was subjected to cruelty by the appellant. The allegation of demand of dowry has also not been proved. It is further submitted by her that the prosecution is under obligation to prove that the woman had met with an unnatural death within 7 years of her marriage. From the report of the Autopsy Surgeon (Ext.4), it is ascertained that he did not find any external or internal injury on the dead body of the deceased. He clearly opined that on examination he found everything over the dead body was normal. If a person consume poison, there must be poisonous fluid with pungent smell in the stomach. The kidneys must be congested. These two findings can be made clinically by the Autopsy Surgeon on intersection. When the Autopsy Surgeon neither found pungent smell in the stomach or congested kidneys, the death of the deceased cannot be presumed to be unnatural due to poisoning. The Autopsy Surgeon reserved his final opinion as to the cause of death till the availability of Chemical Examiner's report from Forensic Science Laboratory. The said report has not come during trial of the case. Under such circumstances, the learned Trial Judge committed gross error in holding that the deceased had met with an unnatural death by poisoning.

It is accordingly submitted by the learned Counsel for the appellant that the prosecution failed to prove the charge against the appellant and the instant appeal should be allowed.

Mrs. Subhasree Patel, Learned Public Prosecutor-in-Charge, on the other hand, submits that all the witnesses on behalf of the prosecution deposed on the same tune that the victim was tortured by the appellant and other matrimonial relations on illegal demand of money. P.W. 2, Sandhya Rani Das is the elder sister of the deceased. Her matrimonial home is situated in the same village where the deceased used to stay with the appellant. She also corroborated the fact that the deceased was subjected to torture by the appellant and other matrimonial relations on illegal demand of Rs.20,000/-. The said fact was narrated to P.W. 2 by the deceased herself. The son of P.W. 2, namely, Kush Das was examined as P.W. 3 during trial of the case. In his evidence, he claimed that he himself had seen the appellant assaulting his wife, Jyotsna under the influence of liquor. He also stated that at that point of time he was a minor and could not resist the appellant from assaulting his maternal aunt. P.W. 3 further stated that Jyotsna terminated her life failing to bear torture inflicted upon her by the appellant. The evidence of P.W. 3 withstood rigorous cross-examination on behalf of the defence but his evidence could not be shaken during cross-examination.

It is further pointed out by the Learned Public Prosecutor-in-Charge that there are certain contradictions in the form of exaggeration of the incident and omission of certain fact. From the cross-examination of the Investigating Officer, it is ascertained that the witnesses did not tell certain facts which they stated on oath in Court. However, according to the Learned Public Prosecutor-in-Charge, the said contradictions are minor in nature and notwithstanding the said contradictions if the evidence on record is taken up to its entirety, it would be found that the appellant was guilty for committing offence under Sections 498A/304B of the Indian Penal Code. Therefore, it is submitted by the Learned Advocate for the respondent-State that there is no ground to spill ink over the impugned judgment and order of conviction and sentence. Therefore, it is submitted by her that the instant appeal ought to be dismissed.

In support of her contention on the point of error in charge Ms. Sinha refers to a decision of the Division Bench of this Court in the case of **Anil Kumar Choulia and Ors. versus State of West Bengal** reported in **2003 (3) CHN 276**. In the said report it was pointed out by the learned advocate for the appellant that the charge under Section 498A/34 of the Indian Penal Code referred a solitary incident dated 17th February, 1986 with regard to the charge under Section 306 of the Indian Penal Code, the charge referred to an

incident dated 18th February, 1986 on which date the accused persons were charged for committing offence of abatement of suicide.

It was argued on behalf of the appellant that in view of the charge having been framed stating specific dates, viz., 17th February, 1986 and 18th February, 1986, the evidence given by the prosecution as regards previous torture etc. should not be looked into and the prosecution case cannot travel on the incidence allegedly took place beyond the said two dates.

The Division Bench of this Court while accepting the contention of the learned advocate for the appellant observed in paragraph 30 as hereunder:-

"30. In the instant case, the prosecution alleged that the cruelty was perpetrated on the victim on 17.02.86 and abetment of suicide was also given at the same time as a result of which the victim committed suicide on 18.02.86. There is no ambiguity in the charge as framed in this case under section 498A/34 and section 306 of the Indian Penal Code. It appears that placing reliance on the evidence of P.W.8 such a charge was framed and it was never disclosed that the alleged cruelty was perpetrated on the victim since 2-3 months after the marriage. So the entire case as made out by the prosecution centres round the alleged incident of 17.02.86 and 18.02.86 and hence, it is rightly argued by Mr. Basu that there was no reason on

the part of the defence to cross-examine the witnesses on the facts that were not included in the charge. True it is that police papers were handed over to the accused persons. But at the same time it is to be kept in mind that while framing the charge it was made clear to the accused persons that they were being tried on the basis of the incidents of 17.02.86 and 18.02.86. So acceptance of evidence beyond the said period actually misled the accused persons and the Trial Court relying on such evidence came to a finding that resulted into failure of justice. There is nothing in the evidence of P.W.8, nor in the materials collected by the prosecution and produced before the Court during the trial to show or indicate that any of the accused persons gave any inducement to the victim for committing suicide.”

It is needless to say that all forms of cruelty and / physical and mental torture upon a married woman by her husband and other matrimonial relations do not constitute an offence under Section 498A of the Indian Penal Code. The meaning of cruelty envisaged in Section 498A is stated in explanation (a) and (b) of the said section. Explanation (a) of Section 498A speaks of any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health of the woman. Clause (b) states about harassment of the woman where such harassment is with a view to coercing her or any person related to her

to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet demand.

It is important to note that Section 498A does not state about unlawful demand of dowry. Any story of unlawful demand for any property or valuable security and consequent harassment thereof amounts to cruelty within the meaning of Section 498A.

It is pertinent to note here that as per the prosecution case the deceased was subjected to torture on illegal demand of money since after marriage. I am in conformity with the learned counsel for the appellant that the charge under Section 498A of the Indian Penal Code framed against the accused persons does not speak about the happening of such incident of torture since after marriage till 8th April, 2000. Therefore, the learned trial Court erred in law in accepting the evidence with regard to cruelty beyond 8th April, 2000. It is surprising to note that according to the father and other relatives of the deceased, Jyotsna was subjected to physical torture and mental cruelty on demand of a sum of Rs.20,000/- for long six years prior to her unfortunate death. It is also found from the evidence of P.W.1 that the deceased made complaints to him about such torture on illegal demand of money. However, the deceased or her near relatives did not file any complaint against the appellant during her

life time. There is also no evidence to the fact that the near relatives of the deceased tried to settle the dispute between her and her husband. By 'salish' or taking the help of local respectable persons. Only after 14 days of her death all such allegations were brought to the notice of the Court of the learned S.D.J.M.

The learned advocate for the appellant is critical on the question as to why no independent local witness was examined in the instant case. I am not in a position to accept the above argument advanced by the learned advocate for the appellant. It is our own experience that in a case of matrimonial dispute the neighbouring people seldom want to involve themselves. Even if they know the incident of the torture, physical and mental cruelty perpetrated upon woman, they are reluctant to come forward because they do not want to purchase animosity of the other neighbours who are accused of a case relating to matrimonial dispute. The said circumstance is dealt with by the Hon'ble Supreme Court in ***Trimukh Maroti Kirkan versus State of Maharashtra*** reported in **(2006) 10 SCC 681** in the following words:-

"The demand for dowry or money from the parents of the bride has shown a phenomenon increase in the last few years. Cases are frequently coming before the Courts, where the husband or in-laws have gone to the extent of killing the bride if the demand is not met.

These crimes are generally committed in complete secrecy inside the house and it becomes very difficult for the prosecution to lead evidence. No 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 want to keep aloof and do not want to antagonize a neighbourhood family. The parents and other family members of the bride being away from the scene of commission of crime are not in a position to give direct evidence which may inculcate the real accused except regarding the demand of money or dowry and harassment caused to the bride but it does not mean that a crime committed in secrecy or inside the house should go unpunished."

Taking into consideration the ratio of the above referred decision of the Hon'ble Supreme Court as quoted above, this Court is of the view that the evidence of the near relatives of a bride is sufficient under the facts and circumstances of a case to hold the accused guilty. However, such evidence must be believable, reliable, cogent and unblemished.

Bearing the above principles in mind if the evidence of the witnesses on behalf of the prosecution is scanned, it would be found that the said witnesses during their deposition travelled beyond the

incident which allegedly took place on 8th April, 2000. This Court, relying on the decision of **Choulia** (supra), cannot look into such evidence.

Coming to the incident that took place on 8th April, 2000, it is found that P.W. 1, P.W.2, P.W. 3 and P.W. 5 were not the eyewitnesses of the occurrence. Their Knowledge about the incident is derivative in nature and hence hearsay.

Hearsay evidence are admissible under certain circumstances which are not present and attracted in the instant case.

The learned Trial Judge came to the conclusion that the deceased had met with an unnatural death placing reliance on a decision of the Hon'ble Supreme Court in **Taiyab Khan –vs- State of Bihar now (Jharkhand)**, reported in **(2005) 13 SCC 455**. In the said report, it was held by the Hon'ble Supreme Court that where the deceased died within three years of marriage, the case was of an unnatural death, there was reliable evidence of dowry demand, the accused would be convicted under Section 304B. The absence of viscera was not made any difference to the facts of the case.

It is true that in the instant case the deceased died within six years of marriage. Though it is found from the evidence of the father and other relatives of the deceased that she had met with an unnatural death, there is no expert opinion in the form of post-

mortem report in support of the prosecution case that the death of the deceased was unnatural. On the contrary, the Autopsy Surgeon found no injury whatsoever in the external part of the body as well as internally. He found, though the instant case is a case of dowry death by poisoning, the stomach, kidney and lungs of the deceased absolutely normal. The observation of the Autopsy Surgeon and the report is fully contrary to the basic canons of forensic medicine. If a person consumes poison and dies, there must be trace of poisonous fluid in the stomach and congestion of kidney with fibrosis on lungs. Even if the remains of the stomach is pumped out during medical treatment in the hospital which is the general mode of treatment in case of poisoning, poisonous fluid will accumulate in the stomach in case of death of the deceased. The Autopsy Surgeon who is the expert in the field and whose report, the Court cannot deny, did not find any such abnormality in any of the body parts of the deceased. In ***Taiyab Khan*** (supra) though the viscera report was not produced, the Autopsy Surgeon opined that this was a case of unnatural death. In the instant case even no such preliminary report was submitted by the Autopsy Surgeon (P.W. 7). In the absence of such evidence, it is not possible for the Court to accept that the deceased expired unnaturally.

It is true that in respect of the case of cruelty perpetrated by the husband upon his wife 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, the Inquest Report suggests that no near relation of the deceased was present at the time of inquest. On the other hand, some other persons whose identity was not disclosed during trial were present. It is claimed by P.W. 5, Sasti Das who is the elder brother of the deceased that he was present at the time of inquest over the dead body of the deceased. In his examination-in-chief, he introduced a new story to the effect that the appellant poured poison forcibly in the mouth of the deceased and compelled her to consume it. The deceased died of poisoning. Surprisingly enough, he did not state the said fact to the Inquest Officer who held inquest though he was present at the time of inquest.

Another important circumstance which lost sight of the learned trial Court is that the de facto complainant claimed that he came to know that his daughter Jyotsna consumed poison and was taken to Beldanga Hospital. Then he went to Beldanga Hospital and came to know that she was referred to Berhampore District Hospital. Thus, the deceased was taken to the hospital for medical treatment obviously

by her matrimonial relations. It is found from the evidence of PW 2 that the appellant took the victim to the hospital for medical treatment. The said circumstance points out the innocence of the appellant had it been the fact that the deceased consumed poison failing to bear the torture perpetrated upon her by the appellant to commit suicide, the appellant would have fled away from the spot seeing his wife consuming poison out of fear of the possible outcome that may come from the side of the paternal home of the deceased.

The learned trial Judge failed to consider the above circumstances while passing the judgment . At the very beginning of the judgment I made a comment regarding applicability of precedence under the facts and circumstances of a particular case. Let me assign the reason in support of my above observation. The learned trial Judge started his judgment after the heading decisions with reason, stating basic principles of law, the observation of the Hon'ble Supreme Court that the circumstance from which the conclusion of guilt is to be drawn should be fully established the ratio of the decision of the Hon'ble Supreme Court in the ***State of Uttar Pradesh –vs- Dr. Ravindra Prakash Mittal***, reported in (1992) 3 ***SCC 300***, some excerpts of Tagore Law Lectures on the Principles of the Law of Crimes in British India, the ratio laid down in ***Rajender – vs State***, reported in ***AIR (1966) SC 1322*** general principles of

intention, motive etc. in criminal trial, then at page 8 of her judgment he started discussion of the evidence on record. I lie to remind the learned trial Judge that the fact should come first and reliability of such facts and circumstances are to be tested on the basis of the precedence . If the fact follows the precedence, there is every chance which lead to wrong decision.

The learned trial Judge obviously toiled much to write the impugned judgment. However, I am not in a position to sustain the impugned judgment and order of conviction and sentence under the above lacunae in the facts and circumstances of the case.

The appellant is entitled to get benefit of doubt.

As a result the instant appeal is **allowed** on contest. The appellant be discharged from his bail bond.

Let a copy of this judgment along with the lower Court record be send to the Court below forthwith.

(Bibek Chaudhuri, J.)