

IN THE HIGH COURT AT CALCUTTA
(CRIMINAL REVISIONAL JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRR 2850 of 1998

SAMIR GHOSH
VS.
STATE OF WEST BENGAL

For the Petitioner	: Mr. Jayanta Narayan Chatterjee, Adv. Ms. Moumita Pandit, Adv. Ms. Nandini Chatterjee, Adv. Ms. Spreem Naskar, Adv. Ms. Jayashree Patra, Adv. Ms. Ritushree Banerjee, Adv. Ms. Pritha Sinha, Adv. Ms. Dipanita Das, Adv.
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For the Opposite Party	: Mr. Bidyut Kumar Roy, Adv., Mrs. Puspita Saha, Adv.
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Hearing concluded on	: 21 st September, 2022
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Judgement on	: 22 nd September, 2022
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Siddhartha Roy Chowdhury, J:-

1. By filing this application under Section 482 of the Criminal Procedure Code the petitioner calls in question the legality of the judgement passed by learned Additional Sessions Judge, 2nd Court, Hooghly in Criminal Appeal No. 56 of 1995 affirming thereby the order of conviction recorded against him for committing offence under Section 498A/304B of the I.P.C. passed on 26th July, 1995 by the

learned Assistant Sessions Judge, 2nd Court, Hooghly in S.T. No. 238 of 1992.

2. Briefly stated, the marriage between the petitioner Samir Ghosh and Kabita Kalyan daughter of Binay Krishna Kalyan was solemnized on 24th of Baishakh, 1396 B.S. corresponding to 7th May, 1989.
3. Kabita, the wife of Samir Ghosh succumbed to burn injury on 8th February, 1991 while she was staying with her husband in her matrimonial home. Consequent upon such unnatural death of his daughter, Binay Kumar Kalyan set the criminal administration of justice into motion by informing the Officer-in-charge, Bhadreswar Police Station in writing about the unnatural death of her daughter. Consequent thereupon Bhadreswar P.S. Case No. 29 dated 8th February, 1991 was registered. Police took up investigation which culminated into submission of charge sheet. After compliance of provision of Section 207 and 209 of the Cr.P.C the case was transferred to the learned Assistant Sessions Judge, 2nd Court, Hooghly. Learned Trial Court framed charge against three accused persons under Section 489A/304B/306 of the I.P.C., pleading innocence who claimed to be tried.
4. To bring home charges prosecution examined 19 witnesses and the accused persons examined two witnesses.
5. Learned Trial Court after considering the evidence adduced by witnesses was pleased to record an order of conviction against accused Swapan Kumar Ghosh and Samir Ghosh for committing offence under Section 498A/304B of the I.P.C. and while recording an order of acquittal against their mother Sitalabala Ghosh. Charge under Section

306 I.P.C. was not proved. The said order of conviction was challenged by the convicts in Criminal Appeal No. 56 of 1995 before the Additional Sessions Judge, 2nd Court, Hooghly. Learned Appellate Court was pleased to set aside the order of conviction as against Swapan Kumar Ghosh while affirming the order of conviction recorded against Samir Ghosh husband of the victim.

6. Assailing the impugned judgement passed by learned Appellate Court Mr. Jayanta Narayan Chatterjee, learned Advocate for the petitioner submits that the impugned judgement is nothing but manifestation of misreading of evidence by learned Courts below resulting into miscarriage of justice. According to Mr. Chatterjee admittedly the victim died an unnatural death and within seven years of marriage but there is no convincing evidence indicating that the victim was subjected to cruelty or harassment in her matrimonial home in connection with demand for dowry soon before her death.
7. Drawing my attention to the testimony of the prosecution witnesses Mr. Chatterjee submits that Kabita and her husband Samir Ghosh used to lead normal conjugal life. They had a baby. Kabita came to her father's house during her advance stage of pregnancy and three months after the birth of her child she was taken back to her matrimonial home. When the baby became six months old 'Annaprasan Ceremony' was held which was attended by the parents and brother of the victim. PW-1 the father of the victim made an allegation that after marriage he was confronted with a demand of Rs. 10,000/- for the purpose of installing a tube-well in the matrimonial home of his daughter which he failed to satisfy. His failure to meet

such demand invited harassment and torture in the life of his daughter ultimately she was compelled to put an end to her life by setting herself ablaze. But according to Mr. Chatterjee, no such claim was ever made and the alleged demand cannot be considered to be a demand of dowry. Drawing my attention to the testimony of PW-1 Mr. Chatterjee adverted that on 29th January, 1991 the petitioner went to the house of his father-in-law with his friend only to inform him that his wife was creating disturbance in the house and requested PW-1 to accompany them to their house. PW-1 further stated that on the next day he visited the house of his daughter together with his wife and found Kabita saying that her husband and mother-in-law were instigated by one Gopal and Subodh to drive her out and on that day for the first time he came to know about the demand of the accused persons to the tune of Rs. 10,000/- for the purpose of installing tube-well in the house. On 8th February, 1991 Kabita was engulfed by fire and succumbed to burn injury. PW-1 claimed to have been told by his daughter in the hospital bed that her husband, brother-in-law and mother-in-law did not allow her to live further and soon thereafter she breathed her last.

8. Drawing my attention to the testimony of PW-8 Sukanta Ghosh and PW-10 Kanailal Ghosh, Mr. Chatterjee argued that on her way to hospital with burn injury Kabita told those persons that she caught fire while cooking and according to the attending doctor PW-12 patient with 100% burn injury cannot have sense for 3-4 hours immediately after sustaining such intense burn injury the patient slips into coma. It is rightly argued by Mr. Chatterjee in the backdrop of such evidence of

attending physician it can safely be presumed PW-1 had no occasion to hear anything from his daughter as to the cause of fire. When immediately after sustaining burn injury she was taken to hospital, Kabita could have disclosed the cause of injury to the persons taking her to hospital. Mr. Chatterjee further argued that there is no cogent evidence other than the allegation of demand of Rs. 10,000/- that the victim was ever tortured during her stay in the matrimonial home far to speak of “soon before” her death. Younger brother of Kabita used to visit her house frequently. Kabita could have disclosed her plight being tortured in her matrimonial home to his brother. Said brother was not cited as witness by the prosecution. Mr. Chatterjee placed his reliance upon decision of Hon’ble Supreme Court pronounced in the case of **BISWAJIT HALDER @ BABU HALDER & ORS. VS. STATE OF WEST BENGAL** reported in **2007 (3) Supreme 124**, **ASHOK VISHNU DAVARE VS. STATE OF MAHARASHTRA** reported in **2004 SCC (Cri) 1468**, **APPASAHEB & ANR. VS. STATE OF MAHARASHTRA** reported in **2007 (1) Supreme 21** to buttress his argument to prove the innocence of the petitioner.

9. Refuting such contention Mr. Bidyut Kumar Roy learned Counsel representing the State argued strenuously supporting the impugned judgement. According to Mr. Roy when the victim admittedly died an unnatural death within seven years of marriage preceded by demand of her husband for a sum of Rs. 10,000/-, there is every reason to draw presumption under Section 113B of the Evidence Act to hold the unnatural death of victim is nothing but dowry death and the impugned judgement passed by learned Appellate Court does not

warrant any interference. According to Mr. Roy, learned Appellate Court in clear terms held that Samir Ghosh being the husband has failed to discharge his duty to protect his wife. When his wife was lying on the bed of hospital awaiting death, the petitioner Samir Ghosh was not thereby the side of his wife. This conduct of Samir Ghosh indicates his apathy towards his wife and it would further indicate his cruel nature with which Kabita was treated and ultimately took a decision to set her ablaze. Mr. Roy prays for dismissal of the case.

10. Section 304B of the I.P.C. deals with dowry death which reads as follows:-

“304B. Dowry death. -- (1) *Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.*

Explanation. For the purposes of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) *Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.”*

11. This provision has application when the death of a woman is caused by any burn or bodily injury or occurs otherwise than under normal circumstances. In order to attract the provision of Section 304B

of the I.P.C. the following essential ingredients are required to be proved.

1. The death of woman should be caused by burn or bodily injury or otherwise than under a normal circumstance.
2. Such death should have occurred within seven years of her marriage.
3. She must have been subjected cruelty or harassment for or in connection with demand of dowry.
4. Such cruelty or harassment is shown to have been meted out soon before her death.

12. Section 113B of the Evidence Act is also relevant for the purpose of adjudication of this case. Section 113B of the Evidence Act reads as follows:-

“113B. Presumption as to dowry death.—When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. Explanation.—For the purposes of this section, “dowry death” shall have the same meaning as in section 304B, of the Indian Penal Code, (45 of 1860).”

13. Presumption under Section 113B of the Evidence Act shall be raised only of proof of the following essentials:-

- a. The question before the Court must be whether the accused has committed the dowry death of a woman.
- b. The woman was subjected to cruelty or harassment by her husband or his relatives.

- c. Such cruelty or harassment was for or in connection with demand of dowry and,
- d. Such cruelty or harassment was soon before her death.

14. Determination of period which may come within term “soon before” no doubt is left to be determined by Court depending upon the facts and circumstances of each case. However, it would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. If the alleged incident of cruelty becomes stale enough not to disturb the mental equilibrium of the woman it would be of no consequence.

15. Cruelty, as rightly argued by Mr. B.K. Roy, learned Counsel representing the State has been defined in the explanation for the purpose of Section 498A of the I.P.C. Though Section 304B and 498A of the I.P.C. cannot be held to be mutually inclusive the cruelty is a common essential to both the Sections which is required to be proved.

16. Section 2 of the Dowry Prohibition Act, 1961 defines:-

“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 parent 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 ¹ [or any time after the marriage] ² [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. ³ [***] Explanation II.— The expression “valuable security”*

has the same meaning as in section 30 of the Indian Penal Code (45 of 1860)."

17. The word 'dowry' appearing in Section 304B of the I.P.C. is required to be understood as it is defined in Section 2 of the Dowry Prohibition Act. Thus, there are three occasions related to dowry. First is before the marriage. Second is at the time of marriage and third is at any time after marriage. The third occasion may appear to be unending period but crucial words are "In connection with marriage of the said parties".
18. In this case the father of the victim in his written information as well as in his oral testimony as PW-1, mother as PW-6 even PW-5 the landlord of PW-1 stated about such demand of money. But such demand was allegedly made for the purpose of installation of tube-well in the house. Though the petitioner as an accused during his examination under Section 313 Cr.P.C. denied such allegation and stated that a tube-well was there just outside their house, yet ignoring such claim of the convict before the Court during his examination under Section 313 of the Cr.P.C. if it is assumed that such a demand of Rs. 10,000/- was made by the convict, there is no reason to hold that this demand of money has got any nexus with the marriage between the Samir Ghosh and Kabita Ghosh. Therefore it cannot be said that Kabita was harassed or treated with cruelty over the demand of dowry that goaded her to set herself ablaze. There is no cogent evidence to hold that she was ever treated with cruelty by her husband at any point time within the meaning of Section 498A of the I.P.C.

19. In my view both the learned Appellate Court as well as learned Trial Court failed to appreciate the evidence properly and such misappreciation of evidence has resulted into miscarriage of justice, which is why I am inclined to invoke inherent power to quash the order of conviction.
20. Consequently the Criminal Revision is allowed on contest but without costs. The impugned judgement stands quashed.
21. Let a copy of the judgement be sent down to learned Trial Court for information and taking necessary action.
22. Urgent Photostat certified copy of this judgement, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)