

CRA 37 of 2003

28.02.2023
S/L. 17
Court No.12
Sourav

In the matter of: **Sk. Mafijul**

....Appellant.

Mr. Partha Sarathi Bhattacharyya,
Mr. Koustava Ratan Chatterjee

... Amicus Curiae.

Mr. Prasun Kumar Dutta, Ld. APP
Ms. Zareen N. Khan
Mr. Ashok Das

... for the State.

1. Heard Mr. Partha Sarathi Bhattacharyya, learned *amicus curiae* being assisted by Mr. Koustava Ratan Chatterjee, learned *amicus curiae* appearing for the appellant and Mr. Prasun Kumar Dutta, learned Additional Public Prosecutor being assisted by Ms. Zareen N. Khan and Mr. Ashok Das, learned Counsel appearing for the State.
2. The husband of the deceased is the sole appellant. Seven accused persons were charged for committing offence under Sections 498A/304B IPC. Learned Additional Sessions Judge, Fast Track Court, 1st Court, Burdwan in Sessions Trial No. 3 of 2003 arising out of Sessions Case No. 60 of 2002 found the present appellant guilty of offence under Sections 498A/304B IPC and acquitted other accused persons of the charge. The judgment of conviction and order of sentence was passed on the same day i.e., on 28.01.2003 and the present appellant was sentenced to suffer R.I. for eight years under Sections 498A/304B IPC. No separate sentence was, however, passed for offence under Section 498A IPC on the ground that the sentence passed under Section 304B IPC covers

the sentence for the offence under Section 498A IPC.

Aforesaid order passed by the learned trial court is the subject matter of the present appeal.

3. The occurrence happened on 17.04.1999. On the same day, the deceased is alleged to have taken poison in the morning and she died on the same day. FIR was lodged by P.W. 1, father of the deceased on 25.04.1999. Allegation is that the present appellant had demanded Rs. 5,000/- towards dowry and there used to be altercation between the appellant and the deceased over the matter. The deceased had come to her father's (P.W. 1's) house 14-15 days prior to the occurrence. She stayed there for about 14-15 days and just before the date of occurrence, P.W. 6, mother of the deceased took her (deceased) to her in-law's house and left her there. Next day the fateful occurrence happened. On getting information about the death of the deceased in Burdwan Hospital, P.W. 1 and others went there and found that there was swelling around the neck of the deceased and saliva was coming out from her mouth.
4. On receipt of medical legal report from the Burdwan Hospital, U.D Case No. 299/99 was registered in Burdwan P.S. and P.W. 10, ASI of Police attached to Burdwan P.S. held inquest over the dead body of the deceased in presence of the witnesses and subsequently challaned the dead body for Post Mortem. Such inquest was held on 18.04.1999 at Burdwan College Morgue. Subsequently, another inquest was held by P.W. 12, the Executive

Magistrate on 19.04.1999 who in course of inquest also found that there was some swelling in the neck. From the aforesaid fact, it is clear that the dead body was challaned for Post Mortem after the second inquest on 19.04.1999. The medical officer, P.W. 16 held Post Mortem over the dead body of the deceased on 19.04.1999 after the second inquest.

5. On registration of the FIR, investigation was taken over by P.W. 13 on the basis of Bhatar P.S. Case No. 34/1999 registered on the basis of FIR lodged by P.W. 1, father of the deceased. In course of investigation, he (P.W. 13) visited the spot, prepared the sketch map, examined some witnesses and thereafter, handed over charge of investigation on his transfer. Thereafter, P.W. 14 took up investigation, collected the inquest reports, dead body challan, post mortem report and sent the viscera of the deceased to Forensic Science Laboratory for chemical examination and handed over charge of investigation to another officer. P.W. 15, thereafter, took up investigation and after doing some peripheral part of investigation, he handed over the charge of investigation again to another officer on his transfer. P.W. 17, thereafter, took up investigation and filed charge-sheet against all the accused persons under Sections 498A/304B IPC read with Sections 201/34 IPC.
6. Learned trial court on consideration of the materials on record, however, framed charge for offence under Sections 498A/304B IPC against all the accused persons including

the present appellant.

7. Prosecution has examined 17 witnesses to bring to whom the charge against the accused persons including the present appellant. P.W. 1 is the father of the deceased, P.W. 6 is the mother of the deceased, P.W. 7 is the younger sister of the deceased, P.W. 8 is the scribe of the FIR lodged by P.W. 1, P.W. 2 is the mediator in the marriage between the appellant and the deceased, P.W.s. 3, 4, 9 and 11 are the neighbours of the appellant, P.W. 5 is, however, an inconsequential witness as he has stated nothing in his evidence, P.W. 16 is the medical officer, who conducted post mortem over the dead body of the deceased, P.W.s. 13, 14, 15 and 17 are the Investigating Officers.

The defence plea is one of complete denial though no evidence has been adduced by the defence.

8. Learned trial court taking into consideration mainly the evidence of P.W. 1 and other corroborative evidence, has reached to the finding that the present appellant being the husband is guilty of offence under Sections 498A/304B IPC. The learned trial court has relied on the evidence of P.W. 2 and P.W. 6 to the effect that they found mark of injury on the neck and different parts of body and there is no cross-examination of the aforesaid witnesses by the defence on this point. The learned trial court had further relied on the factum of demand of Rs. 5,000/- and physical torture by the appellant on the deceased and on reading of such evidence in their entirety, learned trial court has come to the finding thus:

“.....This piece of evidence creates suspicion and complicity of the accused along the other evidences as discussed by me clearly shows that consumption of poison by Saima was after the brutal physical torture on her body which was proved by the prosecution beyond reasonable doubt and also this torture was the reflection of incapacity on the part of the father of the victim to meet the demand of dowry.....”

9. Mr. Partha Sarathi Bhattacharyya, learned *amicus curiae* appearing for the appellant with vehemence submits that the very genesis of the case become doubtful in view of the fact that the P.W. 8, scribe of the FIR has turned hostile and has specifically testified that he does not remember on whose dictation/direction he had scribed the report. It is further submitted by Mr. Bhattacharyya that the narration in the FIR by P.W. 1 without the support of the scribe becomes a doubtful document and whatever has been alleged in that report becomes inconsequential. He proceeds further to submit that learned trial court has grossly failed on appreciation of evidence inasmuch as there being no direct evidence regarding torture on the deceased by the appellant on record and ingestion of poison forcefully to the deceased by the appellant on record and any mark of injuries on the dead body of the deceased as found by the medical officer (P.W. 16), the finding of learned trial court is without any basis. Rather it can be said that the conviction of the appellant under Sections

498A/304B IPC is a moral conviction by the learned trial Court on the basis of suspicion.

Per contra, it is submitted by Mr. Prasun Kumar Dutta, learned Additional Public Prosecutor appearing for the State that learned trial court has arrived at the finding on proper appreciation of the evidence on record and he has rightly relied on P.W. 1 and other corroborative evidence to return the finding of guilt against the appellant. It is his further submission, that the judgment of conviction and order of sentence passed by the learned trial court be affirmed and the appeal be dismissed.

- 10.** On re-appreciation of evidence, we find that P.W. 1, father of the deceased has specifically testified in his examination-in-chief that on the date of incident there was an altercation between his daughter and his son-in-law. His daughter came to his house crying after the said altercation and narrated to him that immediately he has to pay Rs. 5,000/- to his son-in-law. The aforesaid incident happened in the month of 'Chaitra' about 14-15 days before death of his daughter. After staying in his house for 12-13 days, he (P.W. 1) sent his daughter along with his wife (P.W. 6) to her in-law's house directing to his wife to request father-in-law of the deceased that the demanded money shall be paid after harvesting of Boro crop.

Such assertion of P.W. 1 in his testimony is not at all supported by his wife (P.W. 6) who had gone to leave the deceased in her in-law's house just one day before the date of occurrence. She (P.W. 6) has not at all whispered a

word about the demand of Rs. 5,000/- by the appellant. What she has stated is that her daughter was not pulling on well at her in-law's house. She has further testified that at times the appellant and the deceased used to have altercation in her presence. In her cross-examination, P.W. 6 has testified that the said incident of altercation took place about two months before the present incident of consumption of poison by her daughter Saima.

P.W. 7 is the younger sister of the deceased. She has only testified that the in-laws of Saima used to do 'Jhut-Jhamela' for money. She has also testified that the deceased died of consuming poison.

11. From the aforesaid evidence of P.W.s. 1, 6 and 7, it is clear that there is no consistency in their depositions/testimonies regarding the demand of dowry. There is also no proximity so far as the last altercation between the appellant & the deceased and the time of consumption of poison by her is concerned. In view of such evidence, we are constrained to hold that prosecution has failed to prove the factum of demand of Rs. 5,000/- by the appellant and consequent torture and harassment of the deceased for fulfilment of that demand.

12. P.W. 2 is the mediator in the marriage between the appellant and the deceased. Learned trial court has relied on the evidence of P.W.s. 1, 2 and 6 to the effect that they found Saliva coming out from the mouth of the deceased and swelling on her neck and P.W. 2 found some black spots all over the body of the deceased. But P.W. 16, the

medical officer who conducted post mortem has categorically opined that there was no mark of injury on the body of the deceased. It is natural in a case of poisoning that saliva/froth comes out of mouth and nostrils. Finding of black spots on the entire body by P.W. 2, or swelling on the neck of the deceased by P.W.s. 1, 2 and 6 might be their observation in a state of shock or to some extent may be exaggeration but there being no corresponding injury on the body of the deceased suggestive of assault or use of force or for that matter criminal force, the evidence of P.W.s. 1, 2 and 6 when read in conjunction with the evidence of medical officer (P.W. 16), we find that evidence of P.W.s. 1, 2 and 6 on the aforesaid score cannot be made the basis to arrive at a conclusion that there was any physical assault on the deceased just prior to her death by taking poison.

- 13.** P.W. 3 is the neighbour of the appellant and she had taken the deceased to the hospital, first to Bhatar Hospital and thereafter to Burdwan Hospital. She has testified that when she visited the house of Saima, Saima told them that she took poison and she (deceased) was restless. Thereafter, they took Saima to hospital. In her cross-examination P.W. 3 who lives adjacent to the house of the appellant and the deceased testified that appellant and Saima (deceased) had a very congenial relation and marriage between them was a love marriage.

P.W. 4 is another neighbour of the appellant who, had accompanied P.W. 3 to the hospital. She is, however,

silent regarding the nature of relationship between the appellant and the deceased but at the same time there is nothing in her evidence to suggest that relationship between the appellant and the deceased was strained.

P.W. 9 who is one of the neighbours of the appellant has also testified that the deceased died by taking poison. From the aforesaid evidence of the neighbours of the appellant, it is clear that it was the deceased who took poison voluntarily for committing suicide. At the relevant time of her taking poison no male members in the house were there as testified by P.W. 3 in her cross-examination as all male members of the house including the appellant had gone to their work.

14. From the aforesaid evidence of the neighbours, it is further clear that there was normal relationship between the husband and wife and if there would have been any abnormalcy in the relationship leading to frequent quarrels at least the neighbours could have come to know that fact. From the evidence of P.W. 3, it is also clear that the family of the appellant was affluent to some extent as they were having a two storied building with three rooms in each of the floors and all the male members were working outside to earn their living.

15. In the aforesaid backdrop, if the evidence of P.W. 1 is re-appreciated, it would be seen that demand of Rs. 5,000/- towards dowry appears to be improbable in the facts and circumstances of the case. The mediator in the marriage has also been examined as P.W. 2. He has also

not whispered a word about the demand of dowry either before the marriage or at the time of marriage or after the marriage. The evidence of P.W. 1 regarding the demand of dowry is not corroborated by his wife (P.W. 6) and by his younger daughter (P.W. 7) in material particular. The allegation regarding altercation between the appellant and deceased is rather omnibus than specific. P.W. 6 has specifically testified in her cross-examination that two months prior to her death, the appellant had altercation with the deceased. There may be many causes for altercation between husband and wife. All such altercation cannot be said to be for dowry and cannot be said to be causing mental cruelty to the wife within the four corners of Section 498A IPC. The cause of altercation is the answer whether the altercation amounts the cruelty or not. In the present case as already discussed by us, there being omnibus allegation regarding verbal altercation between the appellant and the deceased that cannot be said to be the cause driving the deceased to commit suicide as according to P.W. 6, such altercation took place about two months prior to commission of suicide by the deceased.

- 16.** To attract offence under section 304B IPC, there must be a proximate relationship between the death of the deceased and mental or physical harassment or torture of the deceased. The words 'soon before' occurring in the Section indicate to the aforesaid proximate relationship. In the present case, we failed to find such proximate relationship between the commission of suicide by the

deceased and alleged physical/mental torture and harassment.

17. Regard being had to our discussion (supra), in fine, we hold that prosecution has miserably failed to prove the charge against the appellant.

18. Accordingly, the impugned judgment and order of sentence dated 28.01.2003 passed by the learned Additional Sessions Judge, Fast Track Court, 1st Court, Burdwan in Sessions Trial No. 3 of 2003 arising out of Sessions Case No. 60 of 2002 is hereby set aside.

19. Accordingly, the appeal being **CRA 37 of 2003** is allowed.

20. The appellant being stated to be on bail, he be discharged of the bail bond.

21. The trial court record be sent down to the concerned court along with a copy of this judgment.

22. Department is directed to send a copy of this judgment to Secretary, Calcutta High Court Legal Services Committee for needful action at his end.

23. Judgment dictated in open Court.

(Chitta Ranjan Dash, J.)

(Partha Sarathi Sen, J.)

