

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

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA 81 of 2002

Suman Dey & Ors.

VS.

The State of West Bengal & Ors.

For the Appellants : Mr. Partha Sarathi Bhattacharyya,
Mr. Bhaskar Seth,
Ms. Mitali Mukherjee, Advocates

For the State : Mr. Parthapratim Das,
Ms. Manasi Roy, Advocates

Heard & Judgment on: *December 8, 2023*

DEBANGSU BASAK, J.

1. The appeal is directed against the judgment of conviction and the order of sentence dated February 27, 2002 passed by the Additional Sessions Judge, 2nd Court, Suri, Birbhum in Sessions Trial No. 3 June 2001 Sessions Case No. 19 of 2000.

2. By the impugned judgment of conviction and the order of sentence, the learned Trial Judge found the appellants to be guilty under Section

304B of the Indian Penal Code, 1860 (Act of 1860) and awarded sentence of 8 years rigorous imprisonment.

3. Learned advocate appearing for the appellants submits that, the appellant nos. 2 and 3 served the period of sentence awarded by the impugned judgment and order and were released on September 13, 2008. In support of such contention, he relies upon Certificate issued by the Superintendent, Berhampore Centre, Correctional Home.

4. Adverting to the merits of the case, learned advocate appearing for the appellants submits that, the charge as against the appellants were one under Section 304B of the Indian Penal Code, 1860. He submits that, there was no evidence on either of the two essential components of such Section under which, they were charged, namely, there was torture meted out upon the victim and that the victim died due to such torture being meted out. He refers to the evidence of the prosecution. He submits that, no person of the prosecution came forward to say that such person witnessed any torture being meted out to the victim. He draws the attention of the Court to the fact that, the distance between the matrimonial home and the paternal home of the victim was in close proximity to each other. No neighbour spoke about any torture being meted out on the victim by her in-laws.

5. Learned advocate appearing for the appellants submits that, the victim was a student of the appellant no. 2. There was a love relationship between the victim and the P.W. 2. They eloped at a given point of time. Thereafter, they returned. On their return, marriage between the victim and the P.W. 2 was fixed. The date of marriage was August 26, 1998. The victim expired on September 18, 1998. He contends that, no case of torture being established, the essential ingredients of Section 304B of the Act of 1860 was not established by the prosecution.

6. Referring to the evidence of the prosecution, he submits that, the father of the victim deposed as prosecution witness (P.W.) 1. As P.W. 1, the father of the victim did not state about the source of information and as to the claim that, the victim was tortured. None of the prosecution witnesses disclosed any source of information as to the claim that there was torture on the victim.

7. Learned advocate for the appellants draws the attention of the Court to the evidence of the prosecution and submits that, omnibus allegations of torture were levelled as against the appellants. No particulars of the alleged torture were given by any of the prosecution witnesses.

8. Referring to the questions put to the appellants in their examination under Section 313 of the Criminal Procedure Code, learned advocate appearing for the appellants submits that, the same was not properly conducted. He submits that, the essential evidence as against the appellants of the prosecution witnesses claiming that the victim was tortured, was not put in their examination under Section 313 of the Criminal Procedure. He contends that, since Section 313 of the Criminal Procedure Code was not correctly done, the trial stood vitiated and, therefore, the conviction and the sentence awarded were also bad in law. In support of such contention with regard to Section 313 of the Criminal Procedure Code, learned advocate appearing for the appellants relies upon **(2019) 13 SCC 289 (Reena Hazarika vs. State of Assam)** and **(2019) 18 SCC 161 (Samsul Haque vs. State of Assam)**.

9. Relying upon **(2006) 1 SCC (Cri) 309 (Thakkan Jha & Ors. vs. State of Bihar)**, learned advocate appearing for the appellants submits that, there was a gap between the period when the victim allegedly claimed before the P.W. 1 and other prosecution witnesses that, she was tortured and the date of her death. The prosecution failed to adduce any

evidence with regard to this gap of time. The alleged torture taking place at least seven days prior to the date of death, it cannot be said that the victim died due to torture.

10. Learned advocate appearing for the appellants submits that, out of two remaining appellants, P.W. 1 was of the age of about 17½ years on the date of the incident. He was a student. He should be dealt with leniently, if not exonerated. He also contends that appellant no. 4 is a lady and she is at an advanced age and suffering from various ailments. In such circumstances, learned advocate appearing for the appellants submits that, impugned judgment of conviction and the order of sentence should be reversed.

11. Learned advocate appearing for the State submits that, the appellants were charged under Section 304B of the Act of 1860. Necessarily, Section 113 of the Evidence Act, 1872 applies. He submits that, the appellants did not explain the cause of death of the appellants. The victim died an unnatural death. He draws the attention of the Court to the evidence of the prosecution and to the postmortem report of the victim. He submits that the victim died out of poisoning and that the fact that victim consumed poison was established at the trial.

12. Learned advocate appearing for the State submits that, there was torture meted out upon the victim was established by various prosecution witnesses including P.Ws. 1, 2 and 10. Consequently, he submits that all ingredients under Section 304B of the Act of 1860 stood established by the prosecution at the trial.

13. The father of the victim lodged a police complaint on September 19, 1998 on the basis of which police registered FIR No. 84 of 1998 dated September 19, 1998 under Section 304B of the Act of 1998.

14. On conclusion of the investigations, police submitted charge sheet. Charge under Section 304B of the Act of 1860 was framed as against the appellants.

15. The case of the prosecution at the trial was that, on September 18, 1998, the appellants committed dowry death by causing the death of the victim and thereby committed an offence punishable under Section 304B of the Act of 1860.

16. In order to establish the charge as against the appellants, prosecution examined 17 witnesses. On conclusion of the evidence and prosecution, each of the appellants were examined under Section 313 of the Cr.P.C. where they claimed to be innocent and declined to adduce any evidence.

17. P.W. 1 is the father of the victim. He stated that the victim used to go for private tuition to the house of the appellant no. 2. He stated that the house of the appellant no. 2 was about 150/200 yards from his house. On July 2, 1998, appellant no. 2 went away with the victim and to that effect, he lodged a General Diary with the police station on July 2, 1998. After 7 days, the victim and appellant no. 2 returned at the house of the appellant no. 2. Thereafter, he made a proposal of marriage to the parents of appellant no. 2 being the appellant nos. 3 and 4. All the appellants demanded a sum of Rs.80,000/- as dowry. Since he was without the means to pay such amount, he reported the incident to the villagers and requested the dowry to be fixed at Rs.30,000/-. The marriage was registered on August 26, 1988. He paid Rs.30,000/- as dowry. Subsequent to her marriage, the victim used to live at her matrimonial home with the appellants.

18. P.W. 1 stated that thereafter the appellants started to demand the balance of Rs.50,000/- and for non-payment of the same, they mercilessly

tortured the victim. After 15/20 days of their marriage, the victim came to his house without anything and stated that for non-payment of the balance of Rs.50,000/-, the appellants are harbouring criminal intent to the extent of killing her.

19. P.W. 1 stated that he kept the victim at his house and on that very night, he along with his wife and P.W. 2 went to the house of the appellants and requested that the balance amount to be paid in a reasonable time. On the next morning, appellant no. 1 who is the brother of the appellant no. 2 came to his house and took the victim assuring that no untoward incident would occur. The victim accompanied the appellant no. 1. After about 6 days, the victim consumed poison. He received such information through a neighbour of appellant no. 2, but he could not remember his name.

20. P.W. 1 stated that he went to the hospital with his wife, P.W. 2, P.W. 3 and P.W. 10 and they found the victim dead. They did not find the appellants.

21. P.W. 1 stated that P.W. 2 wrote the written complaint at home and he signed on it. P.W. 2 read over the contents of the complaint whereupon the he filed the complaint with the police. Police conducted an inquest over the body of the victim. Police seized miscellaneous receipts and one letter written by the appellant no. 2 to the victim. The written complaint was tendered in evidence and marked as Exbt. (a). The two miscellaneous receipts with regard to the marriage between the appellant no. 2 and the victim was tendered and marked as Exbt. '2'. The letter written by the appellant no. 2 to the victim was tendered and marked as Exbt. '3'. He identified all the appellants in Court.

22. P.W. 1 was cross-examined at great length on behalf of the defence. He reiterated his stand in the cross-examination. Rather, he explained the

quantum of money given as dowry being Rs.30,000/- and how he paid it. He stated that two Kishan Vikash Patra and Fixed Deposit were given. He explained how and when he made over the money to the appellants.

23. P.W. 2 is a neighbour of the victim. He stated that the victim and the appellant no. 2 fell in love when the victim was taking private tuition from the appellant no. 2. He corroborated the evidence of P.W. 1 with regard to the appellant no. 2 leaving with the victim on July 2, 1998, coming back thereafter and marriage was being fixed. He also corroborated P.W. 1 with regard to demand for dowry as also a portion of the dowry amount being paid. He corroborated P.W. 1 with regard to the manner in which the part of the dowry was paid.

24. P.W. 2 corroborated P.W. 1 with regard to the ill treatment on the victim by the appellants for non-payment of the balance dowry. He stated that everyone of in-law's family of the victim ill-treated the victim for non-payment of balance dowry. He stated that 7 days before the death of the victim, she came to the house of P.W. 1 in the evening when she was weeping. He stated that he was there and the victim told P.W. 1 to pay the balance amount of the dowry and save the victim from the appellants. On that very night, Bipul Chandra Dey and Chandan Dey went to the house of the appellants and tried to impress upon them not to torture the victim and that P.W. 1 will pay the balance amount gradually.

25. P.W. 2 stated that he wrote the written complaint in the house of P.W. 1 at his instance read over the same and thereafter P.W. 1 put his signature on the written complaint. He corroborated P.W. 1 with regard to the other portions of the evidence of P.W. 1. He is a seizure list witness and identified his signature on the seizure list.

26. P.W. 2 was examined at great length by the defence. He recorded his stand in the examination-in-chief with regard to the demand for dowry

and the torture being meted out by the appellants for non-payment of the dowry.

27. P.W. 3 is another neighbour who corroborated P.W. 1 and P.W. 2 with regard to the events occurring prior to the death. He is also an inquest report witness as also seizure list witness. He was also cross-examined at great length by the defence.

28. P.W. 4 is the wife of P.W. 1 and the mother of the victim. She corroborated P.W. 1, P.W. 2 and P.W. 3 with regard to the events leading upto the marriage of the victim, the demand for dowry, part payment thereof and the torture being meted out to the victim subsequent to the failure of P.W. 1 not paying the balance portion of the dowry. She also corroborated P.W. 1, 2 and 3 with regard to the events happening with regard to the torture of the victim, her coming back to the paternal home, and P.W. 2 intervening and making her going back to the matrimonial home.

29. In addition thereto, P.W. 4 also stated that the victim used to tell her that the victim was physically and mentally tortured by the appellants. P.W. 4 was cross-examined at great length by the defence where she reiterated her evidence given in the examination-in-chief.

30. P.W. 5 is an agent of the Post Office who deposed how P.W. 1 purchased the Kishan Vikash Patra and what he did with regard thereto. He also narrated how the Kishan Vikash Patra was purchased in the name of appellant no. 2 and the victim by P.W. 1.

31. P.W. 6 is an employee of the Registry Office at Birbhum. He is a seizure list witness who identified his signature on the seizure list.

32. P.W. 7 is an employee of the District Marriage Registrar. He is also a seizure list witness and he identified his signature on the seizure list.

33. P.W. 8 is a Medical Officer who held the Post Mortem of the victim. He stated that the stomach of the victim contained certain poisonous substance. He tendered the post mortem report in evidence which was marked as Exbt. '7'. He also considered the criminal examination report. He stated that, indosulfan was found in the body of the victim and that the death was due to such poison. This opinion of P.W. 8 was not dislodged by the defence although the defence cross-examined him.

34. P.W. 9 is a Police Personnel who drew up the formal First Information Report. The formal First Information Report was tendered in evidence and marked as Exbt. '8'.

35. P.W. 10 is a neighbour of the victim. He corroborated P.W. 1 as to the marriage between the appellant no. 2 and the victim as also demand for dowry, the part payment with regard thereto and the death of the victim being caused due to torture upon her.

36. A Senior Scientific Officer of the Forensic Laboratory, Kolkata, Government of West Bengal deposed as P.W.11. He tendered the chemical examination report which was marked as Exhibit-9. He stated that, he observed endrosulphen in the viscera of the deceased. He stated that, it was highly poisonous and an insecticide and dangerous for human life and that, if one drinks the same death may be caused.

37. P.W.12 is a Medical Officer who deposed that, the victim was admitted to the hospital on September 18, 1998 at 11:55 P.M. and expired on the same day at 11:58 P.M. that is, within three minutes. He stated that, the victim was admitted at the Hospital as she consumed unknown poison. He was present at the inquest of the victim.

38. P.W.13 is a Constable who accompanied the dead body for Post Mortem. He tendered the challan of the dead body which was marked

as Exhibit-11. P.W.14 is a Constable who took the visera and brought the FSL report.

39. P.W.15 is an employee of the District Marriage Registrar's Office, Suri, Birbhum, who tendered the registration document with regard to marriage of victim with appellant no.2. Such document was marked as Exhibit-12.

40. P.W.16 is a neighbour of the victim, who stated that he was present during the marriage negotiation. He corroborated payment of the dowry by P.W.1 to the appellants.

41. The Investigating Officer deposed as P.W.17. He narrated the course of investigation. He submitted the charge-sheet. He tendered various documents, which were marked as exhibits.

42. As noted above, on conclusion of evidence of the prosecution, each of the appellants were examined under Section 313 of the Criminal Procedure Code where they claimed to be innocent and declined to adduce any evidence.

43. Post Mortem Report being Exhibit-7 read with the chemical examination report being Exhibit-9 establishes that, the victim consumed poison. Death occurred due to the consumption of poison. The death of the victim was unnatural. Marriage of the victim with the appellant no.2 on August 26, 1998 stood established by marriage registration document tendered in evidence at the trial. Marriage between the victim and the appellant no.2 is not disputed.

44. The victim was admitted to the hospital on September 18, 1998 at about 11:55 P.M. with her expiring on the same day within three minutes of her admission at about 11:58 P.M. Death of the victim, by consumption of poisons therefore occurred within seven years of marriage with the appellant no.2.

45. Section 113B of the Evidence Act, 1872 enjoins upon a burden on the appellants to explain the unnatural death of the victim. No evidence was put forward on behalf of the appellants at the trial to explain death of the victim in the manner as noted above.

46. P.Ws. 1, 2, 3, 4 and 10 stated in their evidence that, there was a love affair between the victim and the appellant no.2 by reason of which they initially eloped and returning seven days thereafter. General Diary was registered with regard to their elopement. Thereafter, marriage negotiation took place where demand for dowry of Rs.80,000/- was made by the appellants Rs.30,000/- was paid by the P.W.1 to the appellants. The marriage between the victim and the appellant no.2 was thereafter registered on August 26, 1998. Torture upon the victim commenced for the balance amount of dowry of Rs.50,000/-. The victim confided about the torture with her parents being P.W.1 and P.W.4. P.W.2 corroborated P.W.1 that, the victim confided about the torture with the P.W.1. Torture being meted out to the victim stands established both by the parents of the victim as also by independent witnesses.

47. In our view, therefore, the ingredients of Section 304B of the Act of 1860 stood established at the trial by the prosecution.

48. *Reena Hazarika (Supra)* considered the scope of Section 313 of the Criminal Procedure Code. It is of the following view:-

"19. *Section 313 CrPC cannot be seen simply as a part of audi alteram partem. It confers a valuable right upon an accused to establish his innocence and can well be considered beyond a statutory right as a constitutional right to a fair trial under Article*

21 of the Constitution, even if it is not to be considered as a piece of substantive evidence, not being on oath under Section 313(2) CrPC. The importance of this right has been considered time and again by this Court, but it yet remains to be applied in practice as we shall see presently in the discussion to follow. If the accused takes a defence after the prosecution evidence is closed, under Section 313(1)(b) CrPC the Court is duty-bound under Section 313(4) CrPC to consider the same. The mere use of the word "may" cannot be held to confer a discretionary power on the court to consider or not to consider such defence, since it constitutes a valuable right of an accused for access to justice, and the likelihood of the prejudice that may be caused thereby. Whether the defence is acceptable or not and whether it is compatible or incompatible with the evidence available, is an entirely different matter. If there has been no consideration at all of the defence taken under Section 313 CrPC, in the given facts of a case, the conviction may well stand vitiated. To our mind, a solemn duty is cast on the court in dispensation of justice to adequately consider the defence of the accused taken under Section 313 CrPC and to either accept or

reject the same for reasons specified in writing.

20. *Unfortunately neither the trial court nor the High Court considered it necessary to take notice of, much less discuss or observe with regard to the aforesaid defence by the appellant under Section 313 CrPC to either accept or reject it. The defence taken cannot be said to be irrelevant, illogical or fanciful in the entirety of the facts and the nature of other evidence available as discussed hereinbefore. The complete non-consideration thereof has clearly caused prejudice to the appellant. Unlike the prosecution, the accused is not required to establish the defence beyond all reasonable doubt. The accused has only to raise doubts on a preponderance of probability as observed in Hate Singh Bhagat Singh v. State of Madhya Bharat observing as follows: (AIR p.471, para 26)*

"26. We have examined the evidence at length in this case, not because it is our desire to depart from our usual practice of declining to re-assess the evidence in an appeal here, but because there has been in this case a departure from the rule that when an accused person puts forward a reasonable defence which is likely to be true... then the

burden on the other side becomes all the heavier because a reasonable and probable story likely to be true when pitted against a weak and vicillating case is bound to raise reasonable doubts of which the accused must get the benefit..."

49. Samsul Haque (Supra) also deals on Section 313 of the Criminal Procedure Code and of the following view:-

"22. It is trite to say that in view of the judgments referred to by the learned Senior Counsel, aforesaid, the incriminating material is to be put to the accused so that the accused gets a fair chance to defend himself. This is in recognition of the principles of audi alteram partem. Apart from the judgments referred to aforesaid by the learned Senior Counsel, we may usefully refer to the judgment of this Court in Asraf Ali v. Sate of Assam. The relevant observations are in the following paragraphs: (SCC p.334, paras 21-22)

"21. Section 313 of the Code casts a duty on the court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as necessary corollary therefrom that each material circumstance appearing in the evidence against the accused

is required to be put to him specifically, distinctly and separately and failure to do so amounts to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.

22. The object of Section of 313 of the Code is to establish a direct dialogue between the Court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed a similar view in S. Harnam Singh v. State (Delhi Admn.) while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non-indication of inculpatory material in its relevant facets by the trial court to the accused adds to the vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless exercise.”

50. We are to examine whether, all evidence that the prosecution placed at the trial as against the appellants were brought to the notice of each of the appellants in their examinations under Section 313 of the Criminal Procedure Code or not. We are also to examine whether the defence, if any, set up by the appellants during such examination was considered by the learned trial Judge or not.

51. The charge is one of causing dowry death. The prosecution produced witnesses who claimed that there was a demand for dowry and torture meted out by the appellants on the victim on the failure of P.W.1 paying the balance portions of the dowry. The attention of each of the appellants were drawn by the learned Trial Judge while examining out of the appellants under Section 313 of the Criminal Procedure Code.

52. Moreover, none of the appellants made out any defence ground during such examination. They also did not explain the death.

53. In such circumstances, we are not in a position to return a finding, that, essential elements of evidence as against the appellants were not brought to their attention, during their examination under Section 313 of the Criminal Procedure Code and thereby, the trial stood vitiated. The appellants raised no defence during such examination for the learned trial Judge to consider.

54. *Thakkan Jha & ors. (Supra)* is a case of dowry death. It construes provisions of Section 113B of the Evidence Act, 1872 and is of the following view:-

"7. No presumption under Section 113-B of the Evidence Act would be drawn against the accused if it is shown that after the alleged demand, cruelty or harassment the dispute

stood resolved and there was no evidence of cruelty or harassment thereafter. Mere lapse of some time by itself would not provide to an accused a defence, if the course of conduct relating to cruelty or harassment in connection with the dowry demand is shown to have existed earlier in time not too late and not too stale before the date of death of the victim. This is so because the expression used in the relevant provision is "soon before". The expression is a relative term which is required to be considered under specific circumstances of each case and no straitjacket formula can be laid down by fixing any time-limit. The expression is pregnant with the idea of proximity test. It cannot be said that the term "soon before" is synonymous with the term "immediately before". This is because of what is stated in Section 114 Illustration (a) of the Evidence Act. The determination of the period which can come within the term "soon before" is left to be determined by the courts, depending upon the facts and circumstances of each case. Suffice, however, to indicate that the expression "soon before" would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. There

*must be existence of a proximate and live link
[see Hira Lal v. State (Govt. of NCT). Delhi].”*

55. Thakkan Jha & ors. (Supra) notes that, mere lapse of time by itself would not be provide to an accused with the defence, if the course of conduct relating to cruelty or harassment in connection with the dowry demand is shown to exist, earlier in time, not too late and not too stale before the date of death of the victim.

56. In the facts of the present case, death of the victim occurred within seven days of the victim coming to her parental home. Complaint of her about torture for non payment of the balance portions of the dowry and that, she was under threat of being killed by the appellants, if the balance portions of the dowry was not paid, was established at the trial.

57. In such circumstances, we find no ground to interfere with the judgment and order of conviction.

58. Appellant nos.2 and 3 served their sentences and were released on September 13, 2008 by the Superintendent Berhampore Central Correctional Home as appearing from the certificate dated September 13, 2008. So far as appellant nos.1 and 4 are concerned, the order of sentence was suspended by this High Court pending consideration of the appeal.

59. In view of the decision in the appeal, appellant nos.1 and 4 will surrender before the jurisdictional Court within four weeks from date to serve the remainder of the sentence. In default, the jurisdictional Court is at liberty to take appropriate steps.

60. Trial Court records along with this judgment and order be sent to the appropriate Court for necessary steps.

61. CRA 81 of 2002 is **disposed of** accordingly.

62. Urgent photostat certified copy of this judgment and order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Debangsu Basak, J.)

63. I agree.

(Md. Shabbar Rashidi, J.)