

IN THE HIGH COURT AT CALCUTTA

(Criminal Appellate Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRA 91 of 2015

Jamaluddin Sarkar

Vs.

The State of West Bengal.

For the appellant : Mr. Apalak Basu.

For the State : Mr. Saibal Bapuli,
Mr. Bibaswan Bhattacharya.

Heard on : 16.06.2023

Judgment on : 07.07.2023

Shampa Dutt (Paul), J.:

1. The present appeal has been preferred against the Judgment and Order dated 20.12.2014 passed by the learned Sessions Judge, Dakshin Dinajpur at Balurghat convicting the appellant under Sections 498A/306 of the I.P.C and sentencing him to suffer rigorous imprisonment for two years and to pay fine of Rs.5,000/- in default to suffer rigorous imprisonment for three months more for the offence u/s 306 of I.P.C and to suffer rigorous imprisonment for a period of six months and to pay fine of Rs.2,000/- only in default to suffer rigorous imprisonment of one month more for offence

under Section 498A of I.P.C in connection with Sessions Case No.322 of 2011/Sessions Trial No.6 of 2012.

2. **PROSECUTION CASE :-**

a) The prosecution case, in brief, is that on 09.07.2008, Nazima Bibi (the victim), the sister of the informant got married with the appellant as per Muslim Shariyat and the marriage was registered. Soon after marriage, Nazima Bibi was subjected to torture by the appellant and his parents over demand of additional dowry. For non-fulfillment of the demand, the degree of torture upon Nazima increased. Nazima came to the residence of the informant on one occasion and told the informant that she was being tortured by the appellant and his parents for non-payment of demanded cash. Nazima remained in her parent's house for one week while the informant tried his level best to collect the amount demanded but failed to collect the same. On 03.03.2010 at about 15.00 hrs. the informant Nazrul Islam brought his sister Nazima to her in-law's house and left her there. On the very next night at about 21.00 hrs., the informant was informed by a local person that his sister Nazima swallowed unknown poison. On arrival at the house of the appellant at about 23.00 hrs. the informant found the dead body of his sister Nazima lying on the verandah of the house of appellant.

b) On the basis of a complaint lodged by the informant, Nazrul Islam, Harirampur P.S. Case No.40/2010 dated 05.03.2010 was started against the appellant and his parents under Section 498A/304B/34 of I.P.C and after completion of investigation, the

investigating agency submitted charge-sheet against the appellant and his parents on 23.07.2011 under Section 498A/304B/34 of I.P.C.

c) The case was committed to the Court of Sessions and the case was numbered as Session Case No.322 of 2011/Session Trial No.6 of 2012.

d) On 09.01.2012, charge under Sections 498A/304B/34 of I.P.C was framed by the learned Sessions Judge. The charge so framed was read over and explained to the appellant and his parents to which they pleaded not guilty and claimed to be tried.

e) After examination of all the witnesses and hearing both the parties and examination of all the three accused persons under Section 313 Cr.P.C., the learned Session Judge convicted the appellant only under Section 498A/306 of I.P.C and sentenced him to suffer rigorous imprisonment for two years and to pay a fine of Rs.5,000/- in default to suffer rigorous imprisonment for six months more for the offence committed under Section 306 of I.P.C. and also to suffer rigorous imprisonment for six months and to pay fine of Rs.2,000/- in default to suffer rigorous imprisonments for one month for the offence committed u/s. 498A of I.P.C.

f) The learned Sessions Judge did not find the appellant guilty for the offence punishable under Section 304B of I.P.C and as such the learned trial Judge acquitted the appellant from the charge under Section 304B of IPC framed against him.

g) Finding no incriminating materials against the other two accused persons who are the parents of the present appellant, the

learned trial court acquitted the said two co-accused from all the charges leveled against them.

3. **DEFENCE CASE :**

Being aggrieved by and dissatisfied with the impugned order of conviction and sentence, the appellant herein has preferred the instant appeal on the following Grounds:-

I) That the learned Session Judge failed to apply his judicial mind properly and minutely at the time of passing the judgment and as such the same is liable to be set aside.

II) That there is no substantive and corroborative evidence to implicate the appellant either for the offence under Section 498A of IPC or for the offence under Section 306 of IPC and as such the order of conviction and sentence against the appellant under Section 498A/306 of IPC is liable to be set aside.

III) That learned Session Judge was not justified in believing the testimony of the relatives when their evidence was discarded in respect of the other two co-accused.

IV) There is no tangible evidence showing that the deceased was subjected to cruelty within the meaning of explanation (b) of Section 498A and as such, the presumption under Section 113A of Evidence Act cannot be made.

V) The evidences of material witnesses who are admittedly the brothers, father, mother and sisters-in-law of the deceased were based on what they heard and as such learned trial court erred in law in

placing reliance upon the hearsay testimony of the interested witness in absence of evidence of any overt act in their testimony.

VI) The learned Judge failed to consider the evidence of Dr. Ashoke Kumar Sarkar (P.W.10) who in his cross-examination clearly stated that he kept his opinion reserved about the reason of death of the deceased for want of chemical examination report and he had not mentioned in P.M. (Post mortem) report that the death of the deceased victim was due to poison and as such on the face of the aforesaid admitted evidence of Doctor, the learned trial court committed gross error of law in presuming abatement of suicide. Requirement of proof beyond reasonable doubt does not stand altered even after introduction of Section 498A of IPC and 113A of the Evidence Act. In a case of presumption of suicide, it is duty of the prosecution to prove beyond reasonable doubt that the woman committed suicide and her husband subjected her to cruelty within the meaning of explanation (b) section 498A of IPC.

VII) The learned trial court failed to consider that there was infirmity in the FIR of important facts affecting the credibility of the testimony of the informant, PW-1, the brother of the deceased and PW-1 could not have been relied upon since he has introduced something new for the first time before Court.

VIII) The prosecution has not been able to prove the case beyond reasonable doubt and as such the impugned order of conviction and sentence is illegal, incorrect and improper.

IX) The learned Trial Judge failed to consider the scope and ambit of Section 360 of Cr.P.C. and also the mandatory provision of Section 361 of Cr.P.C. read with the Probation of Offenders Act, 1958 and as such the impugned judgment and order are vitiated.

4. **ANALYSIS OF EVIDENCE:**

I) The case was initiated on the basis of a written complaint filed by the brother of the victim (P.W-1) stating there in that the victim was physically and mentally tortured by her husband and his family (the accused person). It was also alleged that she was administered poison forcefully leading to her death.

II) **Mr. Apalak Basu, learned legal aid counsel for the appellant** has submitted that there was no mention of any dowry being demanded. It is further submitted that the allegation of dowry demand has been **subsequently developed** falsely to implicate the accused persons.

III) From the evidence on record, it appears that the witnesses most of whom are related to the complainant have stated about dowry being demanded by the appellant which finally led to her death, for not giving dowry, she was allegedly forcefully given poison. But the statements are regarding demand of Rs.10,000/-.

IV) Majibar Rahaman, who first informed about the death of the victim to Nazima's family told P.W.19, the investigating officer that he heard through mobile that his friend's sister had taken poison at her in-law's house and he then informed Nazima's brother and family.

V) **Mr. Saibal Bapuli, learned prosecutor** has submitted that there were injuries on the deceased noted in the inquest report. On perusal of the inquest report, it appears that the injuries noted other than the ones caused by poison, **appear old and minor. The Doctor who conducted the post mortem deposed (P.W 10) did not find any external injuries on the body of the deceased.**

5. **FINDINGS:**

The witnesses have stated that there was demand of dowry and allegedly once Rs.10,000/- was paid and a salishi was held. There is no independent witness in this case to support the said allegations. In a case of such nature, **its only the family members, who are aware of such demand as it is made to them only.**

Section 498A of the Indian Penal Code, lays down:-

“498A. Husband or relative of husband of a woman subjecting her to cruelty.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.—For the purpose of this section, “cruelty” means—

(a) 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 (whether mental or physical) of the woman; or

(b) 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.

Ingredients of offence.— The essential ingredients of the offence under Section 498A are as follows:-

- (1) *A woman was married;*
- (2) *She was subjected to cruelty;*
- (3) *Such cruelty consisted in —*
 - (i) *Any willful conduct as was likely to drive such woman to commit suicide or to cause grave injury or danger to her life, limb or health whether mental or physical.*
 - (ii) *Harm to such woman with a view to coercing her to meet unlawful demand for property or valuable security or on account of failure of such woman or any of her relations to meet the lawful demand.*
 - (iii) *The woman was subjected to such cruelty by her husband or any relation of her husband.”*

Section 113A, Evidence Act:-

“113A. Presumption as to abetment of suicide by a married woman.—When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

Explanation.—For the purposes of this section, “cruelty” shall have the same meaning as in section 498A of the Indian Penal Code (45 of 1860).

Ingredients to be satisfied for application of Section 113A.— The following three ingredients require to be satisfied before Section 113A of the Act can be applied:

- (i) *That a woman has committed suicide.*
- (ii) *Such suicide has been committed within a period of seven years from the date of her marriage, and*
- (iii) *The husband or his relatives who are charged had subjected her to cruelty.”*

6. The injuries noted in the inquest as discussed earlier are not significant as, such cuts and injuries are caused, while carrying out daily chores. The victim was married on 09.07.2008. She died on 03.03.2010.

That is within two years of her marriage. It is a fact that the victim died of poisoning, thus the appellant has been also convicted under Section 306 IPC, there being no evidence of forceful administration of poison. It was thus believed/proved that the victim committed suicide by consuming poison, within seven years of marriage (here within 2 years of marriage) being tortured for dowry.

7. That there was some dispute between the husband and wife is evident as the victim would often come to her parents house and on that occasion had returned to her matrimonial home **just one day before her death.**

8. The Supreme Court in ***Ramesh Vithal Patil vs State of Karnataka & Ors., on 31 March, 2014, in Criminal Appeal No. 56 of 2006***, held:-

“15. It is true that the appellant was not charged under Section 306 of the IPC. The charge was under Section 304-B of the IPC. It was, however, perfectly legal for the High Court to convict him for offence punishable under Section 306 of the IPC. In this connection, we may usefully refer to Narwinder Singh. In that case the accused was charged under Section 304-B of the IPC. The death had occurred within seven years of the marriage. The trial court convicted the accused for an offence punishable under Section 304-B of the IPC. Upon reconsideration of the entire evidence, the High Court came to the conclusion that the deceased had not

committed suicide on account of demand for dowry, but, due to harassment caused by the husband in particular. The High Court acquitted the parents of the accused and converted the conviction of the accused from one under Section 304-B of the IPC to Section 306 of the IPC. This Court dismissed the appeal filed by the accused. It was observed that it is a settled proposition of law that mere omission or defect in framing charge would not disable the court from convicting the accused for the offence which has been found to be proved on the basis of the evidence on record. In such circumstances, the matter would fall within the purview of Sections 221(1) and (2) of the Code of Criminal Procedure, 1973. The relevant observations of this Court could be quoted:

“21. The High Court upon meticulous scrutiny of the entire evidence on record rightly concluded that there was no evidence to indicate the commission of offence under Section 304-B IPC. It was also observed that the deceased had committed suicide due to harassment meted out to her by the appellant but there was no evidence on record to suggest that such harassment or cruelty was made in connection to any dowry demands. Thus, cruelty or harassment sans any dowry demands which drives the wife to commit suicide attracts the offence of “abetment of suicide” under Section 306 IPC and not Section 304-B IPC which defines the offence and punishment for “dowry death”. ”

16. *Moreover, admittedly the deceased committed suicide within a period of seven years from the date of her marriage. Section 113-A of the Evidence Act is, therefore, clearly attracted to this case. Presumption contemplated therein must spring in action. This provision was introduced by Criminal Law Second Amendment Act, 1983 to resolve the difficulty of proof where married women are forced to commit suicide but incriminating evidence is difficult to get as it is usually available within the four walls of the matrimonial home. Section 113-A reads as under:*

“113A- Presumption as to abetment of suicide by a married woman.- When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may presume, having regard to

all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

Explanation.-- For the purposes of this section, "cruelty" shall have the same meaning as in section 498A of the Indian Penal Code (45 of 1860)." In this case the prosecution has led evidence to establish cruelty or harassment caused to the deceased, which is rightly taken into account by the High Court. Thus, the foundation for the presumption exists. The appellant, however, has led no evidence to rebut the presumption. Therefore, it can be safely concluded in the facts of this case that the appellant abetted the suicide of the deceased."

9. In the present case the **victim died within two years of her marriage**. She had come to her matrimonial home only the day previous to her death. The prosecution case of the victim being forcefully administered poison could not be proved. But the victim dying of poisoning led to the conviction of the appellant (husband) under Section 306 IPC and 498A IPC. The close proximity of dates, that is when the victim came to her matrimonial home and her death (within two years of marriage) on the next day itself by way of poisoning and the evidence of the witnesses, who are all her family members and know about the torture for dowry, goes to prove that the cruelty inflicted by the appellant led to the victim's suicide. The Trial Court thus rightly held the appellant guilty under Sections 498A/306 IPC and passed the order of conviction.

10. **CRA 91 of 2015 is accordingly dismissed.**

11. The Judgment and Order dated 20.12.2014 passed by the learned Sessions Judge, Dakshin Dinajpur at Balurghat convicting the appellant under Sections 498A/306 of the I.P.C and sentencing him to suffer rigorous

imprisonment for two years and to pay fine of Rs.5,000/- in default to suffer rigorous imprisonment for three months more for the offence u/s 306 of I.P.C and to suffer rigorous imprisonment for a period of six months and to pay fine of Rs.2,000/- only in default to suffer rigorous imprisonment of one month more for offence under Section 498A of I.P.C in connection with Sessions Case No.322 of 2011/Sessions Trial No.6 of 2012, is hereby affirmed.

12. The appellant is not in custody.

13. Accordingly, the appellant, Jamaluddin is directed to surrender before the trial court within one month from the date of this judgment, to serve out his sentence, failing which the trial court shall proceed against the appellant in accordance with law.

14. Connected applications, if any, also stands disposed of.

15. Lower court records along with copies of this judgment be sent down at once **to the learned trial court for compliance.**

16. Photostat certified copy of this judgment, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Shampa Dutt (Paul), J.)