

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 2 of 2005

Kabir Hossain & Ors.

-Vs-

The State of West Bengal

For the Appellants : Mr. Suranjan Mondal

For the State : Mr. Avishek Sinha

Heard on : 17.10.2023, 30.01.2024

Judgment on : 28.03.2024

Ananya Bandyopadhyay, J. :-

1. This appeal is preferred against the judgment dated September 27, 2004 and order of conviction dated September 28, 2004 passed by the Learned Additional Sessions Judge, 1st Fast Track Court, Cooch-Bihar in Sessions Case No. 153/2003 / S.T. No. 9(3) 04, the appellant no. 1/accused no. 1 to suffer rigorous imprisonment for a period of 6 (six) years and also to pay a fine of Rs. 1,000/-, in default, to suffer rigorous imprisonment for a period of another 1 (one) month for committing offence punishable under Section 306 of the Indian Penal Code, 1860 and also to suffer rigorous imprisonment for a period of 3 (three) years and also to pay a fine of Rs. 1,000/-, in default, to suffer rigorous imprisonment for a period of 1 (one) month for committing the offence punishable under Section 498A of the Indian Penal Code, 1860 and the appellant no. 2, accused no. 2 and the appellant no. 3/accused no. 3 to

suffer rigorous imprisonment for a period of 1 (one) year each and to pay a fine of Rs. 1,000/-, in default, to suffer rigorous imprisonment for a period of another one month each for committing the offence punishable under Section 498A of the Indian Penal Code, 1860 and also to suffer rigorous imprisonment for a period of one year each and to pay a fine of Rs. 1,000/- each, in default, to suffer rigorous imprisonment for another one month each for committing the offence punishable under Section 306 of the Indian Penal Code, 1860 subject to set off under Section 428 of the Code of Criminal Procedure, 1973. Both the sentences will run concurrently.

2. The prosecution case in a nut-shell is that the victim Momena Bibi was married to the abovenamed appellant no. 1/accused no. 1 about seven years ago and started to reside at her matrimonial home, i.e. at the residence of the abovenamed appellants/accused persons, along with the abovenamed appellant nos. 2 and 3/accused persons nos. 2 and 3 i.e. the parents-in-law of the victim. Out of their (Momena and Kabir Hossain) wedlock, two children were born. The abovenamed appellants/accused persons subjected Momena to cruelty by perpetrating mental and physical torture. They often used to ask Momena to bring more money from her parents and when Momena refused to do so the accused persons used to increase the degree of torture and used to provoke her to commit suicide so that they could make arrangement of Kabir's second marriage elsewhere.
3. The further prosecution case is that about 10/12 days prior to Momena's suicide, the accused no. 1 Kabir Hossain assaulted Momena

badly and on that matter, a village meeting was held in presence of respectable villagers and following a compromise, Momena was again kept at her matrimonial house. Then on 03.06.2002 anpit 7 A.M, the de facto complainant got the information of her daughter Momena's death. He, i.e. the de facto complainant, went to his daughter's (Momena) matrimonial home and found the dead body of Momena with marks of injuries on her head. At that time, he i.e. the de facto complainant found none of the accused persons present in their house. He came to know from their neighbours that on the previous night the accused persons severely assaulted Momena and provoked her to commit suicide and thereafter Momena committed suicide by consuming poison.

4. The de facto complainant narrated all these incident in his written complaint and the same was lodged before the Inspector-in-Charge, Kotwali Police Station Cooch-Bihar, District – Cooch-Bihar. The said written complaint was registered as Kotwali P.S. Case No. 178/02 dated 04.06.2002. Accordingly, the case was started against all the three accused persons for the offences punishable under Sections 498A and 306 of the Indian Penal Code, 1860.
5. During the investigation, the inquest and post mortem of the dead body were done. The daughter of the victim was produced before the Learned Judicial Magistrate for recording her statement under Section 164 of the Code of Criminal Procedure, 1973.

6. On completion of the investigation, a charge-sheet bearing no. 88/2003 dated 28.03.2003 was submitted by the Investigating Officer (PW-11) against the above-named appellants/accused persons.
7. The case was committed to the Court of Sessions subsequently.
8. Ultimately, the abovenamed appellants/accused persons were placed on trial to answer the charges under Sections 498A and 306 of the Indian Penal Code, 1860 before the Learned Additional Sessions Judge, 1st Fast Track Court, Cooch-Bihar, District Cooch-Bihar. The abovenamed appellants/accused persons pleaded not guilty to the charges framed against them and they claimed to be tried. Their defence, inter alia, was on total innocence.
9. At the trial prosecution examined 12 witnesses and exhibited certain documents.
10. The Learned Advocate for the appellants submitted that:-
 - i. The material contradictions and/or inconsistencies in the evidence of the prosecution witnesses have been over looked by the Learned Trial Judge to the serious prejudice of the appellants.
 - ii. The ingredients of the offences charged not having been proved at all against the appellants on the evidence on record, their conviction under the said charges is wholly impermissible in law.
 - iii. The record of the un-natural death case was not produced by the prosecution deliberately before the Learned Trial Judge.
 - iv. PW-1 stated in his evidence "this complaint was scribed by one Advocate clerk of this court in my presence and he readover and

explained its content to me”. It indicates that the said written complaint was drafted only after interference of legal brain. So it creates doubts regarding genuineness of contents of allegation levelled against the accused persons. So much so the said Advocate clerk was deliberately withheld by the prosecution and no explanation was put forwarded for withholding the said witness.

- v. The name of the Advocate clerk who wrote the complaint was not mentioned by any of the witnesses.
- vi. At the time of preparing the inquest report the relatives of the deceased were present. But they i.e. those relatives at that point of time did not diverge anything against the appellants/accused persons.
- vii. It appears from the inquest report that the husband of the deceased/victim tried to save his wife by calling local people and the victim died in the way to hospital. It does not mean that the accused persons absconded.
- viii. PW-10 stated in her evidence (during her cross-examination) “I made statement before learned Magistrate as per the direction of PW-1”. It means at the time of recording the statement of PW-10 under Section 164 of the Code of Criminal Procedure, 1973 said witness (PW-10) was tutored by the PW-1 (De-facto complainant).
- ix. It appears from the evidence of PW-1 “the accused persons reside in the same house but in separate mess”. It means the

accused no. 2 and 3 had no connection regarding the family matters with the accused no. 1 and they were falsely implicated in this case.

- x. The reasons assigned by the Learned Court below for probability of inflicting cruelty on the women concerned because of common privy, latrine and courtyard does not sound reasonable. It is one sided.
- xi. It is yet to be proved that the women died of procuring poison has been left untouched by the prosecution and the Learned Court below did not care to consider the circumstances essential to be proved in a case of poisoning as enumerated by the Hon'ble Supreme Court.
- xii. The prosecution withheld the best evidence of death by poisoning without any reasonable excuse and as such the Learned Trial Court ought to have drawn an adverse inference under Section 114 of the Indian Evidence Act, 1872.
- xiii. There being no story of systematic mental torture having been made out by the prosecution at the trial through its PWs it cannot be said that the story of mental torture as alleged by the prosecution has been proved to the hilt and beyond all reasonable doubt.
- xiv. The examination of the appellants while they were facing trial as the accused under Section 313 of the Code of Criminal Procedure, 1973 was improper.

- xv. No reasonable time was given to the appellants to make up their mind so as to give answer to the Learned Judge on the point of sentence and accordingly there has been non-compliance of the mandatory provisions of Section 235 (2) of the Code of Criminal Procedure, 1973.
 - xvi. The Trial Court had failed to consider that on the materials on record, the prosecution had failed to bring home the guilt of the appellants.
 - xvii. The findings of the Trial Court are based upon conjecture and surmises not warranted by the evidence on record.
11. The Learned Advocate for the State submitted that the death of the victim was occasioned within 7 years of marriage in the maternal house. There was consistent dowry demand and further stressed on the incident narrated in the written complaint that since marriage due to family affairs the husband, father-in-law and mother-in-law of the victim tortured her both mentally and physically. It was further submitted that the appellants were not present at the house when the father of the victim reached the same being informed about his daughter's death. It was further submitted that a wound was found on the forehead on the victim as per the inquest report which corroborated the statement in the complaint. The victim used to visit her parents' house and disclosed the incident of recurring torture upon her. PW-1 had seen a scar mark on her forehead as a result of an assault by her husband by a 'lathi'. 7 days thereafter the victim committed suicide.

12. The Learned Advocate for the State further submitted that PW-2 the neighbour supported the prosecution case. According to PW-3's testimony, there was a salish in the village which failed subsequently. The Learned Advocate for the State concluded that the prosecution had successfully established its case and the appeal shall be dismissed.
13. PW-1 the father of the victim as well as the de facto complainant reiterated the narrative of the complaint. PW-1 further described the increasing torture perpetrated upon the victim to fulfil their continuous demand for money which owing to his poverty he was unable to fulfil and a salish was held to that effect being attended by the appellants who controlled themselves thereafter only to aggravate the intensity of torture in future. PW-1 witnessed a scar on the forehead of his daughter as a result of an assault by the husband of the victim. Being frustrated by the torture inflicted upon the victim, she committed suicide out of desperation leaving both of her children aged 3 years and 3 months respectively. The accused persons left the children and escaped from their house prior to their arrest by the appellants.
14. PW-2 a neighbour corroborated the evidence of PW-1 in terms of the torture inflicted by the appellants upon the victim who was his cousin sister. He had been to the house of the appellants in order to pacify the appellants to resist themselves from torturing the victim.
15. PW-3, PW-4 and PW-6 were declared hostile by the prosecution.
16. PW-5 had conducted the marriage of the victim and the appellant husband being a priest according to Muslim laws.

17. The evidence of PW-7 was based on hearsay as he resided in the village of PW-1 as a neighbour.
18. PW-8 the mother of the victim conformed to the evidence of PW-1 the father of the victim.
19. PW-9 heard that the victim committed suicide and could not submit any further.
20. PW-10 the daughter of the victim stated that her mother died after consuming poison and she was residing with her maternal grandfather. She admitted to have appeared before the Learned Judicial Magistrate who recorded her statement.
21. PW-11 the Investigating Officer on completion of the investigation had filed the charge-sheet.
22. The statements recorded under Section 164 of the Code of Criminal Procedure are not a substantive piece of evidence but it can be used to corroborate or contradict the maker under Section 145 and 147 of the said Act.
23. The doctor who conducted the post mortem examination was not examined before the Court however the post mortem report was marked as Exhibit 6 on admission. The post mortem report mentioned swollen lips and marks on the abdomen and 'S' shaped cut mark of the size 2" x ½" over the forehead. The statement of the PW-10 admitting to have been examined by the Learned Judicial Magistrate under Section 164 of the Cr.P.C. can be taken into consideration with regard to the statements made therein.

24. A child will not try to falsely implicate her father for the sake of her mother because both of them are endearing to her. In the instant case, she might have been directed to record her statement before the Learned Judicial Magistrate but she was not tutored or influenced to divulge false and concocted statements. The cut injury on the forehead of the victim corroborated with the statement of PW-10 under Section 164 of the Cr.P.C. The victim lady was subjected to torture and the cruelty meted to her compelled her to commit suicide without considering the fate of her minor children constituting the elements of committing an offence under Section 498A of the Indian Penal Code.
25. In the instant case, apart from cruelty, there has been absence of any immediate or proximate instigation or abetment on the part of the appellants to coerce the victim to commit suicide.
26. In the instant case the entire allegations constituting the offence of cruelty imposed upon the victim was by the husband appellant namely Kabir Hossain. The appellant no. 1 is convicted under Section 498A of the Code of Criminal Procedure and the remaining appellants namely Badiar Jamal and Jabeda Bibi are acquitted of charges under Sections 498A/306 of the Indian Penal Code.
27. In view of the above discussions, the instant criminal appeal is allowed in part. The appellants are acquitted of Section 306 of the Indian Penal Code. The appellant Kabir Hossain is convicted under Section 498A of the Indian Penal Code and the sentence is modified to two (2) years.
28. Accordingly, the CRA 2 of 2005 stands disposed of.
29. There is no order as to costs.

30. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
31. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)