

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:-

HON'BLE JUSTICE CHITTA RANJAN DASH
AND
HON'BLE JUSTICE PARTHA SARATHI SEN

C.R.A. No. 180 of 2010
With
CRAN 2 OF 2010 (Old No. CRAN 2736 of 2010)
With
CRA 255 of 2010
With
CRA 302 of 2010

Omar Ali and Ors.
-Versus-
The State of West Bengal.
With
Sk. Altab and Anr.
- Versus-
The State of West Bengal
With
Abdul Hamid and Sk. Naziruddin
- Versus-
The State of West Bengal

For the appellant no.1 in
CRA 180/2010

: Ms. Soumya Nag, Adv.,
: Mr. Rajib Ghosh, Adv.,
: Mr. Karan Prasad, Adv.

For the appellant nos.2, 4 to 7
in CRA 180/2010 and appellants
in CRA 255 of 2010

:Mr. Sekhar Kr. Basu, Sr. Adv.,
:Mr. Tapas Kr. Ghosh, Adv.,
:Mr. Tanmay Chowdhury, Adv.

For the appellant in CRA 302 of 2010 :Mr. Somnath Banerjee, Amicus Curiae

For the State CRA 180 of 2010, : Mr. Prasun Kumar Datta, Adv.,
CRA 255 of 2010 and CRA 302 of 2010 : Mr. Partha Pratim Das, Adv.

For the State in CRA 180 of 2010 : Mr. Binay Panda, Adv.,
and CRA 302 of 2010 : Mr. Subham Bhakat, Adv.

For the State in CRA 255 of 2010 : Ms. Zareen N Khan, Adv.,
: Mr. Ashok Das, Adv.

Last Heard on : 18.01.2024

Judgment on : 05.03.2024

PARTHA SARATHI SEN, J. : –

1. In these three appeals the judgement of conviction dated 26.02.2010 and order of sentence dated 03.03.2010 as passed by Learned Judge, Special Court (EC Act)-cum-Additional Sessions Judge, Hooghly in connection with Sessions Trial No. 05 of 2005 (Sessions Case No. 149 of 2004) has been impugned. By the impugned judgement learned trial court found the present appellants guilty under Sections 498A/302/201/34 IPC and thus convicted them to suffer R.I for three years each with fine of Rs.2,000/- each i.d to suffer further R.I for six months for the offence committed by them under Section 498A IPC, R.I for life each with fine of Rs.10,000/- each i.d to suffer further R.I for two years each for the offence committed by them under Sections 302/34 IPC and to suffer R.I for three years each with fine of Rs.2000/- each i.d. to suffer further period of R.I for six months each for the offence committed by them under Sections 201/34 IPC with a further direction that all the three sentences would run concurrently. The convicts of the said trial felt aggrieved and thus preferred the present appeal.

2. It is pertinent to mention herein that during the pendency of the instant three appeals the appellant no.3 Rijia Bibi in CRA 180 of 2010 died and accordingly the said appeal stood abated as against her vide this Court's order dated 27.03.2023.

3. For effective disposal of the instant three appeals the facts leading to initiation of the aforesaid sessions trial is required to be discussed in a nutshell.

4. One Sahad Ali of village Kantagarh, P.S Pandua lodged a written complaint dated 18.03.2001 with the Officer-in-Charge Pandua P.S District Hooghly, stating inter alia that his daughter Jahanara Bibi was given marriage with one Sk. Omar Ali two years back. It has been stated in such written complaint that during the said period of two years his said daughter was subjected to torture both physical and mental at the instance of her husband and his family members at her matrimonial home and finding no other alternative the matter was reported to a local party office and local Gram Panchayat. It was his further version that after marriage his said daughter was taken to Aligarh by his son-in-law where also his said daughter was physically assaulted and mentally tortured. It was the further version of the informant that during such period the informant and his wife were also assaulted physically by the accused persons. It has been stated that on the day of lodging FIR his said daughter was mercilessly assaulted to death by the accused persons particulars of whom are given in the said written complaint who are the appellants before us.

5. On the basis of aforesaid written complaint Pandua P.S Case no. 49 of 2001 dated 18.03.2021 under Sections 498A/302 IPC was started. Investigation was taken up and on completion of the same charge-sheet was submitted under Sections 498A/302/201/34 IPC against all the appellants herein.

6. Trial court record reveals that after commitment and transfer the said case record was placed in the file of the learned trial court who upon consideration of the entire materials framed charges under Section 498A/302/201/34 IPC against the accused persons. The accused persons denied all the charges as framed against them and claimed to be tried and thus the trial proceeded.

7. The prosecution before the learned trial court examined 30 witnesses in all and exhibited various documents. Before the learned trial court appellant no.1 in CRA 180 of 2010 i.e. Omar Ali examined himself as DW1. From the trend of cross-examination of the prosecution witnesses, the answers as given by the accused persons in their respective examination under Section 313 Cr.P.C and from the evidence adduced by DW1 it reveals that the defence case is based on clear denial and false implication.

8. For the sake of brevity the prosecution witnesses before the learned trial court can be categorized in the following manner:-

Private Individuals	Government officials	Police Personnels
1.PW1- Informant and the father of the deceased.	1.PW9-An examiner of questioned documents.	1.PW14- A constable of police.

2. PW3- Mother of the deceased.	2.PW22-An Executive Magistrate.	2.PW15- A constable of police.
3. PW4- A co-villager of the informant.	3. PW26- The doctor who performed autopsy over the dead body of the deceased.	3. PW27- R.O
4. PW11- A co-villager of the informant.	4. PW28- Assistant Director of SFSL.	4. PW30- First I.O.
5. PW9-Uncle of the deceased		5. PW29- Second I.O.
6. PW10- Uncle of the deceased.		
7. PW 13- A co-villager of the informant.		
8.PW20- A co-villager of the informant.		
9. PW21- Another uncle of the deceased.		
10. PW2- A co-villager of the accused person.		
11.PW5- A co-villager of the accused person.		
12. PW6- A co-villager of the accused person.		
13.PW8- A co-villager of the accused person.		
14. PW 12- A co-villager of the accused person.		
15. PW17- A co-villager of the accused person.		

16. PW23- A neighbour of the accused.		
17. PW24- Wife of PW23.		
18. PW7- Pradhan of local Gram Panchayat where accused persons used to reside.		
19. PW16- A resident of a contiguous village of the accused persons.		
20. PW20- A co-villager of the accused.		
21. PW25- An independent witness.		

9. Mr. Sekhar Kumar Basu, Learned Senior Advocate appearing for the appellant nos.2 and 4 to 7 in CRA 180 of 2010 and for the appellants in CRA 255 of 2010 in course of his argument submits before this Court that before the learned trial court the prosecution has miserably failed to prove the actual cause of death of the deceased. It is further submitted by him that while adducing evidence, the prosecution witnesses more specifically who are the relatives of the deceased practically admitted that prior to her death the physical condition of the deceased lady was very poor and she was sick and pregnant. It is further submitted by him that on proper appreciation of the evidence of the prosecution witnesses it would reveal that the prosecution has miserably failed to prove either the alleged demand of dowry or infliction of torture upon the deceased. It is

thus submitted by him that it a fit case for acquittal of the present appellants.

10. Mr. Soumya Nag, learned advocate for appellant no.1 in CRA 180 of 2010 while echoing the version of Mr. Basu, learned Senior Advocate also contended that on conjoint perusal of the evidence of PW6 (autopsy surgeon) and Exhibit 10 (Post Mortem report of the deceased) it would reveal that the said autopsy surgeon has failed to reach at a conclusion with regard to the actual cause of death of the deceased. It is further submitted by Mr. Nag that the oral evidence of PW26 should be discarded since the same is full of contradiction and/or exaggeration. Mr. Nag thus submits before this Court that the learned trial court is not at all justified in convicting the present appellants under any of the provisions with whom they were charged with.

11. Mr. Somnath Banerjee, learned Amicus Curiae, as appointed by us on behalf of the appellants in CRA 302 of 2010 submits before this Court that the learned trial court is not at all justified in passing the impugned judgement of conviction against the present appellants in absence of any cogent material. He also submits that the instant three appeals may be allowed and the present appellants may be acquitted from the charges as framed against them.

12. Per contra, Ms. Zareen N Khan, duly assisted by Mr. Ashok Das, learned counsel for the State in CRA 255 of 2010 submits before this Court that from the materials as placed before this Court it would reveal that the prosecution witnesses are successful in bringing home the

charges against the accused persons. It is further submitted by us that for the sake of argument even if, the present appellants are found not guilty under Section 302 IPC however, they may be convicted under Section 304 IPC since the death of the deceased occurred within two years of her marriage and there are sufficient materials to show that the deceased was subjected to cruelty and harassment by her husband and his family members for or in connection with demand of dowry.

13. Mr. Prasun Kumar Datta, Learned Additional PP, duly assisted by Mr. Partha Pratim Das, for the State in the other two appeals while accepting the contention as raised by Ms. Zareen N Khan argued that for the sake of argument in the event this Court finds that the conviction of the present appellants under Section 302 IPC is not proper this Appellate Court may very well proceed under Section 304B IPC since there are sufficient materials to establish that the deceased died within two years of her marriage and prior to her death she was subjected to torture and harassment on account of demand of dowry at the instance of present appellants who are her husband and his family members respectively.

14. In course of their reply Mr. Basu, Learned Senior Advocate for the appellant nos. 2,4 to 7 in CRA 180 of 2010 and for the appellants in CRA 255 of 2010, Mr. Soumya Nag, learned advocate for the appellant no.1 in CRA 180 of 2010 and Mr. Somnath Banerjee , learned Amicus Curiae, for appellants in CRA 302 of 2010 conjointly draws our attention to the provisions of Section 221 and Section 222 of the Code of Criminal Procedure. It is argued by them that since the ingredients for the offence

under Section 302 IPC and the ingredients for the offence under Section 304 IPC are quite different and since the mode of proof of the aforesaid two offences are also distinguishable from each other, a serious miscarriage of justice would be caused if this Court proposes to proceed with the charge under Section 304B IPC in this appeal in absence of framing of any alternative charge under Section 304B IPC by the learned trial court.

Learned advocates for the appellants in course of their arguments placed their reliance upon the reported decision of ***Shamnsaheb M. Multtani vs. State of Karnataka*** reported in ***AIR 2001 SC 921***.

15. The factual matrix in which the present appellants came to be prosecuted and convicted has been set out in detail by the learned trial court in the impugned judgement. Therefore, we did not recapitulate the same all over again except to the extent it is necessary to do so for effective disposal of the instant three appeals.

16. In order to arrive at a logical conclusion as to whether the prosecution before the learned trial court is at all successful in proving the homicidal death of the deceased, we propose to have a glance to the relevant portions of the deposition of PW26 who according to the prosecution had conducted the post mortem over the dead body of the deceased. The relevant portions of the evidence of PW26 are as under:-

“ I performed the P.M examination of Jahanara Bibi, Muslim female, aged 20 years. On examination I found that

1. Tongue protruded, Eyes bulged out, body decomposed.

2. *Many linear echymotic marks on neck, echymotic back of two legs.*
3. *No ligature mark clearly seen around the neck.*
4. *Finger print seen in front of neck.*
5. *36 weeks size death female baby in uterus.*

Opinion regarding death due to the effect of ante mortem torture marks cannot be clearly stated.

From the aforementioned evidence it is thus clear that in the post mortem report (Exhibit 10) the said doctor could not be able to give any definite opinion with regard to the cause of death of the deceased. However, on the basis of a subsequent report dated 05.06.2002 he adduced the following evidence:-

“ This case had no sign of antemortem hanging or finger printing of throttling. A fair number of torture marks seen. The story of one piece of cloth of hanging is not believable because no sign of hanging detected.

Some positive signs like protruded tongue, bulged eyeball, congested lungs, pericardium-liver-kidneys and the torture marks are in favour of suffocation with torture. As the body was decomposed and putrefacted, so the mentioned torture marks cannot be clearly stated as cause of death. Circumstantial evidence and witness evidence are necessary.

The signs detected as per P.M examination cited above are the signs of asphyxiated death.

Police enquiry, circumstantial evidence and witness evidence are most in this case.

So, it is opined as the cause of death is due to the effect of ante mortem physical torture followed by suffocation which was homicidal in nature.”

It is pertinent to mention herein that the day of post mortem of the deceased was 19.03.2001 while the day of subsequent report of the self same doctor is 05.06.2002 which is not based upon receipt of any

chemical examination of the viscera or like other report. At this stage if we look to the cross-examination of PW26 the said doctor answered in the following manner:-

“i. I cannot say whether the post mortem report has been written correctly or not.”

“ii. In my post mortem examination I was not in a position to speak whether the death of Jahanara Bibi was homicidal, suicidal or accidental.”

“iii. The injuries which I have found and mentioned in the post mortem report cannot be the cause of death of the deceased.”

“iv. To be determined ante mortem injury vital reactions has great importance.”

“v. I did not find the vital reaction on the body of the injuries.”

“vi. After examining the dead body I did not find any continuous ligature mark or non-continuous ligature mark around the neck of the deceased. In a case of hanging ligature mark is must. Non-continuous mark speaks about suicide and continuous ligature marks speaks the homicide.”

In view of the aforementioned contradictory evidence as laid by PW26 we are of the view that the prosecution has miserably failed to establish beyond reasonable doubt that the death of the deceased was homicidal. Therefore, in our considered view, the charge under Section 302 IPC as against the present appellants must fail and thus their conviction under Sections 302/34 IPC is not sustainable in the eye of law.

17. For the reasons stated hereinabove this Court also finds that the charge under Sections 201/34 IPC as against the present appellants also fails in view of the indefinite opinion of the autopsy surgeon with regard to the cause of death of the deceased.

18. In order to decide as to whether the learned trial court is at all justified in convicting the present appellants under Section 498A IPC and /or it would be proper for us in holding the present appellants guilty under Section 304B IPC in absence of framing of charge under that section we propose to look to the evidence of other prosecution witnesses. From the evidence as adduced by PW1 (the informant and the father of the deceased) we find that he made some ominous allegation against the present appellant with regard to the torture upon his deceased daughter by the present appellants. In his examination-in-chief we however find no iota of evidence with regard to the specific role played by each of the appellants while committing the alleged crime. In his evidence we also find no whisper with regard to the demand of dowry. In his examination-in-chief though he alleged that he found marks of assault by 'rod' and penetration of 'broom stick' in the dead body of his daughter but such evidence gets no corroboration from the post mortem report of the deceased. Admittedly from the evidence of PW1 and the evidence of PW6, PW7 and PW8 who are the co-villagers of the accused persons vis-à-vis Exhibit no. 7 it would reveal that a dispute accrued between the present appellants and the informant and his family members with regard to sending the deceased at her paternal home but from the evidence of PW6 and PW7 it became crystal clear that when a meeting was called for in the local panchayat, the deceased herself expressed that she was not willing to come to her paternal home leaving her husband.

19. On perusal of Exhibit 5 (a) i.e. the letter written by the deceased to her mother it appears to us that she expressed her inability to go to her paternal home on account of her husband's unwillingness but nowhere in such letter the deceased has stated about any physical or mental torture at the instance of the appellants. At this juncture we propose to look to the provisions of Sections 498A IPC which is reproduced hereunder:-

“ 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 purposes 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 such demand.”

20. In the aforesaid Section the legislatures have defined the ‘word’ cruelty. In the event such definition of ‘cruelty’ is assessed in the perspective of the facts and circumstances as involved in the instant three lis, it appears to us that the alleged action and/or in-action on the part of the appellants does not come under the definition of cruelty in absence of any positive evidence with regard to the alleged cause of injury or danger to life or limb or health of the deceased.

21. Admittedly the co-villagers or the relatives of the informant namely: PW4, PW9, PW11, PW13 and PW20 in course of their respective testimony had also made some omnibous allegation against the present appellant.

However, on scrutiny of their cross-examination vis-à-vis the cross examination of the I.O. it reveals to us that it is either their version that they have not stated such thing to the I.O. or the I.O has stated that such witnesses have not stated those things while examining them under Section 161 Cr.P.C. The omission on the part of the aforesaid prosecution witnesses (co-villagers and relatives of the informant) are material omissions in view of the proviso of Section 162 Cr.P.C read with Section 145 of the Evidence Act.

22. In view of such we are of the considered view that the learned trial Court is also not justified in convicting the present appellants under Section 498A IPC.

23. Before parting with, we feel it obligatory to answer as to whether an appellate Court in absence of framing of any alternative charge under Section 304B IPC in a case under Section 302 IPC can at all convict the appellants under Section 304B IPC in absence of proof of ingredients of the said Section.

24. Admittedly Section 222 (2) Cr.P.C empowers a Court to convict an accused of a minor offence although he is not charged with it. However, the offence under Section 304B IPC under no stretch of imagination can be construed as a lesser offence than an offence under Section 302 IPC since the ingredients of the aforesaid two Sections are quite distinct and different.

25. The distinction between the ingredients of the aforesaid two Sections namely; Sections 302 IPC and 304B IPC and the different mode

of proof of the aforesaid two offences have been dealt with by the Hon'ble Apex Court in the judgment **Shamnsaheb M. Multtani (supra)** where the Hon'ble Apex Court expressed the following view: -

"31. Now take the case of an accused who was called upon to defend only a charge under Section 302 IPC. The burden of proof never shifts on to him. It ever remains on the prosecution which has to prove the charge beyond all reasonable doubt. The said traditional legal concept remains unchanged even now. In such a case the accused can wait till the prosecution evidence is over and then to show that the prosecution has failed to make out the said offence against him. No compulsory presumption would go to the assistance of the prosecution in such a situation. If that be so, when an accused has no notice of the offence under Section 304B IPC, as he was defending a charge under Section 302 IPC alone, would it not lead to a grave miscarriage of justice when he is alternatively convicted under Section 304B IPC and sentenced to the serious punishment prescribed thereunder, which mandates a minimum sentence of imprisonment for seven years.

32. The serious consequence which may ensue to the accused in such a situation can be limned through an illustration:-

If a bride was murdered within seven years of her marriage and there was evidence to show that either on the previous day or a couple of days earlier she was subjected to harassment by her husband with demand for dowry, such husband would be guilty of the offence on the language of Section 304-B IPC read with Section 113-B of the Evidence Act. But if the murder of his wife was actually committed either by a decoit or by a militant in a terrorist act the husband can lead evidence to show that he had no hand in her death at all. If he succeeds in discharging the burden of proof he is not liable to be convicted under Section 304B, IPC. But if the husband is charged only under Section 302 IPC he has no burden to prove that his wife was murdered like that as he can have his traditional defence that the prosecution has failed to prove the charge of murder against him and claim an order of acquittal. The above illustration would amplify the gravity of the consequence befalling an accused if he was only asked to defend a charge under Section 302 IPC and was alternatively convicted under Section 304B IPC without any notice to him, because he is deprived of the opportunity to disprove the burden cast on him by law.

33. In such a situation, if the trial court finds that the prosecution has failed to make out the case under Section 302 IPC, but the offence under Section 304-B IPC has been made out, the court has to call upon the accused to enter on his defence in respect of the said offence. Without affording such an opportunity to the accused, a conviction under Section 304-B IPC would lead to real

and serious miscarriage of justice. Even if no such count was included in the charge, when the court affords him an opportunity to discharge his burden by putting him to notice regarding the prima facie view of the court that he is liable to be convicted under Section 304B IPC, unless he succeeds in disproving the presumption, it is possible for the court to enter upon a conviction of the said offence in the event of his failure to disprove the presumption”

26. Nothing is available in the trial court record to suggest that before passing of the impugned judgment the learned trial court has given notice to the present appellants regarding its prima facie view that the present appellants may be convicted under Section 304B IPC and probably such question never arose since it was never the case of the prosecution before the learned trial court that death of the deceased was dowry death within the meaning of Section 304B IPC.

27. In view of the discussion (supra) we find sufficient merit in the instant appeals and accordingly the instant three appeals are allowed. All interim applications are disposed of.

28. The appellants in criminal appeal nos. 180 of 2010, 255 of 2010 and 302 of 2010 are found not guilty of the offence under Sections 498A/302/201/34 IPC and thus they are acquitted of the said charges as framed against them by the learned trial Court in Sessions Trial No. 05 of 2005. The appellant no. 1, Omar Ali, the appellant no. 4, Abdul Rajjak and the appellant no. 5, Altaf @ Altab @ Altaf Hossain in CRA 180 of 2010 are stated to be in correctional home and thus they are set at liberty at once, if not wanted in connection with any other case. The other appellants of CRA nos. 180 of 2010, 255 of 2010 and 302 of 2010 namely;

Ajmira Bibi, Ajijan Bibi and Nazira Bibi who are on bail are discharged from their respective bail bonds and also be set liberty at once.

In the event appellant no.1 Abdul Hamid and appellant no.2 Sk. Naziruddin in CRA 302 of 2010 are detained in correctional home, they be set at liberty at once, if not wanted in connection with any other case.

In the event the said appellants namely; Abdul Hamid and Sk. Naziruddin are on bail, they are also discharged from their respective bail bonds and be set at liberty at once.

29. Department is directed to forward a copy of this judgment along with the trial court record to the learned trial court at once. Department is further directed to forward a copy of this judgment to the Secretary, DLSA, Hooghly who on receipt of this judgment shall take up the matter with the Superintendent(s) of the correctional home(s) where the appellants Omar Ali, Abdul Hamid and Altaf @ Altab @ Altaf Hossain in CRA 180 of 2010 are detained for their immediate release, if not wanted in connection with any other case.

30. In the event the appellant no.1, Abdul Hamid and appellant no.2 in CRA 302 of 2010 are found to be detained in correctional home(s) and if they are not detained in connection with any other case, Secretary, DLSA shall also take up the matter with the Superintendent(s) of the correctional home(s) where they are detained for their immediate release.

31. Department is further directed to forward a copy of this judgement to the Secretary, Calcutta High Court Legal Services Committee who shall

on receipt of the same shall disburse the admissible amount of Honourium to Shri Somnath Banerjee, Ld. Amicus Curiae as appointed by us in CRA 302 of 2010 for his able assistance to this Court in pronouncing this judgement.

32. Urgent Photostat certified copy of this judgement, if applied for, be given to the parties on completion of usual formalities.

I agree.

(Chitta Ranjan Dash, J.)

(Partha Sarathi Sen, J.)