

SUPREME COURT OF INDIA

Chhotan Sao

Vs.

State of Bihar

CrI.A.No.1613 of 2008

(Ranjana P.Desai and J.Chelameswar,JJ.)

17.12.2013

JUDGMENT

J.Chelameswar, J.

1. The two appellants herein were convicted for the offences under sections 304B and 498A IPC by the Additional Sessions Judge VI, Gaya and the same was continued in appeal by the High Court of Patna.

2. Initially three accused were charged for the offences under sections 328, 304B and 498A Indian Penal Code and sections 3 and 5 of Dowry Prohibition Act on the allegation that they harassed and were responsible for the unnatural death of one Babita Devi, the daughter of PW1 and PW6, mother and father respectively. All three accused were found guilty of the offences they were charged with by the trial court. Each of the accused was awarded punishment for seven years for the offence under section 304B IPC and two years for the offence under section 498A IPC. However, the trial court did not award any separate sentence insofar as the other offence of which the accused were charged of.

3. Aggrieved by the judgment of the trial court dated 5th May 2003 all the three accused carried appeals to the High Court of Patna unsuccessfully.

4. The instant appeal is carried by only two accused Chottan Sao and Kamla Devi who happened to be the deceased Babita Devi's father-in-law and sister-in-law (husband's brother's wife). We are informed that the third accused Suhas Sao, husband of the

deceased Babita Devi served the sentence and did not choose to challenge the correctness of the judgment of the High Court. From the proceedings of this Court dated 24.10.2013, it appears that the 1st appellant died during the pendency of this appeal.

5. PW8 Surendra Prasad one of the brothers of the deceased Babita Devi reported on 17.11.1991 to the police station Sherghatty that in the morning of the same day the deceased was beaten up by a lathi and compelled to consume poison which resulted in her death. It is also stated in the report that whenever the deceased Babita Devi came to her parental home, she used to complain that the accused were harassing her with a demand to get more money from her parents coupled with a threat of killing her in the event of her not complying with the demand. On the basis of this complaint, the Sherghatty police registered a case No.166/91. On completion of the investigation, a charge-sheet was filed on 2.11.1994.

6. To establish the guilt of the accused, the prosecution examined in all 13 witnesses including the parents of the deceased (PWs 1 and 6). PW2 and PW3 are sisters-in-law i.e. the wives of two brothers of deceased Babita Devi; PW5 and PW8 are the brothers of the deceased and PW7 is a sister of the deceased. All of them were examined to prove two facts (1) that the marriage of Babita Devi took place some 5 to 6 years prior to her death and (2) that Babita Devi used to complain that the accused were harassing her with a demand of dowry. The said evidence was believed by both the courts. PW4 and PW9 were declared hostile. PW12 and PW13 are the police officers who investigated the case. While PW13 filed charge-sheet against the husband of the deceased and PW12 filed charge-sheet against the other two accused.

7. One disturbing feature of the case is that the doctor who conducted the post-mortem of the body of Babita Devi was not examined at the trial. The post-mortem report (Ex.3) came to be marked at the trial through PW11 Dr. Arbind Prasad, a Professor in Forensic Science Department, M.M.C.H. Gaya, who claimed that he worked with the author (one Dr. Kapildeo Prasad) of the post-mortem report. Dr. Arbind Prasad further deposed that he could and did recognise the handwriting and signature on Ex.3 to be that of Dr. Kapildeo Prasad.

8. The content of the post-mortem is not discussed anywhere in the judgment of the trial court or in the judgment of the High Court. On the other hand, at para 20 of the trial court judgment it is recorded as follows:

“One thing is that from Ext.3, post mortem report it would appear that viscera was sent for post mortem but that report has not been received and no apparent injury external or internal has been found on post-mortem examination of the dead body.”

9. It is on the basis of such scanty medical evidence both the trial court and the High Court rushed to the conclusion that the death of Babita Devi occurred "otherwise than under normal circumstances".

10. It is argued by the learned counsel for the appellants that the judgment of the High Court confirming the judgment of the Sessions Court insofar as it recorded a finding that Babita Devi died an unnatural death is based on no evidence. Therefore, even if it is assumed for the sake of arguments that both the courts below rightly reached a concurrent finding that there were demands of dowry by the accused prior to the death of Babita Devi and that Babita Devi was subjected to either cruelty or harassment for such a demand, the offence under section 304B is not established as one important element of section 304B i.e. the death of Babita Devi occurred otherwise than under normal circumstances, is not established by any legally admissible evidence on record.

11. On the other hand, the learned counsel for the State argued that in view of the consistent versions of PWs 1, 2, 3, 5, 6, 7 and 8 that Babita Devi consistently used to complain of harassment for dowry by the accused, both the courts below rightly convicted the accused.

12. We are of the opinion that the conviction of the accused under section 498A calls for no interference as there is concurrent finding by both the courts below based on evidence that the accused husband and his relatives subjected Babita Devi to cruelty as explained under section 498A I PC.

13. The only question is - whether the prosecution has succeeded in establishing the commission of offence under section 304B. Section 304B reads as follows:

“304B. Dowry death.— (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called “dowry death”, and such husband or relative shall be deemed to have caused her death.

Explanation.—For the purpose of this sub-section, “dowry” shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

It can be seen from the section that in order to constitute an offence under section 304B, the following factors must be established:

1. That there is a death of a woman within seven years of her marriage;
2. That the death is a result of any burn or bodily injury or occurs otherwise than under normal circumstances; or
3. That the woman was subjected to cruelty or harassment by her husband or his relative is by way of any demand for or in connection with dowry.”

14. No doubt the prosecution has adduced sufficient evidence to establish all other facts necessary to prove the offence under section 304B IPC except the cause of death. As seen from the trial court judgment there is no injuries on the body of the deceased. Even according to the First Information Report the death was caused due to poisoning which the deceased was compelled to consume. In such circumstances, the non-examination of the doctor who conducted the post-mortem coupled with the failure to produce the Forensic Laboratory Report regarding the examination of viscera of the deceased leaves a gaping hole in the case of the prosecution regarding the nature of the death of Babita Devi. Learned counsel for the State placed reliance on the decision of this Court in *Bhupendra vs. State of Madhya Pradesh*¹, to which one of us, Ranjana Prakash Desai, J., was a party. In the said case, no doubt this Court held that the production of chemical examination report is not mandatory. The Court held as follows:

"26. These decisions clearly bring out that a chemical examination of the viscera is not mandatory in every case of a dowry death; even when a viscera report is sought for, its absence is not necessarily fatal to the case of the prosecution when an unnatural death punishable under Section 304-B of the IPC or under Section 306 of the IPC takes place; in a case of an unnatural death inviting Section 304-B of the IPC (read with the presumption under Section 113-B of the Evidence Act, 1872) or Section 306 of the IPC (read with the presumption under Section 113-A of the Evidence Act, 1872) as long as there is evidence of poisoning, identification of the poison may not be absolutely necessary."

On the facts of that case, this Court reached to the conclusion that there was sufficient evidence on record to come to the conclusion that the death was due to poisoning.

15. Coming to the case on hand, the conclusion recorded by both the Courts below that Babita Devi died an unnatural death is not based on any legal material on record. None of the witnesses spoke to the factum of their witnessing Babita Devi consuming poison either under compulsion or otherwise. The statement in the FIR by PW8 is based on hearsay evidence. Yaddu Sah of Gopalpur, on whose information PW8 learnt about the death of Babita Devi, and who reported to the Police, is not examined at the trial.

16. In the circumstances, we are of the opinion that the surviving appellant must be acquitted of the offence under Section 304B. Appeal is allowed to that extent.

17. Before parting with the appeal, we wish to place on record our anguish regarding the inadequacy of investigation, the failure to discharge the responsibility on the part of the public prosecutor and the Magistrate who took cognizance of the offence under Section 304B. The Investigating Officer who submitted the charge sheet ought not to have done it without securing the viscera report from the forensic lab and placing it before the Court. Having regard to the nature of the crime, it is a very vital document more particularly in the absence of any direct evidence regarding the consumption of poison by the deceased Babita Devi. Equally the public prosecutor failed in his responsibility to guide the investigating officer in that regard. Coming to the magistrate who committed the matter to the Sessions Court, he failed to apply his mind and mechanically committed the matter for trial. Public

Prosecutors and judicial officers owe a greater responsibility to ensure compliance with law in a criminal case. Any lapse on their part such as the one which occurred in the instant case is bound to jeopardise the prosecution case resulting in avoidable acquittals. Inefficiency and callousness on their part is bound to shake the faith of the society in the system of administration of criminal justice in this country which, in our opinion, has reached considerably lower level than desirable.

Judgment referred