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(2007) 08 P&H CK 0209

High Court Of Punjab And Haryana At Chandigarh

Case No: Criminal Appeal No. 509-SB of 1994

Gulzar Singh APPELLANT

Vs

State of Punjab RESPONDENT

Date of Decision: Aug. 30, 2007

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 173, 221, 222, 222(1), 313
- Evidence Act, 1872 - Section 113B
- Penal Code, 1860 (IPC) - Section 302, 304, 304B, 34, 498A

Citation: (2007) 08 P&H CK 0209

Hon'ble Judges: A.N. Jindal, J

Bench: Single Bench

Advocate: Nand Lal Sammi, for the Appellant; Anter Singh Brar, Dy. Advocate General, for the Respondent

Final Decision: Allowed

Judgement

A.N. Jindal, J.
It is a case where the prosecution in order to seek conviction of the accused for the death of Surjit Kaur, at the hands of her husband and mother-in-law, projected the dowry as a motive. Consequently, both of them were tried and vide judgment dated 10.10.1994 passed by the then Sessions Judge, Patiala, Gulzar Singh-accused/Appellant (hereinafter referred to as the Appellant) was convicted, while co-accused Charan Kaur was acquitted. By way of the present appeal, the Appellant has challenged his conviction.

2. Briefly stated the facts of the case are that Surjit Kaur was married to Gulzar Singh - accused/Appellant (hereinafter referred to as the Appellant) at village Daun Kalan about four years prior to the occurrence. Out of the wedlock, a male child was born who was aged about 1-1/2 years at the time of the occurrence. The relations between the Appellant and the deceased were not cordial. On 13.7.1992 Nachattar Singh (PW-1) (hereinafter referred to as the complainant), father of the deceased had gone to village

Daun Kalan to enquire about the well-being of his daughter and was sleeping over the roof, then at about midnight, he heard the cries of his daughter. Thereafter, he saw that Surjit Kaur (deceased) was in the courtyard of the house. The Appellant Gulzar Singh had caught hold of her, whereas, Charan Kaur had sprinkled kerosene and then set her ablaze. The accused had removed the bamboo staircase for approaching the roof, so that the complainant may not come down from the roof. Motive behind the occurrence is that his daughter Surjit Kaur was earlier being maltreated on the pretext that she had not brought sufficient amount. The complainant had been helping the accused by paying a sum of Rs. 400-500/-, from time to time, but later on, he could not manage the amount. Consequently, she was murdered.

3. On the aforesaid statement of the complainant made before Sub-Inspector Kaka Singh, FIR Ex. PA/1 u/s 302/34 of the Indian Penal Code (for short IPC) was registered against both the accused. The investigation was commenced. Investigating Officer reached the place of occurrence, prepared the inquest Ex. PF in the presence of Sham Singh and Gurcharan Singh, got conducted the post mortem examination on the dead body, inspected the place of occurrence, prepared the site plan with correct marginal notes Ex. PJ and took into possession an empty peepi (cane) of kerosene Ex. P-1, one match box Ex. P-2 vide recovery memo Ex. PB and PC, respectively. He also recorded the statements of the witnesses and got the place of occurrence photographed.

4. The completion of investigation was followed by a report u/s 173 of the Code of Criminal Procedure. The accused were charged u/s 302/34 IPC, to which they pleaded not guilty and claimed trial.

5. During the course of trial, the prosecution examined Nachattar Singh- complainant (PW-1), Dr. S.S. Oberoi (PW-2), Avtar Singh (PW-3) and Sub- Inspector Kaka Singh (PW-4). The trial Court also examined Inspector Rachhpal Singh (CW-1), Udham Singh complaint clerk (CW-2) and Harchand Singh, S.P. (CW-3).

6. When examined u/s 313 of the Code of Criminal Procedure, both the accused denied all the incriminating circumstances appearing against them and pleaded their false implication in the case. During their defence, they examined S.C. Jain (DW-1), who produced salary certificate Ex. DG of the Appellant. The trial ended in acquittal of Charan Kaur and conviction of the Appellant u/s 304-B IPC, whereas, he was acquitted from the charge u/s 302 IPC.

7. While acquitting the accused u/s 302 IPC, the trial Court made the following observation:

(i) There is inordinate delay in lodging the FIR and also in dispatching the special report to the Illaqa Magistrate.

(ii) The presence of Nachhattar Singh-complainant (PW-1) at the place of occurrence at the relevant time is doubtful for the following reasons:

(a) It is not believed that the accused will select the same date for committing the murder of Surjit Kaur when her father was present in the house.

(b) The roof of the room, where the complainant was sleeping may not be higher than 9/10 feet, therefore, the complainant could climb down through the `dahra'' of the wall. It has also come in evidence that staircase was not removed.

(c) The circumstance that the complainant did not come down from the roof and he did not raise hue and cry to call the people from the neighbourhood, shadows his conduct and belies his presence at the spot.

(d) Had the complainant been present in the house, then he would have made efforts to save the life of his daughter.

(e) Immediately after the occurrence, the complainant did not approach the respectables of the village Daun Kalan to apprise them over the conduct of the accused.

(f) The presence of the complainant was also not recorded by the Investigating Officer at the time of inquest.

(g) The Investigating Officer also tried to make padding as he appears to have obtained the thumb impression of the complainant on the recovery memos Ex. PB and PC, later on.

8. Similarly, the trial Court while convicting the Appellant u/s 304-B IPC believed the statement of the same witness regarding the accused having demanding money and harassing the deceased, who has not been believed regarding the theory of murder.

Arguments heard and documents perused.

9. The prime contention raised by learned Counsel for the Appellant is that when the accused was acquitted u/s 302 IPC, then in the absence of charge u/s 304-B IPC, he could not be convicted for the said offence as these two offences are mutually exclusive and having different ingredients. Thus, without notice of accusation against the accused for this offence, he could not be said to have opportunity to defend himself.

10. Having probed into the marathon arguments, advanced by learned Counsel for the Appellant in this regard, apparently, the argument seems to be carrying some weight. Sections 221 and 222 Code of Criminal Procedure prescribe framing of charges by criminal court before commencement of the trial. The primary condition for the application of Section 221 Code of Criminal Procedure is that the court should have felt doubt, at the time of framing of the charge, as to which of the several acts (which may be proved) would constitute an offence on account of the nature of the acts or series of acts alleged against the accused. In such a case, the section permits `to convict the accused'' of the offence of which he is shown to have committed though he was not charged with it.

Section 222(1) Cr.P.C., deals with the case when person charged with an offence consists of several particulars. The section is in the shape of a proviso and empowers the court to convict the accused of a minor offence, though he was not charged for the same. Sub-section (2) of Section 222 Cr.P.C., deals with a similar, but slightly different situation. It says that "When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he is not charged with it."

11. Now question arises as to what is "minor offence". Though, nothing is found in the Code, so as to define the "minor offence", but we can well distinguish it from the context that the test of the minor offence is not merely that the prescribed punishment is less than the major offence, but it could mean much more qua the similarity of the nature of the offence. In other words, where two offences are cognate offences, wherein, the main ingredients are common, the one punishable among them with a lesser sentence and the other with a higher sentence and graver in nature, then certainly, the former could be said to be minor one, but now the other question before me to be decided is, whether the offence u/s 304-B IPC is a specie of Section 302 IPC and whether both the offences have common features and the former could be said to be minor one, if the ingredients of both the Sections are studied in depth, then both the offences could be said to be distinct and of different nature. The offence u/s 304-B IPC relates, particularly to the death of a bride after subjecting her to harassment for dowry within seven years of marriage. The accused need not be present at the time of death. The death could be homicidal or suicidal, whereas, the offence u/s 302 IPC is based on culpable homicide, may amount to murder or may not amount to murder based on direct or circumstantial evidence, needs proof and is not based on presumptions as in the former case u/s 113-B of the Evidence Act. Thus, if the accused is charged u/s 304-B IPC and if 304-B could not be proved, then the accused could be convicted u/s 498-A, but if the accused is charged u/s 302 IPC, then he could not be convicted u/s 304-B, unless before convicting the accused under the said section, he is not given notice of accusation and provided opportunity to defend himself in that case. A similar proposition arose before the Apex Court in case Shamnasheb M. Multtani Vs. State of Karnataka, wherein, Their Lordships observed as under:

... If that be so, when an accused has no notice of the offence u/s 304-B IPC as he was defending a charge u/s 302 IPC alone, it would lead to a grave miscarriage of justice when he is alternatively convicted u/s 304-B IPC and sentenced to the serious punishment prescribed thereunder, which mandates a minimum sentence of imprisonment for seven years. The serious consequence which may ensure (ensue ?) to the accused in such a situation can be rimmed 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 dacoit 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 u/s 304-B IPC. But if the husband is charged only u/s 302 IPC, he has no burden to prove that his wife was murdered like that i.e. for dowry, 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 u/s 302 IPC and was alternatively convicted u/s 304-B IPC without any notice to him, because he is deprived of the opportunity to disprove the burden cast on him by law.

12. Thus, crux of the matter is that the ingredients of Section 302 and 304-B IPC are different and distinct. In the present case, no evidence has been brought on the record to show that there has been any act of omission or commission on the part of the Appellant before the death of the deceased, for which he was responsible.

13. Now, the other question, which remains to be determined, is "whether in the facts and circumstances of the case, if taken on its face value, the ingredients as envisaged u/s 304-B IPC are satisfied, so as to hold the Appellant guilty for the said offence ?" I am quite in consonance with the argument advanced by the counsel for the Appellant that the case is based on the solitary statement of the complainant (PW-1) to base the conviction of the Appellant u/s 304-B IPC. The trial Court has already dubbed him as unreliable. Once the witness, who is so much anxious to see the Appellant guilty of the gravest offence, has not been believed, then how he can be believed qua the factum with regard to the demand of dowry by the Appellant. Truly speaking, at the time of registration of the case, the complainant did not come forward with such facts as to make out a case of dowry death against the Appellant. He at the very inception, only stated, that the accused had been maltreating the deceased on the pretext that she had not brought sufficient amount and he had been helping the accused by parting with the amount ranging Rs. 400/- to Rs. 500/- from time to time. The witness has not given details as to what dowry was given to the accused at the time of marriage and as to what was demanded by the accused. He has not given any particular time when and what demand was raised. The other factor `cruelty" soon before her death has also not been proved by him. Since, he is a failure to prove the demand of any item in approximity to time of occurrence, which could be treated as soon before her death, therefore, the prosecution cannot be said to have established the offence u/s 304-IPC. None of the relations or mother of the deceased has come forward to say that it is a case of dowry death. As such, in the facts and circumstances, as set out by the complainant (PW-1), the solitary witness in this case, who has been disbelieved for the graver offence, cannot be reposed trust for convicting the accused under this offence. Consequently, the inevitable conclusion which can be drawn, is that the prosecution has failed to prove the offence u/s 304-B IPC against the Appellant.

14. For the foregoing reasons, it would not be inappropriate to observe that the trial Court appears to have been swayed by the emotions on seeing the untimely death of Surjit

Kaur, but did not take note of the weakness of the evidence led by the prosecution and also erred in believing a solitary wholly unreliable witness for basing conviction of the Appellant.

As a sequel of above discussion, the present appeal is accepted, impugned judgment of conviction is set aside and the Appellant is acquitted of the charges. Fine, if paid by the Appellant, be reimbursed to him.