

(2005) 09 AHC CK 0205

Allahabad High Court

Case No: Criminal Appeal No. 3063 of 2005

Rajendra Prasad Pandey

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision: Sept. 8, 2005**Acts Referred:**

- Penal Code, 1860 (IPC) - Section 109, 201, 302, 304B, 318

Citation: (2005) 3 ALT(Cri) 30**Hon'ble Judges:** M.C. Jain, J; K.K. Misra, J**Bench:** Division Bench**Advocate:** V.C. Misra, Rakesh Agrahari and R.P. Dubey, for the Appellant; N.A. Moonis and A.G.A., for the Respondent**Final Decision:** Allowed

Judgement

M.C. Jain, J.

The appellant Rajendra Prasad Pandey is the husband of the deceased Meena Devi who, according to the prosecution, was married to him in June 1992. She was allegedly done to death on 12.2.1997 in her Sasural in village Krishna Nagar, Police Station Naini, District Allahabad. The F.I.R. was lodged by her brother PW 1 Shiv Sagar Dubey, resident of Village Khutari, Police Station Maridhan, District Mirzapur at Police Station Naini, District Allahabad. The instant appeal has been filed by the accused appellant against the judgment and order dated 21.7.2005, passed by Dr. Manjoo Nigam Special Judge, SC/ST Act, Allahabad in Sessions Trial No. 334 of 1998, convicting and sentencing the accused appellant u/s 302 and 318 I.P.C.

2. As per the F.T.R., the complainant had performed a decent marriage of his sister according to his status and had given one Hero Honda motorcycle, cash of Rs. 40,000/-, jewellery and other household articles in dowry. The accused appellant was not satisfied and soon after the marriage he started treating the deceased with cruelty over the demand of dowry, particularly a VCR which could not be given by

the complainant for financial difficulties. The accused appellant had also developed illicit relations with one Km. Arti. He continuously treated her with cruelty and ultimately killed her brutally by strangulation after assaulting her. At that time, she had six months pregnancy. It was also mentioned in the F.I.R. that there were ante mortem injuries but those injuries had not been mentioned in the inquest report.

3. At the trial, charges under Sections 498A/304B/318 and 201 I.P.C. were framed against the accused appellant. However, the trial Judge has convicted the accused appellant u/s 302 I.P.C. with sentence of life imprisonment and a fine of Rs. 10,000/-. He has further been convicted u/s 318 I.P.C. with sentence of 2 years" rigorous imprisonment. Both the sentences have been ordered to run concurrently.

4. We have heard Sri V.C. Misra, learned Senior Advocate assisted by Sri R.P. Dubey for the appellant and Ms. N.A. Moonis, learned A.G.A. for the State in opposition. The record of the lower court has been summoned.

5. While pressing the bail prayer of the accused appellant during the pendency of the appeal, learned counsel has placed reliance on the case of Sohan Lal v. State of Punjab, 2004 (48) ACC 132 to stress the point that in the absence of a charge u/s 302 I.P.C., he (when charged u/s 304B I.P.C.) could not be convicted thereunder for allegedly causing the death of the victim. Through the cited decision, the Apex Court has ruled that an accused neither charged u/s 302 I.P.C. nor u/s 109 I.P.C. is prejudiced due to non-framing of the charge under either of these sections. Conviction thereunder is wholly unsustainable when he was only charged for dowry death u/s 304B I.P.C. On the other hand, the submission of the learned A.G.A. is that omission and defect in framing charge u/s 302 I.P.C. did not prejudice the accused appellant at all, But keeping in view the Supreme Court's decision in Sohan Lal's case (supra), we are of the view that the argument of the learned A.G.A. cannot be accepted.

6. The accused could not be convicted u/s 302 I.P.C. without there being a charge framed under the said section. It has to be kept in mind that parameters of burden of proof are different in a case of dowry death u/s 304B I.P.C. and one u/s 302 I.P.C. Under these circumstances, the accused appellant (who was on bail during the trial also) should be released on bail.

7. At the same time, we are of the clear view that the appeal should not be kept pending. Instead, the case should be remanded for retrial of the accused for the offences he was charged with (viz. under Sections 498A, 304B, 318 and 201 I.P.C.) with appropriate directions. We would do the same with little relevant discussion.

8. We should point out that in order to attract the application of Section 304B I.P.C., the essential ingredients are as follows:

1. The death of a woman should be caused by burns or bodily injury or otherwise than a normal circumstance;

2. Such a death should have occurred within seven years of her marriage;
3. She must have been subjected to cruelty or harassment by her husband or any relative of her husband;
4. Such cruelty or harassment should be for or in connection with demand of dowry;
5. Such cruelty or harassment is shown to have been meted out to the woman soon before her death.

9. In the present case, without proper discussion of the prosecution evidence on relevant aspects, the trial Judge with precipitated haste jumped to the conclusion" that the accused appellant had committed the offence of murder by causing the death of his wife. It is sad to note that the trial judge wrote a perfunctory and sketchy judgment without properly addressing to the prosecution evidence on the aspect of time of marriage, evidence regarding demand of dowry and the alleged cruelty allegedly heaped by the accused appellant on the victim. These facts have been supported by PW 1 Shiv Sagar Dubey (brother of the deceased) and P.W. 2 Kapil Deo Dubey (father of the deceased).

10. The trial Judge was also seemingly oblivious to the ingredients of the offence u/s 498A I.P.C. which are that the woman must have been "married, she must have been subjected to cruelty or harassment and such cruelty or harassment must have been shown either by the husband of the woman or by the relative of her husband. There is no legal requirement that such offence must be committed within a span of seven years of the performance of the marriage.

11. The trial judge has ignored the evidence of PW 1 and PW 2 on the aspect of harassment and cruelty heaped upon the victim by the accused appellant without any proper discussion and without testing the same on the anvil of reliability in conjunction with the evidence of PW 8 Dr. Shiv Kumar and post mortem report dated 14.2.1997. Earlier to her death, the deceased had been taken to the clinic of P.W. 8 Dr. Shiv Kumar on 12.2.1997 by the brother-in-law (Devar) of the deceased, followed by her husband. She was unconscious and some fluid was oozing from her mouth. There were some unnatural marks on her neck. When the said Doctor inquired from Rajendra Prasad -husband of the deceased about it, he showed his ignorance and the patient was then referred to S.R.N. Hospital, Allahabad. In the post mortem, eight ante mortem injuries were found. The lady was carrying pregnancy of six months. The death was due to asphyxia and vein's congestion as a result - of pressure applied to the neck.

11. The trial Judge disbelieved the factum of marriage having taken place in June 1992, acting on conjectures and surmises without properly discussing the prosecution evidence in this behalf contained in the testimony of PW 1 Shiv Sagar Dubey and PW 2 Kapil Dev. She simply cursorily mentioned that the father of the accused appellant had died on 13.4.1992 and, therefore, the marriage of the

accused and deceased could not have taken place in June 1992. The trial Judge also did not discuss the relevant defence evidence adduced to contend that the accused's father had died on 13.4.1992. He accepted the defence allegation that the marriage of the deceased was performed in the month of June 1988 without discussing any evidence of defence in this behalf. It was also a relevant question to be considered by the court that even if the father of the accused appellant had died on 13.4.1992, the marriage of the accused appellant with the deceased could have been solemnized in June 1992.

12. To say in nutshell, the trial court has not properly and judiciously considered the evidence related to the commission of the offences u/s 304B and 498A I.P.C. by the accused. Therefore, while granting bail to the accused appellant, we shall remand the case back to the lower court. Our final order is as follows:

(1) The appeal is allowed. The Impugned Judgment and order of conviction and sentence are set aside. The case is remanded back to the trial court for retrial by reappraisal of evidence on record after hearing counsel for both the sides for the offences the accused appellant is charged with, namely, under Sections 498A, 304B, 318 and 201 IPC.

(2) It is made clear that the trial Judge shall be free to come to an Independent conclusion on the basis of the Judicial appraisal of the evidence keeping in view the arguments of the two sides, without being prejudiced by the observations contained in this judgment which have been made to indicate the necessity of remanding the case and the gross carelessness and cursory approach of the trial Judge in preparing the impugned perfunctory and sketchy judgment.

(3) The retrial shall be confined to the conditions given in preceding paragraph and shall be concluded by the trial court within three months from the date of receipt of the certified copy of this order along with the record which shall be transmitted by the office of this Court within a week to facilitate early retrial in the manner indicated above.

(4) During retrial, the accused appellant shall be enlarged on bail on furnishing a personal bond with two sureties, each in the like sum to the satisfaction of the Chief Judicial Magistrate, Allahabad. To ensure early retrial, it is also directed that after availing of the bail order the accused appellant shall appear before the court below on 4.10.2005.

(5) A copy of this judgment shall also be sent to the District and Sessions Judge, Allahabad for being served on the Additional Sessions Judge concerned for her guidance in future.