

(2008) 09 GAU CK 0069

Gauhati High Court

Case No: Criminal Appeal No. 3 of 2007

Azizur Rahman (Md.)

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision: Sept. 4, 2008**Acts Referred:**

- Penal Code, 1860 - Section 304B
- Penal Code, 1860 (IPC) - Section 304B

Citation: (2012) 1 GLT 535**Hon'ble Judges:** Anima Hazarika, J**Bench:** Single Bench**Advocate:** Mr. H.R. A. Chodhury, Sr. Advocate & Mr. S.K. Nargis, Advocate appeared for the Opposite Party: Mr. KA. Mazumdar, Add. PP, Advocates appearing for Parties

Judgement

Smti. Anima Hazarika, J.

This appeal is directed against the judgment and order dated 14.12.06 passed by the learned Sessions Judge, Kamrup, Guwahati in Sessions Case No. 3 (K)/03 thereby convicting the accused appellant under Section 304 (B) IPC and sentencing him to undergo rigorous imprisonment (RI for short) for seven years and also to pay a fine of Rs.2,000/, in default, to undergo RI for six months.

2. The prosecution case was initiated on the basis of the FIR dated 1.4.99 lodged by Syd. Majamil Hussain, brother of deceased Mamuda Begum stating inter alia that the deceased was married with the appellant in December, 1997 and soon after marriage of his sister, she was subjected to cruelty for non payment of dowry. She was used to be beaten on certain previous occasions also on the issue of dowry. On that day, i.e. 1.4.99 the accused appellant again had beaten the deceased, as a result of which she became unconscious whereupon the accused himself took her to Guwahati for treatment. At about 6 pm, on the same day, sister of the accused came to their house and told that the accused had killed his wife, the deceased.

3. On the basis of the FIR, police registered a case being Baihata PS Case No.35/99 under Section 498(A)/302 IPC.

4. The case being exclusively triable by the court of Sessions, learned Judicial Magistrate, 1st Class, Rangia committed the same to the court of Sessions at Kamrup, Guwahati for trial. The learned Sessions Judge on the basis of the materials available on record, framed charge under Section 304 (B) IPC. The charge being read over and explained to the accused, he pleaded not guilty and claimed to be tried. During trial, prosecution examined fourteen witnesses including the doctor and the Investigating Officer (hereinafter referred to as I.O.) and exhibited certain documents.

5. PW 1, the informant, is the brother of the deceased. PWs 2,6 and 9 are the neighbours. PW 3 is the wife of PW 1. PW 4 is the mother of the deceased. PWs 7 and 8 are the sisters of the accused. PW 5 is the doctor, who conducted the post mortem examination. PW 10 is the Senior Scientific Officer, Toxicology Division, Forensic Science Laboratory, Assam, Kahilipara, Guwahati. PW 11 is the I.O. and PW 12 is the Officer in Charge (OC for short), who collected the post mortem examination report. PW 13 is the Police Officer, who submitted chargesheet. PW 14 is the I.O., who received the FIR from PW 1 and investigated the case. It is also pertinent to mention herein that in the present case, two FIRs were filed, one by PW 1 and another by the accused appellant.

6. PW 1, Sayed Majamil Hussain, who lodged the FIR, is the brother of the deceased.

PW 1 stated that on 14.12.97, his younger sister, deceased Mamuda Begum was married with the accused as per social custom and the necessary articles were given in the said marriage from their side. After her marriage, she used to live with the accused in the residence of the accused. She also used to visit her paternal residence. On enquiry, she told him that their marital life was running happily. However, after 2½ months later, his sister reported that the accused demanded cash Rs.25,000/ 30,000/ and other articles like TV, deck and pressure cooker etc. PW 1 discussing the matter with other family members sold a bullock and paid Rs. 1800/ to his sister for payment to the accused. About 4/5 days later, she again came and reported that the accused demanded TV, deck, pressure cooker etc. On 1.4.99, at about 6 pm, one Rejina Begum, sister of the accused had informed about the death of his sister. Rejina Begum, however, has not been examined as witness. On being informed by Rejina Begum, PW1 alongwith his wife and others went to the house of the accused, where they were informed that deceased had been taken to Saikia Nursing Home at Adabari, Guwahati. When they had been to the house of the accused they met Rejina Begum, sister of the accused, who on enquiry reported them that accused after closing the door of the room assaulted his wife, playing a deck inside the room in full volume. He also threatened the other family members who went to protest the assault. Thereafter, all of them proceeded to the nursing home and on the way to nursing home, they also went to the police station wherein

he filed the FIR, Ext1. At about 12:30 am, they reached nursing home and at that time, the dead body of his sister was lying in the verandah in a naked position. They found some police personnel guarding the dead body. They searched for the accused but he was not available. On the next morning, the dead body was taken to the MMC Hospital for post mortem examination.

During crossexamination, he stated that one of his brother, namely, Fajnur Ali lives separately with his family. He denied the suggestions put to him that he did not state before the IO that after 2 months of the marriage of his sister, she reported them about the demand of Rs.25,000/30,000/- including the TV, deck, pressure cooker etc. He also denied the suggestions that he did not state before the I.O. that for nonpayment of cash and articles accused assaulted his sister. He further denied that Rejina did not report that the deceased died after consuming poison. He had further deposed that he had no knowledge about the visit of his brother Fajnur to the house of the accused person. P W1 also denied the fact that Fajnur arranged the marriage of the deceased with the accused. He stated that he had no knowledge about the illicit relation of his sisterinlaw, i.e. wife of Fajnur with the accused. Other suggestions put to him had been denied.

7. PW 2 is the neighbour of PW 1. He has stated that on 1.4.99, after hearing hue and cry in the house of the informant, he went there and came to know about the death of Mamuda.

During crossexamination, this witness stated that he did not know about the cause of death of the deceased.

PW 3 is the wife of PW 1 and P W 4 is the mother of the deceased. Both PWs 3 and 4 deposed on the same line as that of PW 1.

PW 5 is the doctor who held the postmortem examination on the dead body of the deceased. He has stated that opinion regarding cause of death can be given only on the basis of chemical analysis report and for that viscerae were sent to Forensic Laboratory for chemical analysis. There is no effective crossexamination of PW 5.

8. PW 6 is the neighbour. She deposed that deceased committed suicide by consuming poison. She further deposed that both the deceased and the accused were maintaining good relation during their marital life.

During crossexamination, she stated that on the previous day of the day of occurrence, deceased quarreled with her brother Fajnur Ali regarding suspected illicit relation between the wife of Fajnur Ali and the accused. She categorically stated that Fajnur assaulted the deceased on that day. This PW 6 found a piece of paper under the blouse of the deceased and she handed over the same to Rahima Begum, i.e. the sister of the deceased.

9. PW 7 is the younger brother of the accused. He deposed that his sisterinlaw, the deceased committed suicide by taking poison. The deceased and the accused lived

separately from them. He also deposed that marital life of the deceased and the accused was good. He further deposed that one day ahead of the day of occurrence, there had been a quarrel between the deceased and her brother Fajnur Ali. However, he did not know the cause of quarrel. The defence declined to crossexamine this witness.

10. PW 8, another younger brother of the accused, deposed on the same time as that of P W 7. He deposed that deceased had written a suicide note stating that her brother Fajnur and his wife were solely responsible for her death. The said note was seized by police from him vide Ext8. Ext8(1) is his signature. Defence declined to crossexamine this witness also.

11. PW 9, Ajeda Begum is another neighbour of the accused. She used to go to the house of the accused. She further deposed that the marital life of the accused and the deceased was good.

12. PW 10 is the Senior Scientific Officer, Toxicology Division, Forensic Science Laboratory, Assam, Kahilipara, He deposed that the sample sent to them for chemical analysis gave negative test for common poison.

13. PW11 was serving as ASI of Jalukbari Police Station on 1.4.99. He deposed that on that day, OC of Jalukbari Police Station received a written information from the accused and accordingly, registered UD case and endorsed the investigation of the case to him. Accordingly, he started investigation, visited Dr. B Saikia Nursing Home at Adabari and found the dead body of the deceased, conducted inquest on the dead body vide Ext3 wherein Ext3(2) is his signature. After holding the inquest, he sent the dead body for post mortem examination to the Gauhati Medical College Hospital, in the meantime, a regular case was registered by Baihata Police Station and accordingly, case diary was sent to Baihata Police Station.

During crossexamination, PW 11 stated that the FIR lodged by the accused was to the effect that in his absence his wife had consumed poison and accordingly, he took her to Saikia Nursing Home for her treatment. However, she died there.

14. PW 12, Rohini Buragoahain, who, on 10.9.99, was serving as the OC of Baihata Police Station, deposed that on 10.9.99, he had received the case diary of Baihata PS Case No.35/99 under Section 304 (B) from his predecessor. After consulting the case diary he found that the investigation of the case had already been completed except collection of post mortem report. He collected the post mortem report and submitted the same to the OC.

15. PW 13, Iyajut Rahman, who, on 29.7.01, was serving as OC of Baihata Police Station, stated that on receipt of the case diary, he found that the investigation was complete and, therefore, after scrutinizing the same, he had submitted the chargesheet on 26.9.01. Ext. 10 is the charge sheet submitted by him, wherein Ext. 10(1) is his signature.

During crossexamination, he stated that chargesheet was submitted alongwith the post mortem report.

16. PW 14, Sasidhar Pachani, who, on 1.4.99, was serving as OC of Baihata Police Station, deposed that on that day, he had received an FIR from PW1 and accordingly, registered a case and started investigation. During investigation, he visited the place of occurrence. He did not find the deceased at her home as she was taken to Saikia Nursing Home for treatment. He examined the witnesses and during investigation, seized a letter written by the deceased which was produced by Rahima Begum. Ext8 is the said seizure list and Ext8 (2) is his signature. He further deposed that the deceased died while she was undergoing treatment in the Nursing Home.

During crossexamination, he stated that PW 3 did not state before him that the accused demanded pressure cooker, deck, godrej etc. as dowry and for non delivery of the same the victim was subjected to assault. PW1 also did not state before him that after 2 1/2 months of the marriage of his sister with the accused, she had reported him that she was assaulted for non payment of cash Rs.30,000/35,000/.

17. After completion of the prosecution witnesses, statement of the accused was recorded under Section 313 CrPC wherein he denied his involvement in the case.

18. Considering the evidence adduced by the prosecution and also on the basis of the materials on record, learned Sessions Judge has convicted and sentenced the accused as, indicated hereinabove. Hence, the present appeal.

19. Heard Mr HRA Choudhury, learned Senior counsel assisted by Ms SK Nargis, learned counsel for the accused appellant. Also heard Mr KA Mazumdar, learned Additional Public Prosecutor, (Addl. PP, for short) Assam.

20. Mr Choudhury, learned Sr. Counsel strenuously urges that this is not a case of dowry death rather the deceased committed suicide because of alleged illicit relation between her husband and her brother's wife. On the day of occurrence, her brother Fajnur Ali assaulted her when she raised objection to the said illicit relation. On the other hand, the appellant himself took her to the Nursing Home and also filed an FIR to that effect, Further, demand of dowry has not been established as the cause of death. Mr Choudhury further submits that prosecution has failed to make out a case for conviction of the appellant under Section 304 (B) IPC, inasmuch as, in order to bring the, case under Section 304 (B) IPC, prosecution must prove that deceased had been subjected to cruelty or harassment by her husband or by the relatives of her husband "soon before her death".

21. In the aforementioned factual background, point for determination in the case is as to whether it is a case of dowry death or the prosecution has been able to make out a case for dowry death for conviction of the appellant under Section 304 (B) IPC. Section 304 (B) IPC being relevant is quoted hereinbelow:

"(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 subsection "dowry" shall have the same meaning as in Section (2) of the dowry prohibition Act, 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."

22. From the above, it has become clear that in order to attract application of Section 304 (B) IPC, the essential ingredients are as follows:

(i) The death of a woman must have been caused by burns or bodily injury or otherwise than under normal circumstances,

(ii) such a death must have been occurred within seven years of marriage,

(iii) soon before her death she was subjected to cruelty or harassment by her husband or relative of her husband,

(iv) such cruelty or harassment must be in connection with the demand of dowry and

(v) such cruelty is shown to have been meted out to the woman soon before her death.

23. Section 113 B of the Evidence Act is also relevant for the case at hand. Both Section 304 B IPC and Section 113 B of the Evidence Act were inserted by the Dowry Prohibition (Amendment) Act 43 of 1986 with a view to combat the increasing menace of dowry deaths. Section 113 B reads as follows:

"113 B. Presumption as to dowry death when the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death.

Explanation for the purpose of this Section "dowry death" shall have the same meaning as in Section 304 B of the Indian Penal Code, 1860."

24. As per the definition of dowry death in Section 304 B IPC and the wording in the presumptive Section 113 B of the Evidence Act, one of the essential ingredients,

amongst others, in both the provisions is that the concerned woman must have been "soon before her death" subjected to cruelty or harassment "for or in connection with the demand of dowry". Presumption under Section 113 B is a presumption of law. On proof of the essentials mentioned therein, it becomes obligatory on the court to raise a presumption that the accused caused the dowry death. The presumptions shall be raised only on proof of the following essentials:

(1) The question before the Court must be whether the accused has committed the dowry death of a woman (this means that the presumption, can be raised only if the accused is being tried for the offence under Section 304 B IPC).

(2) The woman was subjected to cruelty or harassment by her husband or his relatives.

(3) Such cruelty or harassment was for, or in connection with any demand for dowry.

(4) Such cruelty or harassment was soon before her death.

25. A conjoint reading of Section 113 B of the Evidence Act and Section 304 B IPC shows that there must be material to show that soon before her death, the victim was subjected to cruelty or harassment. Prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the "death occurring otherwise than in normal circumstances". Prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case, presumption operates. Evidence in that regard has to be led by prosecution

26. The significant words are "soon before her death". Thus it is necessary for the prosecution to prove that the deceased was subjected to cruelty or harassment by her husband or relatives soon before her death. In the present case, we find that P W1, brother of the deceased, PW 3, sister of the deceased and PW 4, mother of the deceased had stated that after 34 months of the marriage of the deceased, she reported them that the accused demanded cash of Rs.25,000/30,000/ and other articles like TV, deck, pressure cooker etc. whereas the occurrence took place on 1.4.99, i.e. after about 1 year and four months of her marriage. None of the family member, i.e. PWs 1, 3 and 4 had deposed that soon before her death there was demand of dowry from the side of the accused or her other relatives.

27. PWs 2,6 and 9 are the neighbours. None of them have supported the prosecution case as mentioned hereinabove. PW 6 deposed that both the deceased and the accused were maintaining good relation during marital life and during cross-examination, he deposed that one day ahead of the occurrence, deceased had a quarrel with her brother, Fajnur Ali regarding suspected illicit relation between the wife of Fajnur Ali and the accused. Fajnur Ali assaulted the deceased on that day. PW9 also deposed that the marital life of the accused and the deceased was good.

28. PWs 7 and 8 are the sisters of the accused. Both of them stated that due to consumption of poison deceased died and the reason for taking poison was the

illicit relation between the accused and the wife of Fajnur Ali.

29. Defence case is that deceased committed suicide by consuming poison due to alleged illicit relation of her husband with her brother's wife. Her brother Fajnur Ali assaulted her when she raised objection. The appellant himself took her to the hospital and also filed an FIR. Demand of dowry could not be established as the cause of death by the prosecution.

30. From the discussion made above, the following facts emerge:

a) Doctor of the Saikia Nursing Home was not examined, however, report issued by the doctor of the Nursing Home has been accepted.

b) There are two different versions of prosecution witnesses assault and poison.

c) Post mortem report is vague. Doctor could not opine the cause of death. Doctor also did not find any injury on the body of the deceased. One middle prick mark in the right side of the wrist joint just over the left of radial vein was found when inquest done over the dead body by the IO, which seems to be caused due to injection of saline.

d) As per chemical analysis report, test for common poison found negative.

31. In the present case in hand, the prosecution has failed to establish demand of dowry and ill treatment of deceased shortly before the date of occurrence, so as to bring home the offence or Section 304 (B) IPC. The trial Court has also not given any cogent reason for disbelieving the evidence of PWs 7 and 8 (brothers of the accused), who have specifically stated that the marital life of the deceased and the accused was good and there was a quarrel between the deceased and her brother, Fajnur Ali, regarding suspected illicit relation between the wife of Fajnur Ali and the accused and in the suicidal note, the deceased had stated that Fajnur Ali and his wife are solely responsible for her death. The trial Court has proceeded on the basis of the evidence adduced by PWs 1,3 and 4, brother, mother and sister-in-law respectively. The trial Court has not discussed as to why the evidence of PWs 7 and 8 was disbelieved. The trial Court also did not take note of the context of the suicidal note.

32. Mr. KA Mazumdar, learned Addl. PP, Assam, however, supports the judgment of conviction and submits that the learned trial Court after perusal of the evidence adduced by the prosecution as well as the materials on record has come to conclusion that it is a case of dowry death which has been proved beyond all reasonable doubt by the prosecution and, therefore, the same may not be interfered with by this Court.

33. However, in view of the discussion and observation made hereinabove, this Court is of the opinion that demand of dowry or any harassment being the cause of death of the deceased cannot be said to have been established beyond all

reasonable doubt. The impugned judgment is, therefore, not sustainable in law and the same is, accordingly, set aside.

34. In the result, the appeal is allowed. The appellant is set at liberty forthwith, if not wanted in connection with any other case.

35. Send down the Lower Court Records.