

CHHOTAN SAO & ANOTHER
v.
STATE OF BIHAR
(Criminal Appeal No.1613 of 2008)

DECEMBER 17, 2013.

[**RANJANA PRAKASH DESAI AND
J. CHELAMESWAR, JJ.**]

PENAL CODE, 1860:

ss. 304B and 498-A – Conviction by courts below – Held: Conviction u/s 498A calls for no interference, as there is concurrent finding by courts below based on evidence that accused subjected the deceased to cruelty as explained u/s 498A — As regards offence u/s 304-B, prosecution has failed to establish the cause of death – Post mortem report indicates no injuries on the body of deceased – Further, according to FIR, death was caused by compelling the deceased to consume poison, but the doctor who conducted post-mortem was not examined nor was the Forensic Laboratory Report regarding examination of viscera of deceased was produced — Conclusion recorded by courts below that deceased died an unnatural death is not based on any legal material on record – Therefore, surviving appellant acquitted of the offence u/s 304-B.

s. 304-B – Dowry death – Factors to be established to constitute the offence – Explained.

ADMINISTRATION OF CRIMINAL JUSTICE.

Offence u/s 304-B, IPC – Duty of Investigating Officer, Public Prosecutor and the Magistrate – Emphasised.

A MEDICAL JURISPRUDENCE:

Death of victim alleged to have been caused by compelling her to consume poison – Held: In such a case, viscera report is a very vital document more particularly in the absence of any direct evidence regarding the consumption of poison by the deceased — Investigating Officer ought not to have submitted charge sheet without securing it – Penal Code, 1860 – s. 304-B — Investigation.

The appellants, the father-in-law and sister-in-law (wife of husband's brother) of the deceased were prosecuted along with deceased's husband for committing offences u/ss 328, 304B and 498A IPC and ss. 3 and 5 of Dowry Prohibition Act, 1961, on the allegations that they harassed the deceased for dowry and forced her to commit suicide by consuming poison. The trial court convicted the accused of the offences charged and sentenced them to 7 years imprisonment u/s 304B and 2 years imprisonment u/s 498A IPC. The High Court declined to interfere. The husband of the deceased served the sentence and did not appeal. The father-in-law of the deceased died pending appeal.

Allowing the appeal in part, the Court

HELD: 1.1. The conviction of the accused u/s 498A, IPC 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 the deceased to cruelty as explained u/s 498A. [Para 12] [849-F; 850-A]

1.2. As regards conviction u/s 304B IPC, in order to constitute an offence thereunder, the factors that must be established are: (i) there is death of a woman within seven years of her marriage; (ii) the death is a result of any burn or bodily injury or occurs otherwise than under normal circumstances; and (iii) the woman was subjected to cruelty or harassment by her husband or his relative by

way of any demand for or in connection with dowry. [Para 13] [850-F; 851-A-B] A

1.3. In the case on hand, the conclusion recorded by both the courts below that the deceased died an unnatural death is not based on any legal material on record. As seen from the trial court judgment, there are no injuries on the body of the deceased. The prosecution case in this regard has not been established, as the doctor who conducted the post-mortem, was not examined and the Forensic Laboratory Report regarding the examination of viscera of the deceased was not produced. There is no direct evidence regarding consumption of poison. In the circumstances, the surviving accused is acquitted of the offence u/s 304-B, IPC. [Para 14 to 16] [851-C-D; 852-A-C] B C D

Bhupendra v. State of Madhya Pradesh, 2013(3) SCALE 552 – referred to.

2. The Court records its concern 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 u/s 304B IPC. The Investigating Officer who submitted the charge sheet ought not to have done it without securing the viscera report, which becomes a very vital document, and placing it before the court. Equally the public prosecutor failed in his responsibility to guide the investigating officer in that regard. Further, the magistrate 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. [Para 17] [852-D-G] E F G

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A **Case Law Reference :**

2013 (3) SCALE 552 referred to para 14

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B From the Judgment and Order dated 08.09.2006 of the High Court of Judicature at Patna in Criminal Appeal Nos. 303 and 267 of 2003.

C Mohit Kumar Shah, Rituraj Choudhary, Shilpi Shah, Navin Prakash for the Appellants.

Gopal Singh, Prerna Singh for the Respondent.

The Judgment of the Court was delivered by

D **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.

E 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.

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4. The instant appeal is carried by only two accused A
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 B
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 C
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 death¹. It is also stated in the report
that whenever the deceased Babita Devi came to her parental D
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

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1. "It is respectfully submitted that I had married my sister Babita Devi 5/6
years above to Son of Chotan Sao namely Subhash Sao of Village
Gopalpur. After marriage the husband of my sister Subhash Sao, her father
in law Chotan Sao and sister/s elder Gotani used to always trouble my
sister because whenever my sister used to come to her father's house
then she used to always complain about these people and used to say F
that these people threaten her to kill her and her in laws used to tell my
sister to bring money. Some days ago only Rs.3000.00 was given and
one week ago Rs.7000.00 was demanded and upon not giving the said
money these people on 17.11.91, day Sunday, in the morning beat her
with Lathi and forcefully told her to eat poison and she ate poison helplessly.
Suddenly today dated 17.11.91, Yaddu Sah of Gopal Pur went to Gaya and G
informed that your sister had died. Then we people came to Gopalpur
and came to know that she had eaten poison on account of forcing by
these people whose dead body is lying in Gopalpur.

Hence it is requested that necessary action be taken against the accused
persons."

A 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

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examination of the dead body."

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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".

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10. It is argued by the learned counsel for the appellants that the judgment of the High Court² confirming the judgment of the Sessions Court³ 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.

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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.

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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

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2. As mentioned above it is also clear from the evidence on record that Babita died unnatural death in the house of her husband.

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3. Para 22. So what I find that even if the necessary report has not been received the death of deceased Babita Devi has become in such an unnatural and in a mysterious circumstances which would persuade the court to come to the conclusion that death was caused otherwise than in natural circumstances.

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A that the accused husband and his relatives subjected Babita
Devi to cruelty as explained under section 498A IPC.⁴

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

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“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.

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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).

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(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.

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

4. 498A. x x x

Explanation.- For the purpose of this section, “cruelty” means-

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(a) any willful 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

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(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.

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1. That there is a death of a woman within seven years of her marriage; A
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. B

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 are 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 v. State of Madhya Pradesh*, 2013 (3) SCALE 552, 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: C D E

“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.” F G

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A 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.

B 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.

C 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.

D 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.