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Ancharul Haque (Mia) Vs. State

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Court : Kolkata

Decided On : Aug-18-2008

Reported in : 2009(1)CHN172

Judge : Girish Chandra Gupta and ;Kishore Kumar Prasad, JJ.

Acts : Evidence Act - Section 134; ;Indian Penal Code (IPC), 1860 - Sections 302, 304 and 498A; ;Code of Criminal Procedure (CrPC) - Sections 313, 342 and 465

Appeal No. : Cr. Appl. No. 752 of 2006

Appellant : Ancharul Haque (Mia)

Respondent : State

Advocate for Def. : Sushil Kr Mahato and ;Pinaki Bhattacharya, Advs.

Advocate for Pet/Ap. : Aninda Lahiri and ;Hasna Ara Begum, Advs.

Disposition : Appeal dismissed

Judgement :

Kishore Kumar Prasad, J.

1. This appeal is directed against the judgement and order of conviction dated 7th September, 2006 passed by the learned Sessions Judge, Cooch Behar in Sessions Trial No. 8(2)/05 arising out of Sessions Case No. 67/04 by which the

appellant was convicted for the offences punishable under Section 302/498A of IPC. By an order dated 8th September, 2006, the appellant was sentenced to suffer imprisonment for life as also to pay fine of Rs. 2,000/-, in default to suffer further simple imprisonment for a period of six months for the offence punishable under Section 302 of IPC. No separate sentence for the offence punishable under Section 498A of IPC was awarded by the learned Lower Court.

2. The parents of the appellant namely Tachiruddin Mia @ Tozir Mia and Jamila Bibi were also tried in this case for the offence punishable under Section 498A of IPC but the Trial Court finding no tangible evidence against them to his satisfaction had however, acquitted them of the offence under Section 498A of IPC charged against them.

3. Prosecution version in a nut shell is as follows:

Sometime in the middle part of the year of 2001, the deceased Nachima Bibi was given in marriage to the appellant according to Muslim Rites. After marriage, the deceased went to her marital home at village Shibnathpur and started living there with her husband. Sometimes after marriage, the deceased was subjected to physical and mental torture by her husband and parents-in-law coupled with demand for a sum of Rs. 5,000/-. The deceased become pregnant in the meantime. Getting information about torture upon the deceased coupled with demand for sum of Rs. 5,000/-, the mother of the deceased namely Machiran Bibi had been to the marital house of the deceased and managed to bring her at parental house at Tangomari village with an assurance to send her back after a month along with the quantum of demanded amount. The age of pregnancy of the victim at that time was about 8 months. On 31.12.2002 at about 6 p.m., the appellant came to the parental house of the deceased and demanded money from the deceased. The deceased expressed inability of her father to meet the demand. The appellant all on a sudden brought out one knife from his waist and gave a stab on the chest of the deceased and in consequence thereof the deceased became unconscious and fell down on the ground with a bleeding from her wound. A hue and cry was raised. The appellant escaped from the place of occurrence leaving the knife. As the condition of the deceased was serious, she was taken to M.J.N.

Hospital, Cooch Behar, Sadar immediately where the attending doctor after examining the deceased declared her to be brought dead.

4. Machiran Bibi, mother of the deceased, (PW. 1) on 1.1.2003 at about 08.30 hours went to Kotwali P.S., Cooch Behar, Sadar and lodged written complaint (Ext. 5).

5. At Police Station, Kotawali on the basis of the Machiran Bibi's FIR, a case under Section 498A/304 of IPC was registered against the appellant and his parents.

6. After registering the case, the investigating agency took up investigation. Inquest and post-mortem examination were accordingly held on the dead-body of the deceased. In the usual course, after completion of investigation, chargesheet under Section 302/498A of IPC was submitted against the appellant and his parents. The case was committed to the Court of Sessions. In the Court of Sessions, charges under Section 302/498A of IPC against the appellant and charge under Section 498A of IPC against the parents of the appellant were framed. The appellant and his parents pleaded not guilty to the charge framed against them and claimed to be tried.

7. In the Trial Court as many as eleven witnesses were examined. Two out of them namely Nasimuddin Mia (PW. 3) and Bakul Dutta (PW. 10) were tendered for cross-examination; two out of them namely Asit Dutta (PW. 4) and Jalil Mia (PW. 9) were declared hostile; Machiran Bibi (PW.1) and Majidul Haque (PW. 2), the mother and the younger brother of the deceased respectively were examined as witnesses of the fact. Apart from aforesaid witnesses, Alimuddin Mia (PW.5) who had been to the parental house of the deceased after hearing hue and cry; Abder Rahaman (PW. 6) who scribed the complaint as per instruction of PW.1; Dr. Malay Chakraborty (PW. 7) who conducted post-mortem on the deadbody of the deceased on 1.1.03 at 14.45 hours at M.J.N. Hospital Morgue; Kabul Ch. Singha, the then A.S.I. of Kotawali P.S. who performed the inquest on the deadbody of the deceased and the Investigating Officer, Anil Kr. Ghosh (PW. 11) were also examined. Apart from leading oral evidence, the prosecution also tendered and proved large number of exhibits which were marked as Exts. 1- 9 and MAT.Ext. - (I).

8. Though the appellant was examined under Section 313 of the Cr.PC yet there was no adduction of evidence by the appellant.

9. The learned Trial Judge after considering the oral and documentary evidence on record and hearing the learned Counsel for the parties passed the order of conviction and sentences against the appellant as indicated hereinabove.

10. Learned Counsel appearing on behalf of the appellant submitted that except the evidence of PW.1, there is no corroborative evidence on record to prove the charge levelled against the appellant. Learned Counsel further submitted that the oral evidence of PW.1 led by the prosecution is exaggerated and she has deposed before Court in parrot like fashion and she is an interested witness and, therefore on the version of a single witness whose evidence was discarded in respect of the remaining two accused persons that is the parents of the appellant, the learned Trial Court should not have held the appellant guilty. The submission of the learned Counsel was also that there is a duty cast upon the Courts to question the accused properly and fairly while examining him under Section 313 of the Cr.PC so that the case of prosecution is brought home to the accused in clear words which the accused will have to meet and thereby an opportunity is given to the accused to explain any such point. According to learned Counsel, the learned Trial Judge in the instant case has failed to discharge his duty while recording the statement of the appellant under Section 313 of the Cr.PC. The learned Counsel placed reliance on the decision in the case of Parichhat v. State of M.P. : 1972 CriLJ322 . Learned Counsel also placed reliance on the decision in the case of Rabindra Kr. Dey v. State of Orissa : 1977 CriLJ173 , in support of his contention that before a witness can be declared hostile and the party examining the witness is allowed to cross-examine him, there must be some material to show that the witness is not speaking the truth or has exhibited an element of hostility to the party for whom he is deposing. Merely because a witness in an unguarded moment speaks the truth which may not suit the prosecution or which may be favourable to the accused, the discretion to allow the party concerned to cross-examine its own witnesses cannot be allowed. In order to ascertain the intention of the witness or his conduct, the Judge concerned may look into the statements made by witness before the 10 or the previous authorities to find out as to whether

there is any indication of the witness making a statement inconsistent on a most material point with one of which he gave before the previous authorities.

11. Per contra the learned Counsel appearing for the State-respondent supported the impugned judgment. It was urged that in view of the clear evidence of the eye-witness namely PW. 1 coupled with the testimony of medical evidence, no case has been made out for this Court to interfere with the impugned judgment. Learned Counsel further contended that the relationship is not a factor to effect the credibility of a witness and conviction can be sustained on the testimony of solitary witness. Learned Counsel for the State placed reliance on the two decisions of the Hon'ble Apex Court in the case of Salim Sahab v. State of U.P. 2007 (1) SCC (Cri) 425 and Mahendra Singh v. State of M.P., 2007(3) SCC (Cri) 583, in support of his contention.

12. We have given our anxious and thoughtful consideration to the respective contentions of the learned Counsel for the parties. We have perused the various exhibits tendered and proved by the prosecution to substantiate its case and the impugned judgment.

13. PW. 2, Majidul Hoque is the younger brother of the deceased. We cannot pursuade ourselves to accept the testimony of PW.2, who claims himself to be an eye-witness. The claim of PW. 2 to the effect that he along with his elder sister (deceased) and his mother (PW.1) were at their verandah at the fateful time of stabbing upon the deceased has been clearly falsified by the testimony of his mother, PW.l, who during the course of cross-examination has distinctly admitted that 'I was the only person when the incident of stabbing took place upon my daughter'. -Thus according to the testimony of PW. 1, Majidul Haque (PW.2) had not seen the incident of stabbing.

14. PW. 4, Asit Dutta though turned hostile but he deposed that the deceased died at her parental house. According to him, PW. 1 used to work at his house as a maid servant and on the date of incident the appellant talked over a telephone with his wife (deceased) in his house. He admitted his two signatures (Exts. 1 & 2) on the seizure list but in the later part of his cross-examination he stated that he only put his signatures on two papers as per instruction of police.

15. PW. 5, Alimuddin Mia is a witness to the inquest. His evidence goes to show that he did not find the deceased at her parental house when he came there on hearing hue and cry.

16. PW.6, Abder Rahaman is the neighbour of PW. 1 and he only scribed the complaint (Ext. 5) as per instruction of PW. 1 when PW. 1 came to his house along with her husband.

17. PW.7 Dr. Malay Chakraborty is the Autopsy Surgeon who conducted post-mortem on the deadbody of the deceased at 14.45 hours on 1.1.03 at hospital morgue that is to say within less than 24 hours of the death of the deceased. He deposed that the vertical wound had penetrated the whole chest. He further deposed that 32 weeks female dead fetus was found in the womb of the deceased and the injury could have been inflicted by knife like MAT Ext. I which the IO (PW. 11) had seized from the place of occurrence under seizure list (Ext. 2/1).

18. PW. 8 is the then ASI of Kotawali P.S. who had performed the inquest (Ext. 3/1) over the deadbody of the deceased on 1.1.03 at about 11.00 hours in the verandah of the emergency department of MJN Hospital, Cooch Behar in presence of witnesses wherein he noted about the brief history of the preliminary enquiry as follows:

The brief history on enquiry revealed that the marriage of the victim took place 15 months back from the date of incident. The victim was subjected to torture physically and mentally by her husband Ansarul coupled with demand for a sum of rupess five thousand. At the time of death the deceased was at her parent's house and was directed by her husband to go back to her matrimonial home within 3/4 days along with the money. It is guessed that the accused suspected on the character of his wife resulted he stabbed her wife with a deadly weapon.

19. PW. 9, Jalil Mia though declared hostile but in his evidence he however admitted that 'Reaching my house I heard that a sound coming from the house of Nachima Bibi. Entering into the house I found Nachima Bibi lying of the verandah and blood coming out from her chest'.

20. PW. 10, Bakul Dutta was merely tendered.

21. PW. 11, Anil Kr. Ghosh is the Investigating Officer. In course of investigation, he visited the place of occurrence, prepared sketch of the P.O. with index, seized blood stained knife with wooden handle, one red chaddar and blood-stained earth, examined the witnesses and arrested the appellant on 2.1.03. He also sent incriminating articles to FSL and collected the FSL report (Ext.9). The report goes to show that the knife/dagger contained blood but the origin of the blood on the same could not be determined. After completion of investigation, he submitted chargesheet before Court.

22. The crucial question to be answered is as to whether the evidence of PW.1, Machiran Bibi, mother of the deceased inspires confidence and if the answer is in the affirmative then whether it is sufficient to uphold the conviction.

23. It is now a well-settled law that the conviction can be based on the basis of testimony of a sole witness [See Ramjit Surjya Padvi v. State of Maharashtra 1983 SCC (Cri) 748; Anil Phukan v. State of Assam 1993 SCC (Cri) 810; Seweka v. State of M.P. 2002 SCC (Cri) 940 and Mahendra Singh v. State of M.P. 2007(3) SCC (Cri) 583].

24. PW.1 deposed as follows:

Nachima Bibi is the name of my daughter. She was given in marriage with Ansarul Mia about 3 years ago. After marriage my daughter started residing at her matrimonial home. The father and mother of Ansarul also used to reside in the said house. All of them are present in Court today (identified on dock).

My daughter is no longer alive. She died two years after her marriage. My daughter was done to death due to assault upon her by her husband Ansarul Mia. After the marriage of my daughter I visited the house of her matrimonial home. My daughter used to tell me that she was subjected to torture by her husband and parents-in-law. I met with my daughter 15 days prior to the date of her death. On my last visit my daughter was subjected to torture by the accused persons as they used to make demand of money which we could not fulfil. On the date of incident

my daughter and her husband came to my house and we sat together in the verandah when the husband of my daughter Ansarul demanded Rs. 5,000/- from us. To that my daughter told him that as her father could not pay such an amount she was no longer willing to stay with him. Then her husband Ansarul Mia stabbed her on her chest. My daughter sustained injuries, and we then raised hue and cry. Some neighbouring person rushed to our house and she was taken to MJN Hospital, Cooch Behar. However, on that very day my daughter succumbed to her stab injuries. When the neighbouring person rushed to the P.O. the husband of my daughter Ansarul fled away.

25. Learned Counsel for the appellant contended that the sole testimony of PW. 1 does not inspire confidence and should be rejected by us. We regret that we cannot accede to this contention. After going through her entire deposition carefully, we find that she is wholly reliable witness. In the first instance being the mother of the deceased, we find it extremely difficult to comprehend that she would falsely implicate the appellant and that too on the charges of torture and murder of her daughter carrying about 32 weeks old female fetus in her womb. Secondly, we find that her presence on the place of incident, which is her own house, was very natural. Thirdly, we find her account of the incident, to which we have referred earlier, is in consonance with important probabilities. Fourthly, the appellant is the main culprit who has been implicated by her in the instant crime and we are not prepared to believe that she would have let go the real assailant and falsely implicate the appellant. Apart from these, we find that four circumstances corroborate and lend assurance to her statement:

(a) The FIR in this case was lodged promptly. The incident of murder took place on 31.12.2002 after 6 p.m. and the FIR was lodged next morning at 08.30 hours at Kotawali P.S. which is situated at a distance of about six kilometres from the place of incident. The appellant is named in the FIR as the assailant of the deceased.

(b) The evidence of PW. 1 was corroborated by the post-mortem report conducted within less than 24 hours of the death of the deceased which was proved by Dr. Malay Chakraborty (PW. 7) wherein the deceased was found to have suffered the following ante-mortem injury:

11/2 inch sharp cut penetrating wound vertically placed 1 cm left to the mid line on the front of the chest wall 2 inch below sternal north. A further perusal of the post-mortem report as also the evidence of the Autopsy Surgeon shows that the aforesaid vertical wound had penetrated the whole chest; that 32 weeks old female dead fetus was found in the womb and that injury could have been inflicted by knife like Material Ext. 1.(c) The recovery of blood stained knife from the place of occurrence and its seizure by the I.O. from the spot.

(d) There was motive for the appellant to resort to torture upon the deceased as also to inflict stab injury upon her.

26. We find that the evidence of PW. 1 inspires implicit confidence and by itself is sufficient for the conviction of the appellant. The time honored dictum is incorporated in Section 134 of the Evidence Act. This section reads thus :- Number of witnesses.

27. No particular number of witnesses shall in any case be required for the proof of any fact.

28. It is the quality of the evidence adduced and not the number of witnesses examined. As mentioned earlier, the evidence of PW.l, Machiran Bibi is of an unimpeachable quality and we place reliance on it.

29. Besides some minor wear and tear in the evidence of PW. 1, learned Counsel for the appellant could not point out to us any material infirmity in her evidence which could persuade us to hold to the contrary. Discrepancy which does not go to the root of the matter and shake the basic version of the witness, therefore, cannot be annexed for undue importance, more so when all important 'probabilities-factor' echoes in favour of the version narrated by the witness. Hence, we find the contention of the learned Counsel for the appellant that the testimony of PW.l does not inspire confidence to be without substance and we accordingly reject it.

30. The plea relating to interested witness is a regular feature in almost every criminal Trial. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations

against an innocent person. The ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon was repelled by the Apex Court as early as in Dalip Singh v. State of Punjab : [1954]1SCR145 , in which surprise was expressed over the impression which prevailed in the minds of the members of the Bar that relatives were not independent witness. Speaking through Vivian Bose, J it was observed : (AIR p. 366, para 25).

25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eye-witnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in - 'Rameshwar v. State of Rajasthan' : 1952 CriLJ547 . We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of Counsel.

31. Again in Masalti v. State of U.P. : [1964]8SCR133 , Hon'ble Apex Court observed : (AIR pp. 209 -10, para 14):

But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses...

The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.

32. To the same effect are the decisions in State of Punjab v. Jagir Singh : 1973 CriLJ1589 ; Lehna v. State of Haryana : [2002]1SCR377 ; Gangadhar Behera v. State of Orissa : 2003 CriLJ41 and Salim Sahab v. State of M.P. 2007(1) SCC(Cri) 425. So the plea regarding relationship witness is without substance.

33. The plea regarding principle of 'falsus in uno falsus in omnibus' advanced by the learned Counsel for the appellant is also not tenable. Even if major portion of the evidence is found to be deficient, in case resdue is sufficient to prove the guilty of an accused, his conviction can be maintained. It is the duty of the Court to separate grain from chaff. Where chaff can be separated from grain, it would be open to the Court to convict an accused notwithstanding the fact that the evidence has been found to be deficient or to be not wholly credible. Falsity of material particular would not ruin it from the beginning to end. The maxim 'falsus in uno falsus in omnibus' has no application in India and the witness or witnesses cannot be branded as liar/liars. The maxim 'falsus in uno falsus omnibus' has not received general acceptance nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. All that it amounts to is that in such cases testimony may be disregarded and not that it must be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called 'a mandatory rule of evidence' (See Nisar Ali v. State of U.P. : 1957 CriLJ550). It is always open to a Court to differentiate accused who had been acquitted from those who were convicted where there are a number of accused persons. The doctrine is a dangerous one specially in India for if a whole body of the testimony were to be rejected, because witness was evidently speaking on untruth in some respect, it is to be feared that administration of criminal justice would come to a dead-stop. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the Court considers the same to be insufficient for placing reliance on the testimony of a witness, it does not necessarily follow as a matter of law that it must be disregarded in all respects as well. The evidence has to be shifted with care.

34. Also, there is no rule of law that if the Court acquits the co-accused on the evidence of a witness finding it to be open to some doubt, any other accused against whom there is evidence about his involvement in the crime based on the remaining credible part of the evidence of that witness, should also be acquitted. In this connection, a reference may be made to the decisions of the Hon'ble Apex Court in the case of Swaram Singh v. State of Punjab reported in 2001 SCC (Cri) 190B and in the case of Komal v. State of U.P. reported in 2002 SCC (Cri) 1600-D

: : AIR 2002 SC3057 .

35. The mere fact that benefit of doubt was given to those accused against whom the prosecution evidence is insufficient and thereby fail to prove its case to the hilt, that does not mean that other accused persons against whom there is sufficient material to establish the prosecution case should also be given such benefit of doubt. In this connection, a reference may be made to the two decisions of the Hon'ble Apex Court in the case reported in 2003 SCC(Cri) 1840-F and : 2003 CriLJ41 .

36. In the present case the parents of the appellant were given benefit of doubt with regard to their participation in the act of torture meted to the deceased and for want of tangible evidence to the satisfaction of the learned Trial Court, they were acquitted from the charge under Section 498A of IPC.

37. For the reasons aforesaid, the submission advanced by the learned Counsel for the appellant in this regard is also without substance and we accordingly reject it.

38. So far as the contention of the learned Counsel to the effect that the Trial Judge has failed to discharge his mandatory duty while recording the statement of appellant under Section 313 Cr.PC, we find some substance in it. We have carefully gone through the statement recorded under Section 313 Cr.PC by the learned Trial Judge and having done so we see though the learned Trial Judge had put material questions to the appellant affording him opportunity to explain the circumstances alleged against him, but he failed to put any question regarding the medical evidence. Omission to put any question regarding the testimony of the Autopsy Surgeon in our opinion could only amount to an irregularity which is curable under Section 465 of the Cr.PC particularly when the appellant having full knowledge about the testimony of the Autopsy Surgeon given during the course of examination-in-chief had totally declined to cross-examine him as also when the learned Trial Court put question to the appellant whether he wants to adduce evidence in support of his defence and in reply to the said question, the appellant stated as follows :- 'No'. In such circumstances, the aforesaid irregularity has not occasioned injustice nor it has caused any prejudice to the appellant. In this

connection, a reference may be made in the case of Ramshankar Singh v. State of W.B. : AIR 1962 SC1239 , where the Apex Court held that there may be error or omission in complying with Section 342 of the Cr.PC (corresponding to new Section 313 of the Cr.PC) correctly but that not vitiates the Trial unless injustice is shown to have resulted therefrom.

39. Having regard to the facts that the deceased was subjected to torture by the appellant for failure of the deceased parents' to fulfill his demand for a sum of Rs. 5,000/- and ultimately on the fateful date that is on 31.12.2002 in the evening, the appellant had committed an indiscriminate assault with deadly weapon like knife on the helpless deceased and caused vertical wound penetrating the whole chest which resulted into instantaneous death of the victim including her 32 weeks old female fetus would show that he had acted in a most cruel and unusual manner. We are of the clear view that in the facts and circumstances of the case, the acts committed by the appellant would clearly attract the offences punishable under Section 302/498A of IPC and nothing less than that. Hence, he has been rightly convicted by the learned Trial Judge for the offences punishable under Section 302/498A of IPC.

40. Therefore, having given anxious consideration to the entire matter in issue, we are of the clear view that the impugned judgment and order of conviction and sentences passed by the learned Trial Judge warrant no interference in the appeal.

41. In the result, the appeal filed by the appellant is dismissed. The impugned judgment and order of conviction and sentences passed by the learned Trial Court are affirmed.

42. The appellant is in jail and he is directed to serve out the remainder part of his sentences as awarded by the learned Trial Court.'

43. Lower Court Records with a copy of this judgment to go down forthwith to the learned Sessions Judge, Cooch Behar for information and necessary action. Urgent xerox certified copy of this judgment, if applied for, be supplied to the learned Counsel for the parties upon compliance of all formalities.

Girish Chandra Gupta, J.

I agree.

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