State Vs. Kamlesh Kumar and anr.

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Court : Delhi

Decided On : Dec-07-2010

Judge : Anil Kumar. ; S.L.Bhayana Jj.

Acts : Indian Penal Code (IPC) - Sections 498A/302/34, 302; Limitation Act - Section 5; Code of Criminal Procedure (CrPC) - Section 313

Appeal No. : Crl. M.A. No. 14096/2010 AND Crl. LP No. 304/2010

Appellant : State

Respondent : Kamlesh Kumar and anr.

Advocate for Pet/Ap. : Mr. Jaideep Malik, ,Adv.

Judgement :
This is an application by the appellant/applicant seeking condonation of delay in filing the petition for leave to appeal on the ground that the impugned judgment was pronounced on 28th January, 2010 and considerable time was taken in procuring the certified copy of the judgment.

The applicant has given the details as to who has considered the file to decide whether a petition for leave to appeal is to be filed or not. Crl. LP No. 304/2010 Page 1 of 15 The applicant has relied on Collector of Land Acquisition v. Katiji, (1987) 2 SCC 107 and State of Nagaland v. Lipok Ao, 2005 (3) SCC 752 holding that sufficient cause should be considered with pragmatism in justice oriented approach rather than a technical defection of sufficient causes for explaining every

days delay having regard to considerable delay of procedural red tape in the decision making process of the government, certain amount of latitude is permissible and should be given. The applicant has contended that the State Government is the impersonal machinery working through its officers or servants-hence it cannot be put on the same footing as an individual.

The petitioner/applicant, in the circumstances, has contended that there is sufficient cause for condoning the delay of 102 days in filing the petition for leave to appeal.

Considering the averments made in the application, it is apparent that the petitioner has been able to make out sufficient cause for condonation of delay in filing the petition for leave to appeal. Consequently, the application under Section 5 of the Limitation Act, seeking condonation of delay in filing the petition for leave to appeal is allowed and delay is condoned.

The petitioner has sought leave to appeal against the order dated 28th January, 2010 passed by the Sessions Court in Sessions Case No. 108/2008 titled as State v. Kamlesh Kumar and Avdesh arising out of FIR 207/2006 under Section 498A/302/34 of IPC, at P.S. Kapashera acquitting the accused persons on all charges.

The case of the prosecution is that Priyanka, was admitted in Safdarjung hospital by her husband Kamlesh, while she was unconscious, on 31st May 2006. On receipt of information from the hospital to this effect at 9:20 pm police reached there and it transpired that Priyanka and Kamlesh were married only last year, however Priyanka was not in a position to make any statements. On 1st June 2006 crime team had come to inspect the spot and photographs were taken. It was on 3rd June 2006 that information was received from the hospital that Priyanka had died and DD No. 17 B was recorded in this regard.

Since the death of Priyanka had occurred in suspicious circumstances, and during the second year of marriage itself, information was given to the SDM, who recorded statement of Surinder, father of deceased, who was called and came to Delhi on 6th June 2006. He alleged harassment, cruelty and demands of dowry at

the hands of husband Kamlesh. He also stated that after marriage a Crl. LP No. 304/2010 Page 3 of 15 buffalo and a gold chain was given when demanded and he raised suspicion for the death of his daughter Priyanka, on accused Kamlesh as well as the brother of Kamlesh. Directions to register an FIR were given by the SDM on 6th June 2006. The site plan of the place of incidence was prepared vide Ex. PW15/A.

It is also the case of the prosecution that post mortem on the dead body of Priyanka was conducted on 7th June 2006 and doctor gave the cause of death, being shock due to hypoxic encephalopathy produced by ante-mortem constriction of neck by ligature and gave the time of death to be about three days.

As per charge sheet, the FIR in view of post mortem report was registered u/s 498A and 304B of IPC and accused Kamlesh was arrested on 8th June 2006. After recording of statement of witnesses, accused Avdesh Singh was also interrogated on 10th June 2006, who made a disclosure statement admitting to having committed the murder of Priyanka and Section 302 of IPC was also added in the FIR against accused Avdesh Singh. Subsequently at his instance a key and a handkerchief used while throttling the deceased was also recovered. On the basis of such averments the learned sessions judge framed charges on 14th December 2006, against accused Kamlesh u/s 498 A IPC for subjecting her to cruelty in order to get unlawful Crl. LP No. 304/2010 Page 4 of 15 demands of dowry fulfilled and a charge u/s 302 IPC was framed against accused Avdesh Singh for causing murder of Priyanka on 29th May 2006 at an unknown time at house No. 840, Near Appu Ghar, Kapashera, Delhi.

The Trial Court has concluded that the death of Mrs. Priyanka was clearly on account of homicide and not suicide, relying on the deposition of PW-13 Dr. Yogesh Tyagi. He has categorically stated in his post mortem report Ex. PW13/A that there were two ante mortem injuries in the shape of contusion over left thenar region of palm 5x5 cm. and faint ligature narks in the form of scabbed abrasion present in front of the neck, starting from mid line front where the mark was 2.5 cm broad and 7 cm below chin and cm above supra sterna notch. From there it goes over to both angle of mandible. Beyond that it is not present. Over right side of the

neck, it is 2.5 cm wide and 3.5 cm below right angle of the mandible where it just disappears few cm. Back. Total length of the ligature was 14 cm. and it is absent over back of the neck for a distance of 18 cm. The cause of death as deposed by him is due to hypoxic encephalopathy produced by ante mortem constriction of neck by ligature.

As for the allegations made against the accused Kamlesh u/s 498 IPC the Trial court held that they weren't successfully proved by the prosecution. The main witnesses on whose testimony reliance has been Crl. LP No. 304/2010 Page 5 of 15 placed by the prosecution are PW-14, PW-5 and PW-8, which are fraught with glaring inconsistencies.

The father of deceased, PW-14 Surinder Prakash is the one on whose statement the FIR had been registered u/s 498A/304 B. PW-14 had deposed about the alleged dowry demands made by the accused's father. As per his deposition Priyanka was married with Kamlesh on 22nd May 2005 and an exorbitant amount was demanded by the father of Kamlesh, however, on intervention of family members the amount was reduced to 31,051 which was duly paid in cash. Also further demands of a gold idol of Hanumanji, a gold chain and a buffalo were made. Even though a gold idol of Hanumanji weighing 5 gms. was given, the father of deceased could not make good on the demand for the gold chain and the buffalo. Henceforth PW-14 had informed his son Sanjay, PW-5 to pay the amount towards gold chain. Thereafter the buffalo too was send to the village Toria, where the parents of the accused Kamlesh used to reside.

Trial court however observed that these demands were specifically made by the father of the accused and not the accused himself and also that PW-14 had not deposed any instances of the deceased being harassed or pressurized for meeting the dowry demands. It is further observed that he wasn't even aware of the exact amount paid by PW-5 to the in-laws of the deceased. As per the deposition of PW-5 Sanjay Kumar, the brother of the deceased he had stated that the accused was responsible for the death of his sister since on many occasions he used to consume liquor and quarrel with his sister, which he used to tell him not to do. He further deposed that he paid a total sum of Rs. 4000/-, i.e 2000/- each on

two occasions. However in his entire deposition there is no mention of any demands of the gold chain and buffalo or that his father, PW-14 had asked him to pay cash to the accused nor does he specifically state that his sister was beaten by the accused Kamlesh or was harassed or tortured in any manner which negates the basic requirement of treating with cruelty.

PW-8 is the only witness who has made an assertion as to the demands for dowry being made by the accused Kamlesh and accused Avdesh and the beatings given to the deceased in view of the demands. However his deposition is contrary to the depositions of PW-14 and PW- 5 as neither have stated any instances of beatings being given to the deceased nor have they imputed any demands of dowry being made by the accused persons. Also even though PW-8 had leveled allegations of demanding dowry against accused Avdesh, in his cross-examination he has stated that prior to the incident he did not know of Avdesh, nor had he seen or met him. This clearly goes to show that the averments made by PW-8 are not true and the Trial court has rightly not relied on it in Crl. LP No. 304/2010 Page 7 of 15 view of the various inconsistencies and contradictions in the statements of witnesses. In the circumstances the inferences of trial Court cannot be held to be un-sustainable or perverse nor any such perversity has been pointed out from the Trial Court record which will entail grant of leave to the petitioner against the impugned judgment of acquittal of the respondents.

The Trial court has also observed that the aspect of motive attributed to the accused Avdesh, of being involved in an illicit relationship with the deceased has not been successfully proved by the prosecution. The only witness supporting the case of the prosecution is PW-5 who has deposed that he was having the impression that accused Avdesh had illicit relations with Priyanka and had even told her husband Kamlesh about the same. However he had not paid any heed to it nor did he take any measures to prevent Avdesh from having access to the house. Even PW-12 Daya Chand the landlord of the premises where the accused Kamlesh and Priyanka were residing has not supported the case of the prosecution with respect to the motive, stating that he had never suspected any illicit relations between Priyanka and Avdesh. In the circumstances no such cogent evidence has been pointed out by the Learned Public prosecutor on the basis of

which it can be inferred about the illicit relations between the deceased and accused Avdesh nor any evidence has been pointed out which has not been considered by the Trial Court.

The Trial Court has disbelieved that accused Avdesh visited the place of occurrence on the day of incident as PW-12 categorically deposed that none of his family members had seen the accused entering the premises. From the cross examination of the said witness and other material on record it cannot be held that the deposition of said witness Pw 12 is unreliable. Also the version of the incident told by the lady tenant to PW-12, asserting the presence of the accused Avdesh cannot be believed as she has not been examined and on this account PW-12 is only a hearsay witness and due reliance cannot be given to his deposition.

The trial court has rightly disbelieved the photocopy of the attendance sheet, Ex PW9/B which reflects that from 26th May 2006 itself, accused Avdesh was absenting himself from duty, as it cannot be connected to the incident which occurred on 30th May 2006. The accused has made a statement under Section 313 of Cr.P.C that he had taken leave as he was ill and had gone to Loni and had come back only on hearing about the death of Priyanka. When he attended the cremation he was arrested by the police. The link of leave taken on 26th May 2006 and the incident of 30th May 2006 seems to be too far- fetched and the benefit of doubt has been given to the accused by the Trial court. This is settled law that in reversing the finding of acquittal the High Court has to keep in view the fact that the presumption of innocence is still available in favor of the accused which is rather fortified and strengthened by the order of acquittal passed in his favor. Even if on fresh scrutiny and reappraisal of the evidence and perusal of the material on record, if the High Court is of the opinion that another view is possible or which can be reasonably taken, then the view which favors the accused should be adopted and the view taken by the trial Court which had an advantage of looking at the demeanour of witnesses and observing their conduct in the Court is not to be substituted by another view which may be reasonably possible in the opinion of the High Court. Reliance for this can be placed on 2009(1) JCC 482=AIR 2009 SC 1242, Prem Kanwar v. State of Rajasthan; 2008 (3) JCC 1806, Syed Peda Aowlia v. the Public Prosecutor, High Court of A.P, Hyderabad; Bhagwan Singh and Ors

v. State of Madhya Pradesh, 2002 (2) Supreme 567; AIR 1973 SC 2622 Shivaji Sababrao Babade & Anr v. State of Maharashtra; Ramesh Babu Lal Doshi v. State of Gujarat,(1996) 4 Supreme 167; Jaswant Singh v. State of Haryana, 2000 (1) JCC (SC) 140. The Courts have held that the golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favorable to the accused should be adopted. The paramount consideration of the Court is to ensure that Crl. LP No. 304/2010 Page 10 of 15 miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent.

The High Court has the power to reconsider the whole issue, reappraise the evidence and come to its own conclusion and findings in place of the findings recorded by the trial Court, if the findings are against the evidence or record or unsustainable or perverse. However, before reversing the finding of acquittal the High Court must consider each ground on which the order of acquittal is based and should record its own reasons for not accepting those grounds and not subscribing to the view of the trial Court that the accused is entitled to acquittal. The trial Court has also disbelieved the recovery of the keys of the room of the deceased from the drain at the instance of the accused Avdesh as none of the witnesses have specifically stated the place at which the recovery was made. Now nala (drain) being an open and accessible place does not inspire any confidence as to the recovery of the keys. Also none of the witnesses have deposed that Avdesh too had the keys to the room in his possession and it's has not been disputed before the Trial court that he used to reside in altogether different premises. On perusal of deposition of these witnesses from the Trial Court record which was called by this Court and perused it cannot be Crl. LP No. 304/2010 Page 11 of 15 held that the findings of the Trial Court are un-sustainable and not based on evidence or has been arrived at by ignoring any evidence. As per the deposition of PW-12, on the day of the incident at about 6:00 pm the accused Kamlesh had opened the locked door with a key in his possession and in his presence had given water and food to Priyanka and taken her to the doctor. It has been noted by the Trial Court that the lock which was opened by accused

Kamlesh on the day of the incident has not been identified by PW-12 in whose presence the lock was opened. The recovery of the key of the lock from the nala (drain) has not been proved. The fact that clearly draws further suspicion is that Priyanka had ample opportunity to name Avdesh on being found by her husband subsequent to opening the door, however she does nothing of the sort and remains silent on as to who has throttled her. Also the Ex.PW8/E is dated 8th June 2006 while it is the case of the prosecution itself that accused Avdesh was arrested on 10th June 2006. Hence the recoveries described in Ex. PW8/E were rightly not believed by the Trial Court.

The recovery of the handkerchief which was allegedly used to strangle the deceased, from the house of accused Avdesh has also not been relied on as it was never shown to the doctor for his opinion as to whether it could be used for the purpose of throttling nor was it sent to the FSL for seeking opinion or collecting DNA of deceased Priyanka. Crl. LP No. 304/2010 Page 12 of 15 Furthermore the seal on the pullanda of handkerchief was also found to be a damaged one when it was firstly opened during the testimony of PW-8 in the Court. Thus the trial court was of the opinion that none of the circumstances were proved beyond reasonable doubt against the accused. The learned public prosecutor has not been able to raise any such ground which will entail any interference by this Court in the facts and circumstances.

On perusal of the Trial Court record and the evidence of all the witnesses, it is apparent that there is no allegation against the accused Kamlesh for demanding dowry or even treating his wife, the deceased with cruelty. PW-14 has merely stated one occasion on which Priyanka had told him on the phone that the accused Kamlesh was demanding dowry. However he does not seem able to tell the exact date on which this demand was made nor has he stated that he took any action on account of this demand nor asked his daughter to come to Bihar or himself make a trip to Delhi nor does he even talk to the family members of Kamlesh. This does not seem to be the normal conduct of the father from whose daughter dowry is demanded and she is allegedly harassed. Other than this there are no allegations of any demands being made by the accused or that Priyanka was perturbed because of any such demands made by the accused either prior to

the marriage or with respect to the demands that remained unfulfilled. Rather as per PW-14 himself the accused and the deceased shared a very normal Crl. LP No. 304/2010 Page 13 of 15 husband and wife relationship. The inconsistencies in the depositions of PW-14, PW-5 and PW-8 are also too glaring to be ignored and the trial court has rightly disbelieved them. This court finds no perversity or illegality in the finding of the Trial Court.

On perusal of the testimonies of the other witnesses also, this Court is unable to find any cogent evidence against the accused Avdesh on the basis of which it can be inferred that he had committed the murder of Priyanka. The recoveries of the key and the handkerchief have been carefully scrutinized and have not been sufficient in imputing guilt against the respondent Avdesh. The trial court too has observed that so far as the charge u/s 302 of IPC is concerned, the evidence against the accused is circumstantial in nature and hence requires to form a link that would beyond all reasonable doubt lead to the inference of guilt, which the prosecution was unsuccessful in proving.

In the circumstances, the petitioner has failed to make out a case of cruelty and murder against the accused persons. Thus, there are no grounds to grant leave to appeal to the petitioner and the decision of the Trial Court dated 28th January, 2010 cannot be faulted. Crl. LP No. 304/2010 Page 14 of 15 The learned counsel for the State Mr. Malik is also unable to point out any illegality or perversity in the said order, which would require any interference by this Court.

The petition for leave to appeal, in the facts and circumstances, is without any merit and therefore, the prayer of the petitioner to grant leave is declined and the petition is dismissed.