

CRIMINAL APPEAL

**Present: The Hon'ble Mr. Justice Ashim Kumar Banerjee
And
The Hon'ble Mr. Justice Kishore Kumar Prasad**

C.R.A. No.178 of 2000

Judgment on: March 31, 2010.

**Ashim Khatua
-VS-
State of West Bengal**

POINTS:

LIFE SENTENCE -Suspicion of extramarital relationship of victim by accused- Accused killed victim causing injuries on her head, chest and face-Accused is in custody for ten years-Sentenced the accused for life whether proper- Indian Penal Code, 1860 Ss.498-A and 302, 304 Part-I.

FACTS:

The victim was married to the accused in 1994. She gave birth to a female child in or about 1996. In 1997, accused started torturing the victim on one pretext or the other. He was suspicious about alleged extra marital relationship victim had with his brother. On this issue there had been constant feud between the couple followed by torture by the husband, ultimately victim died an unnatural death. As per the complaint lodged by the victim's father, the accused killed the victim with the help of door stick (Khil), a blunt substance causing injuries on her head, chest and face. As per the medical evidence head injury was the cause of the death.

The accused pleaded innocence and faced trial. Being aggrieved by the judgment and order of the learned Additional Sessions Judge the appellant preferred the instant appeal.

HELD:

When settled principles of law are applied, the conviction of the appellant under Section 302 of Indian Penal Code cannot be sustained. In the considered view of the Court, the appellant ought to have been convicted under Section 304 Part-I of Indian Penal Code instead of under Section 302 of Indian Penal Code. The Court accordingly converts the conviction and sentence of the appellant from Section 302 of Indian Penal Code to one under C of Indian Penal Code for the offence punishable under Section 304 Part-I of Indian Penal Code. Para-26

The appellant is in custody since January 2000 i.e. more than ten years. The aforesaid custodial sentence of more than ten years would meet the ends of justice for the offence punishable under Section 304 Part-I of Indian Penal Code. Para-27

The conviction of the appellant under Section 498-A of Indian Penal Code has been rightly recorded by the learned Trial Judge. In view of the modified sentence being awarded by the Court for major offence under Section 304 Part-I of Indian Penal Code instead of Section 302 of Indian Penal Code, no separate sentence against the appellant need be awarded for the lesser offence punishable under Section 498-A of Indian Penal Code. Para-28

CASES CITED:

- i) Joseph –VS- State of Kerala All India Reporter, 1994, Supreme Court, Page-34

- ii) Bangaru Venkata Rao –VS- State of Andhra Pradesh 2008, Volume-XI, Supreme Court Cases, Page-707

- iii) D. Sailu –VS- State of Andhra Pradesh All India Reporter, 2008, Supreme Court, Page-505

iv) Baban Bandu Patil –VS- State of Maharashtra Judgment Today, 2009, Volume-XIII, Supreme Court, Page-662

v) Indrasan –VS- State of Uttar Pradesh All India Reporter, 2009, Supreme Court, Page-2760

vi) Gurmukh Singh –VS- State of Haryana 2010, Criminal Law Journal, Page-450

vii) Naimuddin –VS- State of West Bengal 2010, Criminal Law Journal, Page-392

For the Appellant : Mr. D.C. Kabir
Mr. Rajib Kumar Acharya

For the State : Mr. Ashok Mukherjee

THE COURT:

1. The unfortunate victim Smt. Sulekha was married to the accused Asim Khatua in 1994. She gave birth to a female child in or about 1996. There was no problem for about two years after the birth of the child. In 1997, Asim started torturing Sulekha on one pretext or the other. He was suspicious about alleged extra marital relationship Sulekha had with his brother Arun. On this issue there had been constant feud between the couple followed by torture by the husband, ultimately Sulekha died an unnatural death. As per the complaint lodged by Sulekha's father Mohan Chandra Saha, PW-7, Ashim killed Sulekha with the help of door stick (Khil), a blunt substance injuring Sulekha on her head, chest and face. As per the medical evidence head injury was the cause of the death.

2. As per the complaint, Sulekha, during her life time, used to complain about torture committed by Asim on the allegation of illicit relationship she had with Arun. The family members tried their best to settle the dispute between the couple but in vain. Even the in-laws used to make complaint

about Asim for the torture. On July 25, 1994 at about 12:30 p.m. Samar Khatua, the elder brother of Asim visited the house of Mohan and informed that Sulekha had died. Mohan being accompanied by Bhanupada Saha, Mantu Bishoyee and others visited her in-law's place and found Sulekha lying dead on the floor of her bedroom. Her entire body from head to leg was covered with the printed cotton saree which she was wearing and Ashim was sitting next to the deadbody. On inquiry Asim admitted that last night he had quarrel and thereafter he struck Sulekha with a wooden bar used for closing door on the head, face and chest and as a result Sulekha died.

3. Asim was arrested and chargesheeted under Section 498-A and 302 of the Indian Penal Code. He pleaded innocence and faced trial.

4. PW-1, the mother of the accused was declared hostile as she did not disclose how Sulekha had died. According to her, she was not at home when the incident took place. She visited her daughter's house at Haldia and returned after four days. According to her, Asim used to look after the Pan shop belonging to his father.

5. PW-2 was the sister in-law of the accused Asim. According to her she was a post occurrence witness. On the next day at about 11/11:30 a.m. she saw the dead body of Sulekha lying on the floor of her room. She deposed that Asim was a drunkard. She heard altercation. Asim informed her about the death of Sulekha. She however did not make any query with regard to the cause of death. She also deposed that the wooden bar was seized by the police. She identified her signature on the seizure list. She was declared hostile. She denied having stated to the police that Asim had informed her that he had killed Sulekha. PW-5 Bhanupada Saha was the cousin brother of Mohan.

He accompanied Mohan to Sulekha's place. He also deposed that Sulekha was subjected to torture both physically and mentally by Asim on suspicion as to the extra marital relationship she had with his brother Arun. Sulekha reported the incident of torture to him. He also accompanied Mohan earlier for settling the dispute but in vain. When they went there they found Sulekha lying dead. On inquiry Ashim told them that Sulekha committed suicide by taking poison and thereafter he confessed his guilt by saying that on the last night he caused injury to her by wooden stick as a result she had died. PW-7, the complainant Mohan, father of Sulekha, corroborated what had been stated by Bhanunupada (PW-5). He deposed that Asim was by the side of the dead body and confessed that he caused injury by a wooden stick on her head as well as other parts of the body. PW-8 Montu Bisai also accompanied Mohan and Bhanupada. He corroborated what Mohan and Bhanu had deposed. He also deposed that earlier he tried to pacify Asim but still Asim continued to assault Sulekha. PW-9 Jugal Pal also accompanied Mohan. He also corroborated Mohan, Bhanupada and Montu.

6. PW-10, the doctor who did post mortem deposed, "*head injury which I found, is sufficient to cause death*". He deposed, "*the above injuries may be caused by hit by a wooden stick like Khil (wooden bar required for closing the door)*". He also proved the post mortem report tendered in evidence.

7. PW-11 was the police officer who recorded the FIR, PW-12 accompanied the dead body to the doctor for post mortem. PW-13 was the investigating officer.

8. The learned Additional Sessions Judge, Tamluk held him guilty of the offence and sentenced him imprisonment for life as also a fine of Rs.10,000/- and in default to suffer one year imprisonment under Section 302 of the Indian Penal Code. He was also imposed a sentence of rigorous imprisonment for three years coupled with a fine of Rs.1000/- and in default another rigorous imprisonment for two months under Section 498-A of the Indian Penal Code. Both punishments were directed to run concurrently.

9. Being aggrieved by the judgment and order of the learned Additional Sessions Judge the appellant preferred the instant appeal.

10. Mr. D.C. Kabir, learned counsel appearing for the appellant contended that there was no eyewitness to the incident and no independent witness came forward to prove the alleged torture or alleged involvement of the accused in the matter of homicidal death of the victim. According to Mr. Kabir PW-5, 7, 8 and 9 are all interested witnesses. PW-7 was the father of the victim whereas PW-8 was his nephew. PW-7 was the local counsellor and PW-9 was known to PW-7. Hence, they were all interested witnesses whose evidence should be considered with great caution. All four witnesses were from the paternal side of the victim. Hence, prosecution failed to prove that the accused was involved in incident. According to him, the appellant/accused was entitled to acquittal as the learned Judge erroneously convicted him and sentenced him for life.

11. As and by way of alternative submission, Mr. Kabir contended that neither there was any actual intention to kill the victim nor there was any motive as proved by the prosecution. According to him, the prosecution miserably failed to prove that the appellant/accused was liable to be convicted

for committing a crime under Section 302 as there was no proof to show that the victim was murdered and it was a case of culpable homicide committed by the appellant with intention to cause bodily injury knowing it that such injury would cause death to the victim or that such injury was sufficient in ordinary course to cause death or he knew that such injury in all probability would cause death or such bodily injury was likely to cause death. According to Mr. Kabir it could at best be under Section 304, Part-II of the Indian Penal Code.

12. While elaborating such alternative submission Mr. Kabir contended that on the spur of the moment the accused might have hit the victim with the blunt substance like wooden bar without any intention to cause death to her. According to him, it would thus come within five exceptions under Section 300 in view of the fact that even if the prosecution story was believed it would, at best, be culpable homicide not amounting to murder as the accused whilst deprived of the power of control on the spur of the moment caused death to the victim.

13. Mr. Kabir contended that if this Court was not satisfied with his first limb of his argument this Court should, to meet the ends of justice, modify the conviction under Section 304, Part-II and reduce the punishment.

14. To support his contention Mr. Kabir cited the following decisions : `

i) All India Reporter, 1994, Supreme Court, Page-34 (Joseph –VS- State of Kerala)

ii) 2008, Volume-XI, Supreme Court Cases, Page-707 (Bangaru Venkata Rao –VS- State of Andhra Pradesh)

iii) All India Reporter, 2008, Supreme Court, Page-505 (D. Sailu –VS- State of Andhra Pradesh)

iv) Judgment Today, 2009, Volume-XIII, Supreme Court, Page-662 (Baban Bandu Patil –VS- State of Maharashtra)

v) All India Reporter, 2009, Supreme Court, Page-2760 (Indrasan –VS- State of Uttar Pradesh)

vi) 2010, Criminal Law Journal, Page-450 (Gurmukh Singh –VS- State of Haryana)

vii) 2010, Criminal Law Journal, Page-392 (Naimuddin –VS- State of West Bengal)

15. Four witnesses corroborated each other on the extra judicial confession made by the accused before them. PW-7 and 8 might be related to each other. However PW-5 was a local counsellor and PW-9 was a villager having no relation with PW-7 or the victim. Hence, they cannot be said to be interested witnesses. Moreover from the tenor of the deposition it appears that they were trustworthy as they could not be shaken in cross-examination. Hence, it was proved that the death was caused to the victim by the injury caused by the accused with the help of the wooden bar, as would appear from the medical evidence appearing from the post mortem report backed up by the deposition of the post mortem doctor being PW-10. Hence, the learned Judge was right in holding the accused guilty of the offence and we do not find any scope of interference on that score.

16. We are, however, inclined to reconsider whether the conviction could be modified under Section 304 Part-II instead of Section 302.

17. To decide the issue, let us first consider the precedents cited at the Bar.

18. In the case of Naimuddin (Supra), the doctor opined that the injury was caused by a hard and blunt substance and was sufficient to cause death in ordinary course. The Apex Court, considering such medical evidence observed that when bricks were thrown on the vital parts of the body of the deceased, an old man of seventy eight years, knowledge to commit murder can definitely be attributed to the appellant and the conviction was modified to the extent that instead of 302 the appellant was convicted under Section 304, Part-II and the sentence was consequently reduced.

19. In the case of Indrasan (Supra) the Supreme Court was impressed by the submission of the appellant that the weapon used for alleged attack was not a dangerous one and was used as a single blow to the victim. The Apex Court altered the conviction from Section 302 to Section 304, Part-I.

20. In the case of Gurmukh Singh (Supra) the Apex Court observed that the occurrence had taken place on the spur of the moment and the accused inflicted a single lathi blow. The conviction was modified to Section 304 Part-II.

21. The case of D. Sailu (Supra) relates to a sudden fight which implied mutual provocation and blows from either side. The Apex Court altered the conviction from Section 302 to Section 304, Part-I.

22. In the case of Joseph (Supra), the accused used a lathi to injure the victim which was in ordinary course of the nature could not cause death. Considering such fact the Apex Court modified the conviction to Section 304 Part-II.

23. The case of Baban Bandu Patil (Supra) was also a sudden fight where conviction was modified to Section 304 part-I.

24. In the case of Bangaru Venkata Rao (Supra), considering the evidence that blows were given with brutality causing death of two persons, the conviction was modified to Section 304 part-I.

25. Following the decisions of the Apex Court referred to above and from the analysis of the evidence, we are of the view that accused was a paranoid. He was suspecting his wife having extra marital relationship with his brother. On this issue there had been quarrel in the past. The accused was also taking alcohol as a routine. He was not in his sense and due to anger he hit his wife with the help of the wooden bar which was there in the room for the purpose of closing the door. The incident occurred at the night. Through the night as well as the day he was sitting next to the victim's body, possibly repenting what he had done. In our view, it was an act on the spur of the moment and could not be termed as a pre-planned murder committed by the accused to be liable for conviction under Section 302 of the Indian Penal Code. The accused caused multiple injuries as we find from the post mortem report. He, in his extra judicial confession, also admitted to have assaulted the victim on her face, chest and head. The last one was fatal.

26. When we apply the settled principles of law which has been enumerated in the aforementioned cases, the conviction of the appellant under Section 302 of Indian Penal Code cannot be sustained. In our considered view, the appellant ought to have been convicted under Section 304 Part-I of Indian Penal Code instead of under Section 302 of Indian Penal Code. We accordingly convert the conviction and sentence of the appellant from Section 302 of Indian Penal Code to one under

Section 304 Part-I of Indian Penal Code for the offence punishable under Section 304 Part-I of Indian Penal Code.

27. The appellant is in custody since January 2000 i.e. more than ten years. The aforesaid custodial sentence of more than ten years would meet the ends of justice for the offence punishable under Section 304 Part-I of Indian Penal Code.

28. In our opinion, the conviction of the appellant under Section 498-A of Indian Penal Code has been rightly recorded by the learned Trial Judge. In view of the modified sentence being awarded by us for major offence under Section 304 Part-I of Indian Penal Code instead of Section 302 of Indian Penal Code, we think that no separate sentence against the appellant need be awarded for the lesser offence punishable under Section 498-A of Indian Penal Code. Accordingly, the separate sentence as awarded by the learned Trial Judge for the offence punishable under Section 498-A of Indian Penal Code is set aside.

29. The appeal is allowed to the aforesaid extent.

30. Let the appellant be set at liberty at once if his detention is not required in connection with any other case.

31. Learned Trial Court is directed to issue revised jail warrant in respect of this appellant in accordance with Rules.

32. Let a copy of this judgment be sent to the Superintendent, Correctional Home where the appellant is now suffering his sentence for information and necessary action.

33. Let a copy of this judgment along with Lower Court Records be sent down at once to the learned Trial Court for necessary action.

34. Urgent xerox certified copy will be given to the parties, if applied for.

Kishore Kumar Prasad, J:

35. I agree.

[ASHIM KUMAR BANERJEE,J.]

[KISHORE KUMAR PRASAD,J.]