

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
(APPELLATE SIDE)**

Present:

The Hon'ble Justice Rai Chattopadhyay

C.R.A No. 296 of 2012

Nitya Gopal Pal & Anr.

Vs.

The State of West Bengal

For the Appellants

: Mr. Apalak Basu,
: Ms. Snehal Seth.

For the State

: Mr. Pravas Bhattacharyya,
: Mr. Mirza Firoj Ahmed Begg.

Hearing concluded on: 20/03/2023

Judgment on: 06/09/2023

Rai Chattopadhyay, J.

1. Appellants are the two convicted persons in Sessions Trial No. 03/October/2006, in the Court of Additional District & Sessions Judge, Fast Track Court at Bolpur, Birbhum. The appellants have been convicted under Sections 498A and 304B of the IPC. The impugned judgment of conviction and order of sentence of the Trial Court is dated April 30, 2012, which is challenged in this appeal.
2. In this appeal this Court is to adjudicate firstly, the propriety of the impugned judgment of the Trial Court as above in so far as whether the trial Court has duly and appropriately invoked provisions under Section

304B of the IPC, along with Section 498A thereof to find the appellants as convicts, that whether the trial Court has duly invoked and applied presumption under Section 113B of the Cr.P.C, that whether the trial Court has duly and appropriately scrutinized the evidence on record to come to the finding as regards proof of the basic ingredients of offence under Section 304B as well as 498A of the IPC and applied the presumption under Section 113B of the Evidence Act, to find, through the said evidence on record, that the guilt of the present appellants have been proved by the prosecution beyond scope of all reasonable doubts.

- 3.** Simultaneous death of the victim Nilima Paul and her minor daughter was the reason for the de facto complainant to set the criminal justice system in motion to seek redressal. The de facto complainant namely, Bhubaneswar Ghosh lodged FIR on June 19, 2002. He reported death of the above persons, to have been caused on June 16, 2002. It was reported that the victim Nilima Paul had let her minor daughter to consume poison and also consumed the same herself. That has caused death of both the victims. The death occurs at victim's matrimonial house. The informant and others could see the dead bodies after reaching to the place of occurrence upon obtaining information about the deaths.
- 4.** The informant has alleged in the FIR that the victim Nilima Paul was subjected to severe physical and mental harassment by the present appellants and the other accused persons, exonerated in the trial. The appellant no.1 is the husband of the victim Nilima Paul and father of the deceased minor whereas accused no.2 is the brother of accused no. 1. It has been reported that three years prior to the date of the FIR, the victim Nilima Paul was married to the appellant no. 1 Nitya Gopal Pal. The minor, since deceased, was the child from this marriage tie. Allegedly the appellants and other two accused persons, who are wife of appellant no.2

and her brother, perpetrated continuous and grave physical and mental torture upon deceased Nilima Paul, on demand of dowry. The informant says that at the time of marriage he being the elder brother and guardian of the deceased upon death of their father, paid valuable marital gifts as dowry, on demand of the appellant no.1 and his family. Allegedly the appellants did not cease to desire more dowry and thus caused torture upon the victim in order to pressurise her to bring money from her paternal home. The informant also said that on June 9, 2002 the victim was forced to come back to her paternal house due to the unbearable torture. At this point, according to the informant, he was made to know about the facts of torture and demand of dowry by all the accused persons including the present appellants. The informant says further that an amount of Rs.10,000/- was collected by him and with the same the victim was again sent back to her matrimonial home.

5. The next important incident is of the death of the two persons as mentioned above on June 16, 2002.
6. Mr. Apalak Basu, appearing for the appellants has formulated certain points in defence of his clients. He says that the trial Court, before applying presumption under Section 113B of the Evidence Act as against the facts of this case, should in accordance with law, have been come to the conclusion regarding existence of a case, at least *prima facie*, on the basis of the evidence on record, so far as offence under Sections 304B or 498A of the IPC, is concerned. On this score according to Mr. Basu the trial Court has erred and failed. Mr. Basu has thoroughly gone into the evidence on record in an endeavour to show that the evidence on record is far from being eligible to be believed as true. According to him there are glaring and unavoidable discrepancies, which have flawed the prosecution's case in this trial. Another limb of his argument is that the trend of examination of all the four accused persons by the Court under

Section 313 of the Cr.P.C is only identical. He says that in such view of the fact that the present appellants have not been subjected to offer explanation as regards any different incriminating circumstances, the verdict against the appellants could not have been reasonably different from the verdict as regards the other two accused persons in the trial, who have been subsequently acquitted by the Court.

- 7.** He finally submits that charges against the present appellants under Sections 498A and 304B IPC have not been proved at all. Hence, the findings of the trial Court is erroneous and liable to be set aside.
- 8.** State has obviously contradicted grounds and contentions of the appellants in this case. It has been submitted that admittedly the victim died within a period of seven years from the date of her marriage with the appellant no.1. The grievousness of the incident and the reasonable basis regarding the truthfulness of the prosecution's case is said to be evident from the fact that the victim before her death has ensured death of her minor child by administering poison to her. Thus, according to the Ld. Public Prosecutor, the evidence of the prosecution has qualified against the touch stone of reasonableness and has satisfied the standard of proof, i.e, beyond all reasonable doubt. He says that the witnesses who have supported prosecution's evidence are consistent, coherent and truthful. They have withstood the cross-examination leaving no doubt as regards the truthfulness of their ocular evidence. According to him, those are sufficient to bring home the charges against the present appellants. Thus, he says, that the trial Court is only just and proper to find guilt of the appellants in this trial and award them adequate sentence. He has urged that no interference as to the same may be made by this appeal Court.

9. There are certain facts, which the prosecution as well as defence, have unanimously accepted in this trial, to be true. That is, the fact of marriage of appellant no.1 with the victim Nilima and victim's death within a period of three years of marriage, have not been seriously contested and thus accepted by defence. Birth of the child (now deceased) in the wedlock of appellant no. 1 Nitya Gopal Pal and deceased Nilima is also undisputed and not denied. Same is with regard to the fact that since after marriage Nilima used to live at her matrimonial house, along with appellant no.1 and that the minor was born there and was under care of her parents.
10. The prosecution in this trial has examined 13 witnesses including police personnel. We may categorized the witnesses in this trial, in the following manner:-

	P.W Nos.	
Witnesses supporting prosecution's Case	P.W 1	De facto Complainant.
	P.W 3 and P.W 4	Family members of the deceased person.
	P.W 12	Scribe of FIR.
Hostile witnesses and witnesses not supporting prosecution's case	P.W 2	Villagers and witness to the inquest.
	P.W 8	
	P.W 9	Priest in the marriage.
	P.W 10	Barbar in the marriage.

Doctor	P.W 5	Autopsy Surgeon.
Police Personnel	P.W 6 and P.W 7	Constable who carried the dead body to morgue through the dead body challan.
	P.W 11	Investigating Officer who initiated investigation.
	P.W 13	Investigating Officer who submitted charge sheet.

11. After having a cursory view about the witnesses cited by the prosecution in the trial, let us also have a cursory view to the findings of the trial Court leading to the conviction of the present appellants.
12. The trial Court noted that the date, time and place of death of Nilima Paul and her minor girl child have been apparent from the evidence of P.W 1, P.W 2, P.W 8 and P.W 13. The Court also noted that the defence has not countered the substantive evidence of these witnesses, by even suggesting that the death of the said persons were due to any other reason than by consuming poison. On this, the trial Court has come to the finding that the mother and the child died unnatural death on June 19, 2002.
13. Thereafter, the Court has examined evidence of doctor, i.e, P.W 5. P.W 5 is the autopsy surgeon, who has proved autopsy report in trial. This witness has identified the post-mortem report prepared by him (exhibit 4 and exhibit 6). His final opinion (exhibit 5 and exhibit 7) is based on the report of FSL (exhibit 8 and exhibit 9). According to the evidence of this witness the death of the said two persons were due to “Phosphomidon”

poisoning. After this, the Court noted that unless compelled by extreme circumstances a mother would not proceed to eliminate her child from the world. The Court also noted that the two deceased persons, at the relevant point of time were residing with the appellant no.1 and the incident happened at the said residence only. This prompted the Court to shift the onus upon the present appellant, to explain the circumstances leading to the death of the two persons, which in turn it holds that the present appellant have not been able to explain in the trial.

- 14.** To come to the finding that the allegations of cruelty and dowry demand have been duly fortified in the trial, the trial Court has heavily relied on the evidence of P.W 1, P.W 3 and P.W 4. The trial Court noted that being the near relatives of the deceased, these witnesses were having knowledge of the facts incidental and leading to the unfortunate, untimely and unnatural death of the two victims. That, there are no doubts or suspicion as regards the truthfulness of the version of these witnesses. After thorough scrutiny of the entire evidence on record, the trial Court has found that offence under Section 304B and 498A of the IPC, have been duly proved in this trial by the prosecution, beyond all reasonable doubts.
- 15.** Accordingly the trial Court has invoked provisions under Section 113B of the Evidence Act, 1872 and raises the presumption against the appellants regarding causing death of the victim for dowry. Precisely the above grounds and reasons led the trial Court to find guilt of the appellant under Sections 304B and 498A and to direct for adequate sentence.
- 16.** As it is discussed earlier that according to the appellants, it is only after when the trial Court could find the strong *prima facie* materials of the

offence alleged, to be available on record, on the basis of the evidence on record, it could invoke the presumption under Section 113B of the Evidence Act, to be applicable in this case. Mr. Basu by referring to certain circumstances revealing from the evidence on record has suggested that the evidence of the prosecution is not free from suspicion. He says, that being so, such evidence could not have been relied on by the trial Court to find that the evidence as alleged has been proved, even *prima facie*, on the basis of which the Court could have successfully and lawfully invoked the presumption as stated above.

- 17.** The discrepancies in the evidence on record as has been pointed out on behalf of the defence/appellants *inter alia* are that though there are allegations of torture by the appellants upon the victim since after marriage, neither the victim nor the de facto complainant or anyone else has ever reported any such incident, anywhere. It has been pointed out that appellant no.2 was living in a separate mess from that of the appellant no. 1, i.e, the husband of the victim. It has also been mentioned that the de facto complainant has been non-specific and vague in deposing as to when and how he collected Rs. 10,000/- and exactly how the same was transmitted to the present appellants as alleged. It has further been indicated that there has not been any eye witnesses of the alleged incident of torture perpetrated by the appellants upon the victim.
- 18.** The menace of increasing deaths of married women due to demands of dowry, has prompted the legislature to incorporate the following provisions in the respective statutes, in order to provide punishment for the offence of dowry death.

Vide Amendment Act 46, 1983 (with effect from 25.12.1983) Chapter XXA was introduced in the Indian Penal Code, which

incorporated Section 498A. The provision addressed the offence of the husband or relative of the husband of a woman subjecting her to cruelty.

Vide Amendment Act, 43, 1986 (with effect from 19.11.1986) Section 304B was introduced to the Indian Penal Code, whereas Section 113B was introduced to the Indian Evidence Act, 1872, vide the same Amendment Act.

19. An exception to the cardinal principal of the criminal law, of presumption of innocence, is found in reverse onus clauses for certain classes of offences. A reverse onus clause shifts onto the accused the burden of proving his/her innocence and creating reasonable doubt regarding his guilt. Such provisions are generally imposed in cases where it is particularly difficult for the prosecution to gather direct incriminating evidence, and the offence in question has such far-reaching and heinous consequences that the State's responsibility to protect innocent citizens outweighs the necessity of the strict presumption of innocence. We can note the modality as to how the reverse onus would operate, in the judgment of *Noor Aga vs. State of Punjab*, reported in (2008) 16 SCC 417, where the Hon'ble Supreme Court holds that even with reverse onus provisions, the initial burden is on the prosecution to prove specific 'foundational facts'. Only then does the burden shift on to the accused to bring forward evidence of his innocence.

20. The following are such certain sets of crime, for which the statute has provided for a reverse burden of proof. Section 304B of the Indian Penal Code provides as follows:-

"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.

Explanation. For the purposes of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 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."

21. Section 113B of the Indian Evidence Act is as follows:-

***"113B. 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 Indian Penal Code."

22. According to Section 304B (1) any woman if dies within seven years of her marriage due to burn or injury or for any other reason otherwise than under normal circumstances, her death may be termed as "dowry death" under the said provisions of law. Before that, however, in accordance with the provisions as above, the prosecution has to show that soon before her death she was subjected to cruelty or harassment by her husband or his relatives, in connection with any demand of dowry.

23. It is a mandate under Section 113B of the Indian Evidence Act, that the prosecution when shows that soon before her death the woman has been subjected to cruelty or harassment for demand of dowry, the Court shall presume that the person at whose instance such cruelty and harassment has been meted out, has caused "death dowry", of the woman in terms of

Section 304B of the Indian Penal Code. This presumption is a device by which the law usually tries to bridge the gulf between two facts, where it is so wide, that it cannot be crossed, with due help of normal rules of evidence.

24. It is a settled law that requirements of proof beyond reasonable doubt in a criminal trial does not stand altered even after introduction of Section 498A or 304B of the IPC or 113B in the Indian Evidence Act. Court's conscience must be satisfied before finding an accused person guilty, when there are no reasonable doubts about the complicity of the accused in respective offences alleged. Thus, to attract the statutory presumption against the present appellants to have committed "dowry death" of the victim, it is incumbent to show that the victim has been subjected by the appellants to cruelty or harassment, soon before her death, for their demand for dowry. By following the Hon'ble Supreme Court in the judgment of *Sher Singh vs. State of Haryana* reported in (2015) 3 SCC 724, it can be stated that Section 304B IPC imposes a reverse burden of proof on the accused if the death of the woman occurs within seven years of the marriage and is caused by burns, bodily injuries or under unnatural/abnormal circumstance given that she was subjected to cruelty or harassment by her husband or in-laws in connection with dowry demands. Also the initial burden of proof on the prosecution to establish ingredients is through 'preponderance of probabilities'.

In the judgment of *Ashok Kumar vs. State of Haryana*, reported in (2010) 12 SCC 350, the Hon'ble Supreme Court has stated that once the initial burden is discharged by the prosecution, what faces the accused is a rebuttable presumption and it is up to the husband and/or the in-laws to lead the defence and prove that the ingredients of Section 304B are not satisfied.

By referring to the judgment of *Pathan Hussain Basha vs. State of A.P.*, reported in (2012) 8 SCC 594, it can be stated that, then it is also for the accused to prove how the death of the deceased did not stem from cruelty or harassment for dowry by the accused persons.

- 25.** According to the appellants the prosecution in this case has not been able to discharge its initial burden as above upon fulfilment of which the Court could have successfully invoked the presumption under Section 113B of the Indian Evidence Act against the present appellants. The perception of the trial Court and its finding has been assailed to be erroneous on this score. It is also said that, cruelty or harassment perpetrated on demand of dowry can also not be found and also that there can be no hint of these facts being brought on record, as having occurred, soon before death of the victim. Thus, according to the appellants, following the provision of the statute as afore stated, prosecution cannot be held to have successfully brought home the charges.
- 26.** At this juncture it is necessary to revisit the evidence on record for once to see the same has met with the criteria as laid down under law. The death occurred on June 19, 2006. According to P.W 1, P.W 3 and P.W 4, who are prime witnesses of the prosecution, the deceased herself had divulged about perpetration of physical and mental torture upon her by the accused persons, including the present appellants. It is her disclosure only to the witnesses as above that the torture was meted out to her on demand of more dowry. P.W 1 has stated about collecting of Rs. 10,000/- from outsiders and having given the same to the deceased for the purpose handing over to the appellants and their family members.
- 27.** The substantive and direct piece of evidence of the witnesses, as above has been barely challenged in the trial. The source of money, said to

have been collected and given to the appellants through the deceased person has been duly explained by P.W 1 in his cross-examination. During cross-examination this witness has also ascertained to have witnessed incident of torture meted out to his sister, while visiting her matrimonial home. The portion of evidence of this witness during cross-examination when he was explaining the source of the money so given, has been challenged on the ground of the same being self-contradictory. This Court is not inclined to accept such submission in view of the fact that the alleged contradictions, if at all, may be termed as minor contradictions. The substantive fact of the money being given, as deposed by the witnesses could not have been made to face any cross-examination, raising any doubt as regards the same. The entire incident of transmission of the money as above happened ten days prior to the date of death of both the victims.

- 28.** Alike P.W 1 the other prime witnesses of the prosecution have also deposed about witnessing torture being meted upon the victim on demand of dowry, on occasions. According to the evidence of P.W 3 in the morning of the fateful day the victim was subjected to physical assault and abuse.
- 29.** Indeed, defence has tried to come up in this trial that regarding monetary transaction to fulfil the dowry demand, there is no supporting document. However mere absence of documentary proof, would not nullify the substantive ocular evidence of the witnesses, if otherwise is found to be truthful and reliable. Thus, the fact of exploiting the “economic opportunity” by the appellants by imposing dowry demand, through wrongful oppression and torture upon the victim, is proved in this trial, to the standard, as it is required.

- 30.** The proximity of time between the alleged ill-treatment and time of death is a relevant factor so far as applicability of Section 304B is concerned and to raise presumption under Section 113B of the Indian Evidence Act and is an essential and necessary evidence for proof of a case of dowry death. As discussed above, in this case the proximity of time between all the relevant factors are proved to satisfy the basic requirements of the afore stated provision of law.
- 31.** On the basis of such direct evidence initially laid down sufficiently to eliminate any shadow of doubt, it is found that presumption under Section 113B of the Indian Evidence Act, can also very well be invoked. Therefore, now the law would require the accused person, to come up with adequate rebutting evidence, to prove their innocence or to set the prosecution evidence at naught. Such statutory duty is grossly unfulfilled by the appellants, in the trial. On the points and aspects as above, the trial Court is found not to have committed any error while delivering the judgment assailed in this appeal. Needless to go through the evidence again for the purpose of re-appreciation after the entire discussion as above for the reason of ascertaining if ingredients of offence under Section 498A of the Indian Penal Code stands against the appellants, or not. So far as the allegation of perpetration of continuous physical and mental torture is concerned, those have already been discussed on the basis of the evidence on record, to have been proved beyond scope of any reasonable doubt. In the considered opinion of this Court, the finding of the trial Court on the point as above also renders any reconsideration thereof or setting aside of the same due to alleged illegality or impropriety, not warranted.
- 32.** Appellants' contention that on the basis of the answers to the same set of questions in their examination under Section 313 of the Cr.P.C, no differential treatment could be made to the two sets to accused persons,

one set having been exonerated from the charges whereas the present appellants having being convicted there upon. The purpose of examination of the accused persons under Section 313 of the Cr.P.C is to afford them opportunity to face the incriminating evidence against each of them. Incriminating evidence against each of the accused persons may or may not be the same. It is incumbent upon the Court to present each of the incriminating evidence distinctively and separately before the individual accused in order to enable them to answer the same.

33. This Court is inclined to hold that, statement of the accused person recorded under Section 313 of the Cr.P.C, is not a substantive piece of evidence. It can be used only for appreciating the evidence led by the prosecution. Regarding the proposition, that on the basis of the similar question put to all the four accused persons, no differential treatment could have been made against the present appellants by convicting them whereas other two accused persons are acquitted, this Court is constrained to find the said argument to be misconceived.

34. The purpose of statement recorded under Section 313 of Cr.P.C, is only for appreciation of the prosecution's evidence. This alone cannot be the basis of formulation of opinion or any decision, by the Court and in this case, it has not been so. Therefore the verdict against each of the accused persons in the case has primarily to depend on the scrutiny and analysis of direct evidence of the witnesses, value of which has to be weighed, taking into consideration, their replies against each incriminating evidence. It would be beneficial to refer to the Hon'ble Supreme Court's decision reported in (2013) 5 SCC 722 [*Raj Kumar Singh vs. State of Rajasthan*], wherein the Hon'ble Court has been pleased to hold that to sustain conviction, prosecution's evidence has to be sufficient. If not, the conviction of an accused cannot be based solely on the inculpatory part of his statement, under Section 313 Cr.P.C. As to

why this cannot be done, has also been held by the Hon'ble Supreme Court, in (2010) 9 SCC 85 [*Dehal Singh vs. State of Himachal Pradesh*] to be the reason that the accused cannot be cross examined, with reference to his statements under Section 313 of the Cr.P.C.

- 35.** Therefore, to look only to what has been asked to an accused, in examination under Section 313 of Cr.P.C, in isolation, without to the manner that how the same has been taken care of, while appreciating a witness, is an erroneous proposition. This Court cannot really repose confidence on the same.
- 36.** The appellants have not however, challenged the legality or correctness of the manner of recording statements under Section 313 of Cr.P.C. Unless it is challenged on the ground of non-compliance of the statutory requirement, there would not have been any other occasion to question that the incriminating circumstances against each of the accused persons were not presented before them individually by the trial Court. In view of such fact this challenge as regards how the Court has dealt with the statements recorded under Section 313 of the Cr.P.C, of the accused persons including the present appellants, appeared to be not sustainable at all.
- 37.** The impugned judgment and sentence of the trial Court dated April 30, 2012, in Sessions Trial No. 03/October/2006, in the Court of Additional District & Sessions Judge, Fast Track Court at Bolpur, Birbhum, appears to be based on appropriate scrutiny on the evidence on record and due appreciation of the settled position of law. Hence, there is no reason for this Court to interfere with the same. Under such circumstances the appeal should fail.
- 38.** Criminal appeal being C.R.A 296 of 2012 is dismissed. The judgment and sentence dated April 30, 2012, in Sessions Trial No.

03/October/2006, in the Court of Additional District & Sessions Judge, Fast Track Court at Bolpur, Birbhum, is upheld. Let a copy of this judgment be immediately sent to the trial Court for immediate implementation of the sentence imposed.

- 39.** Urgent photostat certified copy of this judgment, if applied for, be given to the parties, upon compliance of requisite formalities.

(Rai Chattopadhyay, J.)