

Uttarakhand High Court

Rajesh vs State Of Uttarakhand on 11 January, 2019

Reserved Judgment

Judgment reserved on 20.12.2018

Date of Delivery on 11.01.2019

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Appeal No. 01 of 2015

Rajesh

.....Appellant  
(In jail)

Vs.

State of Uttarakhand

.....Respondent

Mr. Lalit Sharma, Advocate present for the appellant.

Mr. Amit Bhatt, Deputy Advocate General for the State of Uttarakhand.

Coram:Hon'ble Sudhanshu Dhulia, J.

Hon'ble Ravindra Maithani, J.

Per: Ravindra Maithani, J.

This appeal is preferred against the judgment and order dated 19.12.2014 passed by the court of 3rd Additional Sessions Judge, Rudrapur, Udhampur Singh Nagar in Sessions Trial No.215 of 2010, State Vs. Rajesh and others, by which the appellant has been convicted under Section 302 of the India Penal Code, 1860 (hereinafter referred to as "I.P.C.")and sentenced to life imprisonment and a fine of Rs.30,000/-

2. Briefly stated, according to the prosecution, deceased Smt. Rinku was married to the appellant on 15.04.2009, but ever since her marriage deceased Rinku was subjected to cruelty. She was beaten, harassed and taunted for demand of dowry from her parents. The deceased Rinku informed her parents many a times about this treatment. On 03.05.2010, deceased Rinku made a call to her father i.e. the informant Rang Lal and informed him that she is being beaten by her in-laws and they are pressurizing her to bring Rs.50,000/- from her father. Phone was disconnected and again on the same day at 12:00 noon, when informant called his daughter, the phone was picked up by the appellant, who disconnected the phone, but before that, the informant could hear the cries of his daughter from the other side. On the same day, in the afternoon, the informant was told about the death of his daughter Rinku. When the informant reached his daughter's matrimonial house, he found that there were various injuries on the body of the deceased Smt. Rinku. A report of it was given on 03.05.2010 at 7:45 p.m. against Rajesh and four other members of his family. Inquest of the body was prepared. There were various injury marks on the body of the deceased. Postmortem was conducted on 04.05.2010. According to the postmortem report, deceased died of asphyxia due to ante-mortem strangulation. After investigation, chargesheet under Section 498-A, 304-B and 3/4

of Dowry Prohibition Act, 1961 (hereinafter referred to as "D.P. Act") was submitted against the appellant and four other members of his family namely Om Prakash, Jyoti, Mukesh and Smt. Meera Devi, who are father, sister, brother and mother of the appellant respectively.

3. Charges under section 302, 498-A, 304-B I.P.C. and 3/4 D.P. Act were framed against the appellant and others on different dates, to which they denied and claimed trial.

4. Prosecution examined 14 witnesses namely PW1 Rang Lal, PW2 Smt. Sumitra, PW3 Rajan Prasad, PW4 Dr. R.K. Sinha, PW5 Laxman Singh Rautela, PW6 Smt. Chandrawati, PW7 Pawan Kumar, PW8 Krishna Prasad, PW9 Head Constable Puran Singh, PW10 A.S.P. Jagdish Chandra, PW11 Sainthil Akade, PW12 S.I. Lalit Joshi, PW13 S.P. City Ajay Singh and PW14 Constable Lal Singh.

5. Appellant was examined under section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code'). According to the appellant Rajesh, he has been falsely implicated in the case. He has never harassed or tortured the deceased. According to him, the deceased had fallen near the water tap and received some minor injuries, therefore, he had brought her in the courtyard. Learned trial court, after considering the evidence and materials on record, acquitted all the accused, including the appellant, under section 498-A, 304-B I.P.C. and 3/4 D.P. Act and also acquitted all other accused, under Section 302 I.P.C. except the appellant. The learned trial court convicted the appellant under section 302 I.P.C. and sentenced him, as stated hereinbefore. Aggrieved, the instant appeal has been preferred.

6. Heard Mr. Lalit Sharma, learned counsel for the appellant and Mr. Amit Bhatt, learned Deputy Advocate General for the State.

7. Learned counsel for the appellant would argue that all the co-accused of the appellant have been acquitted of all the charges and appellant has also been acquitted of the charges under section 498-A, 304-B I.P.C. and 3/4 D.P. Act, but on the same set of facts, the appellant has been convicted under section 302 I.P.C. According to learned counsel for the appellant, there is no direct evidence against the appellant and even there are no circumstances, which would lead that the appellant has committed the offence punishable under section 302 I.P.C. It is argued that learned court below committed an error in convicting and sentencing the appellant, therefore, impugned judgment and order dated 19.12.2014 deserves to be set aside and the appeal be allowed.

8. PW1 Rang Lal is the informant. In his statement, he has reiterated the content of first information report. According to him, ever since the marriage of deceased Rinku with the appellant Rajesh on 15.04.2009, appellant and his family members harassed and tortured the deceased for Rs.50,000/- as dowry. This was informed by the deceased Rinku to her parents many a time. According to him, on 03.05.2010, the deceased Rinku, informed him that she is being beaten by her in-laws for dowry. Again at about 12:00 noon, he called at the cell-phone of the appellant, but it appeared to him that the cell-phone fell down in some scuffle and he could hear the cries of his daughter deceased Rinku - 'Papa save me.' According to this witness, at about 2:30 p.m. on the same day, he was informed that deceased Rinku died. When he reached her house, he saw that the dead body of deceased Rinku was

laid in the courtyard and there were various marks of injuries on the body

9. PW2 Smt. Sumitra is the mother and PW3 Rajan Prasad is brother of the deceased. They have corroborated the statement of PW1 Rang Lal. In fact PW3 Rajan Prasad exaggerated his statement, which will be looked into at some later stage.

10. PW4 Dr. R.K. Sinha conducted the postmortem. According to this witness, on 04.05.2010, he conducted the postmortem. Death had occurred about 18 to 36 hours prior to that. Cause of death was asphyxia due to ante-mortem strangulation. According to postmortem report, it was conducted at 11:30 a.m. in the morning. According to this witness he noted, interalia, the following ante-mortem injuries:-

"1. Ligature mark transversely around the neck at the same horizontal level passing through the lower border of thyroid cartilage and below it reddish with abraded margin 30 c.m. circumference dark at the posterior margin of neck and grooved and 1.5 c.m. wide lateral aspect of neck except diffuse at anterolateral aspect and midline of the neck where it is 0.5 c.m. wide and contused.

On exploration of the ligature surface the subcutaneous tissue is ecchymosed. Strap muscles injured and congested.

On further exploration the left side of thyroid cartilage fractured at the edges and carotid compression both side seen under the ligature points. The trachea is congested and lumen contains blood mixed froth."

Eyes were closed bilaterally; congested.

Face congested and swollen; upper lip midline swelling present."

11. PW5 Laxman Singh Rautela prepared the inquest report. He has also narrated about the steps taken for sending the body for postmortem.

12. PW6 Smt. Chandrawati, in her cross-examination, has also stated that on a day in the morning at 11:00, when she was at the house of PW1 Rang Lal, Rang Lal received a call on speaker. At that time, this witness also heard that the appellant was asking PW1 Rang Lal to take her daughter back.

13. PW8 Krishna Prasad is also a witness of inquest. This witness along with PW7 Pawan Kumar went at the behest of PW1 to the house of deceased. PW9 Head Constable Puran Singh recorded chick F.I.R. and made entries.

14. PW10 A.S.P. Jagdish Chandra is Investigating Officer. On 04.05.2010 he visited the house of appellant and recovered broken bangles from his bedroom, which according to PW1 Rang Lal belonged to deceased Rinku. A piece of cloth is also said to have been recovered. This witness has proved recovery memo of these articles. PW12 Sub-Inspector Lalit Joshi is also a witness of recovery

of broken bangles belonging to the deceased and a piece of cloth.

15. PW11 Sainthil Akade has taken over the investigation and submitted the chargesheet under sections 498-A and 304-B of I.P.C. against the appellant and others. Subsequent to it, PW13 Ajay Singh continued with investigation and submitted chargesheet against Meera Devi under sections 498-A, 304-B of I.P.C. and 3/4 D.P. Act. This witness has also filed additional chargesheet against the appellant and others under section 3/4 D.P. Act.

16. At the very outset, it is made clear that this is an appeal filed by appellant Rajesh against his conviction and sentenced under section 302 I.P.C., therefore, evidence will be analyzed and looked into to the extent of the role of appellant Rajesh. Appreciation of evidence and burden of proof varies with the charges levelled. In the instant case, if it is 304-B I.P.C., there are certain presumptions, which will be raised against the appellant, but if it is a case of 302 I.P.C., then the prosecution has to prove the charge beyond reasonable doubt.

17. Learned court below has not accepted the allegations of demand of dowry, harassment and torture for the purpose, but convicted the appellant Rajesh under section 302 I.P.C., considering the fact, that his wife deceased Rinku was strangulated; she had marks to that effect on her body; broken bangles were recovered from her room and when questioned at the stage of 313 of the Code, in answer to question no.16, the appellant replied that the deceased Rinku had received some minor injuries at water tap and he had brought her in the courtyard. This statement of the appellant was not believed by the learned court below. Other facts were also considered by the learned court below for recording the conviction under section 302 I.P.C.

18. There cannot be any set of rules or guidelines, which may apply in all cases, under all the circumstances for evaluation of evidence. Evaluation of evidence is a matter, which differs with case to case and even in some cases, it differs from witness to witness.

19. It is not in dispute that the appellant and deceased Rinku were married on 15.04.2009. Rinku died on 03.05.2010 i.e. just after one year of her marriage. According to PW4 Dr. R.K. Sinha, the cause of death was asphyxia due to ante-mortem strangulation. He was cross-examined on various aspects of strangulation. The injuries recorded in the postmortem report, if read together with the statement of PW4 Dr. R.K. Sinha, proves that the deceased Rinku died of asphyxia due to ante-mortem strangulation. There are no reasons to doubt the veracity of the evidence of Dr. R.K. Sinha on this aspect. Now, the question is as to who strangulated deceased Rinku. There is no direct evidence on this. Deceased Rinku was living with her in-laws. When PW1 Rang Lal, her father reached her house, she was lying dead in the courtyard. The best person to tell about the cause of death of deceased Rinku would have been the appellant and his family members, but they have not disclosed anything. In his examination under section 313 of the Code, the appellant has said that the deceased Rinku had fallen near the water tap, and got some minor injuries, therefore, he had brought her in his courtyard. If a person falls down on the ground, he cannot die of asphyxia. The injuries sustained by the deceased, particularly the marks on the neck are distinct, and point out to strangulation. The instant case is of asphyxia due to strangulation. In any case, the deceased Rinku died, otherwise than of normal circumstances, that too just after one year of her marriage.

20. The informant and his family members are not much educated. PW2 Smt. Sumitra cannot even give her signatures, she instead gives her thumb impression. It shows that she is illiterate. PW1 Rang Lal, at one stage, of his cross-examination, has stated that in the year 1982, he was a loader. PW6 Smt. Chandrawati, in her statement, states that PW1 Rang Lal works in a dairy. Demand of dowry is stated to be of Rs.50,000/-, for which, according to PW1 Rang Lal and PW2 Smt. Sumitra, the deceased Rinku suffered in her in-law's house. In this context, the evidence pleaded by the prosecution needs to be evaluated.

21. PW1 Rang Lal in his statement has categorically said that from the day one of the marriage, the demand of dowry was made and for this reason, deceased Rinku was harassed and taunted. According to him, at the instance of the middleman of the marriage he, in fact, had paid Rs.10,000/- as dowry, at the time of marriage. This has been revealed by this witness in his cross-examination. The statement of this witness is very natural. In his cross examination, he has also admitted that whenever deceased fell ill, she was treated by her in-laws and they took care of her. These both statements are to be read together. If deceased was taken care of by the in-laws at some point of time, it does not mean that she was never harassed. PW2 Smt. Sumitra has also corroborated the statement of PW1 Rang Lal regarding demand of dowry by appellant Rajesh. She has also stated that at the time of marriage, Rs.50,000/- was demanded as dowry. PW2 Sumitra, in paragraph 4, bottom lines of her statement (in cross- examination) states that she cannot say as to why appellant demanded Rs.50,000/-. The demand was made not to her, but to the deceased. In reply to a question as to whether any demand, other than Rs.50,000/-, was ever made to the deceased, she replied that she cannot say about it, because deceased Rinku did not disclose her about any other demand, of the appellant.

22. PW3 Rajan Prasad has also stated about the demand of dowry by the appellant and this witness has exaggerated about this demand, but it does not demolish the prosecution case. The exaggeration may be considered as a statement given by the brother, out of anxiety about the cause of death of his sister. It does not falsify the statement of PW1 Rang Lal and PW2 Smt. Sumitra. The evidence of PW1 Rang Lal, PW2 Smt. Sumitra and PW3 Rajan Prasad inspires confidence that the appellant persistently demanded dowry and for this reason, deceased Rinku was harassed by the appellant. The marriage was solemnized on 15.04.2009 and just after one year of her marriage, deceased Rinku died, otherwise than of normal circumstances. It has also been proved by the prosecution that soon before her death, deceased Rinku was subjected to harassment by the appellant, in connection with demand of dowry of Rs.50,000/- . She died of asphyxia due to strangulation. This death is 'dowry death' punishable under section 304-B I.P.C. In such a situation under section 113-B of Indian Evidence Act, it shall be presumed that the appellant had caused the 'dowry death' of deceased Rinku. In so far as charge under section 302 I.P.C. is concerned, there is neither any direct evidence, nor any chain of circumstances, which may lead to the conclusion that it is the appellant and appellant alone, who has committed the offence, punishable under section 302 I.P.C. Therefore, this Court is of the view that the prosecution has been able to prove charges under section 304-B, 498-A I.P.C and 4 D.P. Act against the appellant, but the prosecution has not been able to prove the charge under section 302 I.P.C.

23. The question is whether in a criminal appeal, this Court can alter the finding of acquittal into that of conviction. The powers of the High Court under section 386 of the Code are wide. It does not restrict this Court from changing a finding of acquittal to that of conviction. Unlike section 401, the powers under section 386 of the Code are not restrictive. This question stands answered by a Full Bench decision of the Allahabad High Court in the case of Zamir Qasim and others Vs. Emperor AIR (31) 1944 Allahabad 137. This view has been followed by a Division Bench of this High Court in the case of Indra Singh Vs. State of U.P., 2011(1) U.D., 206, in which, interalia, it was observed that:

"14. In the present case, the learned counsel for the appellant would argue that admittedly no appeal has been filed against acquittal by the State or even by the complainant, for that matter. Since there is no such appeal against acquittal, on what would the Court be altering a sentence of acquittal to that of a conviction! This argument, however, is quite misplaced, as it confuses between the power of an authority or a person to file an appeal with the power of the High Court to give a particular finding or sentence. The contention that the omission to file an appeal against acquittal totally immunises an order of acquittal from any attack from the appellate court, even when the case is before the High Court in appeal seems rather far fetched. This Court in its appellate powers has got powers to "alter the findings". The only question is, whether it has got powers to "alter the findings of acquittal" to that of conviction. The answer to this question has been explained by the majority judgment of Chief Justice Iqbal Ahamed in the Full Bench judgment, referred above. Broadly, it has been said that the correct inference, which has to be drawn here is that there is no such restriction for changing a "finding of acquittal" to that of "conviction", under Section 386, as it is there in Section 401. In case, the Legislature in its intention wanted to limit the powers of the appellate court as well, as they intended to do in case of the revisional court, they would have very well put a similar restrictions in Section 386 Cr.P.C., as well. The majority judgment of Full Bench of Allahabad (supra) says as follows:

"...As the power to "alter the finding" is not circumscribed by any words of limitation and as there is nothing in cl. (b) of S. 423\* to prohibit the appellate Court from going behind a finding of acquittal, the answer to the question just noted must, in my opinion, be in the affirmative. The Legislature has, by sub-s. (4) of S. 439\*\*, debarred the High Court from converting "a finding of acquittal into one of conviction." If the Legislature had intended to impose a similar restriction on the power of an appellate Court while dealing with an appeal from conviction, nothing would have been easier than to enact a similar provision in sub-cl. (2) of cl. (b) of S. 423. The absence of such a provision in that sub-clause is, to my mind, proof positive of the fact that, subject to the other provisions of the Code, the Legislature did intend to empower an appellate Court to convert a finding of acquittal into one of conviction even though the finding of acquittal had not been appealed against."

24. The powers of the appellate court under section 386 of the Code are subjected to only two restrictions, which are given in the provisos. Under the first proviso, the sentence cannot be

enhanced unless the accused has been given an opportunity to showcause. The second proviso restricts the powers of the appellate court not to inflict the greater punishment for the offence which in its opinion accused has committed. The two provisos are as under:

"Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement: Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal."

\* To be read as Section 386 of the present Cr.P.C.

\*\* To be read as Section 401 of present Cr.P.C.

25. Consequently, we find no bar in converting a finding of acquittal to that of conviction.

26. In view of the foregoing discussion, this Court is of the view that the trial court committed an error in acquitting the appellant under section 304-B, 498-A of I.P.C and 3/4 of the Dowry Prohibition Act, 1961 and convicting him under section 302 I.P.C. Therefore, the impugned judgment and order dated 19.12.2014 is set aside. Appellant Rajesh is acquitted of charge punishable under section 302 I.P.C. But he is convicted under section 304-B, 498-A I.P.C and 4 of the Dowry Prohibition Act, 1961. Appellant Rajesh is sentenced to ten years rigorous imprisonment under section 304-B I.P.C., two years rigorous imprisonment and a fine of Rs.10,000/- under section 498-A I.P.C. and one year rigorous imprisonment and a fine of Rs.5000/- under section 4 of the Dowry Prohibition Act, 1961. In default of payment of fine, appellant shall further undergo simple imprisonment for a period of two months. All the sentences shall run concurrently.

27. With the above modification in the conviction and sentence, this appeal is disposed of. Appellant is in jail. Let a copy of this judgment be sent to the trial court to make the appellant Rajesh serve out the sentence, modified by this Court.

28. Lower Court Record be sent back.

(Ravindra Maithani, J.) (Sudhanshu Dhulia, J.) Ujjwal