

**Criminal Appeal**

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

**C.R.A. No.518 of 2005**

**Judgment on: April 13, 2010.**

**Nazirul Sk.**

**-VS-**

**State of West Bengal**

**POINTS:**

**PROOF OF CHARGE:** Victim died an unnatural death within 7 years of marriage-Victim subjected to constant physical and mental torture-Victim initiated proceedings for maintenance as well as domestic violence as against the in-laws-Responsibility cast upon the in-laws to explain their conduct- Nazirul, husband, was held guilty in-laws were acquitted, whether proper- Indian Evidence Act, 1872, Ss.113-B, 106-Indian Penal Code, Ss.201, 302, 34, 498A

**FACTS:**

The victim married to the accused was seven month pregnant at the time of death and was subjected to constant physical and mental torture. She suffered an unnatural death at her in-law's place. From the evidence, it is not clear how she died though, her in-laws who buried her without informing the local police station claimed that she died due to some illness. No medical evidence came out during trial to support the defence. The victim's father who was away from his house at the time of death, made a complaint in the Court of S.D.J.M. after being satisfied that the victim was killed by the accused.

The victim had earlier filed a maintenance case as well as another criminal proceeding alleging domestic violence under Section 498(A) of the Indian Penal Code, before the same Court.

The body was exhumed from the graveyard and was sent for post mortem to ascertain the cause of death. The cause of death was stated as Asphyxia.

Police arrested the accused and charge sheeted them under Section 302 read with Section 34 as well as Section 201 read with 34 of the Indian Penal Code. All the accused pleaded innocence and faced trial where they were found guilty. Being aggrieved, the accused preferred the instant appeal.

**HELD:**

The victim died within 7 years of her marriage. Evidence of torture on account of dowry did not specifically come in evidence during trial. Hence the presumption as provided under Section 113-B of the Indian Evidence Act, 1872 applicable for the offence punishable under Section 304-B of the Indian Penal Code would not be applicable. Similarly, since the Doctor opined that it was a case of homicidal death the provisions of Section 113A of the said Act of 1872 would also not be applicable.

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The victim died within 7 years of her marriage and there had been positive evidence to the effect that the victim was subjected to torture and such torture continued even prior to her death. It also came out in evidence that the victim initiated proceedings under Section 125 of the Code of Criminal Procedure for maintenance as well as Section 498A for domestic violence as against the in-laws. Hence a great responsibility cast upon the in-laws to explain their conduct. Such responsibility is also prescribed in Section 106 of the said Act of 1872 as it was within the special knowledge of the in-laws how the victim died. Nothing came out in evidence to show that there had been proper treatment of the victim for her alleged illness nor had there been proper death certificate issued by any Doctor when she was buried merely because few of the relatives remain

present at the time of burial. These questions remain unanswered and cannot be brushed aside. Learned Trial Judge acquitted the in-laws. There is no cross appeal by the State or the de facto complainant. Para-31

**CASES REFERRED:**

- 1) Tahsildar Singh and another –VS- State of Uttar Pradesh, All India Reporter, 1959, Supreme Court Page-1012.
- 2) Mina Adhikary –VS- State and another 1988, Calcutta Criminal Law Reporter.

For the Appellant : Mr. Dipak Kumar Sengupta  
Mr. Mrityunjoy Chatterjee  
Mr. K. Bhattacharyay

For the State : Mr. Subir Ganguly

**THE COURT:**

**FACTS:**

1) Dolly Bibi was married to Najirul Sekh. She suffered an unnatural death at her in-law's place on July 23, 2003. As per the Muslim rites, the in-laws including Nazirul, buried her at the graveyard of Sankarpur in the district of Mursidabad. From the evidence, it is not clear how she died although, her in-laws claimed that she died of her illness. No medical evidence did come out during trial to support such case of the defence. Dolly's father was away from his house. When he came back he held discussion with his relatives and friends including PW-2 who took part in the ritual conducted at the time of burial. He also discussed with his wife and son who also went there to see Dolly dead. They found unnaturality in the appearance of the dead body. After being

satisfied that his daughter was killed by her in-laws, her father Nurshed Sekh made a complaint in the Court of S.D.J.M., Jangipur, Murshidabad as against Nazirul Sekh, the husband, Nerash Sekh, father in-law, Nesha Bibi, the mother in-law, Sanaul Sekh, the brother of Nazirul, and Rokeya Bibi, sister of Najirul. According to the petition, Nurshed apprehended that his daughter was killed by her in-laws. As per the written complaint, earlier Dolly filed maintenance case as against Nazirul as well as another criminal proceeding alleging domestic violence under Section 498(A) of the Indian Penal Code as against Nazirul, Nerash and Nesha before the same Court. However Nazirul settled the dispute and took Dolly back to her in-law's place. She also became pregnant for seven months and was expecting to give birth to a child very shortly. She was subjected to constant physical and mental torture. The PW-1, 2, 3 and 4 intervened and tried to resist the in-laws from torturing. They were driven out from the house. On the next day Dolly died having injuries on her person. In-laws buried the dead body without informing the local Police Station. At about 3:00 p.m. learned Magistrate directed the Police to take cognizance. Accordingly, the Police took cognizance. The body was exhumed from the graveyard at Sankarpur on August 8, 2003, at about 11:45 a.m. Nazirul identified the body. The body was sent for post mortem to ascertain the cause of death. PW-18, doctor deposed that the body was decomposed. However, the bones were intact. He found fracture on the thyroid bone. He found bluish mark on the tongue and nailbeds. According to him, the death was due to Asphyxia.

2) Police arrested Nazirul and his parents as well as his brother and sister and chargesheeted them under Section 302 read with Section 34 as well as Section 201 read with 34 of the Indian Penal Code. All the accused pleaded innocence and faced trial.

**EVIDENCE :****3) Nurshed Sekh (PW-1) :**

Nurshed Sekh was a cultivator. According to him, Dolly was married about four years back as per Islamic rituals and customs. She was subjected to mental and physical torture and was ultimately driven out from her in-law's place. Dolly then filed two cases against Nazirul and started residing with her parents. After sometime Nazirul settled the dispute and took back Dolly. However, situation did not change. Dolly was again subjected to physical and mental torture. When he was out of station one person of his village informed him that Nazirul and others committed murder of his daughter. He then came back to his residence and held discussion with Sattar, Rejaul, Raisuddin, Nazimuddin who stated that they had seen stains of blood on the face and hand of Dolly. Since it was delayed he filed a case without making a complaint to the Police Station. In cross-examination he deposed that he got the information after six/seven days of occurrence from Tanu, a resident of Shibnagar. After receiving the information he took leave from his employer and then rushed back to his native place. His son and wife saw the dead body. They also saw blood stain on the dead body and informed the same to him. The grave of Dolly was identified by Nazirul.

**4) Sattar Sekh (PW-2) :**

Sattar Sekh was a villager. He knew Dolly. On receipt of the information of torture he went to the house of the accused to enquire about the matter when the accused became angry and chased them. On the next day, he heard that Dolly sustained injury and died. He went to the house of the accused and saw the dead body having blood on the face as also mouth. Information was sent to Shibnagar and relatives came. At about 3:00 p.m. on that day the dead body was put into grave. In cross-

examination, he deposed that he was the brother in-law of Nurshed. He heard the sound of crying from outside the house. He gave vivid description of the house on being asked in cross-examination. On getting the news of death he again went to the house when he found Sattar, Rejaul, Raisuddin, Nazimuddin present there.

**5) Badal Sekh (PW-3) :**

Badal Sekh was a village doctor. He stated that death of Dolly was announced in loudspeaker. In cross-examination he stated that Nazirul requested him to go to his house for treatment of Dolly. He found Dolly lying dead.

**6) Ejamal Sekh (PW-4) :**

Ejamal Sekh was declared hostile. He stated that he heard cries coming out from the house of the accused. After going to the house he found that the accused was assaulting Dolly.

**7) Barjahan Sekh (PW-5) :**

Barjahan was a neighbour. He deposed that Dolly died in her in-law's house. He, however, denied of any dowry dispute being stated to the Police. He was declared hostile.

**8) Bishnu Sankar (PW-6) :**

Bishnu Sankar, a shopkeeper deposed that dead body was exhumed from the graveyard. He was not present during the time of writing of papers in the graveyard by the Police. According to him, the dead body was rotten and skeletal and nothing could be understood to identify the same. He talked of graveyard of Sankarpur and not Nizampur.

**9) Sudhanshu Sekher Mondal (PW-7) :**

Sudhanshu was the investigating officer. He prepared the inquest report after the dead body being identified by Nurshed and Nazirul. Nazirul was at the graveyard when the body was exhumed. He put his LTI on the report.

**10) Raisuddin Sekh (PW-8) :**

Raisuddin deposed that Dolly died of illness. He was related to the accused.

**11) Golam Nabi (PW-9) :**

Golam Nabi was an advocate who prepared the complaint made before the Magistrate.

**12) Moulavi Keramatullh Ali (PW-10) :**

Keramatullah was the moulavi who performed the marriage between Dolly and Nazirul. Marriage took place four/five years ago.

**13) Mortuz Sekh (PW-11) :**

Mortuz Sekh was a boatman. He also deposed that Dolly died of illness.

**14) Nazimuddin Sekh (PW-12) :**

Nazimuddin was a biri binder. According to him, Dolly died of illness. He was related to the accused.

**15) Rejaul Karim (PW-13) :**

Rejaul also deposed that Dolly died of illness in her in-law's place at Nizampur.

**16) Raisuddin Sekh (PW-14) :**

Raisuddin deposed that Dolly was his niece. She died of illness.

**17) Tapas Kr. Ray (PW-15) :**

Tapas Kumar Ray was a constable who escorted the dead body for post mortem.

**18) Montu Mir (PW-16) :**

Montu was witness to the taking out the dead body out of the graveyard. According to him, the dead body was decomposed and as such he could not identify the same.

**19) Surajit Ranjan Mullick (PW-17) :**

Surajit Ranjan Mullick was the Executive Magistrate who was present at the time of exhuming the body from the grave. According to him, Nazirul identified the dead body. He went there being ordered by the SDO.

**20) Dr. Nemaï Chandra Kundu (PW-18) :**

Dr. Nemaï Chandra Kundu supported post mortem report given by him. According to him, the tongue was not decomposed, it was bluish in colour and the thyroid was fractured. The scalp of the head was putrefied but the skull was intact and cerebral matter was liquified. Condition of the next tissue was decomposed. Ribs were exposed. He opined that cause of the death to the best of his knowledge and belief was Asphyxia due to strangulation, ante mortem and homicidal in nature. In



cross-examination he stated that during lifting of the dead body there might be dislocation of bone but there could not be any fracture on that score. According to him, from tongue and nailbed bluish sign was found and that was due to oxygenation of a particular tissue because of Asphyxia.

**21) Sunil Kumar Paul (PW-19) :**

He was the Investigating Officer. He submitted the chargesheet.

**22) DEFENCE VERSION :**

While examining the accused under Section 313 of the Criminal Procedure Code the learned Judge put the entire evidence before the accused and asked for their views. The accused only stated that the entire evidence was incorrect and they were innocent. The accused, however, did not unfold the narrative any further.

**TRIAL COURT JUDGMENT :**

23) Based on the evidence as discussed above, the learned Additional District and Sessions Judge, Fast Track Court, Jangipur, Mursidabad held Nazirul guilty of the offence, however acquitted the other four accused of the charges and they were set at liberty. According to the learned Judge, it was proved in evidence that the convict inflicted extreme and inhuman torture on the victim and ousted her from his house. The victim, thereafter, filed cases against the accused. The accused on the pretext of settlement took his wife back to his house and then intentionally caused death by strangulation breaking the mid-neck bone of the victim. The learned Judge convicted the Nazirul to suffer rigorous imprisonment for life together with fine of Rs 21,000/- and, in default, to suffer

simple imprisonment for another two years for the offence committed under Section 302 of the Indian Penal Code. The learned Judge also imposed rigorous imprisonment for three years coupled with a fine of Rs.5000/- and, in default, to suffer simple imprisonment for six months as against Nazirul under Section 201 of the Indian Penal Code. However, both the sentences were directed to run concurrently.

**APPEAL:**

24) Being aggrieved, Nazirul preferred the instant appeal which was heard by us on the above mentioned dates.

**CONTENTION OF THE APPELLANT :**

25) Mr. Dipak Kumar Sengupta, learned senior counsel appearing in support of the appeal contended that the entire trial was conducted in a perfunctory manner. The learned Judge put rolled up questions to the accused, a rustic villager and as such the proceeding was vitiated by illegality as the accused suffered immense prejudice. According to Mr. Sengupta, all the witnesses consistently deposed that Dolly died of illness. Those witnesses participated in the ritual performed at the time of burial. The mother and brother of the deceased victim were also present, so was PW-2, a close relative of the victim. They did not make any contemporaneous objection. It was after about a couple of weeks the Police exhumed the dead body from the grave at the instance of PW-1 who was not present at all material times. Mr. Sengupta further stated that the witnesses who were present at the graveyard categorically deposed that the body was in a decomposed condition and was not capable of being identified. Hence, the post mortem report could not be treated as a definite conclusion as to the cause of the death.

26) Mr. Sengupta also pointed out discrepancy in the statements. According to the complaint, the burial was conducted in Nizampur whereas the dead body was exhumed from Sankarpur. The wife and son of the PW-1 were not examined, although present at the time of burial. He lastly contended that from a plain reading of the complaint it would appear that PW-1 made the complaint after being informed about the incident by the witnesses who later on, during trial categorically and consistently deposed that Dolly died of illness. He prayed for setting aside of the conviction and sentence.

27) Mr. Sengupta in support of his contention relied on two Apex Court decision reported in *All India Reporter, 1959, Supreme Court Page-1012 (Tahsildar Singh and Another –VS- State of Uttar Pradesh)* and *1988, Calcutta Criminal Law Reporter, Page-376 (Mina Adhikary –VS- State and Another)*

**CONTENTION OF THE PROSECUTION :**

28) Opposing the appeal Mr. Subir Gangully, Ld. Counsel, appearing for the prosecution, contended as follows:

- i) Dolly died within 7 years of her marriage. She was found dead in her in-law's place. That was proved by the prosecution evidence.
- ii) The death was homicidal in nature according to medical evidence. Such finding of the Doctor was not challenged by the defence.

- iii) Under Section 45 of the Evidence Act the opinion of the Doctor was relevant for the purpose of consideration.
- iv) At the time of exumation of the death body Nazjrul was present, he signed the inquest report by putting his L.T.I. The body was sent for post mortem when the Doctor opined that she had died of asphyxia due to strangulation.
- v) Since Dolly died in her in-law's place the inmates of the house specially the husband, being the appellant owed an explanation. Such responsibility was not properly discharged by Najirul.

**REPLY :**

29) Mr. Krishnendu Bhattacharjee, learned Counsel, appearing for the appellant, assisting Mr. Sengupta, in reply contended that the relatives of the victim took part in the ritual at the time of burial as it appears from the prosecution evidence. P.W.2, mother and brother of the deceased were all through out present. They did not raise any objection. Hence the belated complaint of the father was nothing but an after thought. He further contended that the prosecution witnesses categorically and consistently deposed that Dolly died of illness. Such positive evidence would automatically demolish the case of the prosecution.

**OUR VIEW :**

30) We have considered the rival contentions of the parties. We are of the view that the victim died within 7 years of her marriage. Evidence of torture on account of dowry did not specifically come in evidence during trial. Hence the presumption as provided under Section 113-B of the Indian Evidence Act, 1872 applicable for the offence punishable under Section 304-B of the Indian Penal

Code would not be applicable. Similarly, since the Doctor opined that it was a case of homicidal death the provisions of Section 113A of the said Act of 1872 would also not be applicable.

31) The victim died within 7 years of her marriage and there had been positive evidence to the effect that the victim was subjected to torture and such torture continued even prior to her death. It also came out in evidence that the victim initiated proceedings under Section 125 of the Code of Criminal Procedure for maintenance as well as Section 498A for domestic violence as against the in-laws. Najirul, the appellant, abovenamed on the pretext of settling the dispute took her to her in-law's house and again started torturing. Even PW-4 who was declared hostile, supported the case of torture. Hence a great responsibility cast upon the in-laws to explain their conduct. Such responsibility is also prescribed in Section 106 of the said Act of 1872 as it was within their special knowledge of the in-laws how the victim died. Nothing came out in evidence to show that there had been proper treatment of the victim for her alleged illness. Nothing came out in evidence to show that there had been proper death certificate issued by any Doctor when she was buried. These questions remain unanswered and cannot be brushed aside merely because few of the relatives remain present at the time of burial. Learned Trial Judge acquitted the in-laws. There is no cross appeal by the State or the de facto complainant. Hence we refrain from making any comment on the same. Najirul was held guilty of the offence by the learned Trial Judge. We do not see any reason to disagree with the learned Judge.

**RESULT :**

32) The appeal fails and is hereby dismissed.

**DIRECTION :**

33) A copy of the judgment and order along with Lower Court Records be sent down at once to the Court of learned Trial Judge for information and necessary action.

34) The appellant is now in jail. He is directed to serve out the remainder part of his sentence as awarded by the learned Trial Judge.

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

**Kishore Kumar Prasad, J:**

36) I agree.

**[ASHIM KUMAR BANERJEE,J.]**

**[KISHOREKUMARPRASAD,J.]**

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