

\* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CRL.APPEAL No. 161/2001

% Reserved on: November 23, 2010

Decided on: January 07, 2011

SWAPAN KUMAR MANDAL ..... Appellant  
Through: Mr. Ranjan Mukherjee, Mr. S.  
Bhowmick and Mr. M. Mukherjee,  
Advocates.

versus

N.C.T OF DELHI ..... Respondent  
Through: Mr. Pawan Bahl, App.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

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|------------------------------------------------------------------------------|---------------|
| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Not Necessary |
| 2. To be referred to Reporter or not?                                        | Yes           |
| 3. Whether the judgment should be reported in the Digest?                    | Yes           |

MUKTA GUPTA, J.

1. Archana was married to the Appellant on 12<sup>th</sup> December, 1994. Unfortunately, on 6<sup>th</sup> February, 1995 she committed suicide by pouring kerosene oil on herself and setting herself ablaze. Thus, the marriage

lasted for 53 days only. The deceased left a suicide note. Besides the suicide note, the statement of the brothers was also recorded by the SDM, on the basis of which a case under Section 304B/498A IPC was registered. The Appellant was arrested on the same day. On a charge sheet being filed the Appellant was initially charged for offences under Section 304B and 498A IPC. The statements of all the prosecution witnesses were recorded. The brothers of the deceased turned hostile and did not support the prosecution case. After the statement of the accused under Section 313 Cr.P.C., the prosecution moved an application under Section 216 Cr.P.C. to frame an alternative charge and the learned trial court allowed the same vide order dated 21<sup>st</sup> August, 2000 and framed an alternative charge for offence under 306 IPC. The Appellant then moved an application under Section 315 Cr.P.C. to appear as his own witness and was examined as DW1. After hearing the arguments, the learned trial court acquitted the Appellant of the charge under Section 304B IPC, however convicted him for offences under Section 498A and 306 IPC and awarded a sentence of rigorous imprisonment for one year and fine of ₹1,000/- and in default to further undergo rigorous imprisonment for one month under Section 498A IPC and to undergo rigorous imprisonment for four years and a fine of ₹5,000/- and in default thereof to undergo rigorous imprisonment for six months under Section 306 IPC. This is the judgment and order impugned in the present appeal. Before this appeal could be heard, the

trial court record got lost and the same has been reconstructed with the help of learned counsels for the parties. Thus, this appeal has been heard on the basis of photocopies of the documents supplied by the parties.

2. Learned counsel for the Appellant contends that Section 498A IPC contemplates two kinds of cruelty. The first one is in relation to the demand of dowry. The learned trial court has found that the Appellant has not committed any cruelty on the deceased in relation to demand of dowry. The other kind of cruelty contemplated in the Section is a willful conduct which is so grave in nature as is likely to drive the woman to commit suicide. It is stated that there is no such allegation in the statement of PW-1 Sardar Singh the landlord, PW2 and PW3 the brothers of the deceased. Even as per the suicide note Ex. PW2/1 allegedly left by the deceased, the two allegations are, firstly, that the Appellant use to drink, call his friends for drinking, and also made the deceased drink and, on her refusal beat her. The second allegation is that the Appellant did not accept the child in her womb to be fathered by him. According to the learned counsel the second allegation is the bone of contention in the present case. The post mortem report of the deceased confirms the stand of the Appellant that the deceased was pregnant when she married the Appellant and this fact was concealed from him at the time of marriage. The size and the weight of the foetus given in the post

mortem report show that the conception was not from this wedlock as the parties were married only for 53 days.

3. It is next contended that the allegation of drinking and making her drink and on her refusal beating her does not amount to cruelty which can drive a woman to commit suicide. In the absence of any abetment or instigation, the presumption under Section 113A of the Evidence Act cannot be raised. Reliance is placed on *Harijit Singh v. State of Punjab*, (2006) 1 SCC 463, *Kishori Lal v. State of M.P.*, (2007) 10 SCC 797, *Sohan Raj Sharma v. State of Haryana*, (2008) 11 SCC 215, *Mankamma v. State of Kerala*, 2009 (10) SCC 164, to contend that the mere fact that the husband treated his wife with cruelty is not sufficient to prove the commission of offence punishable under Section 306 IPC. The instigation and abetment has to be, as would affect a normal, prudent person and not a hypersensitive person. Since the charge under Section 306 IPC was belatedly framed after the statement of the Appellant was recorded, hence, he has been gravely prejudiced and cannot be convicted for this offence. In the alternative, it is prayed that the Appellant has spent almost 21 months in the jail and his sentence be reduced to the period already undergone.

4. Learned APP, on the other hand, contends that the marriage in the present case has lasted for only 53 days. The Appellant has been acquitted for offence under Section 304-B IPC because the brothers of

the deceased turned hostile. However, the dying declaration of the deceased clearly implicates the Appellant and depicts the cruelty meted out to her by the Appellant in this short period. The dying declaration of the deceased shows the continuous harassment and torture caused to her which drove her to commit suicide. The deceased has stated that the Appellant in the name of love tortured her. She further stated that every night his friends came home and had liquor with the Appellant and also made her drink, and if she stated something she was beaten and threatened that she would be divorced. When she wanted to go to her parent's house he did not allow her to go to her parent's house. She further stated that she has been married to a dangerous animal who does not even let her speak to her neighbours. She was expecting, however, the Appellant does not accept the foetus to be his child. She states that she will have to live with this slur throughout her life. She states to her mother that she does not want to die but for a woman to be living with the Appellant who is a dangerous animal, is impossible. In view of the dying declaration, it is proved beyond reasonable doubt that the Appellant tortured and harassed the deceased thus driving her to commit suicide. It is thus prayed that the appeal be dismissed.

5. I have heard learned counsel for the parties and perused the records. One of the issues that arise in the present case is whether the alternative charge framed during the trial after the statement of the

accused had been recorded under Section 313 Cr.P.C., has caused prejudice to the Appellant. The Appellant was originally charged for offences under Section 304B/498A IPC. However, after his statement was recorded under Section 313 Cr.P.C., an application was moved by the learned APP under Section 216 Cr. P.C for framing of an alternative charge under Section 306 IPC. Section 216 Cr.P.C. permits the Court to alter or modify the charge which would also include framing of an additional charge at any time before the judgment. However, it is required to be examined that on an alternative or amended charge being framed, whether an opportunity should be granted to the accused for further cross examining the witnesses or leading his defence. As per the impugned judgment, in the present case after framing of the alternative charge under Section 306 IPC, the Appellant had moved an application for examining himself as a witness under Section 315 Cr.P.C. and thus it can be safely held that there was no prejudice caused to the Appellant in leading the defence. In *Moosa Abdul Rehman v. State of Kerala, 1982 CrL LJ, 2087* it was held that on strict consideration of the Section allowing alteration or modification of charge, no statutory obligation is found to be cast on the Court to enquire from the prosecution or accused whether they would like to recall or re-summon the witness. In the present case, the prosecution case from the inception was of abetment to suicide, both in relation to harassment for demand of dowry and also harassment which drives the woman to commit

suicide. The presumption as available under Section 113B of the Evidence Act for an offence punishable under Section 304B IPC is also available under Section 113 A of the Evidence Act for an offence punishable under Section 306 IPC. Thus, no prejudice is caused to the Appellant for this belated framing of additional charge.

6. Nothing incriminating has been deposed by the brothers of the deceased PW2 Radhakrishna Devnath and PW3 Ramakrishna Devnath against the Appellant. However, they both have identified the handwriting and signatures of their sister on the suicide note Ex.PW2/1. Thus, the only incriminating evidence against the Appellant is the dying declaration of the deceased in the form of the suicide note Ex.PW2/1. A perusal of the suicide note reveals primarily three kinds of allegations against the appellant. Firstly, despite her being ill in Delhi for the past one month, the news of her illness was not sent by the Appellant to the mother of the deceased. The deceased when desired to see her mother, the Appellant told her that she would never be able to go to her. Secondly, it is alleged that there was a lot of torture meted out to her. In the name of love she was tortured. Every night the Appellant along with his friends used to drink at home and also made the deceased drink. When she refused to drink, she was beaten and also threatened to be divorced. She further alleged that she has been married to a dangerous animal who does not even permit her to speak to the

neighbours. Thirdly, she has alleged that she is expecting and the Appellant refuses to accept the child to be his and there cannot be a greater slur than this for a girl. She states that she is pious but she will have to live with this slur throughout her life. Though in the rest of the letter she only desires to meet her family and expresses her love for them, however, an important fact which is also stated is that it has been one month and fifteen days that she has not got any news from her mother and that the deceased had become a burden on her and that is why she married her and now her family must be in peace. In the form of the dying declaration, the deceased has expressed her inner self by stating that she had real love for her parental family but she had become a burden on them and so was married but even after marriage she got no solace.

7. From a reading of the dying declaration, the third allegation that is the Appellant refusing to accept the foetus in the womb of the deceased as his child and thus doubting her chastity appears to be bone of contention. In this regard it would be relevant to note the testimony of PW4 Dr. Chanderkant who conducted the post mortem of the deceased. On internal examination of the deceased, he noted "Uterus was 260 gms. in weight containing the material of conception having a weight of 190 gms., length about 28 cms. and circumference of the head was 25 cms; Sex was not identified." I find force in the contention of the learned

counsel for the Appellant that the size of this foetus cannot be of a 53 days old foetus. The deceased and the Appellant had been married only for 53 days and as the Appellant had not fathered the child, he doubted the chastity of the deceased. Unfortunately, neither the doctor has opined the age of the foetus nor any question has been put in this regard. In terms of Section 112 of the Evidence Act, a statutory presumption is required to be raised about the legitimacy of the child born during the wedlock. Section 112 reproduces the rule of English law that it is undesirable to inquire into paternity of the child when mother is a married woman and husband had access to her. Where it is shown that during the time the child could have been begotten, the husband had no access to the wife, no presumption of legitimacy can arise. Where it is established that at the time of marriage the bride was pregnant it ipso facto vitiates the marriage unless the opposite party proves that this fact was within the knowledge of the bride groom at the time of marriage. Presumption of legitimacy though strong is rebuttable. Moreover, this presumption is to be raised to prevent the child born from being bastardised. The Appellant has been convicted for an offence under Section 306 IPC for his conduct of doubting the chastity of the deceased, thus driving her to commit suicide. There is clearly a reasonable doubt created about the factum of conception during the subsistence of the marriage thereby giving reason to the Appellant to disown the foetus in the womb. As per "The Essential of

Forensic Medicine and Toxicology” by Dr. K.S. Narayan Reddy; the age of the foetus in its different stages is shown as:

**“End of third month:** Length nine cm; weight thirty g. The eyes are closed and the papillary membrane appears. Nails appear and the neck is formed.

**End of Fourth month:** Length 16 c.m; weight 120g. Sex can be recognized. Lanugo hair is seen on the body. Convolutions begin to develop in brain. Meconium is found in the duodenum.

**End of Fifth month:** Length 25 c.m; weight 400 g. Nails are distinct and soft. Light hair appears on head. Skin is covered with vernix caseosa. Meconium is seen at the beginning of the large intestine.”

8. Thus, it is apparent that the age of foetus is more than four months and less than five months. At this stage it would also be relevant to observe the opening statement of the deceased in her suicide note wherein she states that she had become a burden on her family and that is why she had been married and now those people would be in peace. The deceased has described the Appellant as a dangerous animal because he did not let her speak to the neighbours. However, in her dying declaration she states that after coming here, she has met a family and treats him as her elder brother. Thus, it is apparent that she was not forbidden from meeting people. The only allegation which now remains is that the Appellant with his friends drank every evening and forced the deceased to drink and on refusing beat

her and threatened her to divorce. The same cannot be said to be a willful conduct so as to instigate or abet the woman to commit suicide particularly in the light of the fact that she is a hypersensitive person who describes the husband as a dangerous animal for not permitting her to speak to the neighbours. As held in various decisions, the standard of test to be applied is that of normal and prudent person and not a hypersensitive person. Thus, the Appellant is entitled to the benefit of doubt for the offence punishable under Section 306 IPC.

9. As regards the commission of offence punishable under Section 498A IPC, learned counsel for the Appellant has strenuously argued that the allegations made in the dying declaration do not amount to cruelty to the extent that she would be driven to commit suicide or cause grave injury or danger to life, limb or health. If a woman is forced to drink and on her refusal beaten and threaten to be divorced, especially when she is pregnant, even a single instance of this conduct is a willful conduct which causes grave injury and danger to her life, limb and health. Thus, the Appellant is guilty of the offence punishable under Section 498A IPC.

10. The appeal is partly allowed. The Appellant is acquitted of the offence punishable under Section 306 IPC. The conviction and sentence for offence punishable under Section 498A IPC is upheld. The Appellant has already undergone imprisonment for a period of one year, eight

months and six days and has also paid the fine. His bail bond and surety bond are discharged.

(MUKTA GUPTA)  
JUDGE

JANUARY 07, 2011  
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