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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on : 14.10.2014*
Judgment delivered on : 17.10.2014

+ CRL.A. 422/2006

GURDAYAL KOHLI

..... Appellant

Through Mr.M.K. Vashisht, Adv.

versus

STATE

..... Respondent

Through Ms. Fizani Hussain, APP

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

INDERMEET KAUR, J.

1 This appeal is directed against the impugned judgment and order on sentence dated 23.05.2006 and 27.05.2006 respectively wherein the appellant Gurdayal Kohli stood convicted for the offence under Sections 304-B/498-A of the Indian Penal Code, 1860 (IPC). For the offence under Section 304-B of the IPC, he had been sentenced to undergo RI for a period of 10 years; for the offence under Section 498-A of the IPC

he had been sentenced to undergo RI for a period of three years and to pay a fine of Rs.5,000/- and in default of payment of fine, to undergo SI for a period of one month. The other two co-accused i.e. the brother and mother of the appellant stood acquitted.

2 The nominal roll of the appellant reflects that as on the date when he had been granted bail, he has suffered incarceration of about 2 years including remission.

3 Record shows that the victim i.e. the deceased Kamlesh had been married to the appellant on 10.12.1993. The unfortunate incident had occurred on 07.08.1999. At that time, the parties had a 1- ½ year old female child born out of their wedlock. The victim had been admitted in the hospital with 60% burns; this was at 10:10 pm in the night of 07.08.1999. She had succumbed to her injuries in the morning at 05:10 am on 08.08.1999. Her cause of death was burns shock consequent to burn injuries which post mortem report was proved by Dr.Yogender Bansal (PW-7) as Ex.PW-7/A. Since the incident had occurred within less than 7 years of marriage, inquest proceedings were ordered. The SDM G. Sudhakar (PW-1) had recorded the statements of the relations of the victim which includes her mother Shanti Devi (PW-2), her father

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Mohan Lal (PW-3) and her brother Dalip Kumar (PW-4). It was on the statement of PW-2 that the present FIR was registered.

4 Learned counsel for the appellant at the outset points out that the ingredients of Section 304-B of the IPC necessarily entail four elements; even presuming that the three ingredients i.e. death in circumstances other than normal, within seven years of marriage and that there had been dowry harassment have been established, the fourth ingredient i.e. cruelty having been meted out to the victim 'soon before her death' has not been established.

5 The counter submission of the learned counsel for the State has also been noted. She has in fact conceded to this position but has drawn attention of this Court to the alleged dying declaration recorded of the victim (Ex.PW-16/A) as also the noting made in the MLC as disclosed by the patient herself (Ex.PW-12/A); submission being that these dying declarations are not in consonance with the other evidence collected by the prosecution which clearly establish the guilt of the accused. It is pointed out that investigation had revealed smell of kerosene emanating from the bed room and a kerosene lamp (kept in the open almirah) as also burnt match sticks and some burnt clothes were also seized from the

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room; submission being reiterated that this evidence is contrary to the theory of an accidental fire having engulfed the deceased in the kitchen. Thus the version in the dying declaration that the victim at that time was cooking in the kitchen when the accident occurred is not in consonance with aforementioned seized items which were recovered from the bed-room. The dying declarations were given by the victim under pressure. Submission being that the dying declarations although exonerate the accused yet they cannot be relied upon in view of this aforementioned controversy.

6 Record shows that DD No.69-B was received in Police Station Sarai Rohilla at 10:10 PM giving intimation to the effect that a victim with burn injuries had been admitted in the LNJP Hospital. SI Ashok Kumar (PW-16) reached the hospital along with Constable Nandu Kashyap (PW-14). The MLCs of the victim Kamlesh (Ex.PW-12/A) and Gurdayal Kohli (Ex.PW-12/B) were collected. Ex.PW-12/A revealed that the victim was admitted in the LNJP Hospital as a medico legal case at 10:10 PM on 07.08.1999. The history (as disclosed by the patient herself) was accidental burns received while cooking as the child playing nearby had pushed her due to which it dashed the kettle and oil

spilled on the body of the patient and her clothes caught fire. The victim was conscious and oriented at that time. She was declared fit for statement in terms of Ex.PW-12/A and this position was affirmed on oath by Dr.Arun Prashant Baxla examined as PW-12. He had on oath deposed that he had examined the victim who had been brought in the hospital with 60% burns and she had been declared fit for statement by him as mentioned in the MLC; he had deposed that the history revealed in the MLC was narrated by the patient herself. This narration of the victim exonerated the accused; it had reported to be a case of accidental fire.

7 The second dying declaration of the victim was recorded by the Investigating Officer. This was proved as Ex.PW-16/A. This was written in the hand-writing of the Investigating Officer and signed by the victim. In this dying declaration, it was disclosed that while the victim was preparing to cook food, in her attempt to pour kerosene oil in the stove from a can, her 1-½ years old daughter gave her a push as a result of which kerosene spilled on her clothes; she caught fire from the nearby stove. Her husband had tried to save her by putting a ‘gadda’ (mattress) over her. She was first taken to the Bara Hindu Rao Hospital where she

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was not given medical aid and then to the LNJP Hospital. The signature of the victim at point 'A' is in the handwriting of the deceased; the name 'Kamlesh' is decipherable, so also the date but the handwriting is shaky and quivering, obviously for the reason that the victim was in a state of mental and physical trauma; she had sustained 60% burn injuries. The submission of the learned counsel for the State that the victim could not have signed this statement considering the fact that her entire body was burnt except for her front limbs is negated by the post-mortem report which had noted injuries on almost the whole of the body except the front part of her legs; her skin was peeling off; palms were burnt but her fingers were intact. Her quivering and shaky signature answers the theory that since the palms of the victim were burnt, she was probably not fit enough to hold the pen firmly to sign her name. There was also no smell of kerosene on the body; the fact that the smell of kerosene was not present on the body is indicative of the fact that it was not a case where kerosene oil was poured over her body to kill her but in fact supports the argument of the learned counsel for the appellant that this could be a case where because of an accidental spilling of the oil only some parts of the body of the victim had kerosene. The MLC of the

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appellant (Ex.PW-12/B) shows that his hands had also been burnt; he had also sustained 5% burn injuries.

8 The dying declarations Ex.PW-12/A and Ex.PW-16/A have been penned down by the Investigating Officer. There is however no blanket bar that such a piece of evidence could not be read. PW-12 in his ocular version as also in the document (Ex.PW-12/A) testified that the victim was fit for statement. There was no suggestion given to the Investigating Officer that the victim was in fact not in a fit state of mind. This Court also notes that Dr. Arun Prashant Baxla (PW-12) had certified the patient to be fit for statement which was signed by him in the MLC (Ex.PW-12/A). The victim was brought to the hospital at 10:10 PM. She had expired at 05:10 a.m. on the following morning. There was an intervening gap of seven hours. Her parents had reached the hospital at about 02:30 am and this is clear from their testimonies. At that time, the victim could not speak. It was obviously during this intervening gap i.e. between 10:10 pm and 02:30 am that the dying declaration was recorded. The victim at that time was conscious and oriented. This is reflected in the MLC. There was also no reason for PW-12, a doctor from a reputed government hospital, to have made a false statement. He

was also not cross-examined as to why he would have given a false certificate. Thus there is no reason whatsoever to disbelieve the dying declarations (Ex.PW-12/A and Ex.PW-16/A); both of them have exonerated the appellant.

9 The statements of the parents of the victim were recorded by PW-1 on 07.08.1999 itself. On oath Shanti Devi (PW-2-mother) of the deceased had deposed that Kamlesh had got married to the appellant on 10.12.1993 and in the marriage whatever they could give according to their capacity, they had given; after marriage, her son-in-law used to beat her daughter after consuming liquor; her daughter disclosed to her that the appellant was demanding money; on 07.08.1999, they were informed that their daughter had been admitted in the Irwin Hospital; she reached there where she saw her daughter admitted in burnt condition and thus unable to speak; she died on 08.08.1999.

10 In her cross-examination, it was admitted that she had reached the LNJP Hospital Burn Ward at 02:30 am; they were informed about the incident by Ashok, the brother of the appellant.

11 Mohan Lal (PW-3) is the father of the victim. He deposed that he had four children. His daughter had been married to the appellant. After

marriage, Kamlesh used to tell him that she was being harassed and ill-treated by him but she did not tell who amongst her in-laws harassed her. On the intervening night of 07.08.1999 and 8.08.1999, they received intimation at 12:30 am that his daughter had received burn injuries; they reached the hospital at 02:30 am; his daughter was unable to speak at that time. His statement was recorded by the SDM. This witness was partly hostile. He was permitted to be cross-examined by the learned public prosecutor. He admitted that his daughter was subject to dowry harassment.

12 Dalip Kumar, the brother of the victim was examined as PW-4. His testimony was based largely on what had been told to him by his wife. His wife did not come into the witness box. This witness being an hearsay witness was rightly rejected by the trial Court.

13 Before the trial Judge, what became relevant were the statements of the parents of the victim, i.e. PW-2 and PW-3. Even presuming that was a dowry demand and their daughter was being harassed on this count, there is nothing in their evidence which could establish the ingredient of 'soon before death'. Parties had admittedly been married in 1993. The incident had taken place in the year 1999 i.e. after the lapse of

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six years. Parties had a 1- ½ year old daughter from this marriage. There is not one whisper in the statements of the parents of the words that “soon before her death” the victim was harassed on account of dowry.

14 There is no straight jacket formula of defining what is ‘soon before death’. It might be an unending process. It may continue from the time of marriage up to the incident but this must necessarily come in the evidence. There must be a connection between death and the dowry related cruelty inflicted upon the victim. In fact, it must be the immediate cause of death of the victim.

15 The site plan Ex.PW-16/D has been perused. This discloses that there were three rooms in the accommodation where the parties were living. Room No. 3 was the bed-room of the victim and the appellant. The kitchen was immediately adjacent to room No. 3. There was no in between gallery. In fact, the door of the room if open would straightway lead into the kitchen. The site plan revealed that some burnt clothes and match sticks were lying in the bed-room. A kerosene lamp was also found in the almirah in the room. The statement of the victim in her dying declaration that while she was cooking, the incident of fire had taken place and process of cooking had started at the time when the

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victim was preparing the stove by filling it with kerosene from the lamp in the bed room, is an argument which cannot be straightway rejected. Her statement in the dying declaration was that the 'gadda' was used by her husband in extinguishing the fire; the statement of the Investigating Officer that the 'gadda' was not found at the spot is falsified by the photograph which shows a 'gadda' lying in the bed room. A burnt bed-sheet had also been seized vide seizure memo Ex.PW-14/A which bed-sheet had been recovered at point 'D' in the site plan Ex.PW-16/D. This burnt bed-sheet was lying near the stairs and had probably fallen there at the time when the victim was being taken to the hospital by going down the stairs. The victim in the dying declaration might have made a reference to the bed-sheet as a 'gadda' (mattress).

16 Section 304-B of the IPC has certain essential ingredients; (a) there are demand of dowry and harassment by the accused; (b) the deceased had died in unnatural circumstances; (c) unnatural death occurs within than seven years of marriage; (d) it should also be that soon before her death, she was subjected to this cruelty and harassment. As noted supra and conceded by the learned public prosecutor, the last ingredient of 'soon before death' is missing.

17 In this background in the absence of any such evidence, it would be wholly unsafe to convict the appellant. The trial Judge has committed a grave illegality in doing so. Not only is there a dying declaration from the horse's mouth herself exonerating the accused, even otherwise there is nothing in the version of PW-2 and PW-3 which could even remotely be said to be within the ambit of 'soon before death' to connect the death of the victim with the cruelty inflicted upon her in relation to dowry demands. There is no such evidence on record.

18 This Court has also been informed that the appellant has since re-married. He has two children from the second marriage. The child from the first marriage who was then 1- ½ years old has now attained the age of 18 years and is in the custody of the appellant.

19 In this background, keeping in view the factual position as noted supra, the impugned judgment is liable to be set aside. Benefit of doubt must accrue in favour of the appellant. Appeal is allowed. Appellant is acquitted. Bail bonds cancelled. Surety discharged.

INDERMEET KAUR, J

OCTOBER17, 2014

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