

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

Date of Decision: 22nd July, 2014

+ **CRL.A. 982/2011**
SUSHIL KUMAR

..... Appellant

Through: Mr. Baldev Raj and Mr. Dhiraj
Pandey, Advocates.

versus

STATE GOVT. OF NCT OF DELHI Respondent

Through: Ms. Ritu Gauba, APP for the
State.

%

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. Challenge in this appeal is to the judgment dated 20th May, 2011 and order on sentence dated 23rd May, 2011 passed by learned Additional Sessions Judge-01 (West), Tis Hazari Courts, Delhi in Sessions Case No.66/2010 arising out of FIR No.01/2010 u/s 498A/304B/34 IPC registered with PS Tilak Nagar whereby the appellant was held guilty of offence u/s 498A/304B IPC and was sentenced to undergo rigorous imprisonment for a period of three years and a fine of Rs.5000/- in default of payment of fine, SI for a

period of one month u/s 498A IPC. The accused was also sentenced to RI for a period of ten years u/s 304B IPC. Both the sentences were to run concurrently.

2. Shorn of unnecessary details, the gravamen of the prosecution case is that the appellant got married with Smt. Darshna (hereinafter referred to as deceased) on 21st November, 2008. From the said wedlock, a male child, namely, 'Goldy' was born. Darshna committed suicide on the intervening night of 31st December, 2009/1st January, 2010.

3. Information regarding admission of the deceased was given to PP Tilak Vihar vide DD No.8 on which SI Lalan Prasad along with Head Constable Jai Ram reached DDU Hospital where SI Lalan Prasad collected MLC of the deceased and came to know that she was declared "brought dead". SI Lalan Prasad went to WZ 178, 80 Gaj Harijan Colony, Tilak Vihar. He also informed SDM Patel Nagar. SDM directed Tehsildar Sh.R.K. Saini who reached the spot and recorded the statement of Kranti-PW1 and Vinod-PW3, mother and brother of the deceased respectively. Thereafter, Mr. R.K. Saini went to the spot and conducted inquest proceedings. Direction was given

to the SHO to take action as per law. On the statement of Kranti , Ex.PW5/A, FIR 01/2010 u/s 498A/304B/34 IPC was recorded by Head Constable Hans Kumar on 01.01.2010 at about 10 a.m. Post mortem on the dead body of the deceased was conducted. During the course of investigation, accused Sushil Kumar, Virender @ Bijender and Shanti Devi were arrested. After completion of investigation, the police filed a charge sheet against the appellant and two other accused under Section 498A/304B/34 IPC. The appellant and the co-accused were then committed to the Sessions Judge, where they pleaded not guilty and claimed trial. At the trial, the prosecution examined as many as 17 witnesses to prove its case. All the incriminating evidence was put to the accused persons while recording their statements under Section 313 Cr.P.C. wherein they denied the case of prosecution. Two witnesses were examined in defence. The Additional Sessions Judge eventually came to the conclusion that so far as the appellant is concerned, prosecution has proved its case beyond reasonable doubt and, accordingly, convicted him under Section 498A/304B IPC and sentenced him as mentioned hereinbefore while remaining two co-accused were acquitted on the

ground that allegations against them were general and unreliable.

4. The Additional Sessions Judge based the conviction of the appellant primarily on the ground that evidence as to the harassment to the deceased in connection with the demand of dowry, was specific and consistent and there is reliable evidence to prove that deceased was harassed by the appellant in connection with demand of dowry soon before her death.

5. Aggrieved by his conviction and sentence imposed upon him, the present appeal has been preferred by the appellant.

6. Challenging the findings of the learned Additional Sessions Judge, Sh. Baldev Raj, learned counsel for the appellant submitted that FIR was registered on the statement of mother of the deceased made before the Tehsildar where general allegations of demand of dowry were made and a suspicion was raised that the deceased died due to harassment meted out to her by her husband, mother-in-law and brother-in-law for dowry. However, the complainant disowned any statement made by her before the Tehsildar. Moreover Tehsildar was not even competent to conduct inquest proceedings. According to Tehsildar, he was instructed by the SDM to record the statement

and conduct the inquest proceedings. However, there is no such authorization on record. Moreover, notification, as alleged by him, has not been placed on record. Furthermore, the statement of the complainant was also recorded by the police under Section 161 Cr. P.C. Complainant made material improvement in her deposition before the Court. As such, no reliance can be placed on her testimony. Besides her, two more witnesses, PW2 Manoj Kumar and PW3 Vinod Kumar were examined. However, both these witnesses do not corroborate testimony of the complainant. PW4 Ravinder Kumar was the mediator with whose intervention, the marriage had taken place. However, this witness has not supported the case of prosecution and deposed that no complaint of harassment was made by the deceased to him at any point of time. Moreover, there is no evidence on record to prove that the deceased was subjected to any harassment on account of dowry soon before her death, as such, the essential ingredients of Section 304 B IPC are not attracted in the instant case. Although it was not disputed that the deceased had committed suicide, but it was submitted that there is no evidence that the appellant had abetted the commission of suicide, as such, even

Section 306 IPC is not attracted. Even otherwise the appellant is in judicial custody since 1st January, 2010. As such, he deserves to be released on the period already undergone.

7. Per contra, it was submitted by Ms. Ritu Gauba, learned Additional Public Prosecutor for the State that the essential ingredients of Section 304B IPC are fully attracted in the instant case, inasmuch as, it stands proved that the deceased committed suicide within seven years of marriage. From the testimony of PW1, PW2 and PW3, it is proved that the deceased was subjected to harassment on account of demand of dowry which compelled the deceased to take the extreme step of committing suicide. Moreover, the death had taken place within the matrimonial home. As such, it was for the accused to explain as to why the deceased committed suicide.

8. As regards, certain variations in the testimony of the prosecution witnesses, it was submitted that complainant is a rustic illiterate lady, as such, certain variations have crept in her testimony. But on material aspects, her testimony goes unchallenged and there is no reason to disbelieve the same. Under the circumstances, the appellant was rightly convicted by the learned Trial Court. The

impugned judgment does not suffer from any infirmity which calls for interference. As such the appeal is liable to be dismissed. It was further submitted that since it was a crime against woman, severe punishment should have been imposed. As such after issuing show cause notice to the appellant, punishment for offence u/s 304B IPC be enhanced.

9. I have given my anxious thoughts to the respective submissions of learned counsel for the parties and have also perused the Trial Court record.

10. The dowry system is in existence from the time immemorial in different forms and in different sects of society. It having taken the form of a wide spread epidemic became a matter of concern for the State as well as the social reformatory institutions. The Legislature became alert to the urging necessity of eradicating this social evil by appropriate enactment. True it is that Legislation cannot by itself solve the deep rooted social problem and it is only the education of the society in a particular direction and the efforts of the reformatory bodies that social problems can be solved, however, the Legislation has played an important role in curbing the lust of dowry hungry

persons. The Legislature, as such, enacted the Dowry Prohibition Act, 1961 and introduced subsequent amendments in the provisions thereof to help the helpless weaker section of the society, i.e., the women folk from the torture and harassment, mental and physical, at the hands of the husband and in laws on account of their parents being unable to quench the ever increasing thirst for the property in the form of dowry. Not only those who want to raise their status by managing to get the necessities, comforts and luxuries of life through marriage but the affluent section of the society even in certain cases has a lust for easy money or material through the institution of marriage. Thus the sacred ties of the marriage are given deplorable form and the vows taken by the husband at the altar of marriage are pushed in oblivion and continuous demand every now and then is either directly made by the husband or his relatives to the parents of the bride at the time of marriage or subsequent thereto.

11. Sec. 2 of the Dowry Prohibition Act, 1961 (hereinafter to be referred as 'the Act') defines the term 'dowry' as under:

*“Sec. 2 Definition of 'Dowry': In this Act “dowry” means any property or valuable security given or agreed to be given either directly or indirectly-
(a) by one party to a marriage to the other party to the marriage; or
(b) by the parents of either party to a marriage or by any other person to either party to the marriage or to any other person,*

at or before (or any time after the marriage) (in connection with the marriage of the said parties), but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.”

12. The insertion of the word “or any time after the marriage” and “in connection with the marriage of the said parties” by amendments in the year 1986 and 1984 respectively has significance because clever parties initially do not enter into any agreement or make a demand but subsequent to the marriage after the lapse of some period make the demand directly or through the wife in order to make a show that it is not dowry. It is for this reason that Legislation in its wisdom included subsequent demands and the things given as inclusive in the definition of “dowry”. Along with these amendments, provisions were inserted in the Indian Penal Code and in the Indian Evidence Act. Section 304B was inserted in Indian Penal Code as a new provision in the category of offences falling under sections 302, 304A and 307 IPC, in order to curb the lust of procurement of the dowry in the past marital life.

13. Section 304B reads as under:

“304B. Dowry death:*Where the death of a woman is caused by any burns of 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 purpose of this sub-section "dowry" shall have the same meaning as in Sec.2 of the Dowry Prohibition Act, 1961 (28 of 1961). 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."

14. Hon'ble Supreme Court in ***Sunil Bajaj v. State of MP***, (2001) 9 SCC 417, after noticing the provisions of section 304B IPC had opined that in order to establish an offence u/s 304B IPC, following ingredients must be established before any death can be termed as dowry death:

- (1) The death of a woman must have been caused by burns or bodily injury or otherwise than under normal circumstances.
- (2) Such death must have occurred within 7 years of her marriage.
- (3) Soon before her death, the woman must have been subjected to cruelty or harassment by her husband or by relatives of her husband.
- (4) Such cruelty or harassment must be for or in connection with demand of dowry.

15. This section will apply whenever the occurrence of death of a woman is preceded by cruelty or harassment by husband or in-laws for dowry and death occurs in unnatural circumstances. The intention behind this section is to fasten the guilt on the husband or in-laws even though they did not in fact cause the death. It may be noticed

that punishment for the offence of dowry death under Section 304B is imprisonment of not less than 7 years, which may extend to imprisonment for life, unlike under Section 498A IPC, where husband or relative of husband of a woman subjecting her to cruelty shall be liable to imprisonment for a term which may extend to three years and shall also be liable to fine. Normally, in a criminal case accused can be punished for an offence on establishment of commission of that offence on the basis of evidence, may be direct or circumstantial or both. But in case of an offence under Section 304B IPC, an exception is made by deeming provision as to the nature of death as "dowry death" and that the husband or his relative, as the case may be, is deemed to have caused such death, even in the absence of evidence to prove these aspects but on proving the existence of the ingredients of the said offence by convincing evidence. Hence, there is need for greater care and caution, that too having regard to the gravity of the punishment prescribed for the said offence, in scrutinizing the evidence and in arriving at the conclusion as to whether all the above mentioned ingredients of the offence are proved by the prosecution.

16. Section 113B of the Evidence Act is also relevant for the case in hand. Both Section 304-B IPC and Section 113B of the Evidence Act were inserted by Dowry Prohibition (Amendment) Act 43 of 1986 with a view to combat the increasing menace of dowry deaths.

Section 113 B of the Evidence Act, 1872 reads as under:-

“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 had 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 purposes of this section, "dowry death" shall have the same meaning as in Section 304B of the Indian Penal Code (45 of 1860)“.

17. As per the definition of "dowry death" in Section 304B Indian Penal Code and the wording in the presumptive Section 113B of the Evidence Act, one of the essential ingredients amongst others, in both the provisions is that the woman concerned must have been 'soon before her death' subjected to cruelty or harassment "for or in connection with the demand for dowry". While considering these provisions, Hon'ble Supreme Court in *M. Srinivasulu v. State of A.P.*, (2007) 12 SCC 443 has observed thus:

“8.4... The presumption shall be raised only on proof of the following essentials:

- (1) The question before the court must be whether the accused has committed the dowry death of a woman. (This means that the presumption can be raised only if the accused is being tried for the offence under Section 304-B Indian Penal Code.)*
- (2) The woman was subjected to cruelty or harassment by her husband or his relatives.*
- (3) Such cruelty or harassment was for, or in connection with any demand for dowry.*
- (4) Such cruelty or harassment was soon before her death.”*

18. A perusal of Section 113B of the Evidence Act and Section 304B Indian Penal Code shows that there must be material to show that “soon before her death” the victim was subjected to cruelty or harassment. In other words, the prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the "death occurring otherwise than in normal circumstances". The prosecution is obliged to show that soon before the occurrence, there was cruelty or harassment and only in that case presumption operates.

19. Adverting to the case in hand, it is an undisputed case of the parties that the marriage of the deceased had taken place with the accused Sushil Kumar about 3 years prior to the incident. It also stands proved that the death of deceased was not caused under normal circumstances. The prosecution examined PW6 Dr. Narender Solanki,

Medical Officer at DDU Hospital who proved the MLC of the deceased Ex.PW6/A and as per this MLC, the deceased was 'brought dead' with ligature marks. PW7 Dr. Sushil Kumar, Senior Resident at DDU Hospital conducted post mortem examination of the deceased on 1st January, 2010 and opined that cause of death was asphexia from ante mortem ligature hanging and the manner of death was suicidal. He further opined that the chunni which was seized from the spot vide Ex.PW12/B may be able to sustain the weight of deceased during hanging and the ligature mark present over the neck could be possible by the chunni. Under the circumstances, it also stands proved that the deceased committed suicide. Suicide committed by a woman comes within the purview of Section 304B IPC as it is also a case of death which does not occur under normal circumstances, as such, it is proved that the deceased died "otherwise than under normal circumstances".

20. It is now to be seen whether the third ingredient is satisfied by looking at the evidence on record. In dowry death cases, in the absence of any direct evidence in the form of a dying declaration, the case has to be proved by other evidence like circumstantial evidence.

The closest people to the deceased are generally family members of the deceased and hence, their testimonies are heavily relied upon by the prosecution. In the instant case, the prosecution has relied upon the testimony of PW1 Kranti Devi, PW2 Manoj Kumar, PW3 Vinod Kumar and PW4 Ravinder Kumar.

21. PW1 Kranti Devi is the mother of the deceased and is also the complainant. She has deposed that her daughter Darshna got married to the appellant about two years ago. At the time of her marriage, she had given a refrigerator, double bed, washing machine, cooler, dressing table, gas stove, clothes, utensils, sofa and jewellery of her own will. Rs.20,000/- was given in cash when son of Darshna was unwell. She further deposed that at the time of marriage, Rs.1 lac was demanded by the accused which she did not pay and the accused were threatening that they would kill her daughter if the amount was not given. After the marriage, accused Sushil Kumar, husband of the deceased; Mahender, father-in-law; Shanti Devi, mother-in-law; Babita, sister-in-law (jethani); Kake @ Virender, brother-in-law (jeth) and entire family of accused persons used to trouble and harass her for bringing insufficient dowry. Accused Sushil Kumar used to

beat her daughter and used to press her neck to strangle her. He had once pushed her daughter from the stairs due to which her nose got injured. She further deposed that Sushil Kumar used to drink liquor daily and beat her daughter. All the accused persons and their family members used to harass her daughter and treat her with cruelty for getting their demand of Rs.1 lac fulfilled. On the fateful night, father of the accused, namely, Mahender had visited the house of Ravinder, cousin brother of the deceased and told him that Darshna was not responding. Ravinder went to the house of Darshna and found that she had expired and thereafter he took Darshna to DDU Hospital. She further stated that her daughter had been killed by strangulation due to non-payment of Rs.1 lac. She also had some injuries on her nose, cheek and rear portion of her head.

22. PW2 Manoj Kumar is the brother of the deceased and has deposed that at the time of marriage, no demand was made by the accused persons. Various articles were given in marriage besides cash. After about 6 months of the marriage, all the family members started demanding dowry from his parents. However, no demand was made directly to him. Rs.6,000/- was paid by his parents to the

accused one month prior to the incident. His sister was not happy in her matrimonial home as she was being harassed for dowry.

23. PW3 Vinod Kumar, another brother of the deceased has deposed on the same lines as PW2. Additionally, he deposed that accused Sushil Kumar was a habitual drunkard. He used to drink liquor regularly and beat his sister and used to abuse her. No complaint was made by them during the lifetime of his sister as they wanted that the sister should live in her matrimonial home. His sister informed him that she was being maltreated for dowry.

24. PW4-Ravinder is the cousin brother of the deceased and he was also the mediator between the appellant's family and the deceased's family in the marriage. This witness, however, turned hostile. He deposed that from the marriage till her death, deceased did not make any complaint to him against the accused persons.

25. Testimony of PW1 has been assailed by the learned counsel for the appellant on the ground that no reliance can be placed on the same as the witness has made material improvements. General allegations were made by her before the Tehsildar without specifying as to what was demanded by the accused persons. Thereafter, when her

statement under Section 161 Cr.P.C. was recorded by the police, she tried to improve her version by stating that demand of Rs.1 lac was made and in her deposition before the Court, she made various other allegations not only against the accused persons but also against the family members, as such, her testimony is wholly unreliable and cannot be made the basis for convicting the appellant.

26. While appreciating the evidence, the Court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without affecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The Trial Court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate Court in normal course would not be justified in reviewing the same again without justifiable reasons. {Vide: ***State Represented by Inspector of Police v. Saravanan and Anr.***, AIR 2009 SC 152}.

27. Where the omission(s) amount to a contradiction, creating a serious doubt about the truthfulness of a witness and other witness

also make material improvements before the court in order to make the evidence acceptable, it cannot be safe to rely upon such evidence. {Vide: ***State of Rajasthan v. Rajendra Singh***, (2009) 11 SCC 106}.

28. The discrepancies in the evidence of eye-witnesses, if found to be not minor in nature, may be a ground for disbelieving and discrediting their evidence. In such circumstances, witnesses may not inspire confidence and if their evidence is found to be in conflict and contradiction with other evidence or with the statement already recorded, in such a case it cannot be held that prosecution proved its case beyond reasonable doubt. {Vide: ***Mahendra Pratap Singh v. State of Uttar Pradesh***, (2009) 11 SCC 334}.

29. In case, the complainant in the FIR or the witness in his statement under Section 161 Cr.P.C., has not disclosed certain facts but meets the prosecution case first time before the court, such version lacks credence and is liable to be discarded. {Vide: ***State Represented by Inspector of Police, Tamil Nadu v. Sait @ Krishnakumar***, (2008) 15 SCC 440}.

30. In ***State of Rajasthan v. Smt. Kalki and Anr.***, AIR 1981 SC 1390, while dealing with this issue, Hon'ble Supreme Court observed

as under:

“8.....In the depositions of witnesses there are always normal discrepancies, however honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence, and the like. Material discrepancies are those which are not normal, and not expected of a normal person.”

31. The Courts have to label the category to which a discrepancy belongs. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. {Vide: ***Syed Ibrahim v. State of A.P.***, AIR 2006 SC 2908 and ***Arumugam v. State***, AIR 2009 SC 331 }.

32. In ***Bihari Nath Goswami v. Shiv Kumar Singh and Ors.***, (2004) 9 SCC 186, the Supreme Court examined the issue and held:

“9. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.”

33. While deciding such a case, the Court has to apply the aforesaid tests. Mere marginal variations in the statements cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case,

render the testimony of the witness liable to be discredited.

34. In *Narayan Chetanram Chaudhary and Anr. v. State of Maharashtra*, AIR 2000 SC 3352, the Supreme Court held that while discrepancies in the testimony of a witness which may be caused by memory lapses were acceptable, contradictions in the testimony were not. It was observed:

"42. Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness. The omission in the police statement by itself would not necessarily render the testimony of witness unreliable. When the version given by the witness in the Court is different in material particulars from that disclosed in his earlier statements, the case of the prosecution become doubtful and not otherwise. Minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and the sense of observation differ from person to person."

35. The difference between discrepancies and contradictions was explained by the Supreme Court in *State of Himachal Pradesh v. Lekh Raj and Anr.*, AIR 1999 SC 3916. Reference may also be made to the decision of the Supreme Court in *State of Haryana v. Gurdial Singh*, AIR 1974 SC 1871, where the prosecution witness had come out with two inconsistent versions of the occurrence. One of these versions was given in the Court while the other was contained in the statement made before the Police. It

was observed:

"21. The present is a case wherein the prosecution witnesses have come out with two inconsistent versions of the occurrence. One version of the occurrence is contained in the evidence of the witnesses in court, while the other version is contained in their statements made before the police...In view of these contradictory versions, the High Court, in our opinion, rightly came to the conclusion that the conviction of the accused could not be sustained."

36. Reference may also be made to the decision of the Supreme Court in *Kehar Singh and Ors. v. State (Delhi Administration)*, AIR 1988 SC 1883, where it was held that if the discrepancies between the first version and the evidence in Court were material, it was safer to err in acquitting than in convicting the accused.

37. The Supreme Court in *Vadivelu Thevar v. The State of Madras*, AIR 1957 SC 614 classified witnesses into three categories, namely, (i) those that are wholly reliable, (ii) those that are wholly unreliable and (iii) who are neither wholly reliable nor wholly unreliable. In the case of the first category the Courts have no difficulty in coming to the conclusion either way. It can convict or acquit the accused on the deposition of a single witness if it is found to be fully reliable. In the second category also there is no difficulty in arriving at an appropriate conclusion for there is no

question of placing any reliance upon the deposition of a wholly unreliable witness. It is only in the case of witnesses who are neither wholly reliable nor wholly unreliable that the Courts have to be circumspect and have to look for corroboration in material particulars by reliable testimony direct or circumstantial.

38. In the instant case, the police machinery was set in motion on the statement Ex.PW5/A made by Kranti, mother of the deceased before the Tehsildar wherein she stated that her daughter Darshna got married to Sushil Kumar about 3 years ago. After marriage, Sushil used to harass her daughter after drinking liquor. Sushil, his parents and elder brother used to harass Darshna on account of dowry and used to beat her. Sushil Kumar did not permit Darshna to visit her parental home. She suspected that her daughter had died due to harassment meted out to her by her husband, mother-in-law and brother-in-law Virender on account of dowry and she prayed for action against them.

39. Thereafter, her statement under Section 161 Cr.P.C., Ex.PW1/D1 was recorded by the police wherein she stated that Sushil Kumar used to beat her daughter on account of dowry while her

mother-in-law Shanti and brother-in-law Virender used to maltreat her on account of dowry. They used to taunt her. One day prior to her death, Sushil had given beatings to Darshna. This fact was disclosed to her by her daughter on telephone. She did not make any complaint to the police as she wanted that her daughter should live in her matrimonial home. Six months prior to the incident, she had given a sum of Rs.8,000/- to her son-in-law.

40. However, when she appeared in the witness box, material improvements were made by her wherein she has not only levelled allegations against the accused Sushil Kumar, mother-in-law Shanti Devi and Virender, brother-in-law but also levelled allegations against Mahender, father-in-law, Babita, co-sister (jethani) and Kake, another brother-in-law of the deceased for harassing her daughter for bringing insufficient dowry. She went on stating that accused Sushil used to press her neck to strangle her. He had once thrown her from the stairs due to which her nose got injured. She further went on deposing that deceased had some injuries on her nose, cheek and rear portion of her head. She was confronted on material aspects with her earlier statement made before the Tehsildar and before the police. In

fact, at one stage she disowned having made any statement before Tehsildar, at other places, she deposed that her statement was recorded by police and one more person. Moreover, she herself admitted that various articles were given by her at the time of marriage **“with her own consent”**. Even when the son of Darshna was born, a sum of Rs.20,000/- was given and there is no allegation that this payment was made in pursuance to any demand raised either by the appellant or any of his family members. Moreover, in her initial statement made before the Tehsildar and statement u/s 161 Cr.P.C recorded by police, she has levelled allegations only against Sushil Kumar, Bijender and Shanti Devi, husband, brother-in-law and mother-in-law respectively of the deceased, however, in her deposition before the Court, she has tried to rope in all the family members by levelling allegations against the father-in-law, co-sister Babita (Jethani) and Kake, another brother-in-law of deceased. Further, according to her, deceased was having injuries on her nose, cheek and rear portion of head but neither in the MLC of the deceased nor in her post mortem report, there is any mention of any injury on the persons of deceased. Rather Dr. Sushil Kumar has given a

categorical finding that “manner of death was suicidal”.

41. In view of the foregoing, the testimony of PW1 cannot be said to be wholly reliable or wholly unreliable. She, being the mother of the deceased, was the best person to depose as to how her daughter was being kept at her matrimonial home. It has come in her statement that her daughter used to call her daily, sometimes in the evening and sometimes in the morning. She also used to call her daughter. Her children also used to visit the matrimonial house of her daughter quite frequently and they used to visit after every week or fortnight. Under these circumstances, what makes it suspicious is that the witness despite being a natural witness, made a substantial improvement in the version without there being any acceptable explanation in regard to the facts and matters which were in her knowledge. The Court would, therefore, look for independent corroboration to her version, which corroboration is not forthcoming.

42. PW2 Manoj Kumar and PW3 Vinod Kumar, brothers of the deceased have categorically deposed that no demand was made by the accused persons at the time of marriage. According to them, after about six months of the marriage, all the family members of the

accused started demanding dowry from their parents. A general and vague allegation has been made without specifying as to what demand was made by the family members of the accused from their parents. According to them, one month prior to the incident, a sum of Rs.6000/- was paid by their parents to the accused. However, factum of this payment does not find corroboration from the testimony of PW1-Kranti. Statement of Om Prakash, father of the deceased although was recorded under Section 161 Cr.P.C., however, this witness was dropped by the prosecution. Under the circumstances, in the absence of any deposition by PW1 Kranti regarding payment of Rs.6000/- and in the absence of examination of Om Prakash, it is not proved that any payment was made to the accused persons by the parents of the deceased.

43. From the evidence of the prosecution witnesses and in particular, PW1, PW2 and PW3, we find that they have made general allegations of harassment by the appellant and his family members towards the deceased and have not brought in evidence any specific acts of cruelty or harassment by the appellant on the deceased on account of dowry.

44. Hon'ble Supreme Court in ***Biswajit Halder @ Babu Halder and Ors. v. State of West Bengal***, (2008) 1 SCC 202 observed as under:

*"14. In this case we find that there is practically no evidence to show that there was any cruelty or harassment for or in connection with the demand of dowry. There is also no finding in that regard. This deficiency in evidence proves fatal for the prosecution case. Even otherwise mere evidence of cruelty and harassment is not sufficient to bring in application of Section 304B IPC. It has to be shown in addition that such cruelty or harassment was for or in connection with the demand for dowry. (See: ***Kanchy Komuramma v. State of A.P.*** , 1996 SCC (Crl.) 31. Since the prosecution failed to prove that aspect, the conviction as recorded cannot be maintained.*

45. Moreover, to bring home the guilt of the accused within four corners of Section 304B IPC, it is incumbent upon the prosecution to prove that "soon before her death", deceased was subjected to cruelty or harassment by her husband or in-laws. The expression "soon before death" has not been defined and the legislation has not specified any time which would be the period prior to death that would attract the provisions of section 304B IPC.

46. We may refer to the judgment in ***Kans Raj v. State of Punjab***, (2000) 5 SCC 207, wherein the Supreme Court considered the term 'soon before'. The relevant observations are as under:

"Soon before" is a relative term which is required to be considered under specific circumstances of each case and no straitjacket formula can be laid down by fixing any time-limit. This expression is pregnant with the

idea of proximity test. The term "soon before" is not synonymous with the term "immediately before" and is opposite of the expression "soon after" as used and understood in Section 114 Illustration (a) of the Evidence Act. These words would imply that the interval should not be too long between the time of making the statement and the death. It contemplates the reasonable time which, as earlier noticed, has to be understood and determined under the peculiar circumstances of each case. In relation to dowry deaths, the circumstances showing the existence of cruelty or harassment to the deceased are not restricted to a particular instance but normally refer to a course of conduct. Such conduct may be spread over a period of time. If the cruelty or harassment or demand for dowry is shown to have persisted, it shall be deemed to be "soon before death" if any other intervening circumstance showing the non-existence of such treatment is not brought on record, before such alleged treatment and the date of death. It does not, however, mean that such time can be stretched to any period. Proximate and live link between the effect of cruelty based on dowry demand and the consequential death is required to be proved by the prosecution. The demand of dowry, cruelty or harassment based upon such demand and the date of death should not be too remote in time which, under the circumstances, be treated as having become stale enough."

47. Hon'ble Apex Court in the case of ***Yashoda v. State of Madhya Pradesh***, (2004) 3 SCC 98, stated that determination of the period would depend on the facts and circumstances of a given case. However, the expression would normally imply that there has to be reasonable time gap between the cruelty inflicted and the death in question. If this is so, the Legislature in its wisdom would have specified any period which would attract the provisions of this Section. However, there must be existence of proximate link between the acts of cruelty along with the demand of dowry and the death of

the victim. For want of any specific period, the concept of reasonable period would be applicable. Thus, the cruelty, harassment and demand of dowry should not be so ancient where after, the couple and the family members have lived happily and that it would result in abuse of the said protection. Such demand or harassment may not strictly and squarely fall within the scope of these provisions unless definite evidence was led to show to the contrary. These matters, of course, will have to be examined on the facts and circumstances of a given case.

48. Thus, there must be a nexus between the demand of dowry, cruelty or harassment, based upon such demand and the date of death. The test of proximity will have to be applied. But, it is not a rigid test. It depends on facts and circumstances of each case and calls for a pragmatic and sensitive approach of the Court within the confines of law.

49. Adverting to the case in hand, it is not in dispute that the appellant and the deceased got married about three years ago. PW1 Kranti Devi, in her testimony, has deposed that a demand of Rs.1 lac was made at the time of marriage, which was not fulfilled. The

demand was repeated subsequently and deceased was also threatened to be killed if the demand was not met. However, this part of her testimony does not find corroboration from her own sons PW2-Manoj Kumar and PW3-Vinod Kumar. In fact, both these witnesses have gone to the extent of deposing that at the time of marriage, no demand was made by the accused persons and their family members. According to them, demand was made after six months of the marriage which allegation was also very vague. Absolutely, there is no evidence that “soon before her death” any demand was made by any of the accused or she was harassed in connection with demand of dowry. This aspect of the matter has not been considered by the learned Additional Sessions Judge.

50. As such, prosecution has failed to prove that “soon before her death”, the deceased was subjected to cruelty or harassment by the appellant or his family members.

51. Presumption under Section 113B of the Evidence Act can be drawn only when prosecution first establishes the essential ingredients of Section 304B IPC. Since the evidence falls short of proving the essential ingredients to Section 304B IPC, question of

drawing presumption against the accused under Section 113B does not arise. The learned Trial Court fell in error in concluding that the appellant was guilty of offence when the crucial and necessary ingredient that deceased Darshna was subjected to cruelty and harassment soon before her death on account of dowry was not proved. Therefore, the findings of learned Trial Court in this regard cannot be sustained.

52. The appellant was also charged for offence under Section 498A IPC which reads as under:-

“498A. Husband or relative of husband of a woman subjecting her to cruelty.—Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.—For the purpose of this section, “cruelty” means—

- (a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or*
- (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.”*

53. A bare reading of this Section goes to show that the cruelty meted out to the deceased is not only confined to harassing the women with a view to coercing her or any person related to her to meet any unlawful demand for any property or any valuable security

but the cruelty also means the wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman. Although the prosecution has not been able to prove that the deceased was subjected to harassment on account of meeting unlawful demand or any property or valuable security but it has come in the testimony of PW1 and PW3 that the appellant was a habitual drunkard and used to beat the deceased daily. This part of their testimony has not been challenged in cross-examination. Under the circumstances, physical cruelty inflicted upon the deceased stands proved from the testimony of PW1 and PW3. As such, as regards the conviction of the appellant under Section 498A IPC is concerned, the same is upheld. However, as per the nominal roll dated 3rd October, 2013, the appellant has already undergone sentence including under trial period for a period of 3 years, 9 months and 3 days besides that he also earned remission for 9 months and 12 days. The punishment prescribed under Section 498A IPC extends to 3 years only. Under the circumstances, the appellant has already undergone the period of

sentence prescribed under this Section, as such, he is entitled to be released on the period already undergone on deposit of fine.

54. Keeping in view the fact that Darshna had committed suicide within seven years of marriage, it may also be seen whether any case u/s 306 IPC is made out. Although, no charge u/s 306 IPC was framed, however, it is a settled proposition of law that mere omission or defect in framing of charge would not disentitle the Court from convicting the accused for the offence which has been found to be proved on the basis of the evidence on record. In such circumstances, the matter would fall within the purview of Section 221(1) and (2) of the Code of Criminal Procedure, 1973. Section 306 IPC provides that if any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment which may extend to ten years and with fine.

55. Section 107 IPC defines “abetment” which reads as under :

*“S.107. A person abets the doing of a thing, who
First— Instigates any person to do that thing; or*

Secondly— Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly— Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation.1- A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Explanation.2 – Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act.”

56. This section has to be read with section 113A of Evidence Act, 1872 which reads as under:-

“When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband has subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

Explanation.- For the purposes of this section, “cruelty” shall have the same meaning as in section 498A of the Indian Penal Code (45 of 1860)”.

57. A perusal of this section goes to show that any person, who abets commission of suicide, is liable to be punished under section 306 IPC. Section 107 IPC lays down ingredients of abetment, which includes instigating any person to do a thing or engaging with one or more persons in any conspiracy for the doing of a thing, if an act or illegal omission takes place in pursuance of that conspiracy and in order to the doing of that thing, or intentional aid by any act or illegal

omission to the doing of that thing. As per definition of abetment as laid down u/s 107 IPC, there has to be instigation to commit suicide on behalf of the accused persons.

58. In *Sanju @ Sanjay Singh Sengar v. State of M.P.*, (2002)

Cri.LJ. 2796, it was observed:

“Where suicide was not the direct result of the quarrel when the appellant used abusive language and told the deceased to go and dies, no offence u/s 306 IPC is made out.”

59. In *Kishori Lal v. State of M.P.*, (2007) 10 SCC 797, it was observed :-

“Mere fact that the husband treated the deceased wife with cruelty is not enough to bring the case within the parameter of Section 306 IPC.”

60. In the absence of direct evidence, it is to be seen whether presumption u/s 113 A of Indian Evidence Act can be drawn or not.

61. Unlike Section 113B of the Indian Evidence Act, a statutory presumption does not arise by operation of law merely on proof of the circumstances enumerated in section 113A of the Indian Evidence Act. Under section 113A of the Indian Evidence Act, the prosecution has to first establish that the woman concerned committed suicide within a period of seven years from the date of her marriage and that her husband and in-laws had subjected her to cruelty. Even if these

facts are established, the Court is not bound to presume that the suicide had been abetted by her husband. Section 113A gives a discretion to the Court to raise such a presumption, having regard to all the other circumstances of the case, which means that where the allegation is of cruelty it must consider the nature of cruelty to which the woman was subjected, having regard to the meaning of word cruelty in section 498A IPC. The mere fact that a woman committed suicide within seven years of her marriage and that she had been subjected to cruelty by her husband and in-laws does not automatically give rise to the presumption that the suicide had been abetted by her husband and in-laws. The Court is required to look into all other circumstances of the case. One of the circumstances which has to be considered by the Court is whether the alleged cruelty was of such nature as was likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health of the woman. The law has been succinctly stated in ***Ramesh Kumar v. State of Chhattisgarh***, (2001) 9 SCC 618 wherein Hon'ble Supreme Court observed:-

"This provision was introduced by the Criminal Law (Second) Amendment Act, 1983 with effect from 26.12.1983 to meet a social demand to resolve difficulty of proof where helpless married women were eliminated by

being forced to commit suicide by the husband or in laws and incriminating evidence was usually available within the four corner of the matrimonial home and hence was not available to anyone outside the occupants of the house. However, still it cannot be lost sight of that the presumption is intended to operate against the accused in the field of criminal law. Before the presumption may be raised, the foundation thereof must exist. A bare reading of Section 113A shows that to attract applicability of section 113A, it must be shown that (i) the woman has committed suicide, (ii) such suicide has been committed within a period of seven years from the date of her marriage, (iii) the husband or his relatives, who are charged had subjected her to cruelty. On existence and availability of the abovesaid circumstances, the Court may presume that such suicide had been abetted by her husband or by such relatives of her husband. Parliament has chosen to sound a note of caution. Firstly, the presumption is not mandatory; it is only permissible as the employment of expression "may presume" suggests. Secondly, the existence and availability of the above said three circumstances shall not, like a formula, enable the presumption being drawn; before the presumption may be drawn the Court shall have to have regard to "all the other circumstances of the case". A consideration of all the other circumstances of the case may strengthen the presumption or may dictate the conscience of the Court to abstain from drawing the presumption. The expression "the other circumstances of the case" used in Section 113A suggests the need to reach a cause and effect relationship between the cruelty and the suicide for the purpose of raising a presumption. Last but not the least, the presumption is not an irrebuttable one. In spite of a presumption having been raised the evidence adduced in defence or the facts and circumstances otherwise available on record may destroy the presumption. The phrase "may presume" used in section 113A is defined in section 4 of the Evidence Act, which says "Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it".

62. In the ***State of West Bengal v. Orilal Jaiswal and anr.***, (1994)

1 SCC 73, Hon'ble Apex Court observed :-

"We are not oblivious that in a criminal trial the degree of proof is stricter than what is required in a civil proceedings. In a criminal trial however intriguing may be facts and circumstances of the case, the charges made against the accused must be proved beyond all reasonable doubts and the

*requirement of proof cannot lie in the realm of surmises and conjectures. The requirement of proof beyond reasonable doubt does not stand altered even after the introduction of section 498A IPC and section 113A of the Indian Evidence Act. Although, the Court's conscience must be satisfied that the accused is not held guilty when there are reasonable doubts about the complicity of the accused in respect of the offences alleged, it should be borne in mind that there is no absolute standard for proof in a criminal trial and the question whether the charges made against the accused have been proved beyond all reasonable doubts must depend upon the facts and circumstances of the case and the quality of the evidence adduced in the case and the materials placed on record. Lord Denning in **Bater v. Bater**, 1950 (2) All ER 458, 459 has observed that the doubt must of a reasonable man and the standard adopted be a standard adopted by a reasonable and just man for coming to a conclusion considering the particular subject matter”.*

63. In **Gangula Mohan Reddy v. State of Andhra Pradesh**, (2010)

1 SCC 750, Hon’ble Supreme Court, observed as under:-

*“In State of **West Bengal v. Orilal Jaiswal & Ors** (1994) 1 SCC 73, this Court has cautioned that the Courts should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end the life by committing suicide. If it transpires to the Court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance, discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the Court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty.”*

64. In **Mahendra Singh v. State of MP**, 1995 SCC (Cri) 1157,

Hon’ble Supreme Court observed that it is common knowledge that the words uttered in a quarrel or in spur of moment or in anger cannot be treated as constituting *mens rea*. In the said case, appellant said to

the deceased to “to go and die” and as a result of such utterance, the deceased went and committed suicide, however, Hon’ble Supreme Court observed that no offence under Section 306 IPC read with Section 107 IPC was made out since there was no element of *mens rea*.

65. In ***Bhagwan Das v. Kartar Singh & Ors.***, (2007) 11 SCC 205, it was held that quite often there are disputes and discord in the matrimonial home and wife is harassed by husband or by her in-laws, this, however, would not by itself and without something more attract Section 306 IPC read with Section 107 IPC.

66. In the instant case, there is no averment in the statement of the witnesses that any of the accused instigated the deceased to commit suicide. There is no direct evidence to establish that any of the accused either aided or instigated the deceased to commit suicide or entered into any conspiracy to aid her in committing suicide. In the facts of this case, prosecution has been unsuccessful in proving that there was element of *mens rea* on the part of the accused, accordingly, in our view, ingredients of evidence under Section 306 IPC r/w Section 107 IPC are not attracted. As observed in ***Smt. Bisno***

v. State, 2011 II AD (Delhi) 501, there is always a reason behind an act committed by a person. Committing of suicide by deceased by hanging herself, that too within thirteen months of the marriage does raise a suspicion that everything was not normal. This suspicion, however, cannot be a substitute for the proof of dowry demand or subjecting the deceased to harassment and cruelty, i.e., the requisite ingredients which constitute the offence under Section 498-A, 304-B IPC or 306 IPC.

67. It is a cardinal principle of criminal jurisprudence that the guilt of the accused is to be established by the prosecution beyond the possibility of any reasonable doubt. Even if there may be an element of truth in the prosecution story against the accused but considered as a whole there is invariably a long distance to travel and whole of this distance must be covered by the prosecution by legal, reliable and unimpeachable evidence before an accused can be convicted. Similar view was taken in *Sarwan Singh Rattan Singh v. State of Punjab* AIR 1957 SC 637; *Anil W.Singh v.State of Bihar*, (2003) 9 SCC 67; *Reddy Sampath W. v. State of A.P*, (2005) 7 SCC 603 and *Ramreddy Rajesh Khanna Reddy v. State of A.P.*, (2006) 10 SCC 172.

68. Under the circumstances, the appeal is partly allowed. The impugned judgment dated 20th May, 2011 and order on sentence dated 23rd May, 2011 convicting the appellant under Section 304B IPC and sentencing him for 10 years is set aside. However, the conviction under Section 498A IPC is upheld but keeping in view the fact that he has already undergone the maximum sentence prescribed under this Section, as such, he is sentenced to the period already undergone. He is, however, directed to deposit fine of Rs.5,000/- within a period of seven days with the learned Trial Court. Subject to deposit of fine, he be set at liberty, if not wanted in any other case. Intimation be sent to the concerned Superintendent, Jail.

Trial Court record be sent back along with the copy of the judgment.

(SUNITA GUPTA)
JUDGE

JULY 22, 2014
rs