

Court No. - 16

Case :- CRIMINAL APPEAL No. - 195 of 2003

Appellant :- Mahraj Deen And 3 Ors.

Respondent :- State of U.P.

Counsel for Appellant :- Amitabh Srivastava, Ashish Tripathi, M. Shamshad Khan, Manoj Kumar Yadav, Neeraj Kumar, Sunil Dixit

Counsel for Respondent :- Govt. Advocate

Hon'ble Mohd. Faiz Alam Khan, J.

1. Heard learned counsel for the appellants well as Ms. Sudha Sharma, learned A.G.A. for the State and perused the record.
2. The instant criminal appeal under Section 374(2) Cr.P.C. has been preferred by the appellants- **Mahraj Deen, Ravi Shanker, Hari Shanker and Smt. Phool Mati** against the judgment and order dated 30.01.2003 passed by 1st Additional Sessions Judge, Raebareli in Sessions Trial No. 240 of 1995 (State vs. Mahraj Deen and others) arising out of Case Crime No. 136 of 1993, under Sections 498-A, 304-B I.P.C. and Section 3/4 of the Dowry Prohibition Act, Police Station Sareni, District Raebareli, whereby each of the appellants have been convicted and sentenced for the offences under Section 304-B IPC for ten years rigorous imprisonment; under Section 498-A IPC for two years rigorous imprisonment; and under Section 4 of the Dowry Prohibition Act for one year rigorous imprisonment along with fine and default clause.
3. The factual matrix necessary for disposal of the instant appeal as is evident from the record of the trial court is to the tune that the FIR of this case was lodged by the informant alleging that deceased (daughter of Jiyalal and cousin sister of

the informant) was married to the accused Ravi Shankar on 01.06.1993 and after solemnization of her marriage, the co-accused persons started making illegal demand of dowry, such as a motorcycle and a gold chain which could not be fulfilled by her relatives and thereafter they started torturing and misbehaving with her and had administered poison to her, by which she died on 19.07.1993.

4. On this information provided by the informant, an FIR was registered at Crime No. 136 of 1993, under Sections 498-A, 304-B I.P.C. and Section 3/4 of the Dowry Prohibition Act at Police Station Sareni, District Raebareli and the investigation started.

5. The investigating officer after arriving at the spot got the inquest report prepared and the dead body of the deceased was sent for post-mortem. As per the post-mortem of date 21.07.1993, no ante-mortem injuries were found on the person of the deceased and the cause of death could not be ascertained and viscera was preserved. Later on, in the viscera report which was submitted by the forensic laboratory, aluminium phosphide poison was found.

6. The investigating officer prepared the site plan and also arrested the accused persons and after recording the statements of the witnesses and completing the investigation, the investigating officer submitted the charge-sheet against the accused persons under Sections 498-A, 304-B I.P.C. and Section 3/4 of the Dowry Prohibition Act.

7. The charges against all the accused persons were framed under Sections 498-A, 304-B I.P.C. and Section 3/4 of the Dowry Prohibition Act, to which the accused persons pleaded not guilty and claimed to be tried.

8. The prosecution in order to prove its case has produced seven prosecution witnesses, namely, P.W.-1 Ram Autar, informant; P.W.-2 Smt. Ganga Dei, mother of the deceased; P.W.-3 Mani Ram, brother of the deceased; P.W.-4 Dr. G.K. Srivastava who has conducted the post-mortem; P.W.-5 Sri Ram Das, Tehsildar before whom the inquest was made; P.W.-6 Shri Ram Sundar Tiwari, the Circle Officer who has investigated the case; and P.W.-7 Subhash Chandra Bajpai, Head Constable who has registered the FIR and entered the substance in the GD of the police station. Apart from oral evidence, the prosecution has also relied on the documentary evidence e.g. FIR Tehrir, chik FIR, G.D., Qayami, post-mortem report, site plan etc.

9. After closure of the evidence of the prosecution, the statement of the accused persons was recorded by the trial court under Section 313 CrPC, wherein they denied the allegations and the evidence produced by the prosecution and have taken a defence that the deceased had died of 'cholera' and also that the information of her death was given to her family members by the husband namely, Ravi Shankar. The accused persons in their support have also testified D.W.-1 Govind in order to prove that the death of the deceased is the result of her suffering from cholera.

10. The trial court after appreciating the evidence available on record came to the conclusion that the prosecution has been able to prove its case beyond reasonable doubt and convicted all the accused persons for committing the offences under Sections 498-A, 304-B I.P.C. and Section 3/4 of the Dowry Prohibition Act and sentenced them in the manner as described in the second paragraph of this judgement.

11. Learned counsel for the appellants while drawing attention of this Court towards the impugned judgement and order

vehemently submits that the trial court has committed manifest illegality in appreciating the evidence available on record and has failed to appreciate that it was the husband of the deceased who had taken her to the hospital and prima facie, it was evident that the death of the deceased occurred as she was suffering from 'cholera'. It is also submitted that general allegations of demand of a motorcycle and a gold chain have been levelled against all the accused persons and no specific role or overt act has been assigned to any of the appellants/convicts and no common intention could be attached with appellants.

12. It is further submitted that admittedly, the case of the prosecution was based on circumstantial evidence and even for drawing a presumption as provided under Section 113-B of the Indian Evidence Act, the prosecution was obliged to prove the initial facts on the basis of which such presumption may be drawn and in this case, the prosecution has miserably failed to prove those initial facts on the basis of which any presumption may be made.

13. It is also submitted that the trial court has not considered the fact that the other accused persons except the husband of the deceased would not be the beneficiary of the dowry which had allegedly been demanded and also that the trial court has not considered major contradictions which appear in the testimony of the prosecution witnesses and thus, the quality of evidence, which was produced before the trial court, was not touching the parameters of proof beyond reasonable doubts and thus, the impugned judgement and order is liable to be set aside and the appellants are entitled to be acquitted of all the charges framed against them.

14. Learned AGA, on the other hand, submits that it is just after

49 days of the marriage, the deceased has either consumed poison or has been administered the same and in both conditions, the provisions of Section 304-B IPC would attract as the death of the deceased has occurred otherwise than in normal circumstances, within seven years of her marriage.

15. It is further submitted that to substantiate its case, the prosecution has testified three witnesses of fact namely, PW-1 informant, PW-2 the mother of the deceased and PW-3 the brother of the deceased and they are all close relatives of the deceased who in one voice have stated that soon before death, the deceased was subjected to cruelty in lieu of demand of a motorcycle and a gold chain and thus, when this fact of committing cruelty in lieu of demand of dowry, just before the death of the deceased has been proved beyond reasonable doubt and thus, no illegality has been committed by the trial court in drawing a presumption that the dowry death has been caused by the accused persons as the defence taken by the accused persons that deceased had died of cholera, has not been corroborated by any medical evidence and since it is proved that the death of the deceased has been caused by consumption of poison, no illegality has been committed by the trial court in convicting and sentencing the appellants.

16. Having heard learned counsel for the parties and having perused the record, a perusal of definition of dowry death as provided under Section 304-B of I.P.C. would reveal that if it is proved that death of a women is caused by any burn or bodily injury or occurs otherwise than under normal circumstances within 07 years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or his relatives and such cruelty or harassment was for or in connection with demand of dowry and such cruelty or

harassment was soon before her death, then it shall be obligatory on the Court to raise a presumption that the accused person(s) have caused the dowry death.

17. In ***Baijnath and Ors. vs. State of Madhya Pradesh reported in MANU/SC/1501/2016*** Honble Supreme Court while considering the requirement of section 304B I.P.C. opined as under :

"27. The evidence on record and the competing arguments have received our required attention. As the prosecution is on the charge of the offences envisaged in Sections 304B and 498A of the Code, the provisions for reference are extracted hereunder:

304B. Dowry death.-(1) Where the death of a woman is caused by any burns or 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 Section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) 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.

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.

28. Whereas in the offence of dowry death defined by Section 304B of the Code, the ingredients thereof are:

(i) death of the woman concerned is by any burns or bodily injury or by any cause other than in normal circumstances and

(ii) is within seven years of her marriage and

(iii) that soon before her death, she was subjected to cruelty or harassment by her husband or any relative of the husband for, or in connection with, any demand for dowry.

the offence Under Section 498A of the Code is attracted qua the husband or his relative if she is subjected to cruelty. The explanation to this Section expositis "cruelty" as:

(i) 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) or

(ii) 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.

29. Patently thus, cruelty or harassment of the lady by her husband or his relative for or in connection with any demand for any property or valuable security as a demand for dowry or in connection therewith is the common constituent of both the offences.

30. The expression "dowry" is ordained to have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961. The expression "cruelty", as explained, contains in its expanse, apart from the conduct of the tormentor, the consequences precipitated thereby qua the lady subjected thereto. Be that as it may, cruelty or harassment by the husband or any relative of his for or in connection with any demand of dowry to reiterate is the gravamen of the two offences.

31. Section 113B of the Act enjoins a statutory presumption as to dowry death in the following terms:

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 has 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 purpose of this section, "dowry death" shall have the same

meaning as in Section 304B of the Indian Penal Code (45 of 1860)

32. Noticeably this presumption as well is founded on the proof of cruelty or harassment of the woman dead for or in connection with any demand for dowry by the person charged with the offence. The presumption as to dowry death thus would get activated only upon the proof of the fact that the deceased lady had been subjected to cruelty or harassment for or in connection with any demand for dowry by the accused and that too in the reasonable contiguity of death. Such a proof is thus the legislatively mandated prerequisite to invoke the otherwise statutorily ordained presumption of commission of the offence of dowry death by the person charged therewith.

33. A conjoint reading of these three provisions, thus predicate the burden of the prosecution to unassailably substantiate the ingredients of the two offences by direct and convincing evidence so as to avail the presumption engrafted in Section 113B of the Act against the accused. Proof of cruelty or harassment by the husband or her relative or the person charged is thus the sine qua non to inspire the statutory presumption, to draw the person charged within the coils thereof. If the prosecution fails to demonstrate by cogent coherent and persuasive evidence to prove such fact, the person accused of either of the above referred offences cannot be held guilty by taking refuge only of the presumption to cover up the shortfall in proof.

34. The legislative primature of relieving the prosecution of the rigour of the proof of the often practically inaccessible recesses of life within the guarded confines of a matrimonial home and of replenishing the consequential void, by according a presumption against the person charged, cannot be overreached to gloss-over and condone its failure to prove credibly, the basic facts enumerated in the Sections involved, lest justice is the casualty.

35. This Court while often dwelling on the scope and purport of Section 304B of the Code and Section 113B of the Act have propounded that the presumption is contingent on the fact that the prosecution first spell out the ingredients of the offence of Section 304B as in *Shindo Alias Sawinder Kaur and Anr. v. State of Punjab* MANU/SC/0499/2011 : (2011) 11 SCC 517 and echoed in *Rajeev Kumar v. State of Haryana* MANU/SC/1144/2013 : (2013) 16 SCC 640. In the latter pronouncement, this Court propounded that one of the essential ingredients of dowry death Under Section 304B of the Code is that the accused must have subjected the woman to cruelty in connection with demand for dowry soon before her death and that this ingredient has to be proved by the prosecution beyond reasonable doubt and only then the Court will presume that the accused has committed the offence of dowry death Under Section 113B of the Act. It referred to with approval, the earlier decision of this Court in *K. Prema S. Rao v. Yadla Srinivasa Rao* MANU/SC/0890/2002 : (2003) 1 SCC 217 to the effect that to attract the provision of Section 304B of the Code, one of the main ingredients of the offence which is required to be established is that "soon before her death"

she was subjected to cruelty and harassment "in connection with the demand for dowry"."

18. The Apex Court in the case of ***Kaliyaperumal Vs. State of Tamil Nadu***, **MANU/SC/0624/2003** has held that presumption shall be raised only on proving of the following essential:-

(I) The question before the court must be whether the accused has committed the dowry death of a woman.

(II) The woman was subjected to cruelty or harassment by her husband or his relatives.

(III) Such cruelty or harassment was for, or in connection with, any demand for dowry.

(IV) Such cruelty or harassment was soon before her death.

19. A conjoint reading of Section 304-B IPC and Section 113-B of the Evidence Act indicates that if the prosecution has proved that the death of the wife was not natural or accidental death then it brings the case within the purview of 'death occurring otherwise than in normal circumstances and once the prosecution had succeeded in proving that the deceased had died an unnatural death in her matrimonial home within seven years of her marriage and soon before her death she was subjected to cruelty or harassment by husband or her relatives, the presumption under Section 113-B of Indian Evidence Act shall be attracted.

20. The word "soon before death" fell for consideration in a large number of cases before the Supreme Court and this Court. The Supreme Court in the case of ***Hira Lal and others v. State (Government of NCT), Delhi***, **MANU/SC/0495/2003 : (2003) 8 SCC 80**, has considered the scope of Section 113-B of the Evidence Act and Section 304-B IPC in the following terms:

"9. A conjoint reading of Section 113-B of the Evidence Act and Section 304-B IPC shows that there must be material to show that soon before her death the

victim was subjected to cruelty or harassment. The prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of "death occurring otherwise than in normal circumstances". The expression "soon before" is very relevant where Section 113-B of the Evidence Act and Section 304-B IPC are pressed into service. The prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by prosecution. "Soon before" is a relative term and it would depend upon circumstances of each case and no strait-jacket formula can be laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Section 113-B of the Evidence Act. The expression "soon before her death" used in the substantive Section 304-B IPC and Section 113-B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression "soon before" is not defined. A reference to expression "soon before" used in Section 114. Illustration (a) of the Evidence Act is relevant. It lays down that a Court may presume that a man who is in the possession of goods "soon after the theft, is either the thief has received the goods knowing them to be stolen, unless he can account for his possession". The determination of the period which can come within the term "soon before" is left to be determined by the Courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression "soon before" would normally imply that the interval should not be much between the concerned cruelty or harassment concerned and the death in question. There must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the death concerned. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned, it would be of no consequence."

21. The principle laid down in this case has been uniformly followed by the Supreme Court in a large number of cases. Reference may be made to the judgments in the case of **Rajinder Kumar v. State of Haryana, MANU/SC/0046/2015 : (2015) 4 SCC 215; Baljinder Kaur v. State of Punjab, MANU/SC/1047/2014 : (2015) 2 SCC 629; and, Vijay Pal Singh and others v. State of Uttarakhand, MANU/SC/1172/2014 : (2014) 15 SCC 163.**

22. It is also reflected that it is just after 49 days of her marriage with the appellant no.2- Ravi Shanker, the deceased had died.

The post-mortem of the deceased would fortify that no injury etc. has been found on her person and her viscera was preserved. A report of the Forensic Laboratory was also produced before the trial court, which fortifies that the deceased had died due to consumption of poison of aluminium phosphide.

23. There are few facts which appears to be admitted to the parties and could not be denied. It is admitted that the death of the deceased had occurred within 7 years of the marriage of the deceased with the appellant no.2- Ravi Shanker. It is also not in dispute that as per the Forensic Lab Report with regard to viscera of the deceased, she died by consumption of poison (aluminium phosphide). The said aluminium phosphide has either been administered to her against her will or may be consumed by her, and in both cases the death of the deceased had occurred otherwise than in normal circumstances.

24. The main ingredient for invoking Section 304-B IPC is that soon before her death, the deceased was subjected to cruelty in lieu of demand of dowry. To prove this material ingredient, the prosecution appears to have examined three prosecution witnesses of fact namely, PW-1, informant; PW-2 the mother of the deceased and PW-3, the brother of the deceased and they all in their statement have stated that the deceased was being subjected to cruelty in lieu of demand of a motorcycle and a gold chain. The cross examination appears to have been made at length with these prosecution witnesses, however, their testimony may not be termed either as shaky or full of contradictions so far as the husband of the deceased is concerned, who in initial days of the marriage would have been the only person with whom the deceased was interacting frequently. It has to be understood that a witness is not required

to give evidence in a videographic manner and certain discrepancies of minor nature are bound to occur in their evidence as the witnesses used to depose after many years of the incident and the duty of the trial court while disposing of the criminal cases is to see the case of the prosecution in broad spectrum and thus, minor contradictions and embellishments should be ignored.

25. Coming to the factual position of the instant case, as stated earlier, so far as the appellant no.2- Ravi Shanker is concerned, the evidence of three witnesses of fact namely, PW-1, informant; PW-2 the mother of the deceased and PW-3, the brother of the deceased may not be doubted and it is evident that the prosecution was able to prove that the deceased was being subjected to cruelty by the appellant no.2- Ravi Shanker in lieu of demand of a motorcycle and a gold chain. It also appears to be evident that in the presence of the husband of the deceased, no other accused persons may be termed as the beneficiary of the dowry which was being allegedly demanded.

26. So far as the case of other appellants namely, Mahraj Deen and Smt. Phool Mati, who are the parents-in-law of the deceased as well as of Hari Shankar who is the *Jeth* of the deceased is concerned, it appears to be an admitted situation that no overt act or specific instance of committing any cruelty has been alleged against them by any of the prosecution witness. As stated earlier, the case of the prosecution was based on circumstantial evidence and though presumption under Section 113-B of the Indian Evidence Act has been provided enabling the trial court to draw a presumption of commission of dowry death, but it is only after the initial facts are proved on the basis of which a presumption as provided under Section 113-B of the Indian Evidence Act may be drawn and in absence

of any such proof, the trial court may not draw any such presumption and it is not so that only on the basis of the allegations, the trial court would be in a position to draw a presumption that the accused persons have committed dowry death.

27. As stated earlier, no specific instance has been narrated by any of the prosecution witnesses of fact which may specifically involve any other accused person/convict except the husband and thus, in absence of any specific averment or overt act, it may not be presumed that like husband who may be the only beneficiary of the dowry which was being demanded, there may be some other accused persons who are torturing and harassing the deceased in lieu of such demand of dowry that too in absence of any specific allegations. Thus, in absence of any specific averment or overt act assigned to other accused persons except husband, the trial court appears to have been guided by the heinousness of the offences and has convicted other accused persons also along with husband of the deceased. Thus in convicting the other accused persons also along with the husband, in the considered opinion of this Court, the trial court has committed an illegality in appreciating the evidence available on record.

28. One more ground, on the basis of which this Court is of the view that trial court has committed error in convicting other accused persons except husband Ravi Shanker, is that the case of the prosecution was based on circumstantial evidence and the dead body of the deceased was found in the house of the accused persons, in a room and in presence of husband of the deceased i.e., Appellant no.2 Ravi Shanker, the burden under Section 106 of the Indian Evidence Act may not be placed on other accused persons to explain the circumstances under which

the deceased has committed suicide or done to death by consumption of poison and this fact could only be explained by the husband of the deceased and if appellant no.2- Ravi Shanker has not explained the death of the deceased or has given a wrong explanation, which could not be believed in the facts and circumstances of the case than the missing link in the chain of circumstances could only be believed with regard to appellant no.2- Ravi Shanker and this principle may not be extended to those inmates of the house, who were sleeping in separate rooms.

29. A Division Bench of this Court in Dr. (Smt.) Nupur Talwar vs. State of U.P. and another, reported in ADJ 2017 (10) 586, discussed the principle of Section 106 of the Indian Evidence Act as under:

"237. In **Ch. Razik Ram versus Ch. J.S. Chouhan reported in AIR 1975 SC 667** it has been held as under:-

"116. In the first place, it may be remembered that the principle underlying Section 106, Evidence Act which is an exception to the general rule governing burden of proof - applies only to such matters of defence which are supposed to be especially within the knowledge of the defendant-respondent. It cannot apply when the fact is such as to be capable of being known also by persons other than the respondent."

238. In *State of West Bengal versus Mir Mohammad Umar* reported in 2000 SCC(Cr) 1516 it has been reiterated as under:-

"36. In this context we may profitably utilise the legal principle embodied in Section 106 of the Evidence Act which reads as follows : "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

37. The section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the Section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn 35 regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the Court to draw a different inference.

38. Vivian Bose, J. had observed that Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused."

239. The applicability of Section 106 of the Indian Evidence Act, 1872 has been lucidly explained by the Apex Court in paragraph 23 of its judgement rendered in the case of State of Rajasthan versus Kashi Ram reported in JT 2006 (12) SCC 254 which runs as here under:-

"23. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution."

242. P. Mani Vs. State of T.N. 2006 (3) SCC 161 the Apex Court held as here under :

10. We do not agree with the High Court. In a criminal case, it was for the prosecution to prove the involvement of an accused beyond all reasonable doubt. It was not a case where both, husband and wife, were last seen together inside a room. The incident might have taken place in a room but the prosecution itself has brought out evidences to the effect that the children who had been witnessing television were asked to go out by the deceased and then she bolted the room from inside. As they saw smoke coming out from the room, they rushed towards the same and broke open the door. Section 106 of the Evidence Act, to which reference was made by the High Court in the aforementioned situation, cannot be said to have any application whatsoever.

245. A Division Bench of this Court in paragraph 24 of the aforesaid judgement rendered in the case of Pawan Kumar versus State of U.P. and reported in 2016 SCC OnLine All 949 held as under:-

"Section 106 of the Evidence Act can not be utilised to make up for the prosecution's inability to establish its case by leading cogent and reliable evidence, especially when prosecution could have known the crime by due diligence and care. Aid of section 106 Evidence Act can be had only in cases where prosecution could not produce evidence regarding commission of crime but brings all other incriminating circumstances and sufficient material on record to prima facie probablise its case against the accused and no plausible explanation is forthcoming from the accused regarding fact within his special knowledge about the incident. That section lays down only this much that if a fact is in the "special knowledge of a person" and other side could not have due

knowledge of it in spite of due diligence and care then burden of proving that fact lies on that person in whose special knowledge it is. Section 106 Evidence Act has no application if the fact is in the knowledge of the prosecution or it could have gained it's knowledge with due care and diligence."

30. In State of **Rajasthan versus Thakur Singh reported in (2014) 12 SCC 211**, the Hon'ble Apex Court opined as under:

"The High Court did not consider the provisions of Section 106, Evidence Act at all. The law is quite well settled, that burden of proving guilt of the accused is on the prosecution, but there may be certain facts pertaining to a crime that can be known only to the accused, or are virtually impossible for the prosecution to prove. These facts need to be explained by the accused, and if he does not do so, then it is a strong circumstance pointing to his guilt based on those facts. In the instant case, since the deceased died an unnatural death in the room occupied by her and the respondent, cause of unnatural death was known to the respondent. There is no evidence that anybody else had entered their room or could have entered their room. The respondent did not set up any case that he was not in their room or not in the vicinity of their room while the incident occurred, nor he did set up any case that some other person entered room and cause to the unnatural death of his wife. The facts relevant to the cause of the death of the deceased being known only to the respondent, yet he chose not to disclose them or to explain them. The principle laid down in Section 106, Evidence Act, is clearly applicable to the facts of the case and there is, therefore, a very strong presumption that the deceased was murdered by the respondent. It is not that the respondent was obliged to prove his innocence or prove that he had not committed any offence. All that was required of the respondent was to explain the unusual situation, namely, of the unnatural death of his wife in their room, but he made no attempt to do this. The High Court has very cursorily dealt with the evidence on record and has upset a finding of guilt by the trial court in a situation where the respondent failed to give any explanation whatsoever for the death of his wife by asphyxia in his room. In facts of the case, approach taken by the trial court was the correct approach under the law and the High Court was completely in error in a relying primarily on the fact that since most of the material prosecution witnesses (all of whom were relatives of the respondent) had turned hostile, the prosecution was unable to prove its case. The position in law, particularly Section 106, Evidence Act, was completely overlooked by the High Court, making it a rife at a perverse conclusion in law."

31. It is also to be recalled that whether the wife has consumed some poisonous substances or has been given such substance in absence of any direct evidence, could only be believed to be in the knowledge of the husband and if the deceased was vomiting

frequently, the other family members may believe that perhaps the deceased is suffering from cholera and if in such circumstances, they have stated in their statements recorded under Section 313 CrPC that deceased had died of cholera, no adverse inference may be drawn against them. Thus, the case of the husband of the deceased/appellant no.2 Ravi Shanker is distinguishable with other accused persons and other accused persons than husband were entitled to be given benefit of reasonable doubt.

32. It is to be recalled that the trial court while appreciating the evidence may safely and legally accept part of the evidence of the prosecution witnesses which, according to it, appears to be reliable and trustworthy and in this regard, the principle of 'falsus in uno falsus in omnibus' is not applicable in this country and it is the duty of the trial court, so far as the trial of criminal cases is concerned, to separate chaff from grain, that is to say, to separate truth from the falsehood and while doing so, the trial court is perfectly justified in appreciating the evidence of the factual witnesses, in order to separate the evidence which may be accepted and to segregate that part of the evidence which may be discarded. Thus the evidence of the prosecution witnesses of fact in this case appears to be reliable and trustworthy only with regard to appellant no.2 (husband) and not with regard to other convicts.

33. Thus, having considered the evidence produced by the prosecution in totality and the defence taken by the accused persons, this Court is not having any hesitation in observing that the defence taken by the accused persons is not at all substantiated by the facts and circumstances of the case as the deceased appears to have died by consuming poisonous substance and not by any disease like cholera. No cruelty with

deceased appears to have been committed by any of the appellants except appellant no.2- Ravi Shanker and having regard to the reasons mentioned herein before, the judgement and order of the trial court with regard to the conviction of the appellant no.2- Ravi Shankar is not suffering from any illegality and the same is hereby confirmed.

34. So far as the appellant nos. 1, 3 and 4 namely, Mahraj Deen, Hari Shanker and Smt. Phool Mati are concerned, the trial court for the reason mentioned herein-before appears to have committed an illegality in convicting them and thus, the judgement and order of the trial court in this regard is required to be interfered and is liable to be set aside.

35. In result, the judgement of the trial court with regard to the conviction of the appellant nos. 1, 3 and 4 namely, Mahraj Deen, Hari Shanker and Smt. Phool Mati is liable to be set aside.

36. Coming to the sentencing part of the judgement of the trial court, the convict/appellant no.2- Ravi Shanker has been sentenced for ten years' rigorous imprisonment along with fine so far as Section 304B IPC is concerned and for two years rigorous imprisonment under Section 498A IPC and for one year rigorous imprisonment under Section 4 of the Dowry Prohibition Act alongwith fine. In the facts and circumstances of the case, the sentencing of the appellant no.2- Ravi Shanker appears to be perfectly justified as death of the deceased had occurred within 49 days of her marriage with the appellant no.2- Ravi Shanker.

37. Thus, having regard to all the facts and circumstances of the case mentioned herein before, the appeal preferred by the appellant no.2- Ravi Shanker is **dismissed** and the judgement

and order of the trial court with regard to his conviction and sentencing is hereby affirmed. Appellant no.2- Ravi Shanker who is shown to be in jail shall serve out the whole of sentence as imposed by the trial court.

38. The appeal preferred by the appellant nos. 1, 3 and 4 namely, Mahraj Deen, Hari Shanker and Smt. Phool Mati respectively is hereby **allowed** and the impugned judgement and order of date 30.1.2003 with regard to their conviction and sentencing is hereby set aside and they are acquitted of all the charges framed against them.

39. The appellant nos. 1, 3 and 4 namely, Mahraj Deen, Hari Shanker and Smt. Phool Mati are on bail. They need not to surrender in this case unless they are not required to be detained in any other case. They shall file personal bond of Rs. 50,000/- along with two sureties of the same amount before the trial court in compliance of Section 437-A of the CrPC for the purpose of their presence before the Hon'ble Supreme Court, if any S.L.P. (Criminal)/Criminal Appeal is preferred against the judgement and order of this Court.

40. A copy of this order be sent to the trial court for the purpose of information/compliance.

41. The record of the trial court be also sent to the trial court forthwith.

Order Date :- 6.5.2024
Shravan