

IN THE HIGH COURT OF JUDICATURE AT PATNA

Death Reference No.3 of 2014

AGAINST THE JUDGMENT OF CONVICTION, DATED 1ST DECEMBER, 2014, AND THE ORDER OF SENTENCE, DATED 4TH DECEMBER, 2014, PASSED, IN SESSIONS TRIAL NO. 206 OF 2010, ARISING OUT OF HATHAURI POLICE STATION CASE NO. 82 OF 2009, BY SHRI SAMANY NATH SHRIVASTAVA, 4TH ADDITIONAL SESSIONS JUDGE, MUZAFFARPUR

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The State of Bihar				Petitioner
	Versus			
Santosh Kumar				Respondent

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With
Criminal Appeal (DB) No. 9 of 2015

Arising Out of PS.Case No. -82 Year- 2009 Thana -HATHAURI District- MUZAFFARPUR

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Santosh Kumar Son of Siya Ram Singh Resident of Village-Asmanpur, P.S-Hathuri, District-Muzaffarpur

.... Appellant

Versus

The State of Bihar Respondent

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Appearance :
(In D. REF. No. 3 of 2014)

For the Petitioner :	Mr. Ashwini Kumar Sinha, A.P.P.
For the Respondent :	Mr. Rana Pratap Singh, Senior Advocate
	Mr. Aruni Kumar, Advocate
	Mr. Rabindra Kumar, Advocate

(In CR. APP (DB) No. 9 of 2015)

For the Appellant :	Mr. Rana Pratap Singh, Senior Advocate
	Mr. Aruni Kumar, Advocate
	Mr. Rabindra Kumar, Advocate
For the Respondent :	Mr. Ajay Mishra, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI
and
HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE I. A. ANSARI)

Date: 11-05-2015

Dowry is a social evil. No wonder, therefore, that

the Legislature has made stringent laws to deal with the



devilish acts of dowry by enacting the Dowry Prohibition Act, 1961 and incorporating, in the Indian Penal Code too, Sections 498A and 304B. Though the menace of *dowry* still survives, what needs to be borne in mind is that howsoever serious a charge may be against an accused, the offence, alleged to have been committed by him, must be proved in accordance with law. Gravity of an offence cannot make admissible a piece of evidence, which is, otherwise, inadmissible. It is the duty of the court to ensure that every piece of evidence, which it considers against an accused, is admissible in law, for, howsoever grave the charge against an accused may be, he can be convicted only and only when, we must remember, he is proved guilty in accordance with law.

2. By the judgment, dated 01.12.2014, passed, in Sessions Trial No. 206 of 2010, by learned 4th Additional Sessions Judge, Muzaffarpur, the sole appellant, namely, Santosh Kumar, stands convicted under Sections 302 and Section 201 read with Section 34 of the Indian Penal Code. Following his conviction under Section 201 read with Section 34 of the Indian Penal Code, the sole accused-appellant has been sentenced, under the order, dated 04.12.2008, to undergo rigorous imprisonment for five years and pay a fine of Rs.5,000/- and, in default of payment of fine, suffer simple imprisonment for a period of six months. Following his

conviction under Section 302 of the Indian Penal Code, the sole appellant has been sentenced to *death*.

3. The case of the prosecution, as unfolded at the trial, may, in brief, be set out as under:

(i) Minu Devi, sister of the informant, Chandan Kumar (PW 7), was married to accused Santosh Kumar, about 8-9 years before her death, her death having occurred sometime on 04.07.2009 and the information about the occurrence having been lodged, at Hathauri Police Station, on 04.07.2009, at 08:00 PM.

(ii) Minu Devi had two sons and one daughter, the eldest son being 6-7 years old and the younger son and daughter, both being twins, were aged about four years.

(iii) About six months before her death, accused Santosh Kumar, his brother, Deepak Kumar, and the sister-in-law of accused Santosh Kumar, i.e., wife of Deepak Kumar, had abused and beaten Minu Devi and asked her to bring from her parents cash amounting to Rs.50,000/-, a sofa set and a bed or else, they would burn her by pouring kerosene on her.

(iv) Minu Devi, accordingly, informed her brother, Chandan Kumar, i.e., the informant (PW 7), whereupon, the informant went to the house of accused Santosh Kumar and tried to persuade all the accused, namely, accused Santosh Kumar, his brother, Deepak Kumar, and wife

of Deepak Kumar not to behave in the manner in which they had been behaving with Minu Devi, because the financial condition, in the parental family of Minu Devi, was not sound and the informant also promised that he would give the demanded money and also the articles, when they succeed in making the necessary arrangement.

(v) However, on 04.07.2009, at 02:00 PM, Nawal Kishore Singh (PW 3) told the informant (PW 7) that he (PW 3) had gone to Village Asman (i.e., the village of the accused), at about 11:00 AM, to bring his buffalo and came to learn there that all the three accused aforementioned, having tied the hands and legs of Minu Devi, threw kerosene and petrol on her and burnt her and also caused disappearance of her dead body.

(vi) On receiving the information from PW 3 (Nawal Kishore Singh), as mentioned hereinabove, informant (PW 7) went to village Asman, at about 03:30 PM, on 04.07.2009, but found the house of the accused locked and none was present there. However, the informant also came to learn from the villagers of Asman that at about 10 O'clock on that day, i.e., 04.07.2009, the said three accused had beaten Minu Devi to death after tying her hands and legs and, having thrown petrol and kerosene on her, they burnt her and caused disappearance of her dead body.



(vii) The informant, accordingly, went to Hathauri Police Station and lodged there a written information with regard to the occurrence. Treating the said information as the First Information Report, Hathauri Police Station Case No. 82 of 2009 was registered, under Sections 302/201/34 of the Indian Penal Code, against three accused persons, namely, Santosh Kumar, his brother, Deepak Kumar, and Deepak Kumar's wife.

(viii) Pending further investigation against accused Deepak Kumar and his wife, a *charge-sheet* was laid under Section 302/201/34 of the Indian Penal Code against accused Santosh Kumar.

4. At the trial, however, charges, under Sections 302 and Section 201 read with Section 34 of the Indian Penal Code, were framed against accused Santosh Kumar. To the charges so framed, he pleaded not guilty.

5. In support of their case, prosecution examined altogether 08 (eight) witnesses. The accused was, then, examined under Section 313 (1) (b) of the Code of Criminal Procedure and, in his examination aforementioned, accused Santosh Kumar denied that he had committed the offences, which were alleged to have been committed by him. The case of the defence being that of denial. The defence also adduced evidence by examining three witnesses. According to

the defence, Minu Devi died, because of diarrhea.

6. Having, however, arrived at the finding that accused Santosh Kumar had been proved guilty of the offences under Section 302 and Section 201 read with Section 34 of the Indian Penal Code, learned trial Court convicted him accordingly. Following his conviction, sentences have been passed against him as mentioned above.

7. For the reason that sentence of death has been passed against the accused aforementioned, learned trial Court has, in terms of the provisions of Section 366 of the Code of Criminal Procedure, committed the proceedings of the case to this Court for confirmation of the sentence of death. At the same time, aggrieved by his conviction and the sentences passed against him, accused Santosh Kumar, as a convicted person, has preferred appeal.

8. The reference, under Section 366 of the Code of Criminal Procedure, made by the learned trial Court, has come to be registered as Death Reference No. 3 of 2014; whereas the appeal, preferred by the accused-appellant, Santosh Kumar, has come to be registered as Criminal Appeal (DB) No. 9 of 2015.

9. Because of the fact that the death reference and the appeals are wholly inextricable from each other, we have heard both, the *reference* as well as the *appeals*,

together.

10. We have heard Mr. Ashwini Kumar Sinha, learned Additional Public Prosecutor, appearing for the State in Death Reference and, Mr. Rana Pratap Singh, learned Senior Counsel for the respondent. We have also heard Mr. Rana Pratap Singh, learned Senior Counsel, for the appellant in Cr. Appeal (D.B.) No.09 of 2015, and, Mr. Ajay Mishra, learned Additional Public Prosecutor, appearing for the State in the appeal.

11. While considering the present appeal, it needs to be pointed out, at the very outset, that according to the prosecution's case, Minu Devi was put to death on being burnt by accused Santosh Kumar, his brother, Deepak Kumar, and Deepak Kumar's wife. However, the *charge-sheet* was submitted, under Sections 302/201/34 of the Indian Penal Code, against accused Santosh Kumar alone and learned trial Court, too, framed charges under Section 302 and Section 201 read with Section 34 of the Indian Penal Code and the accused-appellant, Santosh Kumar, has been convicted under Sections 302 and Section 201 with the aid of Section 34 of the Indian Penal Code.

12. It is elementary that Section 34 postulates vicarious liability and makes a person responsible not merely for his own act, but also for the act of other. In the case at



hand, though the charges were framed under Section 302 and Section 201 read with Section 34 of the Indian Penal Code, none other than the accused-appellant, Santosh Kumar, was put on trial nor has it been the charge that Minu Devi had been put to death, in further of the *common intention* of the accused-appellant, Santosh Kumar, his brother, Deepak Kumar, and Deepak Kumar's wife.

13. With the aid of, therefore, Section 34 of the Indian Penal Code, accused Santosh Kumar could not have been held guilty alone until it was found that it was he alone, who had put to death his wife in the manner as is alleged by the prosecution and if Santosh Kumar was to be convicted with the aid of Section 34 of the Indian Penal Code, there ought to have been evidence as to who had put to death Minu Devi and who had caused disappearance of the dead body and how Santosh Kumar shall be vicariously made liable for the act, which he may not have committed.

14. Coupled with the above, it is also necessary to bear in mind that no witness has been examined, at the trial, as an eye witness to the alleged occurrence of killing of Minu Devi at the hands of accused-appellant. The prosecution's case, as unfolded at the trial, comes to rest on the alleged dying declaration said to have been made by Minu Devi, while she was lying burnt.



15. Keeping in view what we have indicated above, when we turn to the evidence of PW 3 (Nawal Kishore Singh), we notice that according to his evidence, on 04.07.2009, he went to village Asman to fetch his buffalo and heard there from children of *Mushahar* and *Harijan* community that Santosh Kumar, i.e., the accused-appellant, had killed his wife, i.e., Minu Devi, and he (PW 3) accordingly went to the house of the appellant, but found his house locked and no one was present there. It is the evidence of PW 3 that he (PW 3), thereafter, asked his *bhabhi*, i.e., sister-in-law, a neighbour of the appellant, as regards Minu's death and the sister-in-law of PW 3 told PW 3 that Santosh Kumar, his brother, Deepak Kumar, and wife of Deepak Kumar, had damaged Minu Devi's eyes, broken her teeth, cut her tongue and burnt her after pouring kerosene on her.

16. It is in the evidence of PW 3 that he went and inform Minu Devi's brother, Chandan Kumar (PW 7), and, accompanied by Chandan Kumar, came back to the appellant's house and, then, he (PW 3) also accompanied the informant, Chandan Kumar (PW 7) to Hathauri Police Station, where the informant lodged the *first information report*, with PW 3 as a witness to the *first information report*.

17. It is also in the evidence of PW 3 that accused Santosh Kumar used to assault his wife and used to

demand Rs. 50,000/- and a sofa set and as Minu Devi was his niece, he, accompanied by Minu Devi's father, had gone to the appellant's house to persuade him not to torture Minu Devi, but the appellant remained adamant and, ultimately, killed Minu Devi.

18. Before proceeding further, we may promptly point out that neither the identity of the children, who are claimed by PW 3 to have informed him (PW 3) that accused Santosh Kumar has killed his wife, could be established by the evidence on record nor has any child been examined to prove that he or she had informed PW 3 to the effect that the accused-appellant had killed his wife.

19. PW 3 could not even say the name of any of the children from whom he claims to have received the information about Minu Devi having been killed by her husband and/or his relatives.

20. Clearly, therefore, the evidence given by PW 3 that he was told by children of *Mushahar* and *Harijan* community that Santosh Kumar, i.e., the accused-appellant, had killed his wife, is nothing but *hearsay* and ought to be kept excluded from the purview of this Court's consideration.

21. We must also hasten to point out that though PW 3 claims that he made an inquiry from his *bhabhi*, i.e., sister-in-law, a neighbour of accused Santosh Kumar, who



told him (PW 3) that the three accused, namely, accused Santosh Kumar, his brother, Deepak Kumar, and wife of Deepak Kumar, had damaged Minu's eyes and teeth, cut her tongue and burnt her after pouring kerosene on her, is also nothing, but *hearsay* inasmuch as PW 3's bhabhi (i.e., sister-in-law), who is claimed to have given such information to PW 3, has not been examined at the trial nor has even her complete identity been established by adducing evidence.

22. Unquestionably, therefore, the evidence given by PW 3 as to what his *bhabhi* (i.e., sister-in-law) had informed him is nothing but *hearsay* and ought to be kept excluded from the purview of this Court's consideration.

23. In fact, it appears from the evidence on record that PW 3 had claimed before the police that it was from Jhapsi Manjhi (PW 5) that he had learnt that Minu Devi had been killed, but Jhapsi Manjhi (PW 5) has himself failed to show that he knew that Minu Devi had been put to death by her husband and/or by the relatives of her husband.

24. Contrary to what PW 3 has claimed, PW 5 (Jhapsi Manjhi) does not, in his evidence, even mention to have met PW 3 (Nawal Kishore Singh) inasmuch as the evidence of PW 5 (Jhapsi Manjhi) is to the effect that on the day of occurrence, at about 10 O'clock in the morning, when he reached his house after cutting grass, he heard *hulla* that

accused Santosh Kumar had set ablaze his wife, he went and saw accused Santosh Kumar's wife in burnt condition. PW 5 has clearly deposed that he did not see whether she was taken away by Deepak Kumar or accused Santosh Kumar.

25. The evidence, therefore, of PW 3 attributing his knowledge to the information given by PW 5 is also nothing, but *hearsay* and cannot be the basis for holding the accused-appellant guilty of having put to death his wife in the manner as alleged. This apart, even the evidence of PW 5 does not help the prosecution in proving that it was the accused-appellant, who had put to death his wife, Minu Devi, for, PW 5 has no knowledge, if Minu Devi was burnt by the accused-appellant or by someone else or by the accused-appellant conjointly with some other person or persons or her death was accidental or suicidal.

26. Coming to the evidence of informant (PW 7), we notice that according to him, the accused used to demand Rs.50,000/- and a sofa set and having learnt about the said demand, he went to the house of the accused to persuade the latter not to raise such demand, but the accused did not relent.

27. It is in the evidence of the informant (PW 7) that on 03.07.2009, he happened to meet the appellant at Muzaffarpur Court, where PW 7 had gone along with Ujjawal



Kumar, and the accused told the informant, at Muzaffarpur Court, that if the informant did not give him a bed and sofa set, he would kill Minu Devi and, accordingly, the informant alleges, the appellant killed Minu Devi on 04.07.2009, at about 10:00 AM, by tying her hands and legs, damaging her eyes, breaking her teeth, cutting her tongue and burning her.

28. It is also in the evidence of the informant that he came to learn about the death of his sister, Minu Devi, on 04.07.2009, at about 02:00 PM, from PW 3 and, accompanied by PW 3, he went to the appellant's house, but none was present there and he was told by the *people*, in the vicinity of the appellant's house, that Minu Devi had been burnt to death.

29. It needs to be noted that though in the light of the evidence of the informant (PW 7), the appellant happened to meet PW 7 at Muzaffarpur Court on 03.07.2009 and told him (PW 7) that if the informant did not give him a bed and sofa set, he would kill Minu Devi, this fact was not stated in the first information report by the informant. As against this omission, the informant alleged, in his First Information Report, (as we have already pointed out above,) that it was about six months ago that accused Santosh Kumar, Deepak Kumar and Deepak Kumar's wife had abused and beaten Minu Devi and told her to bring Rs.50,000/-, a sofa set

and a bed or else, they would burn her after pouring kerosene on her.

30. Situated thus, it becomes clear that while the informant (PW 7) has abandoned his case that his sister was abused and beaten six months before her death and a demand for Rs.50,000/-, a sofa set and a bed was raised, about six months back, the informant has introduced, for the first time, in his evidence, that on 03.07.2009, the appellant told him (PW 7) that if he did not give him the bed and sofa set, he would kill Minu Devi. Such improved version introduced, for the first time, at the trial, cannot be safely relied upon, particularly, when we notice that the said Ujjawal Kumar, who, according to the informant, had accompanied him to Muzaffarpur Court, has not been examined by the prosecution and no explanation has been offered for the prosecution's omission to examine Ujjawal Kumar or discernible from the evidence on record.

31. Withholding of Ujjawal Kumar leaves us with no option, but to hold that Ujjawal Kumar would not have supported the evidence of PW 7 and that was the reason why Ujjawal Kumar has been withheld from the Court.

32. Coupled with the above, the evidence given by the informant (PW 7) that the people, who resided in the vicinity of the appellant's house, told him (PW 7) and Nawal

Kishore Singh (PW 3) that Minu Devi had been done to death by the accused-appellant is nothing, but *hearsay* inasmuch as prosecution has not adduced evidence of even a single witness, who could claim that he or she had witnessed the occurrence of Minu Devi having put to death and/or reported the occurrence to the informant (PW 7) and/or PW 3.

33. Turning to the evidence of PW 6 (Achal Kumar), we notice that according to him, on the day of occurrence, at about 02:00 PM, he came to know about Minu Devi's death and, accompanied by PW 3, PW 7 and one Uma Shankar Singh, though he went to the house of the appellant, Santosh Kumar, they did not find any one there and he (PW 6), PW 3, PW 7 and Uma Shankar Singh were told by the co-villagers of the appellant that Minu Devi's hands and legs were tied, her eyes were gouged out, her teeth were broken, her tongue was cut and, then, she was set ablaze after pouring kerosene by accused Santosh Kumar, Deepak Kumar and the wife of Deepak Kumar.

34. Noticeable it is, while considering the evidence of not only PW 6, but also of PW 3 and PW 7, that no co-villager of the appellant has been examined, at the trial, who could claim to have reported to PW 6, PW 3 and/or PW 7 that he or she had seen the accused-appellant putting to death Minu Devi or the appellant's wife, Minu Devi, having made any

dying declaration to the effect that her husband had set her on fire. The evidence, therefore, of PW 6 given, in this regard, is nothing, but *hearsay*.

35. What is also important to note, while considering the evidence of PW 6, in the light of evidence of PW 7, is that PW 6 has claimed that when PW 7 talked to the accused on phone, the accused told PW 7 that he (accused Santosh Kumar) was in the hospital and when PW 7 told the accused-appellant that he (PW 7), too, would arrive at the hospital, the appellant told him (PW 7) that the doctor had referred Minu Devi to Patna and he (appellant) was, accordingly, taking Minu Devi to Patna; whereas the evidence of PW 7 is that when he contacted the appellant on phone, the appellant told him (PW 7) that he (PW 7) would never know where the dead body of his sister had been thrown after killing her and, then, he (PW 7) went to Hathauri Police Station and lodged there the first information report.

36. While, thus, PW7 claims that the appellant told him on phone that he would never come to know the river, wherein the appellant had thrown the dead body of Minu Devi, PW 6 claims that the appellant told PW 7 that the appellant was in the hospital and when PW 7 told the appellant that he (PW 7) was also arriving at hospital, appellant told him (PW 7) that the doctor had referred Minu Devi to Patna and he (appellant)

was, accordingly, taking Minu Devi to Patna.

37. Situated thus, there is no escape from the conclusion that the evidence given by PW 3, PW 6 and PW 7 is nothing but a bundle of lies and, at any rate, none of them is such a witness, whose evidence can be confidently relied upon. This apart, their evidence does not legally prove that Minu Devi had been killed, or her death was accidental or suicidal and/or the accused-appellant was the one, who had put to death his wife, Minu Devi.

38. When we examine the evidence of PW 4 (Uma Shankar Singh), we notice that, according to his evidence, he learnt from PW 3 that Minu Devi had been put to death by the appellant and when he went to village Asman, he found the house of the appellant locked and the villagers told that after assaulting Minu Devi and cutting her tongue, she had been burnt, but no such villager has been examined, whom PW 4 has referred to in his evidence.

39. The evidence of PW 4 as to what the appellant's co-villagers had told as regards the death of Minu Devi must, therefore, be regarded as nothing, but *hearsay*.

40. Moreover, PW 4 claims that he (PW 4) accompanied PW 3 to village Asman, but PW 3 does not support this assertion of PW 4 inasmuch as the evidence of PW 3 is to the effect that he (PW 3) went to the appellant's village,

Asman, to fetch his cattle and, upon hearing that Minu Devi had been done to death, when he (PW 3) went to the house of the appellant, he (PW 3) did not find anyone there. In such a situation, the question of PW 4, accompanying PW 3 to village Asman, did not arise, because PW3 went back to Asman village not with PW 4, but along with PW 6 and PW 7.

41. We, now, turn to the evidence of PW 1. His evidence is that on the day of occurrence, at about 10 O'clock in the morning, while he was constructing a bamboo bridge over a culvert, he, on hearing *hulla*, went to the house of accused Santosh Kumar and saw that accused Santosh Kumar's wife was burning and her *sari* stood completely burnt and that accused Santosh Kumar, his brother, Deepak Kumar, and Deepak Kumar's wife were present there. It is the evidence of PW 1 that Deepak Kumar said that Minu Devi should be taken to hospital and they accordingly put her on a cot to take her to hospital and he (PW 1) accompanied them. It is also in the evidence of PW 1 that on way to hospital, when they stopped, they found Minu Devi dead and, then, accused Santosh Kumar made a telephone call to Deepak Kumar, whereupon Deepak Kumar came there and the dead body was carried to Ram Shakal Singh's house and a Bolero vehicle was called. It is the further evidence of PW 1 that when he (PW 1), on the pretext of making water, tried to run away, he was threatened, at the

point of a pistol, by the accused and was made to board the vehicle, wherein the dead body was kept, and, then, the dead body was taken to Pahleja Ghat, where it was cremated.

42. It is in the evidence of PW 1 that quarrel between accused Santosh Kumar's wife and Deepak Kumar's wife was a regular feature.

43. Having considered the evidence of PW 1, we find it frightfully difficult and wholly impossible to place reliance on his evidence inasmuch as it is clear that if the accused-appellant was the one, who had poured kerosene and burnt Minu Devi, he (accused Santosh Kumar) would not have taken an outsider, such as, PW 1, with him. This apart, if Minu Devi's dead body was cremated at Pahleja Ghat, there is no reason for the Investigating Officer to have not examined, or for the prosecution to have not brought, witnesses to prove Minu Devi's cremation at Pahleja Ghat; whereas there is not even a particle of evidence on record that Minu Devi's dead body was cremated at Pahleja Ghat.

44. Close on the heels of the evidence of PW 1 is the evidence of PW 2. It is the evidence of PW 2 that on the day of occurrence, i.e., on 04.07.2009, at about 10:00- 10:30 AM, while he was taking rest after having his meals, he saw the people of his village running towards the house of accused Santosh Kumar shouting that accused Santosh Kumar has set



his wife on fire. It is in the evidence of PW 2 that he (PW 2), too, went to the house of accused Santosh Kumar and saw that accused Santosh Kumar's wife was writhing in pain in burnt condition and was asking for water, her eyes were damaged, her teeth were broken and tongue was also cut. It is further evidence of PW 2 that when the women folk, who had gathered around Minu Devi, asked her as to how she had caught fire, she said that Deepak Kumar, Deepak Kumar's wife and accused Santosh Kumar had dragged her to the out house and beaten her, they had broken her teeth by means of tongs, gouged her eyes, cut her tongue and, having cut her tongue, they poured kerosene on her and lit fire. It is the evidence of PW 2 that as Minu Devi's tongue was cut, she was not speaking clearly.

45. PW 2 asserts, in his evidence, that the son of accused Santosh Kumar was also present there, who said the same what had been told by Minu Devi. It is also the evidence of PW 2 that they asked accused Santosh Kumar to take Minu Devi for treatment, whereupon the accused called a vehicle and Minu Devi was carried on a cot.

46. A combined reading of the evidence of PW 1 and PW 2 shows that when PW 1 reached the house of the appellant, he claims to have found Minu Devi still burning, whereas the evidence of PW 2 is that when he saw Minu Devi, she was already burnt. If the evidence of PW 1 were to be

believed, then, he had arrived at the place, where Minu Devi was lying, before PW 2 arrived there.

47. Curiously enough, while PW 2 claims that Minu Devi told the women of the appellant's village that her husband, accused Santosh Kumar, her brother-in-law, Deepak Kumar, and her sister-in-law had poured kerosene on her and set her on fire, PW 1 does not support such assertion of PW 2. This apart, PW 2, in his cross-examination, admits that he did not even enter into the group of the female persons, who were talking to Minu Devi.

48. In the light of what have been pointed out above, when the evidence of PW 2 is considered, it becomes abundantly clear that when he did not enter the group of female persons aforementioned, he could not have heard Minu Devi making any statement to her female co-villagers as to how she had suffered burn injury. When PW 2 had not even entered the group of women, who are claimed to have been reported by Minu Devi the manner in which she (Minu Devi) had been burnt, the evidence of PW 2 cannot be safely relied upon.

49. In fact, the best witnesses, in the circumstances indicated above, were those women, who had been, in the light of the evidence of PW 2, told by Minu Devi how she had suffered burn injuries; but none of the women,

who are claimed to have been told by the said deceased as to how she had suffered burn injuries, has been examined by the prosecution. Here again, and as before, none of these witnesses has been examined by the prosecution at the trial and no explanation has been offered for withholding them.

50. We are, in the circumstances indicated, left with no option, but to draw adverse inference against the prosecution, the inference being that had any female witness been examined to prove that Minu Devi had made statement as to how she happened to have suffered burn injuries, the female person would not have supported the evidence of PW 2 and that was the reason why no woman witness has been produced and examined at the trial by the prosecution as a witness, though female persons were the ones and not PW 2 to whom Minu Devi, immediately preceding her death, is claimed to have told how the accused had burnt her.

51. Mr. Ajay Mishra, learned Additional Public Prosecutor, has pointed out that the defence has not specifically suggested to PW 2 that no *dying declaration* was made by Minu Devi. It is true that while cross-examining PW 2, there was no specific denial of Minu Devi having told how she had suffered burn injuries.

52. With regard to the above, it needs to be noted that putting of suggestion in denial is not the only mode



of proving the factum of reliability or otherwise of a witness. An accused has the right to remain silent and it is the prosecution, which has, in the criminal law, the burden to prove the commission of offence beyond reasonable doubt. If the prosecution seeks conviction of the accused-appellant on the basis of the sole testimony of PW 2, it is the duty of the prosecution to prove that PW 2 is a witness, who is wholly reliable. A reference may be made, in this regard, to the case of **Juwarsingh and other v. The State of Madhya Pradesh, (AIR 1981 Supreme Court 373)**, wherein despite absence of any cross-examination at all of DWs. 1, 2 and 3, when it was contended that the evidence of these three witnesses should be unhesitatingly accepted, the Supreme Court, disagreeing with the submissions so made, observed at paragraph 5 thus:

*"Cross-examination is not the only method of discrediting a witness. If the oral testimony of certain witnesses is contrary to proved facts their evidence might well be discarded on that ground. If their testimony is on the face of it unacceptable. **Courts are not bound to accept their testimony merely because there was no cross-examination.**"*

(Emphasis is added)

53. Reference may also be made to with regard

to the above, the case of **P. Ram Reddy and others V. Land Acquisition Officer, Hyderabad Urban Development Authority, Hyderabad and others (1995 AIR SCW 871)**.

54. PW 2 has admitted that he had submitted, in the Court, his sworn testimony on 12.08.2009 and whatever had been written, in the said sworn testimony, were true and, in the said sworn testimony, he had made no statement to the effect that Minu Devi had told how she had suffered burn injury. This apart, the evidence of PW 2 is that because of the fact that Minu Devi's tongue was cut, Minu Devi was unable to speak properly. This fact, too, was not recorded in the sworn testimony, which PW 2 had submitted in the Court.

55. Coupled with the above, the evidence of PW 2 shows that according to him, the son of accused Santosh Kumar was also present at the place, where his mother was lying writhing in pain, because of the burn injuries suffered by her and he (son of the appellant) also told those, who had gathered there, that his father, uncle and aunt had killed his mother, but the appellant's son was also not examined by the prosecution nor has been examined anyone, who could claim that the accused-appellant's had told that his mother, Minu Devi, had been set ablaze by his father, his uncle and his aunt.

56. From the failure on the part of the prosecution to examine the appellant's son and/or the women,



whom Minu Devi is claimed to have reported how she had suffered burn injuries are serious infirmities in the prosecution's case and the same cannot be ignored. Present one is not a case, where there was no witness to the alleged dying declaration made by Minu Devi inasmuch as the evidence of PW 2, if true, shows that according to him, when he reached the house of the appellant, about 100-150 people had already gathered there and he claims to know all of them, but none of these persons was examined to support the sole testimony of PW 2 that Minu Devi had made a dying declaration in the manner as claimed by PW 2.

57. When the evidence of PW 2 suffered from the infirmities, which we have indicated above, we do not find that his evidence can be implicitly relied upon or could have been implicitly relied upon for founding conviction of the accused-appellant thereon.

58. At any rate, the evidence of PW 2 is not of the kind, which can be treated as the evidence of a wholly reliable witness. Necessarily, therefore, his evidence needs corroboration from independent evidence, direct or circumstantial.

59. It is trite that the witnesses, ordinarily, fall into three distinct categories, namely, (i) wholly reliable, (ii) wholly unreliable and (iii) neither wholly reliable nor wholly



unreliable. If the witness is *wholly reliable*, his evidence can be implicitly relied upon and such a witness's testimony can be made basis for conviction of an accused. Similarly, when a witness is found to be *wholly unreliable*, no reliance can at all be placed on his evidence and his evidence has to be rejected outright. When, however, a witness is found to be *neither wholly reliable, nor wholly unreliable*, his evidence cannot be accepted as true unless his evidence is found to have been corroborated by some credible independent evidence, direct or circumstantial.

60. It is also an undisputed position of law that one infirm witness cannot be treated to have corroborated the evidence of another infirm witness meaning thereby that witnesses of same brand cannot be taken to have corroborated each other. Thus, when a witness is *neither wholly reliable nor wholly unreliable*, his evidence cannot be taken to have been corroborated by a witness of the same brand, namely, a witness, who is *neither wholly reliable nor wholly unreliable*, for, evidence is not to be counted, but weighed. It is not the number of the witnesses, which determines the outcome of a trial; rather, it is the inherent falsity or truth of the evidence given by the witness, which decides the outcome of trial. If each one of a large number of witnesses is found to be *wholly unreliable*, their evidence cannot become acceptable as true

merely because a large number of similar brand of witnesses has corroborated each other.

61. A reference, with regard to the above position of law, may be made to the case of **Muluwa, S/o Binda and others Vs. The State of Madhya Pradesh (AIR 1976 Supreme Court 989)**, wherein the Supreme Court has observed as follows :

"It is elementary that the evidence of an infirm witness does not become reliable merely because it has been corroborated by a number of witnesses of the same brand; for, evidence is to be weighed not counted. Since the evidence of P.Ws. 5 and 6 suffered from the same infirmities as that of Smt. Jugatia, it cannot be said that the trial Judge had no basis, whatsoever, for stigmatising it as unreliable."

(Emphasis is added)

62. Situated thus, it is clear that merely because some persons give evidence describing an occurrence in tune with each other, their evidence cannot be made basis for holding them truthful witnesses unless their evidence is found to have been true or is corroborated by credible independent evidence, direct or circumstantial.

63. What crystallizes from the above discussion is that the prosecution's case rests on *hearsay* evidence and



the only evidence, which has surfaced against the appellant so far as the charge under Section 302 of the Indian Penal Code is concerned, it is the alleged *dying declaration* made by Minu Devi. In this regard, however, in the light of what we have pointed out above, solitary testimony of PW 2, cannot, in our view, be held so credible, safe or reliable that conviction of the accused-appellant could have been founded thereon.

64. Coupled with the above, in the absence of any evidence showing that Minu Devi had not suffered burn injury accidentally or she did not commit suicide, the appellant could not have been convicted for the burn injuries, which Minu Devi had from, particularly, when it is the evidence, adduced by the prosecution itself, that the appellant, Santosh Kumar, along with his wife, Minu Devi, and their children resided in the same house, wherein the appellant's brother, Deepak Kumar, lived with his family including the latter's wife. There is also nothing in the evidence on record that at the time, when Minu Devi suffered burn injuries, the appellant was present at his house inasmuch as the accused-appellant was found present at his house, even according to the evidence adduced by the prosecution, after Minu Devi had already suffered burn injuries.

65. Situated thus, it becomes clear that when even the presence of the appellant has not been convincingly proved by the prosecution either by direct or circumstantial

evidence, at his house at the time when Minu Devi had suffered burn injuries, the question of holding the accused-appellant guilty of murder could not have arisen.

66. When no offence is proved to have been committed by the accused-appellant, the question of convicting the accused-appellant for an offence under Section 201 of the Indian Penal Code could not have arisen inasmuch as Section 201 of the Indian Penal Code would come into play only when an offence is committed and, then, disappearance of the evidence of the commission of offence is caused.

67. In the light of the provisions of Section 201 of the Indian Penal Code, commission of an offence must proceed so as to enable a Court to hold that it was to screen the offender that the evidence of the commission of the offence has been caused.

68. In the case at hand, when the offence of murder has not been proved to have been committed, the question of causing disappearance of evidence with the intention to screen the offender did not arise.

69. Clearly thus, the evidence on record neither warranted conviction of accused-appellant under Section 302 nor did the evidence on record warrant conviction of the accused-appellant under Section 201 of the Indian Penal Code.

70. What, however, remains in the evidence on



record is the claim of PW 3, PW 6 and PW 7 that the appellant had been demanding Rs.50,000/-, a sofa set and a bed. However, no charge have been framed either under Section 498A of the Indian Penal Code or under the Dowry Prohibition Act, 1961. We would not like to comment on the veracity of the evidence adduced by the prosecution that the appellant had been demanding cash, amounting to Rs. 50,000/-, a bed and a sofa set.

71. What crystallizes from the above discussion is that though the evidence, adduced by the prosecution, does not, as already held above, warrant conviction of the accused-appellant under Section 302 and 201 of the Indian Penal Code, there is evidence on record to the effect that the accused-appellant had demanded a sum of Rs. 50,000/-, a bed and a sofa set, and had also threatened that if his demands were not met, Minu Devi would be burnt to death.

72. In the face of the evidence so adduced by the prosecution, framing of the charge under Section 498 A of the Indian Penal Code and Section 4 of the Dowry Prohibition Act, 1961, were, indeed, warranted inasmuch as the evidence, so adduced, if true, indicate that Minu Devi was subjected to cruelty, mental if not physical,.

73. Though the First Information Report unfolds with the accusation that about six months ago, Santosh Kumar,



Deepak Kumar and Deepak Kumar's wife had assaulted Minu Devi, abused her and told her to bring from her father, Rs. 50,000/-, a sofa and a bed, or else, they would burn her by pouring kerosene on her, the accusation so made has been given a complete go-by, when the informant (PW 7) gave his evidence to the Court inasmuch as the informant has deposed in his evidence that it was a day preceding the day of occurrence that he (PW 7) happened to meet, at Muzaffarpur Court, the accused-appellant, Santosh Kumar, who told him (PW 7) that if his demands for money, bed and sofa set, were not met, his sister (i.e., Minu Devi) would be killed.

74. There is, thus, clear, evidence, reliable or otherwise, that the accused-appellant had raised the demand of Rs. 50,000/-, a bed and a sofa set, which constitute demand for dowry within the provisions of Section 4 of Dowry Prohibition Act, 1961, and makes the accused-appellant, if the evidence is true, liable for prosecution under Section 4 of Dowry Prohibition Act, 1961.

75. There could have, therefore, been and ought to have been a charge under Section 4 of the Dowry Prohibition Act, 1961. No such charge was, however, framed at the trial.

76. In the circumstances indicated above, this Court would have, ordinarily, ascertained if the evidence on record has proved the fact, beyond reasonable doubt, that



demand for dowry, as alleged by prosecution, was really raised by the accused-appellant, for, the demand for dowry is an act punishable under Section 4 of the Dowry Prohibition Act, 1961. In the case at hand, however, for the reasons, which we assign hereinbelow, we find that it will not be in accordance with law for this Court to even attempt to determine, in the present appeal, if offence, under Section 4 of the Dowry Prohibition Act, 1961, is proved to have been committed by the accused appellant.

77. In the present case, though the accusation exists that the accused-appellant had demanded dowry within the meaning of the definition of dowry as given in the Dowry Prohibition Act, 1961, no charge, under Section 4 of the Dowry Prohibition Act, 1961, was framed by the learned trial Court. Even when a formal charge has not been framed, at a given trial, against an accused in respect of an offence, which the evidence on record shows, the accused may be convicted provided that the omission to frame the charge does not cause prejudice to the accused. The law laid down, in this regard, by the Constitution Bench, in **Willie (William) Sidney v. State of Madhya Pradesh**, reported in **1956 Cri.L.J. 291**, has been consistently adhered to by the Courts in India. Taking note of what **Willie (William) Sidney** (supra) lays down, the Supreme Court, in **State of West Bengal v. Laisal Hague**

and Ors., etc., reported in **MANU/SC/0508/1988: 1989 Cri.L.J. 865** , observed, thus :

"In the celebrated case of Willie (William) Sidney v. State of Madhya Pradesh MANU/SC/0038/1955 : 1956CriLJ291 , Vivian Bose, J, speaking for the Court after an elaborate discussion observed that in judging a question of prejudice, as a guilt, the Courts must act with a broad vision and look to the substance and not to the technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried, for whether the main facts sought to be established against him were explained to him fairly and clearly, and whether he was given a full and fair chance to defend himself. That test is clearly fulfilled in the facts and circumstances of the present case. The principles laid down by that very eminent Judge in Sidney's case have throughout been followed by this Court. See K.C. Mathew v. State of Trauancore Cochin, MANU/SC/0037/1955 : 1956CriLJ444 , Gurbachan Singh v. State of Punjab, MANU/SC/0132/1957 : 1957CriLJ1009 . Eirichh Bhuian v. State of Bihar, MANU/SC/0158/1962 : AIR1963SC1120 and State of Maharashtra v. Ramdas Shrinivas Nayak MANU/SC/0117/1982 : 1982CriLJ1581 .

78. The question, therefore, which this Court, in the context of the facts of the present case, has to

determine is: whether the present accused-appellant can be said to have had full and fair chance to defend himself against the accusation made under Section 4 of the Dowry Prohibition Act, 1961.

79. While considering the above aspect of the case, what needs to be borne in mind is that Section 8A of the Dowry Prohibition Act, 1961, lays down that the burden of proving that he has not committed an offence under Section 4 of the Dowry Prohibition Act, 1961, is on the person, who faces prosecution for raising demand for dowry. To put it differently, when a person is accused to have demanded dowry and faces, on such accusation, prosecution for offence punishable under Section 4 of the Dowry Prohibition Act, 1961, Section 8A of the Dowry Prohibition Act, 1961, places, unlike an ordinary criminal trial, the burden on the accused to prove that he had not demanded the dowry and had not committed the offence alleged to have been committed by him under Section 4 of the Dowry Prohibition Act, 1961.

80. In the face of the fact that Section 8A of the Dowry Prohibition Act, 1961, places the burden to prove that he had not demanded dowry on the person, who faces the accusation of having demanded dowry, logical it is to infer that in a case punishable under Section 4 of the Dowry Prohibition Act, an accused cannot be said to have had a fair trial if he was



not formally charged for having committed an offence punishable under Section 4 of this Act, for, had he been made aware of such an accusation, his nature of defence might have changed and he might have even given evidence to prove that he had not committed any offence under Section 4 of the Dowry Prohibition Act, 1961. When the burden of proving certain facts is placed on an accused, the accused cannot be, ordinarily, convicted without formally framing a charge against him in respect of such an offence or without explaining to him formally the particulars of such an offence (see **Shamnsaheb M Mumani v. State of Karnataka MANU/SC/0391/ 2001.**)

81. Because of what have been discussed and pointed out above, we hold that the charges framed against the accused-appellant, under Sections 302 and 201 read with Section 34 of the Indian Penal Code, have not been proved beyond all reasonable doubt and the accused-appellant ought to be acquitted accordingly. However, as there is *prima facie* evidence on record attracting the penal provisions of Section 498A of the Indian Penal Code and also of an offence under Section 4 of the Dowry Prohibition Act, 1961, the accused-appellant needs to be formally charged under Section 498A of the Indian Penal Code as well as under Section 4 of the Dowry Prohibition Act, 1961, and he be made to face a fair trial on these two charges.



82. In the result, and for the reasons discussed above, while the conviction of the accused-appellant under Sections 302 and 201 read with Section 34 of the Indian Penal Code and the sentences passed against him are hereby set aside and he (i.e., the accused-appellant) is acquitted of the same and the case is remanded to the learned trial Court with direction to frame a charge under Section 498A of the Indian Penal Code and also under Section 4 of the Dowry Prohibition Act, 1961, against the accused-appellant and proceed with his trial in accordance with law. In the trial, which may be so held, the prosecution as well as the defence shall have the liberty to recall all or any of the witnesses, who have already been examined at the trial of the accused-appellant, and/or to adduce such further or other evidence as may be permissible in the law.

83. In terms of what have been observed and directed above, this appeal stands partly allowed and the *reference* stands answered accordingly.

84. In order to expedite disposal of the case against the accused-appellant, it is further directed that the learned trial Court shall proceed with the case expeditiously and dispose off the same in accordance with law, preferably, within a period of three months from the date of receipt of the case record with a copy of this judgment and order, by holding,

if necessary, day-to-day trial and ensuring that no adjournment is allowed to any of the parties unless any adjournment becomes indispensable in the interest of justice.

85. With the above observations and directions, the *death reference* and this appeal shall stand disposed of.

86. Registry shall, forthwith, send a copy of this judgment and order to the learned trial Court along with the Lower Court Records.

(I. A. Ansari, J.)

(Vikash Jain, J.)

A.F.R.
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