

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Crl. Appeal No. S-2308-SB of 2011(O&M)

Date of decision : 07.09.2015

Shanni @ Kala and another

..... Appellants

versus

State of Haryana

... Respondent

CORAM:- HON'BLE MRS. JUSTICE ANITA CHAUDHRY

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

**Present: Mr. Rajbir Sehrawat, Advocate
for the appellants**

Mr. G.S. Salwara, DAG Haryana

ANITA CHAUDHRY, J.

The appellants have assailed the judgment and order dated 02.09.2011 passed by the Additional Sessions Judge, Rohtak who recorded conviction under Section 304-B and 498-A IPC. Appellant No. 1 – Shanni @ Kala, the husband, appellant No. 2 the mother-in-law of the deceased Mukesh were sentenced to undergo rigorous imprisonment for a period of 10 years under Section 304-B IPC and 2 ½ years rigorous imprisonment under Section 498-A IPC and to pay a fine of ₹ 5000/- each. In default of payment of fine they were to undergo rigorous imprisonment for 6 months.

Mukesh was married to Shanni in March 2008. The complainant is the brother who alleged that sufficient dowry beyond

his means was given in the marriage. The in-laws were not satisfied with the dowry. Shanni repeatedly taunted Mukesh that they had not given the car at the time of marriage and on the birth of the child. Taunts were thrown by the mother-in-law that Mukesh was from a destitute family and did not bring 'Kanthi' or 'ring' in the marriage nor any gift was given at the time of birth of the child. The allegations are that on the instigation of the husband and mother-in-law, the father-in-law also taunted and abused her. Mukesh had been narrating it to her family whenever they came to meet her. On the unfortunate date, the family received information that Mukesh had died in PGI Rohtak.

Based on this complaint, the FIR was registered. The matter was investigated and challan was presented under Section 304-B and 498-A IPC. At the trial the prosecution examined 13 witnesses.

In the statement under Section 313 Cr.P.C. the accused adjured the trial and pleaded false implication. They had stated that it was accidental death and Mukesh had consumed poison accidentally and examined one witness in defence.

The trial Court accepted the statement of the witnesses and convicted and sentenced them to punishment mentioned herein above.

Learned counsel for the appellants had submitted that there is no evidence that there was any demand at the time of the marriage and the incident was accidental death and a perusal of the MLR would reveal that when the girl was taken to the hospital for

treatment, her vitals were stable and she was conscious and oriented and had given a statement that some tablets was accidentally consumed. It was urged that there is no evidence that relations were strained and no Panchayat had taken place and the history given in the MLR should be taken as the dying declaration. He strenuously urged that witnesses have made improvements at the trial and the story comes out from the mouth of Shamsheer that the girl had visited her parents before her death and had disclosed about the harassment which is an improvement and statements are hearsay. It was urged that parents and the uncle had stated that there was no earlier complaint and there is no evidence of harassment or cruelty soon before the death and general allegations have been levelled and no specific instances were given and the best possible statement could have been of the brother who had the first hand version. It was urged that the accused had examined one witness and had taken the risk to probablise the defence. It was urged that wedding of the uncle of the deceased was fixed for 18.04.2010 and family had asked Mukesh to reach by 13.04.2010 and Shanni did not allow her to attend the wedding though the parents had no issue and Mukesh went to uncle's house but was brought back by Shanni and that could have upset her. It was urged that there were suicidal tendency running in the family. It was urged that Shakuntla PW-3 clearly stated that Shanni had never directly demanded anything and Shanni had been visiting the house of the parents of Mukesh 4-5 times after his marriage and all was well.

The State counsel had submitted that it was case of

unnatural death in the matrimonial home and the girl had died of poisoning and there is no previous history of medication and poison that was consumed was not odorless and one can not consume it accidentally and there is a presumption against the accused as the death had taken place in their house and they had to explain and discharge the presumption.

When the case pertains to death of a woman within 7 years of marriage there are numerous features *inter alia* which have to be seen, the investigators have to examine whether the death is accidental, suicidal or homicidal. The first can be tragedy and there can be no criminal complexion but when the death is of a woman otherwise than under normal circumstances and there is an endeavour to cover up then it has to be examined whether it was suicidal death and who had meted cruelty, the husband or his family, Or she had been murdered? In the case of abnormal death of a young bride the homicidal death is chargeable and punishable under Section 304-B IPC. Section 113-A of the Evidence Act was enacted by the Parliament in a case of wife's death, "presuming" the guilt of the husband and the members of his family. Section 113-B of the Act pointedly refers to dowry deaths, Parliament has again employed the word "presume". The Parliament has in Section 304-B IPC "deemed" the guilt of the husband and the members of his family and it is necessary to notice the relevant Sections and examine the facts and the evidence to find out whether a case under Section 304-B of the Indian Penal Code can be said to have been made out.

Section 304-B of the Indian Penal Code reads as under:-

"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."

A legal fiction has been created in the said provision to the effect that in the event it is established that soon before the death, the deceased was subjected to cruelty or harassment by her husband or any of his relative; for or in connection with any demand of dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death. The Parliament has also inserted Section 113 B of the Indian Evidence Act by Act No.43 of 1986 with effect from 1.5.1986 which reads as under :-

"113.B- 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 304-B of the Indian Penal Code (45 of 1860)."

From a conjoint reading of Section 304-B of the Indian Penal Code and Section 113-B of the Indian Evidence Act, it will be apparent that a presumption arising thereunder will operate if the prosecution is able to establish the circumstances as set out in Section 304-B of the Indian Penal Code.

The ingredients of the aforementioned provisions are :

(1) That the death of the woman caused by any burns or bodily injury or in some circumstances which is not normal; (2) Such death occurs within 7 years from the date of her marriage (3) That the victim was subjected or cruelty or harassment by her husband or any relative of her husband; (4) Such cruelty or harassment should be for or in connection with demand of dowry; and (5) is established that such cruelty and harassment was made soon before her death.

Having examined the legal proposition at this junction we may now notice the deposition of the prosecution witnesses.

Shamsher Singh PW-1 is uncle of the deceased. He had deposed that taunts were thrown at the girl as she had come from a poverty stricken family and there were demand of car after marriage and a Gold Necklace (Kanthi) and Gold Ring when the child was born. The witness was candid to admit that there was no demand in his presence. He explained that the deceased used to disclose whenever she visited them and it was disclosed in the presence of

her brother and mother. He also stated that they sent the girl back to her matrimonial home under the expectation that things may improve.

Rohtash PW-2 deposed that he had given sufficient dowry but the husband and the in-laws were not happy and there were demands and the girl was harassed in connection with the dowry demand. He disclosed that a week before the death Mukesh had visited them and narrated her woes. He stated that Dharambir taunted her as she has come from poor family.

Shakuntla PW-3 mother of the deceased gave a detailed statement and supported the statement given by her husband. She was categorical that Mukesh had telephonically informed them that her husband and in-laws were harassing her and she used to cry and had conveyed the demands that had been made. She stated that there was a demand of car and there was a threat that in case it was not met then she would be done to death. She disclosed that they persuaded Mukesh to join her matrimonial home and assured that they would arrange a car and ornaments for her mother-in-law.

The mother was categorical that Mukesh had visited them 6 days before the death. She admitted that no complaint was lodged with any authority nor any Panchayat was convened. She stated that her brother's marriage had been fixed for 18.04.2010 and her (Mukesh) father sent a telephonic message to invite her for marriage and asked her to reach by 13.04.2010 but the husband did not allow though in-laws were willing to send her. She stated that Mukesh went to attend the wedding but she was brought back and Mukesh

left the wedding before the ceremonies could be over. The in-laws took her back to the matrimonial home on the same day. The witness had denied that Mukesh was angry as she had not been allowed to attend marriage and had ended her life.

Report of the FSL (Ex. P-14) has been tendered in the record. According to which Aluminum Phosphide was detected in the exhibits.

There is no dispute with respect to the date of marriage or the date of incident. It is also not in dispute that the incident occurred in the matrimonial home. The star witnesses of the prosecution were members of the immediate family who had deposed that Mukesh had visited them a week prior to the incident and had disclosed that the accused had been taunted and harassed for bringing less dowry and they used to pressurize her. They have also stated that she was not allowed to attend the wedding and was called back in the mid of the rituals.

The defence taken by the accused was that the deceased was hurt and felt insulted as she had not been allowed to attend the marriage. It is also their case that there was no demand at the time of the marriage nor any Panchayat was convened.

Another submission on behalf of the defence was that the deceased had disclosed the history to the Medical Officer at the time of admission and it had been contended that it should be taken as a dying declaration. So far as the last submission is concerned, I am not inclined to accept the same.

The doctor concerned had only mentioned the date of the

arrival in the hospital. The time of arrival is not indicated and it reads:-

“Alleged history of ingestion of some tablets accidentally at home on 13.5.2010. On examination patient was conscious oriented with stable vitals.

The submission on behalf of the appellants was that Dr. Rakesh Kumar had deposed in the cross examination that the history was given by the patient herself. The incident is said to have taken place in the morning. The time of admission is not available it is difficult to accept that the condition of the patient was such that she could make a statement. There are certain parameters which would apply for a statement to be accepted as a dying declaration. Mukesh was accompanied by her father-in-law. There is no explanation why the husband did not accompany her to the hospital when he was home. Not a word has been said by Mukesh in her statement under Section 313 Cr.P.C. in this regard. The poison which was found in the FSL report was Aluminum Phosphide which can not be consumed accidentally. It is highly toxic inorganic compound and emits strong smell. Its severe inhalation can cause respiratory distress syndrome. The after effects on consumption would be greater. The patient had been declared dead on 8.50 a.m. on 13.05.2010. The prosecutors had failed in their duty to question the Medical Officer with respect to the time the patient was brought to the hospital that was very important. It is difficult to accept that the patient herself had given the history. The history recorded in the MLR can not be taken to be the dying declaration.

Dying declaration enjoys a sancroscant status as piece of evidence coming from the mouth of the deceased/victim. It has to pass the test of careful scrutiny of the Court and only then it can become a reliable piece of evidence, if the Court is satisfied that it is true and free from any embellishment.

The FIR had been lodged on the same day. The statement had been made by the complainant before 1.00 p.m. on 13.05.2010. It is not a case where there was a delayed FIR. The family had no time to cook a story. The witnesses had spoken about the cruelty meted out soon before the death. There is ample material in the shape of the testimonies of the near ones who have deposed that Mukesh had been subjected to harassment and cruelty. The facts show existence of proximate link between the cruelty based on demand of dowry and death of the victim and it passes the proximity test.

From the evidence of PW-1, PW-2, and PW-3, it emerges that the girl was being harassed and cruelty was meted upon her and the cruelty was in connection with demand of dowry. The girl had narrated the incident to her family whenever she paid them a visit. The defence taken by the accused that the girl was upset because she was not allowed to attend the wedding can not be said to be the cause. The wedding of Rajbir was fixed on 18.04.2010. This incident took place on 13.5.2010 and could not be the reason for taking the extreme step.

The prosecution had been able to establish that there was cruelty and harassment soon before the occurrence and,

therefore, the presumption under Section 113-B of the Evidence Act was rightly raised.

The trial Court had examined the evidence in detail and had recorded conviction against both the appellants while acquitting the father-in-law. In my considered view the conviction passed by the Court below does not suffer from any error whatsoever which would call for any interference and is affirmed.

The Hon'ble Supreme Court in ***Hem Chand vs. State of Haryana IV (1994) CCR 814 (SC)*** had observed that when a dowry death takes place in a matrimonial home, while awarding punishment, the Court should take notice of the fact that Section 304-B IPC only raises a presumption and law lays down minimum sentence of 7 years which may be extended to imprisonment for life. The Hon'ble Supreme Court held that awarding extreme punishment of imprisonment for life should be in rare cases and not in other cases. The ends of justice would be met if the sentence of both the appellants namely Shanni @ Kala and Rajwanti is reduced to 8 years under Section 304-B IPC. There will be no change in the sentence awarded under Section 498-A IPC nor in the fine imposed under both the Sections.

The appeal is dismissed with the above modification in the sentence.

September 07, 2015

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**(ANITA CHAUDHRY)
JUDGE**