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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 24th April, 2015

+ CRL.A. 769/2014 & Crl.M.B.9943/2014 (suspension of sentence)

MOHD. SARFARAJ Appellant

Through: Mr.K.Singhal and Mr.Jaideep
Tandon, Advocates

versus

STATE Respondent

Through: Mr.Pramod Saxena, Additional Public
Prosecutor for the State.

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. By virtue of this appeal u/s 374 (2) of the Code of Criminal Procedure, the appellant challenges the impugned judgment and order on sentence dated 28th April, 2014 and 30th April, 2014 in Sessions Case No. 95/2001 arising out of FIR No.410/2010 whereby he was convicted u/s 498A/306 IPC and was sentenced to undergo rigorous imprisonment for a period of six years and fine of Rs.15000/- in default to undergo rigorous imprisonment for six months u/s 306 IPC and rigorous imprisonment for three years and fine of Rs.5000/- in default to undergo rigorous imprisonment for a period of three months u/s 498A IPC. Both the sentences were to run concurrently.

2. The appellant was married to the deceased on 7th June, 2009. According to the prosecution, the appellant subjected the deceased to cruelty at 310/25, Onkar Nagar, Tri Nagar, Delhi demanding a sum of Rs.10,000/- at the time of delivery of a son and thereafter a sum of Rs.1 lac for purchase of computer. On account of unbearable cruelty, on 9th December, 2010, the deceased committed suicide by hanging with a ceiling fan.

3. In support of its case, prosecution examined 19 witnesses. The important witnesses who unfolded the prosecution story are PW10-Mohd. Kasim and PW13-Mohd.Sikandar, father and brother of the deceased respectively. PW1- Dr. Vijay Kumar Jha attached to BJRM Hospital conducted the post-mortem of the deceased. He opined that the cause of death was asphyxia as a result of ligature pressure over neck structure produced by *ante mortem* ligature hanging. The accused pleaded not guilty to the charge.

4. By placing reliance on the testimony of PW10 and PW13, learned Trial Court observed that prosecution succeeded in establishing beyond reasonable doubt that the accused being the husband of the deceased subjected her to cruelty with a view to coerce her, her relatives to meet the unlawful demands of dowry of the accused. Hence, accused was convicted u/s 498A IPC. However, as regards offence u/s 304B IPC, learned Trial Court observed that one of the essential ingredients for proving the charge u/s 304B IPC is that the prosecution has to prove that harassment or cruelty given to the

deceased was related to demand of dowry and was 'soon before her death'. Although PW10 & PW13 had orchestrated a story regarding unlawful demand of Rs.1 lac by the accused for purchasing of computer, however, discrepancies regarding the same were noted by observing that PW10-Mohd. Kasim deposed that his daughter telephoned him and informed about the demand of Rs.1 lac and beatings given by the accused to her and that 10 days prior to her death, his daughter telephonically informed him regarding the cruelty, harassment and beatings given to her by accused due to non fulfilment of this demand. The factum of this demand of Rs.1 lac for purchase of computer was not disclosed by this witness when his statement was recorded by the SDM-PW12-Sh. Pradeep Baijal and the explanation given that due to death of his daughter, he was disturbed is not a proper explanation as when he disclosed all other material facts to the SDM, he could not have forgotten this very important and recent fact which was the immediate cause of death of his daughter. Furthermore, according to him the telephone call was received by his son Mohd. Sikandar but Mohd. Sikandar did not corroborate his version by stating that he was informed by his father that the accused was demanding Rs.1 lac to purchase a computer. Further, according to the witness, the accused also demanded Rs.1 lac from Rawana Parveen, sister of the deceased and on that issue, abuses were exchanged between accused and Rawana Parveen. However, Rawana Parveen was not examined by the prosecution. Under the circumstances, prosecution has failed to prove that 'soon before death', the deceased was subjected to cruelty or harassment by the

accused in connection with demand of dowry. As such, the evidence fell short of proving the essential ingredients of Section 304B IPC.

5. However, learned Trial Court convicted the appellant for offence u/s 306 IPC on the ground that factum of commission of suicide by the deceased by hanging herself within seven years of her marriage with the accused is not disputed. He has also been convicted u/s 498A IPC. That being so, a presumption arises u/s 113A of the Indian Evidence Act, 1872 that the husband has abetted the suicide of the deceased. The accused has failed to rebut the presumption, as such, he was held guilty of offence u/s 306 IPC.

6. Being aggrieved, present appeal has been preferred challenging the impugned judgment.

7. Learned counsel for the appellant submitted that although the appellant was charged for offence u/s 304B IPC, he was rightly acquitted by learned Trial Court but erroneously convicted for offence u/s 306 IPC. There was no external or internal injury except ligature mark as per MLC. There are no allegations of mental cruelty. The plea of father of the deceased that the accused had bolted the dead body in the house is falsified as it is the case of prosecution itself that it is the accused who informed the police and thereafter opened the door where the dead body was found.

8. He further submits that there are no allegations that the accused aided or abetted the commission of suicide. As such, offence either

u/s 498A or 306 IPC is not made out. Alternatively, it was submitted that out of six years sentence awarded to the appellant, he has remained in jail for more than four years. As such, he be released on the period already undergone.

9. Per contra, learned Additional Public Prosecutor for the State supported the judgment passed by the learned Trial Court and submitted that the impugned judgment does not suffer from any infirmity. As such, the appeal is liable to be dismissed.

10. Factum of marriage of the deceased Shabana with the accused on 7th June, 2009 and factum of her unnatural death by hanging on 9th December, 2010 is not in dispute. It is the case of prosecution that due to harassment and cruelty caused to the deceased, she committed suicide.

11. It is, therefore, to be seen whether a case u/s 498A IPC is made out against the appellant or not. In ***Girdhar Shankar Tawade vs. State of Maharashtra***, (2002) 5 SCC 177, Hon'ble Supreme Court gave a succinct enumeration of the object and ingredients of Section 498A IPC when it observed as follows:

"3. The basic purport of the statutory provision is to avoid "cruelty" which stands defined by attributing a specific statutory meaning attached thereto as noticed hereinbefore. Two specific instances have been taken note of in order to ascribe a meaning to the word "cruelty" as is expressed by the legislatures: whereas Explanation (a) involves three specific situations viz. (i) to drive the woman to commit suicide or (ii) to cause grave injury or (iii) danger to life, limb or health, both mental and physical, and thus involving a physical torture or atrocity, in Explanation (b) there is absence of physical injury but the legislature thought it fit to

include only coercive harassment which obviously as the legislative intent expressed is equally heinous to match the physical injury: whereas one is patent, the other one is latent but equally serious in terms of the provisions of the statute since the same would also embrace the attributes of "cruelty" in terms of Section 498A."

12. To unfold the case of prosecution, the material witnesses are PW10 Mohd. Kasim and PW13 Mohd. Sikander, father and brother of the deceased respectively.

13. PW10 has deposed that his daughter was married to accused on 7th June, 2009 and after the marriage, the accused along with the deceased remained with him at his native place and thereafter, he brought her at Mubarak Pur, Delhi where they stayed for few days and then they started residing at a rental accommodation at Onkar Nagar, Tri Nagar, Delhi. He further deposed that after marriage, his daughter visited him twice. On first occasion, she remained with him for about one month and on the second occasion when she was pregnant she remained with him for about six months and delivered one male child at his native place. He also deposed that accused used to demand money from his daughter and also used to beat her and whenever he demanded money from his daughter, he (PW10) tried to fulfil his demands of money. He further deposed that after delivery of the male child, accused came to his native place and at that time pursuant to the demand made by the accused, he paid a sum of Rs.10,000/- to him after taking a loan. He also deposed that on one occasion, the accused demanded Rs.1 lac for purchasing a computer but he could not pay the same and thereafter accused started giving

beatings to his daughter and after 2-3 days of that demand, he came to know that his daughter had expired. His daughter had informed him on telephone about the demand of Rs.1 lac and the beatings given by the accused to her.

14. PW13-Sikandar also deposed regarding the demand of Rs.1 lac for purchase of computer by the accused. Although this demand of Rs.1 lac for purchase of computer was not believed by the learned Trial Court as mentioned hereinbefore but the allegations regarding subjecting the deceased to cruelty and harassment by the accused to meet his unlawful demands of dowry which ultimately resulted in the untimely death within 18 months of the marriage stands proved from the corroborative testimony of both these witnesses. It was duly proved that the deceased was subjected to cruelty and harassment by the accused on account of dowry demand. The findings of the learned Trial Court regarding conviction u/s 498A IPC does not call for interference and is accordingly upheld.

15. As regards acquittal of the appellant under Section 304B IPC, after careful examination of the evidence led by the prosecution, I find that the findings of learned Trial Court does not call for any interference. Moreover, State has also not challenged the findings of learned Trial Court in this regard.

16. Coming to Section 306 IPC, it is true that the appellant was not charged for this offence. The charge was u/s 304B IPC. It was, however, perfectly legal for the learned Trial Court to convict him for

offence punishable u/s 306 if the essential ingredients are fulfilled. In this connection, reference may be made to *Narwinder Singh vs. State of Punjab*, (2011) 2 SCC 47. In that case, the accused was charged under Section 304B of the Indian Penal Code. The death had occurred within seven years of the marriage. The trial court convicted the accused for an offence punishable under Section 304B of the Indian Penal Code. Upon reconsideration of the entire evidence, the High Court came to the conclusion that the deceased had not committed suicide on account of demand for dowry, but, due to harassment caused by the husband in particular. The High Court acquitted the parents of the accused and converted the conviction of the accused from one under Section 304B of the Indian Penal Code to Section 306 of the Indian Penal Code. Hon'ble Supreme Court dismissed the appeal filed by the accused. It was observed that it is a settled proposition of law that mere omission or defect in framing charge would not disable the court from convicting the accused for the offence which has been found to be proved on the basis of the evidence on record. In such circumstances, the matter would fall within the purview of Sections 221(1) and (2) of the Code of Criminal Procedure, 1973.

17. It is next required to be seen whether the essential ingredient of Section 306 IPC in the facts and circumstances of the present case is made out or not.

18. Section 306 deals with abetment of suicide and Section 107 deals with abetment of a thing. They read as follows:

“306. Abetment of suicide.--If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

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

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

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

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

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

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

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

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

20. The legal position as regards Sections 306 IPC which is long settled was reiterated by Hon’ble Supreme Court in the case of

Randhir Singh vs. State of Punjab, (2004) 13 SCC 129 as follows in paras 12:

“12. Abetment involves a mental process of instigating a person or intentionally aiding that person in doing of a thing. In cases of conspiracy also it would involve that mental process of entering into conspiracy for the doing of that thing. More active role which can be described as instigating or aiding the doing of a thing is required before a person can be said to be abetting the commission of offence under Section 306 IPC.”

21. Further in the case of ***Kishori Lal vs. State of M.P.***, (2007) 10 SCC 797, the Court gave a clear exposition of Section 107 IPC when it observed as follows in para 6:

“6. Section 107 IPC defines abetment of a thing. The offence of abetment is a separate and distinct offence provided in IPC. A person, abets the doing of a thing when (1) he instigates any person to do that thing; or (2) engages with one or more other persons in any conspiracy for the doing of that thing; or (3) intentionally aids, by act or illegal omission, the doing of that thing. These things are "essential to complete abetment as a crime. The word "instigate" literally means to provoke, incite, urge on or bring about by persuasion to do anything. The abetment may be by instigation, conspiracy or intentional aid, as provided in the three clauses of Section 107. Section 109 provides that if the act abetted is committed in consequence of abetment and there is no provision for the punishment of such abetment, then the offender is to be punished with the punishment provided for the original offence. "Abetted" in Section 109 means the specific offence abetted. Therefore, the offence for the abetment of which a person is charged with the abetment is normally linked with the proved offence.”

22. This view was reiterated in ***Amlendu Pal @ Jhantu vs. State of West Bengal***, (2010) 1 SCC 707 by observing as under:-

“12. Thus, this Court has consistently taken the view that before holding an accused guilty of an offence under Section 306 IPC, the Court must scrupulously examine the facts and circumstances of the case and also assess the evidence adduced before it in order to find out whether the cruelty and harassment meted out to the victim had left the victim

with no other alternative but to put an end to her life. It is also to be borne in mind that in cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide. Merely on the allegation of harassment without their being any positive action proximate to the time of occurrence on the part of the accused which led or compelled the person to commit suicide, conviction in terms of Section 306 IPC is not sustainable.

13. *In order to bring a case within the purview of Section 306 of IPC there must be a case of suicide and in the commission of the said offence, the person who is said to have abetted the commission of suicide must have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide. Therefore, the act of abetment by the person charged with the said offence must be proved and established by the prosecution before he could be convicted under Section 306 IPC.*

14. *The expression 'abetment' has been defined under Section 107 IPC which I have already extracted above. A person is said to abet the commission of suicide when a person instigates any person to do that thing as stated in clause firstly or to do anything as stated in clauses secondly or thirdly of Section 107 IPC. Section 109 IPC provides that if the act abetted is committed pursuant to and in consequence of abetment then the offender is to be punished with the punishment provided for the original offence."*

23. Therefore, the issue that arises for consideration is whether any of the aforesaid clauses of Section 107 is attracted in the facts and circumstances of the present case so as to bring the present case within the purview of Section 306 IPC.

24. This aspect of the matter was considered in ***Mahavir Kumar and Ors. vs. State***, MANU/DE/1321/2014 by observing as under:-

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

54. Unlike section 113B of the Indian Evidence Act, a statutory presumption does not arise by operation of law merely on proof of the circumstances enumerated in section 113A of the Indian Evidence Act. Under section 113A of the Indian Evidence Act the prosecution has to

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

“This provision was introduced by the Criminal Law (Second) Amendment Act, 1983 with effect from 26.12.1983 to meet a social demand to resolve difficulty of proof where helpless married women were eliminated by being forced to commit suicide by the husband or in laws and incriminating evidence was usually available within the four corner of the matrimonial home and hence was not available to anyone outside the occupants of the house. However, still it cannot be lost sight of that the presumption is intended to operate against the accused in the field of criminal law. Before the presumption may be raised, the foundation thereof must exist. A bare reading of Section 113A shows that to attract applicability of section 113A, it must be shown that (i) the woman has committed suicide, (ii) such suicide has been committed within a period of seven years from the date of her marriage, (iii) the husband or his relatives, who are charged had subjected her to cruelty. On existence and availability of the abovesaid circumstances, the Court may presume that such suicide had been abetted by her husband or by such relatives of her husband. Parliament has chosen to sound a note of caution. Firstly, the presumption is not mandatory; it is only permissible as the employment of expression "may presume" suggests. Secondly, the existence and availability of the above said three

circumstances shall not, like a formula, enable the presumption being drawn; before the presumption may be drawn the Court shall have to have regard to "all the other circumstances of the case". A consideration of all the other circumstances of the case may strengthen the presumption or may dictate the conscience of the Court to abstain from drawing the presumption. The expression "the other circumstances of the case" used in Section 113A suggests the need to reach a cause and effect relationship between the cruelty and the suicide for the purpose of raising a presumption. Last but not the least, the presumption is not an irrebuttable one. In spite of a presumption having been raised the evidence adduced in defence or the facts and circumstances otherwise available on record may destroy the presumption. The phrase "may presume" used in section 113A is defined in section 4 of the Evidence Act, which says "Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

30. In the **State of West Bengal vs. Orilal Jaiswal and Anr.**, (1994) 1 SCC 73, Hon'ble Apex Court observed:-

*"We are not oblivious that in a criminal trial the degree of proof is stricter than what is required in a civil proceedings. In a criminal trial however intriguing may be facts and circumstances of the case, the charges made against the accused must be proved beyond all reasonable doubts and the requirement of proof cannot lie in the realm of surmises and conjectures. The requirement of proof beyond reasonable doubt does not stand altered even after the introduction of section 498A IPC and section 113A of the Indian Evidence Act. Although, the Court's conscience must be satisfied that the accused is not held guilty when there are reasonable doubts about the complicity of the accused in respect of the offences alleged, it should be borne in mind that there is no absolute standard for proof in a criminal trial and the question whether the charges made against the accused have been proved beyond all reasonable doubts must depend upon the facts and circumstances of the case and the quality of the evidence adduced in the case and the materials placed on record. Lord Denning in **Bater vs. Bater**, 1950 (2) All ER 458, 459 has observed that the doubt must of a reasonable man and the standard*

adopted be a standard adopted by a reasonable and just man for coming to a conclusion considering the particular subject matter.

55. In **Gangula Mohan Reddy vs. State of Andhra Pradesh**, (2010) 1 SCC 750, Hon'ble Supreme Court, observed as under:-

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

56. In **Mahendra Singh vs. State of MP**, 1995 SCC (Cri.) 1157, Hon'ble Supreme Court observed that it is common knowledge that the words uttered in a quarrel or in spur of moment or in anger cannot be treated as constituting mens rea. In the said case, appellant said to the deceased to "to go and die" and as a result of such utterance, the deceased went and committed suicide, however, Hon'ble Supreme Court observed that no offence under Section 306 IPC read with Section 107 IPC was made out since there was no element of mens rea.

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

25. The mere fact that the deceased was subjected to cruelty is not sufficient to presume that the same was made wilfully or intentionally in order to instigate the deceased in taking extreme step of ending her life or to bring the case within the parameter of Section 306 IPC. As observed in **Smt. Bisno vs. State**, 2011 II AD (Delhi) 501, there is

always a reason behind an act committed by a person. Committing of suicide by deceased by hanging herself, that too within 18 months of the marriage does raise a suspicion that everything was not normal. However, suspicion howsoever grave, cannot take the place of proof.

26. The learned Additional Public Prosecutor for the State submitted that since the offence has taken place within the matrimonial home, as such, under Section 106 of Evidence Act, 1872, it was for the appellant to prove as to why the deceased committed suicide as this fact was especially within his knowledge. So far as Section 106 of Evidence Act is concerned, appellant has taken a plea that the deceased was a weak hearted lady and she could not manage with changed circumstances of the married life and matrimonial obligations. He further pleaded that due to poor financial condition of her in-laws, she used to remain under depression. This defence, accused failed to substantiate but as stated above, the presumption under Section 113A of the Evidence Act is not mandatory. The facts and circumstances of the case do not warrant raising of such presumption against the accused. Reference was also made to his conduct for submitting that although the unfortunate incident had taken place on 9th December, 2010, however, after locking the house, he went to his parent's house and did not inform the police.

27. As regards conduct of accused, record reveals that the appellant himself returned to his residence on 10th December, 2010 and informed his landlord Ramphal Bhardwaj and disclosed that he had gone to make a call from STD/PCO on 9th December, 2010 and when

he returned back, he saw his wife hanging with ceiling fan with the help of a *chunni*. He took his wife down, made her lie down on the bed and then left the room after locking it. Thereafter he along with police officials came to the house and the house was opened by the accused with the help of a key where the dead body of Shabana Praveen was found lying on the bed. True, the appellant should have informed the police on the date of suicide itself, however, this fact alone is not sufficient to give rise to an inference that the appellant aided or instigated the deceased to commit suicide. How a person will react to a situation differs from person to person. In the absence of any direct evidence to show that the appellant had, by his acts, instigated or provoked the deceased to commit suicide and in the absence of any other evidence to show any act on the part of the appellant which would have facilitated the commission of suicide by the deceased, from the mere fact that offence u/s 498A is proved, it cannot be said that Section 306 IPC is also made out. As observed in ***Girdhar Shankar Tawade*** (supra), the charges u/s 306 and 498A of the Indian Penal Code are independent of each other and acquittal of one does not lead to acquittal of the other.

28. Accordingly, the appeal is partly allowed. While upholding the conviction of the appellant for offence u/s 498A IPC, his conviction under Section 306 IPC is set aside. The appellant was sentenced to undergo rigorous imprisonment for three years and fine of Rs.5000/- for offence u/s 498A IPC. As per the nominal roll dated 27th February, 2015, the appellant has already undergone a period of 4 years, 2

months and 12 days besides earning remission of 2 months and 14 days. It is also reported that fine has already been paid in the Court.

29. That being so, since the appellant has already undergone the sentence awarded to him u/s 498A IPC, he be released forthwith if not wanted in any other case.

Trial Court record be sent back immediately.

Information be sent to the Superintendent Jail for information and compliance.

(SUNITA GUPTA)
JUDGE

APRIL 24, 2015

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