

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

+ **CRL.A.1216/2011**

% Reserved on: 04.08.2015  
Date of Decision: 10.08.2015

NAFIS KHAN ..... Appellant

Through Ms. Rakhi Dubey, Adv.

versus

STATE ..... Respondent

Through Mr. Yogesh Verma, APP.

**CORAM:**

**HON'BLE MR. JUSTICE ASHUTOSH KUMAR**

**ASHUTOSH KUMAR, J:**

1. Nafis Khan impugns the judgment and order of conviction dated 21.07.2011/4.8.2011 passed by the learned District Judge-cum-Additional Sessions Judge, incharge North East District, Karkardooma Courts, Delhi in Sessions Case no. 4/2010 whereby he has been convicted under sections 498A/304B IPC and sentenced to undergo RI for 3 years, fine of Rs. 3,000/- (in default RI for 3 months) for the offence under section 498A IPC and RI for 10 years, fine of Rs. 7,000/- (in default RI for 1 year) for the offence under section 304B IPC, the sentences however having been ordered to run concurrently.

2. The appellant has been charged for subjecting Farzana (deceased), his wife, to cruelty by maltreating/beating her and demanding Rs. 20,000/-. He has been further charged for causing death of Farzana by pouring kerosene oil on her and burning her. Thus

the appellant has been charged for the offences under 498A/304B IPC and alternatively under section 302 IPC.

3. The prosecution has relied upon the dying declaration made by Farzana (deceased) and the testimonies of Shakeena Khatoon (PW.7), mother of the deceased and Mohd. Zameel (PW.8), father of the deceased, to bring home the charges.

4. It would only be appropriate, first to examine whether the deceased had made a dying declaration and that such dying declaration could have been relied upon by the prosecution for punishing the appellant.

5. ASI Jalbir Singh (PW.12) has deposed that on 4.10.2009, while he was posted at PS Welcome, he received an information (DD No. 18A, Ex.PW.12/A) regarding burning of a woman near Chataiwali Masjid, Janta Colony. On reaching the spot along with Ct. Surrender (PW.11) he learnt that the injured has been taken to GTB Hospital. Ct. Surrender (PW.11) was left behind and ASI Jalbir Singh (PW.12) went to GTB Hospital, where he collected the MLC of the injured Farzana. Farzana had suffered 99% burn injuries and was unfit for statement. PW.12, however, has further stated that the doctors with whom he contacted, permitted him to record the statement of Farzana as she was in a position to talk. He has deposed that on the direction of Dr. S.Kohli, CMO GTB Hospital (PW.2), he recorded the statement of Farzana (Ex.PW.2/B) and took her thumb impression.

6. Dr. S.Kohli (PW.2) has deposed, that on 4.10.2009 he was posted as CMO of Guru Teg Bahadur Hospital and one Dr. Hitender (not examined) was working under his supervision. He saw the MLC

No. C4571/2009 of Farzana who was brought by HC Jitender (PW.9) with the alleged history of burn at 8:30 PM. Though there was no loss of consciousness, seizure and ENT bleeding, the condition of the patient was unstable. After initial treatment, Farzana was referred to surgical emergency. He has specifically stated in his examination in chief that Farzana was unfit for statement. He has proved the MLC which is in the handwriting of Dr. Hitender, whose handwriting he identified.

7. However, in the next breath, Dr.S.Kohli (PW.2) has stated that he made his endorsement on the aforesaid MLC, that the patient was fit for statement at 9:30PM. In his cross-examination PW.2 has stated that one police officer recorded the statement of Farzana in his presence. However, the date was not appended beneath the thumb impression of Farzana.

8. Vimal Kumar (PW.3) has deposed that on 4.10.2009 while he was posted as Executive Magistrate, Seema Puri, Shahdara, he received an information at 10PM from ASI Jalbir Singh (PW.12) that a lady by the name of Farzana has been burnt at Chataiwali Gali, Janta Colony and PCR officials have taken the injured to GTB Hospital. PW.3 has categorically stated that ASI Jalbir Singh told him that the patient is unfit for statement. PW.3 asked PW.12 to inform him as soon as the patient is declared fit for statement by the doctor so that her statement could be recorded by him.

9. On 5.10.2009, PW.3 visited GTB Hospital where he learnt that Farzana was still unfit for statement. In the night intervening between 5/6.10.2009 Farzana died in the hospital. On 6.10.2009, PW.3

recorded the statement of PW.7 and PW.8 namely Shakeel Khatoon and Mohd. Zameel, parents of the deceased (Ex. PW.3/A, Ex. PW.3/B). A request was made by him to conduct the Post Mortem. The proceedings under Section 175 CrPC (Ex.PW.3/F) was completed by him. He also directed for release of dead body to the relatives of the deceased after post mortem.

10. On the basis of endorsements made by PW.3 on the statements of the parents of the deceased, Rukka (Ex.PW.12/B) was prepared by ASI Jalbir Singh (PW.12). There is no averment in the rukka that the statement of Farzana was recorded at 9:30 PM on 4.10.2009.

11. The dying declaration has not been signed by ASI Jalbir Singh (PW.12).

12. While dealing with the aforesaid issue the Trial Court rightly observed that if at all Farzana had made her statement before ASI Jalbir Singh (PW.12), FIR ought to have been registered on that statement as there was substantive allegation against the appellant in the aforesaid statement.

13. The FIR was only registered after Farzana died on 6.10.2009 and after her parents gave their statements.

14. There is another reason to suspect the genuineness of the dying declaration. The investigation of the case was handed over to inspector S.S. Duggal, who recorded the statement of ASI Jalbir Singh (PW.12) under section 161 Cr.P.C. In that statement also there is no reference of the injured (deceased) having made any statement before ASI Jalbir Singh (PW.12) on 4.10.2009.

15. In such circumstances, it would be highly unsafe to place any reliance on the so called dying declaration of the deceased.

16. Now, to the testimonies of the parents of the deceased.

17. Shakeena Khatoon, (PW.7) mother of the deceased, has deposed that her husband is a rickshaw puller and that the deceased was born to her from her previous husband. She has further deposed that she visited the house of the appellant to meet her daughter, but later on she stopped visiting the house of the appellant as he assaulted her daughter in her presence. It has been categorically stated by her that she never complained against the appellant and never took the issue of ill treatment of her daughter to the panchayat. She has denied the suggestion that money was demanded by her from the deceased, or the appellant. She has also stated that a year before the present occurrence, the appellant had tried to burn the deceased and about that incident she had complained at women's cell. The matter, because of intervention of relatives, was compounded. PW.7 has vehemently denied the suggestion that after the death of Farzana, money was demanded from the appellant and non-payment of the same led to filing of this false case against him.

18. Mohd. Zameel, (PW.8) father of the deceased has also supported the incident and denied the suggestion that because of non-payment of money by the appellant, the present case was lodged.

19. It has been argued on behalf of the appellant that he was not at home at the time of the occurrence/incident.

20. Tahera (DW.1), a neighbour has deposed before the court that on 4.10.2009 at 8:30 PM, she heard some commotion in front of the

house of the appellant. The door of the house of the appellant was locked from the inside and the appellant was not present at the house. She has further stated that the relationship between the appellant and the deceased were cordial, but the mother of the deceased, being poor, demanded money from the appellant and his wife. However, in her cross-examination she has stated that she had seen the mother of the deceased only once or twice but had not talked to her. In fact, no money was demanded by PW.7 in her presence.

21. Yunus Khan and Abdul Gaffar, who have been examined as DW.2 and DW.3 have stated that the appellant was the driver of an auto rickshaw and used to ply the same between 2 PM till the morning of the next day. Both the defence witnesses are TSR drivers.

22. On behalf of the appellant it was argued that the only evidence against the appellant is in the shape of testimonies of PW.7 and PW.8 who have spoken about cruel treatment, beating and demand of Rs. 20,000/- soon before the death of the deceased.

23. In order to prove a case of dowry death, it is necessary for the prosecution to show that in addition to the fact that death took place otherwise than in normal circumstances, within 7 years of marriage, that soon before her death, the wife was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry. Explanation to sub-section 1 of section 304B provides, that for the purposes of the said section “dowry” shall have the same meaning as under section 2 of the Dowry Prohibition Act, 1961.

24. Section 113B of the Evidence Act, provides that when the question is whether a person has committed the dowry death of a woman, and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death.

25. The explanation appended to this section clarifies that for the purposes of this section, “dowry death” shall have the same meaning as in section 304B IPC.

26. A conjoint reading of section 113B of the Evidence Act and section 304B IPC shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. “Soon before” is a relative term and it would depend upon the circumstances of each case and no straight jacket formula can be laid down as to what would constitute a period of “soon before”. There must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the concerned death. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence (Refer: Kunhi abdulla vs. State of Kerala, AIR 2004 SC 1731; State of A.P. vs. Raj Gopal Asawa, AIR 2004 SC 1933; Kaliyaperumal vs. State of Tamil Nadu, AIR 2003 SC 3828; Hiralal vs. State (GNCTD), AIR 2003 SC 2865; Yashoda vs. State of M.P., (2004) 3 SCC 98).

27. The presumption under section 113B of the Evidence Act will operate only if the prosecution is able to establish circumstances set out in section 304B IPC and not otherwise.

28. From the deposition of PW.7 and PW.8 it can safely be gathered that both of them come from a very poor strata of society. PW.7 is a rag picker, whereas PW.8 is a rickshaw puller. Their testimonies are replete with inconsistent statements which go to the root of the matter. Attention was drawn to the statement made by the aforesaid witnesses under section 161 Cr.P.C. PW.7 has tried to explain away the different stand at the trial by saying that after the death of her daughter, she was not in a fit state of mind to state correctly as to what had happened.

29. It is difficult to believe that money would be demanded from such persons namely PW.7 and PW.8 who can barely eke out their living.

30. The statement of PW.7 and PW.8, that on an earlier occasion an attempt was made by the appellant to do away with the life of the deceased does not inspire confidence. No details of the case or the time of the occurrence has been given. Even otherwise, assuming but not admitting, that such an attempt was made by the appellant, such an occurrence was of distant past and there does not appear to be any live/ proximate link between such an occurrence and the present death.

31. There is no evidence on record to clearly come to the conclusion that the appellant was present in the house when the occurrence had taken place. The defence witnesses have been categorical in stating about the absence of the appellant from his house at the time of occurrence.

32. The appellant in his statement under Section 313 Cr.P.C, has admitted that Farzana died because of burn injuries. He has stated that on 4.10.2009, he was at Anand Vihar Metro Station, when he was telephonically informed by a neighbour regarding the incident. It was categorically stated by the appellant that money was demanded from him and on refusal to pay, he has been falsely implicated in this case. Even the deceased used to remain disturbed because PW.7 demanded money from her as well.

33. The Trial court has, queerly, expressed surprise that the appellant has not taken any plea as to whether the deceased died of suicide or of accidental death. With reference to Section 106 Evidence Act, the Trial court has held that the appellant as in duty bound, was required to explain as to how the deceased died.

34. No doubt the deceased got burnt at home and later died in hospital but there does not appear to be any evidence to suggest that the appellant was available in the house. There is no evidence regarding presence of any other person in the house. In this context the evidence of DW1, DW2 and DW3 and the statement of the appellant under section 313 Cr.P.C. assumes importance.

35. The initial burden to establish the case is undoubtedly on the prosecution and the same has not been discharged.

36. This court, then, finds no good reason to disbelieve the evidence of DWs. 1, 2 and 3 and the statement of the appellant.

37. How Farzana caught fire and got burnt remains a mystery.

38. It is not the case of the prosecution that the deceased was abetted into committing suicide. There could be, therefore, no

presumption under section 113A of the Evidence Act with respect to abetment to commit suicide.

39. The appellant married the deceased of his own volition. The story of demand of money and consequent torture is incredible and implausible.

40. On the above conspectus of facts and circumstances, this court is inclined to give benefit of doubt to the appellant keeping in mind the fact that except for certain bald statements by PW.7 and PW.8, alleging cruelty and harassment prior to the death, there is no other evidence to prove that the victim either committed suicide or was killed at the hands of the appellant.

41. In that view of the matter, the appeal is allowed and the judgment of the trial court is set aside.

42. The appellant shall be released forthwith if in custody and if not required in any other case.

43. Trial court records to be returned.

44. Let a copy of this judgment be sent to the Superintendent of the concerned jail for information and compliance.

**AUGUST 10, 2015**  
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**ASHUTOSH KUMAR, J**