

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.936 of 2016

Arising Out of PS.Case No. -57 Year- 2010 Thana -DIGHA District- PATNA

- =====
1. Amar Nath Mahto, S/o Late Sita Ram Mahto,
 2. Usha Devi, W/o Mahadeo Mahto, both resident of village-Dighaghat Patlipul,
P.S. Digha, District-Patna.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Pramod Kumar-Advocate

For the Respondent/s : Mr. Sujit Kumar Singh-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date: 1-08-2017

Both the appellants namely Amar Nath Mahto and Usha Devi have been found guilty for an offence punishable under Section 304B/34 of the I.P.C. vide judgment of conviction dated 09.09.2016 and each one has been sentenced to undergo rigorous imprisonment for 10 years with a further direction to set off in terms of Section 428 of the Cr.P.C. with regard to custodial period spent during course of trial vide order of sentence dated 16.09.2016 passed by the Additional Sessions Judge-4th, Patna in Sessions Trial No.1459 of 2013.

2. The factual matrix of the case as is evident on the basis of the fard-bayan of Saroj Devi (PW-9) on 02.03.2010 at P.M.C.H. before police officials of Pirbahore P.S. is that her daughter Aarti Devi was married with Dharmendra Mahto, son of Amar Nath Mahto. On 19.02.2010 at about 6.00 p.m. father in-law Amar Nath Mahto,



Usha Devi, Fufia Sas and Chachia Sas lit fire over her body after sprinkling kerosene oil for the dowry. After coming to know about the same, she rushed and found her daughter badly burnt. Till then, her son-in-law, who happens to be driver also arrived and then, all of them admitted her at P.M.C.H. where she succumbed on 02.03.2010 during course of treatment. It has also been divulged that statement of her daughter had already been recorded by the Pirbahore P.S. at an earlier occasion at P.M.C.H. itself. It has also been disclosed that for the last three days her son-in-law had also left her daughter.

3. The aforesaid fard-bayan was forwarded to Digha P.S. on the basis of which, Digha P.S. Case No.57 of 2010 was registered on 08.03.2010, followed with an investigation as well as submission of chargesheet paving the way of trial, which ultimately concluded with finding of guilt and sentence against appellants, put under challenge.

4. The defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C. is that of complete denial of the occurrence in a way as narrated by the prosecution. Furthermore, it has also been pleaded that deceased set ablaze herself after locking the door under suicidal approach out of reason best known to her whereupon was rescued after breaking the door, shifted to hospital immediately for treatment



during course of which, unfortunately she died. However, neither oral nor documentary evidence has been adduced in support thereof.

5. In order to substantiate its case, prosecution had examined altogether ten PWs, out of whom, PW-1 Shankar Mahto, PW-2 Rajendra Prasad Mehta, PW-3 Kashi Mahto, PW-4 Sanjay Kumar @ Sanju, PW-5 Ranjit Mahto @ Ranju, PW-6 Madan Mishra, PW-7 Kumari Kanchan Sinha, PW-8 Dr. Arvind Kumar, PW-9 Saroj Devi and PW-10 Dharmendra Mahto. Side by side, had also exhibited the documents as Exhibit-1 statement of deceased, Aarti Devi, (dying declaration), Exhibit-2 and 2/1 post mortem report.

6. Though, as per roster appeal of the Year 2015 is being taken up for hearing, but considering the legal intricacies involved in this appeal so perceived during course of argument having made on behalf of appellants over their plea of bail, this appeal has been directed to be listed out of turn and accordingly, been heard.

7. From the record, it is evident that in the written report, there happens to be insertion in different pen concerning dowry which, keeping away for a moment, being confronted to the appellant on the score that having absence of date of marriage, demand of dowry, torture or cruelty meted out to the deceased since before her death by husband or relative of the husband, would not have justified in sailing of the trial under Section 304B/34 of the I.P.C. and in



likewise manner, the statement of the victim which, on account of her death became dying declaration suggesting that on account of opposing the lascivious demand of her father-in-law to indulge in illicit relationship, she has been put on fire by the accused persons coupled with direction of the Hon'ble Apex Court to frame charge in an alternative under Section 302 of the I.P.C., whenever there happens to be case of dowry death and for that, the judgment was to be circulated to trial Court all over in India in ***Rajvir @ Raju and another vs. State of Haryana reported in (2010) 15 SCC 116***, which has also been reaffirmed in a case reported in ***Jasvinder Saini v. State (Govt. of NCT of Delhi) reported in (2013) 7 SCC 256***, the learned counsel for the appellants has been requested to assist the Court in order to just decision of the appeal apart from arguing the appeal on its merit, how far non-obedience of the direction of the Hon'ble Apex Court by the trial Court failing to frame alternative charge which, in the facts and circumstances of the case mentioned above, was more appropriate followed with remedial steps to be taken thereupon, the learned counsel for the appellants as well as learned Additional Public Prosecutor lucidly argued the matter.

8. Learned counsel for the appellants firstly submitted that the judgment impugned on its face suggest that the learned lower Court had acted in a mechanical way than judicious manner and that



happens to be reason behind that he failed to appreciate that case of the prosecution was deficient relating to the dowry death. To substantiate the same, it has been submitted that save and except informant, PW-9, none had deposed on that very score. Furthermore, other family members of the informant, PW-9 did not oblige her by way of their presence during trial. It has also been submitted that her evidence (PW-9) suffers from exaggeration, contradiction, development so much so failed to substantiate the mandatory requirement of law in order to constitute a case of dowry death. That being so, the conviction and sentence recorded by the learned lower Court relating thereto is absurd and fit to be set aside.

9. Though the learned counsel for the appellants did not opt to enlighten the issue in the light of aforesaid finding of the Hon'ble Apex Court. Contrary to it, tried to full advancing alternative argument magnifying the deficiencies persisting in the prosecution case. It has also been argued that at the present moment, appellate Court should not indulge in futile exercise in tracing out the impact over trial by non-observance of direction of the Apex Court as such, exercise will tantamount to crippling interest of the appellants, illegally against the settled principle of law.

10. The learned counsel intelligently drew attention towards Section 386 of the Cr.P.C. and submitted that the Appellate



Court during course of exercising such power should firstly consider the evidence on record whereupon either acquit or discharge, in case the evidence happens to be deficient one. This happens to be intention of the legislature, and that happens to be reason behind keeping the same at first ladder of exercising the appellate power and if not, then other options have been prescribed including that of the re-trial. In toe thereof, the learned counsel for the appellants has submitted that because of the fact that from the evidence available on the record, no case under Section 304B/34 of the I.P.C. is found duly substantiated, on account thereof, the judgment impugned should be set aside instead of peeping for other option. The other rudimentary issue which the Court has perceived on its own after going through the record should not be taken as a hurdle in due discharge of appellate jurisdiction during course of allowing the appeal. To substantiate such plea, relied upon *State of Karnataka vs. Dattaraj and others reported in A.I.R. 2016 SCW 882*.

11. It has also been submitted that Appellate Court should not make a futile exercise as, such exercise is going to jeopardize the interest of the appellants, who happen to be under custody for such long period. The situation so visualized is an out come of inefficiency of the trial judge, who failed to obey the direction of the Hon'ble Apex Court in *Rajvir @ Raju and another*



vs. State of Haryana reported in (2010) 15 SCC 116, wherein appellants have no role to play and so, while considering the event of re-trial, the interest of the appellants is also to be seen coupled with whether on account of such lapses, miscarriage of justice has really occurred.

12. The learned counsel for the appellants has drew attention over the principle laid down by the Hon'ble Apex Court in **State of U.P. vs. Kapil Deo Shukla reported in (1972) 3 SCC 504**, ...**Ramanlal Rathi vs. the State reported in A.I.R. 1951 Calcutta 305**, ...**Machander vs. the State of Hyderabad reported in A.I.R. 1955 SC 792** and submitted that Court neither should act in partial manner nor should allow an opportunity to the prosecution to fill up lacuna, so persisting. Court has to maintain balance. In likewise manner, the learned counsel also urged that accused should not be penalized for the lapses having at the end of the Court as well as by the prosecution.

13. Now, coming to miscarriage of justice, the learned counsel for the appellants led much stress over the principle decided by the Apex Court reported in **Ajay Kumar Ghoshal Etc. vs. State of Bihar and another reported in 2017(1) P.L.J.R 458 (SC)** and submitted that mere omission at the end of trial court would not, in ordinary course of nature, suggests miscarriage of justice nor it could



be subject of abhorrence. Miscarriage of justice is an event whereunder the whole proceeding is found coloured with some sort of illegality adversely affecting upon the mode of trial and in likewise manner, its ultimate result. Mere perceiving some sort of deficiency while conducting the trial will not cover nor will come within the ambit of miscarriage of justice. Apart from this, the learned counsel for the appellants also drew attention towards case of **Zahira Habibulla H. Sheikh and another vs. State of Gujarat and others reported in (2004) 4 SCC 158** and submitted that though a caution has been given by the Apex Court to the effect that in ordinary course of nature, it should not be referred as, the same has been passed perceiving extra-ordinary situation persisting, justifying the same directing retrial which, in the present facts and circumstances of the case, did not find favour. Consequent thereupon, the same could not be ordered. So, concluding the submission, has submitted that this appeal be allowed after setting aside the judgment of conviction and sentence impugned by way of acquitting the appellants.

14. On the other hand, the learned Additional Public Prosecutor vehemently refuted the submissions having made on behalf of appellants. It has been submitted that on account of insincerity of the trial Court, the direction given by the Hon'ble Apex Court has not been complied with and on account thereof, whole trial



vitiates. The only option now available is to direct the trial Court to proceed afresh (de novo trial) after framing alternative charge by remitting the matter after setting aside the judgment of conviction and sentence impugned. Furthermore, it has also been submitted that had there been proper application of judicious mind at the end of the learned trial Court at the stage of framing of charge and in likewise manner, by conducting prosecutor such mistake would not have occurred. That being so, the trial culminated to its logical end in illegal manner, whereupon bound to face its ultimate result. Furthermore, it has been submitted that present situation is same as faced by the Hon'ble Apex Court in **Zahira Habibulla H. Sheikh and another vs. State of Gujarat and others reported in (2004) 4 SCC 158**, so referred by the learned counsel for the appellants, whereupon re-trial is only remedial recourse to be adopted. Learned Additional Public Prosecutor further submits that Section 386 Cr.P.C. amply empowers the appellate Court to set right the mistake committed by the trial Court, specially Section 386(e) Cr.P.C., whereunder appellate Court may make any amendment or any consequential or incidental order that may begust and proper apart from having been entrusted with directing retrial.

15. Giving a pause before coming to discuss the legal question involved in this appeal, first of all, glimpse of factual aspect



is to be taken. Apart from evidence of PW-8, Dr. Arbind Kumar, all the witnesses including husband (PW-10) have had substantiated the cause of death due to ante-mortem burn injury. Furthermore, from the evidence of PW-8, it is evident that no cross-examination has been made on behalf of appellants in order to challenge the Exhibit-1, statement of deceased Aarti Devi (dying declaration) whereupon L.T.I. of her husband was by way of suggesting that due to severe burn injuries, she might not be in a position to make any statement.

16. So far ocular evidence is concerned, it is evident that none of them including informant had claimed to be an eye witness to occurrence. PW-1, PW-2 have been declared hostile. PW-3 had stated that after hearing alarm, he rushed to the place of Shankar Mahto and seen, there was fire inside house. Door was closed from inside. Door was broken whereupon he saw daughter-in-law of Shankar Mahto under fire. Some persons extinguished fire, taken to doctor. At that very time, she was shouting, but voice was not clear. He returned back to his place. This case has been instituted by the mother of the deceased. During cross-examination at Para-3, he had stated that he does not know how fire was broken.

17. PW-4, PW-5 are hearsay witness as they came to know about the same after the occurrence. PW-10 is the husband of deceased, who had deposed that Aarti Devi was married with him



about 7-8 years ago. Since then, she was residing with him. Occurrence is of month of February, 2010. At about 7.00 p.m., he received information that his wife burnt while cooking. When he reached at his house, he found his wife in burnt condition. She was uttering slowly that during course of cooking, she caught fire. Thereafter, she was taken to hospital. After admitting her at P.M.C.H., he had gone to Orissa. When he returned back, found all the eventualities completed. When he admitted his wife, at that very time, police had come, but returned back. This case has been registered by his mother-in-law. He further stated that he had put his L.T.I. on blank paper. During cross-examination, he had stated that all the family members were living jointly. No quarrel had ever taken place. He had further deposed that whenever dispute arose with his father, he got it calm down. He had further stated that when he reached at his house after being informed regarding occurrence, door was opened and she was cooking food. He after admitting her, remained there. His mother-in-law took his L.T.I. on the pretext of purchasing of medicine. Police did not record statement of his wife in his presence. His wife was not in a position to speak while she was admitted. His Fua never remained with them. In Para-9, he had stated that when he reached at his house, his wife had disclosed that during course of cooking, she caught fire. Who done 'Shradh', he is unable to say. His father also resides in one



of the rooms of same building.

18. PW-9 is informant. She had deposed that her daughter Aarti was married 7-8 years ago with Dharmendra, S/o Amarnath. When Aarti gone to her sasural, her father-in-law, mother-in-law and Mausia mother-in-law began to torture her for dowry. Her daughter begotten two children. Occurrence is 5-6 years ago. She got information that her daughter is admitted at P.M.C.H. She went there. All the members of her sasural were absent. Aarti had disclosed that after pouring kerosene oil over her, father-in-law, mother-in-law and Mausia mother-in-law lit fire. For the last three days, she was not provided food. Aarti died at P.M.C.H. during course of treatment. Police came and took her fard-bayan. Post mortem was conducted, she conducted rituals. During cross-examination, she had stated that after coming to know about occurrence, first of all, she had gone to the place of her daughter where house was closed. She came to know that daughter is admitted at P.M.C.H. She came to P.M.C.H. and found her daughter completely burnt. None of accused was present. In Para-9, she had stated that police had recorded statement of his daughter in her presence as well as in presence of his son-in-law. Same police had recorded her statement. In Para-10, she had deposed that accused persons used to treat her daughter badly. At all occasions, she used to send her daughter after getting her consoled. No complaint



was made for the same. At Para-11, she had stated that accused persons have informed her that as she fell down, therefore, she has been admitted at P.M.C.H. Accused persons fled away from hospital. When she reached at P.M.C.H., at that very time, her son-in-law was present. Her son-in-law lives jointly with his father. She denied the suggestion on that very score.

19. So from the evidences, it is abundantly clear that the statement having been made by the deceased in presence of husband (PW-10) has duly found substantiated. Though PW-10 wanted to explain that his L.T.I. was taken by his mother-in-law, which is found completely ruled out from Para-9 of PW-1. Furthermore, the theme of accidental fire has itself been tutored by the PW-10. Furthermore, PW-10 also showed presence of accused Amarnath in the same building, though being tenant of other room. Furthermore, from Para-10 of PW-9, she on her own disclosed that the the occurrence took place after 7-8 years of marriage.

20. All the Courts within the Indian Territory is bound to obey the order of the Hon'ble Apex Court as laid down under Article 141 of the Constitution of India. Furthermore, non-obedience of the order will be subject to contempt under Article 129 of the Constitution of India. In the aforesaid background, first of all, the relevant direction of the Hon'ble Apex Court is to be seen. In ***Rajvir***



@ *Raju and another vs. State of Haryana reported in (2010)15 SCC*

116, the same has been directed in following way:-

“7. We further direct all trial Courts in India to ordinarily add Section 302 to the charge of section 304B, so that death sentences can be imposed in such heinous and barbaric crimes against women. Copy of this order be sent to Registrar Generals/Registrars of all High Courts, which will circulate it to all trial Courts.”

21. The aforesaid view has further been subject to close scrutiny before the Hon’ble Apex Court in ***Jasvinder Saini & others v. State (Government of NCT of Delhi) reported in (2013) 7 SCC 256***, wherein it has been observed:-

“14. Be that as it may the common thread running through both the orders is that this Court had in Rajbir’s case (supra) directed the addition of a charge under [Section 302](#) IPC to every case in which the accused are charged with [Section 304-B](#). That was not, in our opinion, the true purport of the order passed by this Court. The direction was not meant to be followed mechanically and without due regard to the nature of the evidence available in the case. All that this Court meant to say was that in a case where a charge alleging dowry death is framed, a charge under [Section 302](#) can also be



framed if the evidence otherwise permits. No other meaning could be deduced from the order of this Court.

15. It is common ground that a charge under [Section 304B](#) IPC is not a substitute for a charge of murder punishable under [Section 302](#). As in the case of murder in every case under [Section 304B](#) also there is a death involved. The question whether it is murder punishable under [Section 302](#) IPC or a dowry death punishable under [Section 304B](#) IPC depends upon the fact situation and the evidence in the case. If there is evidence whether direct or circumstantial to prima facie support a charge under [Section 302](#) IPC the trial Court can and indeed ought to frame a charge of murder punishable under [Section 302](#) IPC, which would then be the main charge and not an alternative charge as is erroneously assumed in some quarters. If the main charge of murder is not proved against the accused at the trial, the Court can look into the evidence to determine whether the alternative charge of dowry death punishable under [Section 304B](#) is established. The ingredients constituting the two offences are different, thereby demanding appreciation of evidence from the



*perspective relevant to such ingredients. The trial Court in that view of the matter acted mechanically for it framed an additional charge under [Section 302 IPC](#) without advertng to the evidence adduced in the case and simply on the basis of the direction issued in *Rajbir's case (supra)*. The High Court no doubt made a half hearted attempt to justify the framing of the charge independent of the directions in *Rajbir's case (supra)*, but it would have been more appropriate to remit the matter back to the trial Court for fresh orders rather than lending support to it in the manner done by the High Court.*

16. In the light of what we have said above, the order passed by the trial Court and so also that passed by the High Court are clearly untenable and shall have to be set aside. That would not, however, prevent the trial Court from re-examining the question of framing a charge under [Section 302 IPC](#) against the appellant and passing an appropriate order if upon a prima facie appraisal of the evidence adduced before it, the trial Court comes to the conclusion that there is any room for doing so. The trial Court would in that regard keep in view the decision of this Court in [Hasanbhai Valibhai Qureshi v. State of Gujarat and Ors.](#)



(2004) 5 SCC 347 where this Court has recognized the principle that in cases where the trial Court upon a consideration of broad probabilities of the case based upon total effect of the evidence and documents produced, is satisfied that any addition or alteration of the charge is necessary, it is free to do so.

17. Reference may also be made to the decisions of this Court in [Ishwarchand Amichand Govadia and Ors. v. State of Maharashtra and Anr.](#) (2006) 10 SCC 322 and the decision of the Calcutta High Court in [Rajendra Singh Sethia v. State and Ors.](#) 1989 Cri.L.J. 255 and that delivered by the Allahabad High Court in [Shiv Nandan and Ors. v. State of U.P.](#) 2005 Cri. L.J 3047 which too are to the same effect. In any such fresh exercise which the trial Court may undertake, it shall remain uninfluenced by the observations made by the High Court on merits of the case including those touching the probative value of the autopsy surgeon's opinion."

22. Again the issue came up for consideration in ***Vijay Pal Singh and others vs. State of Uttarakhand reported in (2014) 15 SCC 163*** and the same has been dealt with in following way:-

"18. However, it is generally seen that in cases where



*a married woman dies within seven years of marriage, otherwise than under normal circumstances, no inquiry is usually conducted to see whether there is evidence, direct or circumstantial, as to whether the offence falls under Section 302 of IPC. Sometimes, Section 302 of IPC is put as an alternate charge. In cases where there is evidence, direct or circumstantial, to show that the offence falls under Section 302 of IPC, the trial court should frame the charge under Section 302 of IPC even if the police has not expressed any opinion in that regard in the report under Section 173(2) of the Cr.PC. Section 304B of IPC can be put as an alternate charge if the trial court so feels. In the course of trial, if the court finds that there is no evidence, direct or circumstantial, and proof beyond reasonable doubt is not available to establish that the same is not homicide, in such a situation, if the ingredients under Section 304B of IPC are available, the trial court should proceed under the said provision. In **Muthu Kutty and another v. State (2005) 9 SCC 113 by Inspector of Police, T.N.1**, this Court addressed the issue and held as follows:*

“20. A reading of Section 304-B IPC and Section 113-B, Evidence Act together makes it clear that law authorises a presumption that the husband or any other relative of the husband has caused the death of



a woman if she happens to die in circumstances not normal and that there was evidence to show that she was treated with cruelty or harassed before her death in connection with any demand for dowry. It, therefore, follows that the husband or the relative, as the case may be, need not be the actual or direct participant in the commission of the offence of death. For those that are direct participants in the commission of the offence of death there are already provisions incorporated in Sections 300, 302 and 304. The provisions contained in Section 304-B IPC and Section 113-B of the Evidence Act were incorporated on the anvil of the Dowry Prohibition (Amendment) Act, 1984, the main object of which is to curb the evil of dowry in the society and to make it severely punitive in nature and not to extricate husbands or their relatives from the clutches of Section 302 IPC if they directly cause death. This conceptual difference was not kept in view by the courts below. But that cannot bring any relief if the conviction is altered to Section 304 Part II. No prejudice is caused to the accused-appellants as they were originally charged for offence punishable under Section 302 IPC along with Section 304-B IPC.”

19. *In a recent decision, this Court in **Jasvinder Saini and others v. State (Government of NCT of Delhi)** (2013) 7 SCC 256, observed thus:*



“15. It is common ground that a charge under Section 304-B IPC is not a substitute for a charge of murder punishable under Section 302. As in the case of murder in every case under Section 304-B also there is a death involved. The question whether it is murder punishable under Section 302 IPC or a dowry death punishable under Section 304-B IPC depends upon the fact situation and the evidence in the case. If there is evidence whether direct or circumstantial to prima facie support a charge under Section 302 IPC the trial court can and indeed ought to frame a charge of murder punishable under Section 302 IPC, which would then be the main charge and not an alternative charge as is erroneously assumed in some quarters. If the main charge of murder is not proved against the accused at the trial, the court can look into the evidence to determine whether the alternative charge of dowry death punishable under Section 304-B is established. The ingredients constituting the two offences are different, thereby demanding appreciation of evidence from the perspective relevant to such ingredients. The trial court in that view of the matter acted mechanically for it framed an additional charge under Section 302 IPC without adverting to the evidence adduced in the case and simply on the basis of the direction issued in Rajbir case. The High Court no doubt made a halfhearted



attempt to justify the framing of the charge independent of the directions in Rajbir case, but it would have been more appropriate to remit the matter back to the trial court for fresh orders rather than lending support to it in the manner done by the High Court.”

20. *Though in the instant case the accused were charged by the Sessions Court under Section 302 of IPC, it is seen that the trial court has not made any serious attempt to make an inquiry in that regard. If there is evidence available on homicide in a case of dowry death, it is the duty of the investigating officer to investigate the case under Section 302 of IPC and the prosecution to proceed in that regard and the court to approach the case in that perspective. Merely because the victim is a married woman suffering an unnatural death within seven years of marriage and there is evidence that she was subjected to cruelty or harassment on account of demand for dowry, the prosecution and the court cannot close its eyes on the culpable homicide and refrain from punishing its author, if there is evidence in that regard, direct or circumstantial.*

21. *In the instant case, the prosecution has not made any attempt to explain the ante-mortem injuries which conclusively point to the cause of death as asphyxia caused by strangulation. Yet, no serious*



attempt, it is disturbing to note, was done to connect the murder to its author(s).

22. No doubt, nothing prevents this Court from putting the appellants on notice as to why the punishment should not be appropriately enhanced but why we reluctantly decline to do so, we shall explain in the later part of the judgment.

*23. In two of the early decisions of this Court, after the introduction of Section 304B of IPC, the ingredients of the offence and the interplay of Section 304B of IPC with Sections 498A, 302, 306 of IPC have also been discussed. In **State of Punjab v. Iqbal Singh and others (1991) 3 SCC 1**, the Court in paragraph-8 stated that:*

“8. ... The legislative intent is clear to curb the menace of dowry deaths, etc., with a firm hand. We must keep in mind this legislative intent. It must be remembered that since crimes are generally committed in the privacy of residential homes and in secrecy, independent and direct evidence is not easy to get. That is why the legislature has by introducing Sections 113-A and 113-B in the Evidence Act tried to strengthen the prosecution hands by permitting a presumption to be raised if certain foundational facts are established and the unfortunate event has taken place within seven years of marriage. This period of seven years is considered to be the turbulent one



after which the legislature assumes that the couple would have settled down in life. If a married women is subjected to cruelty or harassment by her husband or his family members Section 498-A, IPC would be attracted. If such cruelty or harassment was inflicted by the husband or his relative for, or in connection with, any demand for dowry immediately preceding death by burns and bodily injury or in abnormal circumstances within seven years of marriage, such husband or relative is deemed to have caused her death and is liable to be punished under Section 304-B, IPC. When the question at issue is whether a person is guilty of dowry death of a woman and the evidence discloses that immediately before her death she was subjected by such person to cruelty and/or harassment for, or in connection with, any demand for dowry, Section 113-B, Evidence Act provides that the court shall presume that such person had caused the dowry death. Of course if there is proof of the person having intentionally caused her death that would attract Section 302, IPC. Then we have a situation where the husband or his relative by his willful conduct creates a situation which he knows will drive the woman to commit suicide and she actually does so, the case would squarely fall within the ambit of Section 306, IPC. In such a case the conduct of the person would tantamount to inciting or



provoking or virtually pushing the woman into a desperate situation of no return which would compel her to put an end to her miseries by committing suicide. ...”

23. **Section 221 of the Cr.P.C.** permits the Court to convict a person even in case of absence of charge in case of presence of sufficient material available on the record and such finding would not be subject to challenge as laid down under **Section 464 of the Cr.P.C.** For better appreciation, the same is quoted below:-

“221. Where it is doubtful what offence has been committed.

(1) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

(2) If in such a case the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of sub-section (1), he may be convicted of the offence which he is shown to have committed, although he



was not charged with it. Illustrations

(a) A is accused of an act which may amount to theft, or receiving stolen property, or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft, or receiving stolen property, or criminal breach of trust or cheating.

(b) In the case mentioned, A is only charged with theft. It appears that he committed the offence of criminal breach of trust, or that of receiving stolen goods. He may be convicted of criminal breach of trust or of receiving stolen goods (as the case may be), though he was not charged with such offence.

(c) A states on oath before the Magistrate that he saw B hit C with a club. Before the Sessions Court A states on oath that B never hit C. A may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of these contradictory statements was false.

464. *Effect of omission to frame, or absence of, or error in, charge.*

(1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or



on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may-

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommended from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction."

24. In ***Mohan Singh vs. State of Bihar reported in (2011) 9 SCC 272***, where no charge under Section 302 I.P.C. was framed, was taken into consideration and has been decided as:-

"27. In view of such consistent opinion of this Court, we are of the view that no prejudice has been caused to the appellant for non-mentioning of



Section 302 I.P.C. in the charge since all the ingredients of the offence were disclosed. The appellant had full notice and had ample opportunity to defend himself against the same and at no earlier stage of the proceedings, the appellant had raised any grievance. Apart from that, on overall consideration of the facts and circumstances of this case we do not find that the appellant suffered any prejudice nor has there been any failure of justice.

28. In the instant case, in the charge it has been clearly mentioned that the accused-appellant has committed the murder of Anil Jha. By mentioning that the accused has committed the murder of Anil Jha all the ingredients of the charge have been mentioned and the requirement of [Section 211](#), sub-section (2) has been complied with. Therefore, we do not find any substance in the aforesaid grievance of the appellant.”

25. The Constitution Bench of the Apex Court in ***Willie (William) Slaney vs. State of Madhya Pradesh reported in A.I.R. 1956 SC 116***, has held:-

“44. Now, as we have said, [sections 225, 232, 535](#) and [537\(a\)](#) between them, cover every conceivable typo, of error and irregularity referable to a charge



that can possibly arise, ranging from cases in which there is a conviction with no charge at all from start to finish down to cases in which there is a charge but with errors, irregularities and omissions in it. The Code is emphatic that whatever the irregularity it is not to be regarded as fatal unless there is prejudice.

It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in a labyrinth of unsubstantial technicalities. Broad vision is required, a nice balancing of the rights of the State and the protection of society in general against protection from harassment to the individual and the risks of unjust conviction.

Every reasonable presumption must be made infavour of an accused person; he must be given the benefit of every reasonable doubt. The same broad principles of justice and fair play must be brought to bear when determining a matter of prejudice as in adjudging guilt. But when all is said and done, what we are concerned to see is whether the accused had a fair trial, whether he knew what be



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.

If all these elements are there and no prejudice is shown the conviction must stand whatever the irregularities whether traceable to the charge or to a want of one.”

26. In ***Darbara Singh vs. State of Punjab*** reported in (2012) 10 SCC 476, it has been held:-

“20. The defect in framing of the charges must be so serious that it cannot be covered under [Sections 464/465](#) Cr.P.C., which provide that, an order of sentence or conviction shall not be deemed to be invalid only on the ground that no charge was framed, or that there was some irregularity or omission or misjoinder of charges, unless the court comes to the conclusion that there was also, as a consequence, a failure of justice. In determining whether any error, omission or irregularity in framing the relevant charges, has led to a failure of justice, the court must have regard to whether an objection could have been raised at an earlier stage, during the proceedings or not. While judging the question of prejudice or guilt, the court must



bear in mind that every accused has a right to a fair trial, where he is aware of what he is being tried for and where the facts sought to be established against him, are explained to him fairly and clearly, and further, where he is given a full and fair chance to defend himself against the said charge(s).

21. The 'failure of justice' is an extremely pliable or facile expression, which can be made to fit into any situation in any case. The court must endeavour to find the truth. There would be 'failure of justice'; not only by unjust conviction, but also by acquittal of the guilty, as a result of unjust failure to produce requisite evidence. Of course, the rights of the accused have to be kept in mind and also safeguarded, but they should not be over emphasised to the extent of forgetting that the victims also have rights. It has to be shown that the accused has suffered some disability or detriment in respect of the protections available to him under Indian Criminal Jurisprudence. 'Prejudice', is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial, and not with respect to matters falling outside their scope. Once the accused is able to show that



there has been serious prejudice caused to him, with respect to either of these aspects, and that the same has defeated the rights available to him under jurisprudence, then the accused can seek benefit under the orders of the Court. (Vide: [Rafiq Ahmed @ Rafi v. State of U.P.](#), AIR 2011 SC 3114; [Rattiram & Ors. v. State of M.P.](#) through Inspector of Police, AIR 2012 SC 1485; and Criminal Appeal No.46 of 2005 ([Bhimanna v. State of Karnataka](#)) decided on 4th September, 2012)."

27. In ***Begu and others vs. King Emperor reported in A.I.R. 1925 Privy Council 130***, wherein accused was charged and convicted at an initial stage under Section 302 I.P.C., but in appeal, conviction was altered under Section 201 I.P.C. though no charge was existing thereunder, it has been held:-

"A man may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made."

28. In ***Kamalanantha and others vs. State of Tamil Nadu reported in (2005) 5 SCC 194***, it has been observed:-

"50. It is clear from the aforesaid decisions that misjoinder of charges is not an illegality but an irregularity curable under [Section 464](#) or [Section](#)



465 Cr.P.C. provided no failure of justice had occasioned thereby. Whether or not the failure of justice had occasioned thereby, it is the duty of the Court to see, whether an 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.”

29. In *Annareddy Sambasiva Reddy and others vs. State of Andhra Pradesh* reported in (2009) 12 SCC 546, it has been held:-

“55. In unmistakable terms, Section 464 specifies that a finding or sentence of a court shall not be set aside merely on the ground that a charge was not framed or that charge was defective unless it has occasioned in prejudice. Because of a mere defect in language or in the narration or in form of the charge, the conviction would not be rendered bad if accused has not been adversely affected thereby. If the ingredients of the section are obvious or implicit, conviction in regard thereto can be sustained irrespective of the fact that the said section has not been mentioned.”

30. In *K. Prema S. Rao and another vs. Yadala Srinivasa Rao and others* reported in (2003) 1 SCC 217, it has been



held:-

"22. Mere omission or defect in framing charge does not disable the Criminal Court from convicting the accused for the offence which is found to have been proved on the evidence on record. The Code of Criminal procedure has ample provisions to meet a situation like the one before us. From the Statement of Charge framed under [Section 304B](#) and in the alternative [Section 498A, IPC](#) (as quoted above) it is clear that all facts and ingredients for framing charge for offence under [Section 306, IPC](#) existed in the case. The mere omission on the part of the trial Judge to mention of [Section 306, IPC](#) with [498A, IPC](#) does not preclude the Court from convicting the accused for the said offence when found proved. In the alternate charge framed under [Section 498A](#) of IPC, it has been clearly mentioned that the accused subjected the deceased to such cruelty and harassment as to drive her to commit suicide. The provisions of [Section 221](#) of Cr.P.C. take care of such a situation and safeguard the powers of the criminal court to convict an accused for an offence with which he is not charged although on facts found in evidence, he could have been charged for such offence. [Section 221](#) of Cr.



P.C. needs reproduction:-

"221. Where it is doubtful what offence has been committed-(1) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged. In the alternative with having committed some one of the said offences.

(2) If in such a case the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of sub-section (12), he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

23. The provision of sub-section (2) of [Section 221](#) read with sub-section (1) of the said Section can be taken aid of in convicting and sentencing the accused No. 1 of offence of abetment of suicide under [Section 306](#) of IPC along with or instead of [Section 498A](#) of IPC.

24. [Section 215](#) allows criminal court to ignore any



error in stating either the offence or the particulars required to be stated in the charge, if the accused was not, in fact, misled by such error or omission in framing the charge and it has not occasioned a failure of justice. See [Section 215](#) of Cr. P.C. which reads:-

"215. Effect of errors - No error in stating, either the offence or the particulars required to be stated in the charge, and no commission to state the offence or those particulars, shall be regarded any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.

25. As provided in [Section 215](#) of Cr.P.C. commission to frame charge under [Section 306](#) IPC has not resulted in any failure of justice. We find no necessity to remit the matter to the trial court for framing charge under [Section 306](#) IPC and direct a retrial for that charge. The accused cannot legitimately complain of any want of opportunity to defend the charge under [Section 306, IPC](#) and a consequent failure of justice. The same facts found in evidence, which justify conviction of the appellant under [Section 498A](#) for cruel treatment of his wife, make out a case against him under [Section](#)



306 IPC of having abetted commission of suicide by the wife. The appellant was charged for an offence of higher degree causing "dowry death" under Section 304B which is punishable with minimum sentence of seven years rigorous imprisonment and maximum for life. Presumption under Section 113A of the Evidence Act could also be raised against him on same facts constituting offence of cruelty under Section 498A, IPC. No further opportunity of defence is required to be granted to the appellant when he had ample opportunity to meet the charge under Section 498A, IPC."

31. In ***Dinesh Seth vs. State of NCT of Delhi*** reported in ***(2008) 14 SCC 94***, it has been held:-

"11. A reading of the plain language of Section 221(1) and (2) shows that if a single act or series of acts constitute several offences and the prosecution is not certain about the particular offence then the accused can be charged with the allegation of having committed all, some or any of the offences. In such a case the accused can be convicted of the offence with which he may not have been specifically charged but evidence produced by the prosecution proves that such an offence has, in fact, been committed.



12. [Section 222\(1\)](#) lays down that when a person is charged with an offence consisting of several particulars and combination of only some of the particulars constituting a minor offence is proved then he can be convicted of the minor offence with which he may not have been charged. [Section 222\(2\)](#) lays down that when a person is charged with an offence but the facts proved constitute a minor offence then he can be convicted of the minor offence despite the fact that he may not have been charged with that offence. Sub-section (3) of [Section 222](#) lays down that a person charged with an offence, can be convicted of an attempt to commit such offence even though a separate charge may not have been framed on that account.

13. [Section 464\(1\)](#) lays down that any error, omission or irregularity in the framing of charge including any misjoinder of charges, will not invalidate a finding, sentence or order by a court of competent jurisdiction unless the higher court comes to a conclusion that failure of justice has been occasioned. Sub-section (2) of [Section 464](#) specifies the modes which can be adopted by the Court of appeal, confirmation or revision, if such court is of the opinion that a failure of the justice



has been occasioned on account of non framing of charge or any error, omission or irregularity in the framing of charge.

14. The question whether omission to frame a charge or any error or irregularity in the charge, is by itself, sufficient for quashing the conviction of the accused was considered in Willie (William) Slaney vs. State of M.P. [AIR 1956 SC 116]. After examining the issue in detail, the Constitution Bench of this Court observed:-

"6. Before we proceed to set out our answer and examine the provisions of the Code, we will pause to observe that the Code is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice.

If he does, if he is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of



defending himself, then, provided there is 'substantial' compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venal by the Code and the trial is not vitiated unless the accused can show substantial prejudice. That, broadly speaking, is the basic principle on which the Code is based.

7. Now here, as in all procedural laws, certain things are regarded as vital. Disregard of a provision of that nature is fatal to the trial and at once invalidates the conviction. Others are not vital and whatever the irregularity they can be cured; and in that event the conviction must stand unless the Court is satisfied that there was prejudice. Some of these matters are dealt with by the Code and wherever that is the case full effect must be given to its provisions."

15. The Constitution Bench then referred to the provisions of Sections 225, 232, 535 and 537 of the Code of Criminal Procedure, 1898, which are analogous to Section 215, 464 and 465 of the Code and held (AIR 1956 SC 116.:

"44. "Now, as we have said, Sections 225, 232, 535 and 537(a) between them, cover every



conceivable type of error and irregularity referable to a charge that can possibly arise, ranging from cases in which there is a conviction with no charge at all from start to finish down to cases in which there is a charge but with errors, irregularities and omissions in it. The Code is emphatic that 'whatever' the irregularity it is not to be regarded as fatal unless there is prejudice.

It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in a labyrinth of unsubstantial technicalities. Broad vision is required, a nice balancing of the rights of the State and the protection of society in general against protection from harassment to the individual and the risks of unjust conviction.

Every reasonable presumption must be made in favour of an accused person; he must be given the benefit of every reasonable doubt. The same broad principles of justice and fair play must be brought to bear when determining a matter of prejudice as in adjudging guilt. But when all is said and done what we are concerned to see is 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.

If all these elements are there and no prejudice is shown the conviction must stand whatever the irregularities whether traceable to the charge or to a want of one."

16. In Gurbachan Singh vs. State of Punjab [AIR 1957 SC 623], a three Judges' Bench considered the question of prejudice and observed:

"7. In judging a question of prejudice, as of guilt, courts must act with a broad vision and look to the substance and not to 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."

17. In Lakhjit Singh vs. State of Punjab [1994 Supp. (1) SCC 173], the accused were charged and convicted of offence under Section 302 IPC. The High Court upheld their conviction. A two Judges'



Bench of this Court held that charge under [Section 302 IPC](#) is not established but convicted the appellants under [Section 306 IPC](#). While rejecting the argument that in the absence of a specific charge under [Section 306 IPC](#), the appellants cannot be convicted under that section, the Court observed:-

"9. The learned counsel, however, submits that since the charge was for the offence punishable under [Section 302](#) Indian Penal Code, the accused were not put to notice to meet a charge also made against them under [Section 306 IPC](#) and, therefore, they are prejudiced by not framing a charge under [Section 306](#) Indian Penal Code and; therefore, presumption under [Section 113-A](#) of Indian Evidence Act cannot be drawn and consequently a conviction under [Section 306](#) cannot be awarded. We are unable to agree. The facts and circumstances of the case have been put forward against the accused under [Section 313 CrPC](#) and when there was a demand for dowry it cannot be said that the accused are prejudiced because the cross-examination of the witnesses, as well as the answers given under [Section 313 CrPC](#) would show that they had enough of notice of the allegations which attract [Section 306](#) Indian Penal Code also."



18. *In Sangaraboina Sreenu vs. State of A.P.* [1997 (5) SCC 348], another Bench of two Judges' expressed a contrary view. The facts of that case were that the accused was convicted by the trial court under [Section 302 IPC](#). The High Court converted the conviction to one under [Section 306 IPC](#). While reversing the judgment of the High Court, this Court held:

"2. This appeal must succeed for the simple reason that having acquitted the appellant of the charge under [Section 302 IPC](#) -- which was the only charge framed against him -- the High Court could not have convicted him of the offence under [Section 306 IPC](#). It is true that [Section 222 CrPC](#) entitles a court to convict a person of an offence which is minor in comparison to the one for which he is tried but [Section 306 IPC](#) cannot be said to be a minor offence in relation to an offence under [Section 302 IPC](#) within the meaning of [Section 222 CrPC](#) for the two offences are of distinct and different categories. While the basic constituent of an offence under [Section 302 IPC](#) is homicidal death, those of [Section 306 IPC](#) are suicidal death and abetment thereof."

19. In view of the apparently conflicting judgments



of the coordinate Benches, the issue was referred to a larger Bench. In Dalbir Singh vs. State of U.P. [2004 (5) SCC 334], a three Judges' Bench considered the provisions of Section 222 and 464 of the Code and observed:-

"14.....Sub-section (1) of Section 222 lays down that when a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it. Sub- section (2) of the same section lays down that when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it. Section 222 CrPC is in the nature of a general provision which empowers the court to convict for a minor offence even though charge has been framed for a major offence. Illustrations (a) and (b) to the said section also make the position clear. However, there is a separate chapter in the Code of Criminal Procedure, namely, Chapter XXXV which deals with irregular proceedings and their effect. This chapter enumerates various kinds of irregularities



which have the effect of either vitiating or not vitiating the proceedings. Section 464 of the Code deals with the effect of omission to frame, or absence of, or error in, charge. Sub-section (1) of this section provides that no finding, sentence or order by a court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby. This clearly shows that any error, omission or irregularity in the charge including any misjoinder of charges shall not result in invalidating the conviction or order of a competent court unless the appellate or revisional court comes to the conclusion that a failure of justice has in fact been occasioned thereby." (emphasis in original)

20. The three Judges' Bench then referred to the earlier judgments in *Willie (William) Slaney vs. State of M.P.* (A.I.R. 1956 SC 116), *Gurbachan Singh vs. State of Punjab* (supra) and observed:-

"17. There is a catena of decisions of this Court on the same lines and it is not necessary to burden this



judgment by making reference to each one of them. Therefore, in view of [Section 464](#) CrPC, it is possible for the appellate or revisional court to convict an accused for an offence for which no charge was framed unless the court is of the opinion that a failure of justice would in fact occasion. In order to judge whether a failure of justice has been occasioned, it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself. We are, therefore, of the opinion that Sangaraboina Sreenu was not correctly decided as it purports to lay down as a principle of law that where the accused is charged under [Section 302](#) IPC, he cannot be convicted for the offence under [Section 306](#) IPC."

21. The ratio of the above noted judgments is that in certain situations an accused can be convicted of an offence with which he may not have been specifically charged and that an error, omission or irregularity in the framing of charge is, by itself not sufficient for upsetting the conviction. The appellate, confirming or revisional Court can



interfere in such matters only if it is shown that error, omission or irregularity in the framing of charge has caused prejudice to the accused and failure of justice has been occasioned.”

32. In ***Sanichar Sahni vs. State of Bihar*** reported in **(2009) 7 SCC 198**, it has been held:-

21. *It is also not the case where the appellant can take the plea that he was not aware as what was the charge against him and what defence he could lead. There had been evidence of hatching the conspiracy of impeccable character. On the point of conspiracy the courts below have recorded the finding against the appellant.*

22. *In State of A.P. v. Thakkidiram Reddy, (1998) 6 SCC 554, this Court considered the issue of not framing the proper charges. In that case averment had been raised that charges have not been framed against the accused persons in accordance with Section 211 Cr.P.C.. In that case the charge had been framed under Section 148 IPC, though it was alleged that they were the members of an unlawful assembly, it was not mentioned what its common object was. Besides, it was contended, a charge under Section 302 IPC simpliciter was framed against all the accused persons and not with the aid*



of [Section 149](#) IPC for which they were convicted by the trial court.

23. This Court repealed the contention observing as under: (1998) 6 SCC 554).

"10. Sub-section (1) of [Section 464](#) of the Code of Criminal Procedure 1973 ("Code" for short) expressly provides that no finding, sentence or order by; a court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless in the opinion of the court of appeal, confirmation or revision, a failure of justice has in fact (emphasis supplied) been occasioned thereby. Sub-section (2) of the said section lays down the procedure that the court of appeal, confirmation or revision has to follow in case it is of the opinion that a failure of justice has in fact been occasioned. The other section relevant for our purposes is [Section 465](#) of the Code; and it lays down that no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered by a court of appeal, confirmation or revision on account of any error, omission or irregularity in the proceedings, unless



in the opinion of that court, a failure of justice has in fact been occasioned. It further provides, inter alia, that in determining whether any error, omission or irregularity in any proceeding under this Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings." (emphasis in original)

24. *The Court in Thakkidiram case 1998) 6 SCC 554 further held that in judging a question of prejudice, as of guilt, court must act with a broad vision and look to the substance and not to technicalities, and its 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. In the said case this Court ultimately came to the conclusion that in spite of defect in framing of charge, as no prejudice had been caused to the convicts, no interference was required.*

25. A Constitution Bench of this Court in *Willie (William) Slaney, v. State of M.P.*, AIR 1956 SC



116, considered the issue of non- framing of charges properly and conviction of an accused for the offences for which he has not been charged and reached the conclusion as under:-

"86. ...In such a situation, the absence of a charge under one or other of the various heads of criminal liability for the offence cannot be said to be fatal by itself, and before a conviction for the substantive offence, without a charge, can be set aside, prejudice will have to be made out."

87 If it is so grave that prejudice will necessarily be implied or imported, it may be described as an illegality. If the seriousness of the omission is of a lesser degree, it will be an irregularity and prejudice by way of failure of justice will have to be established".

26. This Court in [Gurpreet Singh v. State of Punjab](#), (2005) 12 SCC 615 referred to and relied upon its earlier judgments in Willie (William) Slaney, (AIR 1956 SC 116) and [State of A.P. v. Thakkidiram Reddy](#), (1998) 6 SCC 554) and held that unless there is failure of justice and thereby the cause of the accused has been prejudiced, no interference is required if the conviction can be upheld on the evidence led against the accused. The Court should



not interfere unless it is established that the accused persons were in any way prejudiced due to the errors and omissions in framing the charges against him. A similar view has been reiterated by this Court in [Ramji Singh v. State of Bihar](#) (2001) 9 SCC 528.

29. On this very issue of conspiracy, the prosecution led evidence of impeccable character of two witnesses, namely, Ashok Paswan PW.2 and Ashok Kumar Verma PW.5. The appellant was given full opportunity to defend himself only on this very point of conspiracy as there was no other allegation against him. He was asked specific question by the trial court on the point of conspiracy while recording his statement under [Section 313 Cr.P.C.](#) Therefore, it cannot be held even by any stretch of imagination that any prejudice has been caused to the appellant on this very issue.”

33. At the present moment, one should not lost sight of obligation having entrusted on the part of the Court as well as prosecutor in case being sessions triable, as Section 226 Cr.P.C. prescribes an obligation upon the prosecutor to open his case by stating that under what penal provisions, charge is to be framed and



by what evidence the aforesaid charge is going to be proved which, in terms of Section 227 as well as Section 228 of the Cr.P.C. the Court has to perceive whether the materials having placed before the Court is to justify trial and if so, under what relevant provision Court attracts discharge on account of paucity of prima facie material.

34. At the present moment, one more aspect is to be seen as is visualizing from the record itself. From the L.C. Record, it is evident that fard-bayan of informant does contain disclosure that fard-bayan of deceased was already recorded by Pirbahore P.S. at an earlier occasion which, the reason best known to the concerned authorities did not find favour as that version was the initial version which ought to have been the basis of the registration of the case and further, the aforesaid statement which later on became dying declaration was kept away and remained away conspiracy though duly certified photo copy has been brought up on record by PW-6 and PW-7, Investigating Officer during course of trial Exhibit-1, which completely rules out the theme of dowry death rather as deceased did not accede to lecherous desire of the accused/ appellant on account thereof, she was caught hold, kerosene oil was sprinkled and then, lit fire over her body by the appellants.

35. Whether it happens to be a miscarriage of justice or not, is a theme to be perceived whereupon de novo trial be directed



while exercising appellate power in terms of Section 386 of the Cr.P.C. Though, such eventualities have not been defined under Section 386 of the Cr.P.C. At the other end, it has been left out within the arena of appellate Court to pass such order in a case so appreciated, warranting the same.

36. At the present juncture, it looks pertinent to perceive the submission made on behalf of learned counsel for the appellant, who has stressed over Clause-b(1) of Section 386 of the Cr.P.C. and submitted that first obligation which, the appellate Court is to discharge, to acquit the appellant by way of reversing the finding and if not, then may order for retrial in appropriate cases. That being so, retrial should not be the proper step taken by the appellate Court even finding lapses at the part of the lower Court which, on due consideration, be considered as a ground for acquittal of the accused and not for retrial. Lapses were at the end of learned lower Court and so, the same could not be allowed to be corrected, filled up in order to sustain conviction against an accused causing prejudice to their interest.

37. There happens to be obligation on the part of the Court to see that it is not only protection of the interest of the accused rather it is also for protection of the victim. A crime is not always against an individual rather it happens to be against the State and so,



its impact has also to be seen, more particularly allowing a perception against the system that on account of wrong having been committed by the Court, the culprit has been allowed to go free. Furthermore, the Court should not be a mere silent expectator rather it has to be active during course of trial to ward off any kind of lapses affecting the trial on account of undue steps. That being so, an obligation having attributed upon a Court by the statute is to be duly discharged in legal way so that no one could be aggrieved thereby.

38. Miscarriage of justice is not at all defined rather it happens to be an eventuality perceived by the Court, committed by the Court which ultimately costs upon propriety of the judgment Court. As has been referred by learned counsel for the appellant in ***Ajay Kumar Ghoshal Etc. vs. State of Bihar and another reported in 2017(1) P.L.J.R. 458 (SC)***, it has been held by the Hon'ble Apex Court as follows:-

“10. Section 386 Cr.P.C. deals with the powers of the appellate court. As per Section 386 (b) Cr.P.C, in an appeal from a conviction, the appellate court may:- (i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or



(ii) alter the finding, maintaining the sentence, or
(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same.

11. Though the word “retrial” is used under [Section 386\(b\)\(i\) Cr.P.C.](#), the powers conferred by this clause is to be exercised only in exceptional cases, where the appellate court is satisfied that the omission or irregularity has occasioned in failure of justice. The circumstances that should exist for warranting a retrial must be such that where the trial was undertaken by the Court having no jurisdiction, or trial was vitiated by serious illegality or irregularity on account of the misconception of nature of proceedings. An order for retrial may be passed in cases where the original trial has not been satisfactory for some particular reasons such as wrong admission or wrong rejection of evidences or the Court refused to hear certain witnesses who were supposed to be heard.

39. In ***Ukha Kolhe-appellant v. the State of Maharashtra-respondent*** reported in ***A.I.R. 1963 (SC) 1531***, the majority view of the Constitution Bench held as follows:-



“11. An order for retrial of a criminal case is made in exceptional cases, and not unless the appellate Court is satisfied that the Court trying the proceeding had no jurisdiction to try it or that the trial was vitiated by serious illegalities or irregularities or on account of misconception of the nature of the proceedings and on that account in substance there had been no real trial or that the Prosecutor or an accused was, for reasons over which he had no control, prevented from leading or tendering evidence material to the charge, and in the interests of justice the appellate Court deems it appropriate, having regard to the circumstances of the case, that the accused should be put on his trial again. An order of re-trial wipes out from the record the earlier proceeding, and exposes the person accused to another trial which affords the prosecutor an opportunity to rectify the infirmities disclosed in the earlier trial, and will not ordinarily be countenanced when it is made merely to enable the prosecutor to lead evidence which he could but has not cared to lead either on account of insufficient appreciation of the nature of the case or for other reasons. Harries, C. J., in [Ramanlal Rathi v. The State](#) AIR 1951



Cal 305 observed :

"If at the end of a criminal prosecution the evidence leaves the Court in doubt as to the guilt of the accused the latter is entitled to a verdict of not guilty. A retrial may be ordered when the original trial has not been satisfactory for particular reasons, for example, if evidence had been wrongly rejected which should have been admitted, or admitted when it should have been rejected, or the Court had refused to hear certain witness who should have been heard. But retrial cannot be ordered on the ground that, the prosecution did not produce the proper evidence and did not know how to prove their case."

In the present case, undoubtedly the trial before the Magistrate suffered from irregularities which we have already set out. The evidence, such as was led, was deficient in important respects; but that could not be a sufficient ground for directing a retrial. If the Sessions judge thought that in the interests of justice and for a just and proper decision of the case it was necessary that additional evidence should be brought on the record he should have, instead of directing a retrial and reopening the entire proceedings



resorted to the procedure prescribed by s. 428 (i) or the Code of Criminal Procedure. There is no doubt that if the ends of justice require, the appellate Court should exercise its power under the said section.

40. In ***Rajeshwar Prasad Mishra, Appellant v. the State of West Bengal and another, Respondents reported in A.I.R. 1965 SC 1887***, wherein it has been held:-

“8. These arguments disclose a tendency to read the observations of this Court as statutory enactments. No doubt, the law declared by this Court binds Courts in India but it should always be remembered that this Court does not enact. The two cases of this Court point out that in criminal jurisdiction the guiding principle is that a person must not be vexed twice for the same offence. That principle is embodied in S. 403 of the Code and is now included as a Fundamental Right in Art. 20(2) of the Constitution. The protection, however, is only as long as the conviction or acquittal stands. But the Code contemplates that a retrial may be ordered after setting aside the conviction or acquittal (as the case may be) if the trial already held is found to be unsatisfactory or leads to a failure of justice. In the same way, the Code gives a



power to the appellate Court to take additional evidence, which, for reasons to be recorded, it considers necessary. The Code thus gives power to the appellate Court to order one or the other as the circumstances may require leaving a wide discretion to it to deal appropriately with different cases. The two cases of this Court deal with situations in which a retrial was considered necessary by the appellate Court. In the case of Abinash Chandra Bose, AIR 1963 SC 316, this Court held that the order for retrial was not justified. In Ukha Kolhe's case, AIR 1963 SC 1531, too the order for retrial was considered unnecessary because the end could have been achieved equally well by taking additional evidence. This Court mentioned, by way of illustration, some of the circumstances which frequently occur and in which retrial may properly be ordered. It is not to be imagined that the list there given was exhaustive or that this Court was making a clean cut between those cases where retrial rather than the taking of additional evidence was the proper course. It is easy to contemplate other circumstances where retrial may be necessary as for example where a conviction or an acquittal was obtained by fraud, or a trial for a



wrong offence was held or abettors were tried as principal offenders and vice versa. Many other instances can be imagined. The Legislature has not chosen to indicate the limits of the power and this Court must not be understood to have laid them down. Cases may arise where either of the two courses may appear equally appropriate. Since a wide discretion is conferred on appellate Courts, the limits of that Court's jurisdiction must+ obviously be dictated by the exigency of the situation and fair play and good sense appear to be the only safe guides. There is, no doubt some analogy between the power to order a retrial ind the power to take additional evidence. The former is an extreme step approximately taken if additional evidence will not suffice. Both actions subsume failure of justice as a condition precedent. There the resemblance ends and it is hardly proper to construe one section with the aid of observations made by this Court in the interpretation of the other section.”

41. In ***ShamSaheb M. Multtani vs. State of Karnataka reported in (2001) 2 SCC 577***, it has been held:-

“24. One of the cardinal principles of natural justice is that no man should be condemned without



being heard, (Audi alterum partem). But the law reports are replete with instances of courts hesitating to approve the contention that failure of justice had occasioned merely because a person was not heard on a particular aspect. However, if the aspect is of such a nature that non-explanation of it has contributed to penalising an individual, the court should say that since he was not given the opportunity to explain that aspect there was failure of justice on account of non-compliance with the principle of natural justice.

32. The serious consequence which may ensue to the accused in such a situation can be limned through an illustration:- If a bride was murdered within seven years of her marriage and there was evidence to show that either on the previous day or a couple of days earlier she was subjected to harassment by her husband with demand for dowry, such husband would be guilty of the offence on the language of [Section 304-B](#) IPC read with [Section 113-B](#) of the Evidence Act. But if the murder of his wife was actually committed either by a decoit or by a militant in a terrorist act the husband can lead evidence to show that he had no hand in her death at all. If he succeeds in discharging the burden of



proof he is not liable to be convicted under [Section 304B, IPC](#). But if the husband is charged only under [Section 302](#) IPC he has no burden to prove that his wife was murdered like that as he can have his traditional defence that the prosecution has failed to prove the charge of murder against him and claim an order of acquittal.

33. The above illustration would amplify the gravity of the consequence befalling an accused if he was only asked to defend a charge under [Section 302](#) IPC and was alternatively convicted under [Section 304B](#) IPC without any notice to him, because he is deprived of the opportunity to disprove the burden cast on him by law.

34. In such a situation, if the trial court finds that the prosecution has failed to make out the case under [Section 302](#) IPC, but the offence under [Section 304-B](#) IPC has been made out, the court has to call upon the accused to enter on his defence in respect of the said offence. Without affording such an opportunity to the accused, a conviction under [Section 304-B](#) IPC would lead to real and serious miscarriage of justice. Even if no such count was included in the charge, when the court affords him an opportunity to discharge his burden by putting



him to notice regarding the prima facie view of the court that he is liable to be convicted under [Section 304B](#) IPC, unless he succeeds in disproving the presumption, it is possible for the court to enter upon a conviction of the said offence in the event of his failure to disprove the presumption.

35. As the appellant was convicted by the High Court under [Section 304-B](#) IPC, without such opportunity being granted to him, we deem it necessary in the interest of justice to afford him that opportunity. The case in the trial court should proceed against the appellant (not against the other two accused whose acquittal remains unchallenged now) from the stage of defence evidence. He is put to notice that unless he disproves the presumption, he is liable to be convicted under [section 304-B](#) IPC.”

42. In *Vinod Kumar vs. State of Punjab* reported in (2015) 3 SCC 220, it has been held:-

“3. The narration of the sad chronology shocks the judicial conscience and gravitates the mind to pose a question, is it justified for any conscientious trial Judge to ignore the statutory command, not recognize "the felt necessities of time" and remain impervious to the cry of the collective asking for



justice or give an indecent and uncalled for burial to the conception of trial, totally ostracizing the concept that a civilized and orderly society thrives on rule of law which includes "fair trial" for the accused as well as the prosecution.;

43. In ***Rattiram and others vs. State of Madhya Pradesh with Satyanarayan and others vs. State of Madhya Pradesh reported in (2012) 4 SCC 516***, it has been held:-

“39. The question posed by us fundamentally relates to the non-compliance of such interdict. The crux of the matter is whether it is such a substantial interdict which impinges upon the fate of the trial beyond any redemption or, for that matter it is such an omission or it is such an act that defeats the basic conception of fair trial. Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracise injustice, prejudice, dishonesty and favouritism.”

44. In ***Pooja Pal vs. Union of India and others reported in (2016) 3 SCC 135***, it has been held:-

“53. This Court in the above disquieting backdrop



in Zahira Habibulla Sheikh case (2004) 4 SCC 158, did underline that discovery, vindication and establishment of truth were the avowed purposes underlying the existence of the courts of justice. Apart from indicating that the principles of a fair trial permeate the common law in both civil and criminal contexts, this Court underscored the necessity of a delicate judicial balancing of the competing interests in a criminal trial - the interests of the accused and the public and to a great extent that too of the victim, at the same time not losing the sight of public interest involved in the prosecution of persons who commit offences.

54. It was propounded in Zahira Habibulla Sheikh case (2004) 4 SCC 158 that in a criminal case, the fate of the proceedings cannot always be left entirely in the hands of the parties, crimes being public wrongs in breach and violation of public rights and duties, which affect the whole community and are harmful to the society in general. That the concept of fair trial entails the triangulation of the interest of the accused, the victim, society and that the community acts through the state and the prosecuting agency was authoritatively stated. This Court observed that the interests of the society are



not to be treated completely with disdain and as persona non grata. It was remarked as well that due administration of justice is always viewed as a continuous process, not confined to the determination of a particular case so much so that a court must cease to be a mute spectator and a mere recording machine but become a participant in the trial evincing intelligence and active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth and administer justice with fairness and impartiality both to the parties and to the community.

55. In Zahira Habibulla Sheikh case (2004) 4 SCC 158, While highlighting the courts' overriding duty to maintain public confidence in the administration of justice, it was enunciated as well, that they cannot turn a blind eye to vexatious and oppressive conduct, discernable in relation to the proceedings. That the principles of rule of law and due process are closely linked with human rights protection, guaranteeing a fair trial, primarily aimed at ascertaining the truth, was stated. It was held as well, that the society at large and the victims or their family members and relatives have an inbuilt right to be dealt fairly in a criminal trial and the



denial thereof is as much injustice to the accused as to the victim and the society.

56. Dwelling upon the uncompromising significance and the worth of witnesses in the perspective of a fair trial, the following revealing comments of Bentham were extracted in paragraph 41:

“41. “Witnesses”, as Bentham said: are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being not in a position for reasons beyond control to speak the truth in the court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experiences faced by courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political count and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface rendering truth and



justice to become ultimate causalities. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slot process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the court and justice triumphs and that the trial is not reduced to a mockery. The State has a definite role to play in protecting the witnesses, to start with at least in sensitive cases involving those in power, who have political patronage and could wield muscle and money power, to avert the trial getting tainted and derailed and truth becoming a causality. As a protector of its citizens it has to ensure that during a trial in court the witness could safely depose the truth without



any fear of being haunted by those against whom he has deposed.”

57. It was underlined in Zahira Habibulla Sheikh case (2004) 4 SCC 158 that if ultimately the truth is to be arrived at, the eyes and ears of justice have to be protected so that the interest of justice do not get incapacitated in the sense of making the proceedings before the courts, mere mock trials. While elucidating that a court ought to exercise its powers under [Section 311](#) of the Code and [Section 165](#) of the Evidence Act judicially and with circumspection, it was held that such invocation ought to be only to subserve the cause of justice and the public interest by eliciting evidence in aid of a just decision and to uphold the truth. It was proclaimed that though justice is depicted to be blindfolded, it is only a veil not to see who the party before it is, while pronouncing judgment on the cause brought before it by enforcing the law and administer justice and not to ignore or turn the attention away from the truth of the cause or the lis before it, in disregard of its duty to prevent miscarriage of justice. That any indifference, inaction or lethargy displayed in protecting the right of an ordinary citizen, more particularly when



a grievance is expressed against the mighty administration, would erode the public faith in the judicial system was underlined. It was highlighted that the courts exist to do justice to the persons who are affected and therefore they cannot afford to get swayed by the abstract technicalities and close their eyes to the factors which need to be positively probed and noticed. The following statement in Jennison vs. Baker, (1972) 1 All ER 997 was recalled:

“The law should not be seen to sit by limply, while those who defy it go free, and those who seek its protection lose hope.”

58. It was declared in Zahira Habibulla Sheikh case (2004) 4 SCC 158 that the courts have to ensure that the accused persons are punished and that the might or the authority of the state is not used to shield themselves and their men and it should be ensured that they do not wield such powers, which under the Constitution has to be held only in trust for the public and society at large. That if any deficiency in investigation or prosecution is visible or can be perceived by lifting the veil covering such deficiency, the courts have to deal with the same with an iron hand appropriately within the



framework of law was underlined.

59. Referring to its earlier decision in *Karnel Singh vs. State of M.P.* (1995) 5 SCC 518, it was reiterated that in a case of a defective investigation, the court has to be circumspect in evaluating the evidence and may have to adopt an active and analytical role to ensure that truth is found by having recourse to *Section 311* of the Code or at a later stage also resorting to *Section 391* instead of throwing hands in the air in despair. It recalled as well its observations in *Ram Bihari Yadav v. State of Bihar & others*, (1998) 4 SCC 517 that the courts are installed for justice oriented mission and thus if a negligent investigation or omissions or lapses due to perfunctory investigation are not effectively rectified, the faith and confidence of the people would be shaken in the law enforcing agency and also in the institution devised for administration of justice.

60. Though, as referred to hereinabove, trial was completed and the accused persons were acquitted, in the textual facts, this Court did direct retrial as prayed for, to avoid subversion of the justice delivery system and ordered the investigating agency or those supervising the investigation to act



in terms of Section 173(8) of the Code as the circumstances would so warrant.

61. The observations and the propositions, though made in the backdrop of a request for retrial, those pertaining to the essentiality of a fair and complete investigation and trial as well as the solemn duty of the courts to ensure the discernment of truth to administer even handed justice as institutions of trust of public faith and confidence, are in our estimate, of universal application and binding effect, transcending the factual settings of a case. An adverse deduction vis-à-vis the quality of investigation and/a trial trivializing the cause of justice, is however the essential pre-requisite, for such remedial intervention by way of further investigation, reinvestigation, additional evidence, retrial etc. to be made objectively but assuredly for the furtherance of the salutary objectives of the justice dispensing system as contemplated in law, it being of paramount pre-eminence.

62. This Court in Mohd. Hussain @ Julifkar Ali (2012)9 SCC 408 was also seized of a situation imploring for a retrial following the termination of the prosecution principally on account of delay, when juxtaposed to the demand for justice in cases



involving grave crimes affecting the society at large. The offence involved was under Sections 302/307/120B IPC and Sections 3 and 4 of the Explosive Substances Act, 1908 and had perpetrated an explosion in a passenger carrying bus. This Court amongst others recalled its observations in Kartar Singh vs. State of Punjab (1994) 3 SCC 569 that while dispensing justice, the courts should keep in mind not only the liberty of the accused but also the interest of the victim and their near and dear ones and above all the collective interest of the community and the safety of the nation, so that the public, may not lose faith in the system of judicial administration and indulge in private retribution. It however also took note of its ruling in State of M.P. vs. Bhooraji and others (2001) 7 SCC 679 that a de novo trial should be the last resort and that too only when such a course becomes desperately indispensable and should be limited to the extreme exigency to avert a failure of justice. It noted with approval the observation in P. Ramachandra Rao (supra) that it is neither advisable nor feasible nor judicially permissible to draw or prescribe an outer limit for conclusion of all criminal proceedings and that the criminal courts are not obliged to terminate the trial or



criminal proceedings merely on account of lapse of time. That such time limits cannot and will not by themselves be treated by any court as a bar to further continuance of the trial or proceedings or to terminate the same and acquit or discharge the accused, was emphatically underlined. Reference too was made of the decision in Zahira Habibulla H. Sheikh (2004) 4 SCC 158.”

45. After scrutiny of the materials available on the record as well as the principle decided by the Apex Court, the following facts emerge out:-

- I) *There happens to be violation of direction of the Hon'ble Apex Court given under **Rajvir @ Raju Case**.*
- II) *There happens to be non-appreciation of the material available on the record to search out by the learned lower Court whether charge under Section 302 I.P.C. is alterable or not.*
- III) *No step has been taken by the Court even during evidence of PW-6 and PW-7, who had exhibited the certified photo copy of fard-bayan of deceased, Aarti Devi which, on account of her death became dying declaration, to procure the original.*
- IV) *There should have been proper step at the end of the Court to procure original dying declaration.*



- V) *In spite of presence of Exhibit-1, the Court failed to confront the same to appellant during course of statement recorded under Section 313 Cr.P.C.*
- VI) *The learned lower Court failed to consider that in the fard-bayan the word dowry has been inserted in different pen and in likewise manner, lacks discloser over time elapsed since marriage.*
- VII) *The learned lower Court failed to consider the evidence of PW-9, informant as well as PW-10, husband of informant with regard to solemnization of marriage about 7-8 years ago since the death of deceased.*

The aforesaid eventualities fell within the ambit of miscarriage of justice whereupon de novo trial is warranted.

46. Because of the fact that on account of grave illegality having been committed by the learned lower Court during conduction of trial leading to miscarriage of justice as held hereinabove. Though, Section 221 of the Cr.P.C. does permit to convict an accused even if he is not charged and is found legally permissible in terms of Section 464 Cr.P.C., but considering the fact that Section 304B I.P.C. as well as Section 302 I.P.C. lie on different pedestal, prescribing two distinct criterion for consideration and further, considering the principle decided by the Apex Court in



ShamSaheb M. Multtani vs. State of Karnataka reported in (2001) 2 SCC 577, it has become abundantly clear that the appellants have to be given an opportunity to defend themselves. That being so, the same is set aside. Appeal is allowed. Matter is remitted back to the learned lower Court to proceed afresh in light of finding recorded hereinabove. Appellants are directed to be produced before the learned lower Court.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
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