

HIGH COURT OF CHHATTISGARH, BILASPUR**CRA No. 479 of 1998**

1. Bhawarsay, aged about 22 years son of Bhagwan Din Chandra
2. Sumant Prasad alias Suman, aged about 35 years, son of Bhagwan Din Chandra
3. Bhagwan Din, aged about 60 years, son of Deonath Chandra (*since deceased*)
4. Samund Bai alias Chortelhin, aged about 50 years, wife of Bhagwan Din Chandra (*since deceased*)
5. Chhote Bai alias Chhotehin, aged about 28 years, wife of Dilharan Prasad
6. Amund Bai, wife of Bhuwaneshwar Prasad Chandra aged about 30 years

(All residents of village Karigaon, police Station Malkharoda, Distt. Bilaspur, Chhattisgarh) --- **Appellants**

Versus

State of Madhya Pradesh (now Chhattisgarh) through Police Station Malkharoda, Tehshil Shakti, Distt. Bilaspur --- **Respondent**

For the Appellants	:	Mr. Vishnu Kostha with Mr. Sobhit Kostha, Advocates
For the Respondent	:	Mr. Suryakant Mishra, Panel Lawyer

Hon'ble Shri Justice Goutam Bhaduri**Judgment/Order on Board****21.07.2017**

1. This appeal is against the judgment/order dated 19.02.1998 passed by the Additional Sessions Judge, Shakti, District Bilaspur (C.G.) in Sessions Trial No.225/1993 whereby the appellants Bhawar Sai, Sumant Prasad @ Suman, Bhagwandin (since deceased), Samund Bai @ Chortelhin (since deceased), Chhote Bai @ Chhotehin and Amund Bai,

W/o. Bhuvneshwar were convicted under Section 304-B of I.P.C. and sentenced to undergo R.I. for 7 years and to pay a fine of Rs.500/- with further default stipulation.

2. An application has been received that appellant No.3 Bhagwandin and appellant No.4 Samund Bai alias Chortelahin wife of Bhagwandin who were father-in-law and mother-in-law have breathed their last during the pendency of the appeal and their names be deleted from the cause title of this memo of appeal. The said application is also supported by the death certificate, as such, having not been opposed by the State, the names of appellants No.3 & 4 are directed to be deleted from the array of the appellants.
3. As per the prosecution case, on 15.03.1993 Laxmi Kumar who is wife of appellant No.1 Bhawarsay died by consuming poison. She was married to Bhawarsay and at the time of incident 1 1/2 (one and half) years baby was also there. It is alleged by the prosecution that after marriage Laxmi Kumari was subjected to torture for demand of dowry for not bringing, TV, cot, bed, etc. It is also stated that Bhawarsay used to beat the deceased and having heard the same, the mother of the deceased Amarkunwar had gone to take her back to maternal home and one Panchayat was also convened. However, the accused did not send her back. Thereafter, the mother and father received the news that their daughter had consumed poison and by the time they reached, the daughter was found dead. It was also discovered that she was having injury marks on her cheek and chin and she was also having injury mark on her body. Having received the information, the merg was prepared and

the investigation was carried out. Thereafter, charge sheet under Sections 304-B, 306 & 498A of IPC was registered.

4. During the course of trial, the charges were framed under Section 304-B of IPC. The prosecution on their behalf had examined as many as 16 witnesses including that of Ramprasad as PW-1 a villager, Balram who was member of Panchayat as P.W.2; Amar Kunwar, the mother of deceased as PW-3, Himabai the Kotwarin as PW-4, a villager Rampat as PW-5, Ramkumari a villager as PW-6, Santoshi (the daughter of deceased and appellant No.1) as PW-8; Leeladhar father of deceased as PW-10, Satya Swaroop Das, the brother of deceased as PW-11, Dr. (Smt.) U.G.Alen as PW-12. Apart from the above witnesses, the prosecution has also examined the Investigating Officer, H.P.Singh (Sub-Inspector) as PW-13.
5. The appellant examined three witnesses in defence namely Bedram as DW-1, Poonam Chandra as DW-2 and Shritam Singh as DW-3. The trial Court after evaluating the evidence on record, convicted and sentenced the appellants as aforesaid. Hence this appeal.
6. Learned counsel Mr. Vishnu Kostha assisted by Mr. Shobhit Kostha appearing for the appellants would submit that the prosecution in this case has failed to prove the fact that the incident happened within seven years of marriage, which is proved by the document Partika of marriage exhibited as Ex.D-3. Ex.D-3 would show that the date of marriage was in the month of April, 1995. It is further contended that no statement of witness on record would show that the prosecution has failed to bring into evidence that the

incident happened within seven years of marriage, consequently, the conviction under Section 304-B of IPC cannot be sustained. It is further contended that as per the law laid down by the Supreme Court, the factum of marriage under unnatural circumstances within seven years of marriage have to be established otherwise, the presumption of Section 113 (B) of the Evidence Act cannot be invoked. He further went through the statement of witnesses and would submit that the statement of two witnesses would show that no harassment was even caused to the deceased and it is stated that there may be some differences between the husband and wife and since the deceased committed suicide by consuming poison, the cause cannot be attributed to the appellants, therefore, the conviction under Section 304-B of IPC may be set aside.

7. Per contra, learned State counsel supports the judgment /order of the Court below and submits that the order of the Court below is well merited which do not call for any interference by this Court.
8. Heard learned counsel appearing for the parties, perused the statement of witnesses and the documents exhibited.
9. Section 304 IPC deals with dowry death and section 113-B of the Evidence act deals with presumption as to dowry death. For the sake of brevity, Section 304-B IPC as well as 113-B of the Evidence Act are reproduced herein below :

304-B. Dowry death - (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected

to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called “dowry death”, and such husband or relative shall be deemed to have caused her death.

- Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

113-B. Presumption as to dowry death – When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.

10. Further, Hon’ble Supreme Court in case of ***Gurudeep Singh v. State of Punjab & others AIR 2011 S.C. 3616*** with respect to commission of offence u/s 304-B held thus:

“Indisputably, in order to attract Section 304-B, it is imperative on the part of the prosecution to establish that the cruelty or harassment has been meted out to the deceased 'soon before her death'. There can not be any doubt or dispute that it is a flexible term. Its application would depend upon the factual matrix obtaining in a particular case. No fixed period can be indicated therefor. It, however, must undergo the test known as 'proximity test.' What, however, is necessary for the prosecution is to bring on record that the dowry demand was not too late and not too stale before the death of the victim.”

11. Again, Hon'ble Supreme Court in case of *Rajesh Bhatnagar Vs. State of Uttarakhand* reported in (2012) 7 SCC 91 held thus in paragraphs 15 & 16.

“15. Before we examine the merit or otherwise of this contention, it will be useful to state the basic ingredients of Section 304-B IPC. The requirement of Section 304-B is that the death of a woman be caused by burns, bodily injury or otherwise than in normal circumstances, within seven years of her marriage. Further, it should be shown that soon before her death, she was subjected to cruelty or harassment by her husband or her husband's family or relatives and thirdly, that such harassment should be in relation to a demand for dowry. Once these three ingredients are satisfied, her death shall be treated as a “dowry death” and once a “dowry death” occurs, such husband or relative shall be presumed to have caused her death. Thus, by fiction of law, the husband or relative would be presumed to have committed the offence of dowry death rendering them liable for punishment unless the presumption is rebutted. It is not only a presumption of law in relation to a death but also a deemed liability fastened upon the husband/relative by operation of law.

(Emphasis supplied)

“16. This Court, in *Bansi Lal V. State of Haryana*, (2011) 11 SCC 359 while analysing the provisions of Section 304-B of the Act, held as under : (SCC pp. 366-67, paras 18)

18. In such a fact situation, the provisions of Section 113-B of the Evidence Act, 1872 providing for presumption that the accused is responsible for dowry death, have to be pressed in service. The said provisions read as under:

“113-B. *Presumption as to dowry death.*-- When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to

cruelty or harassment for, or in connection with, any demand for dowry, *the court shall presume* that such person had caused the dowry death.'

(emphasis supplied) ”

12. Further more, in case of *Kashmir Kaur and Another V. State of Punjab AIR 2013 SC 1039* it has been held by Hon'ble the Supreme Court in Para 16 thus:

“16. From the above decisions the following principles can be culled out:

(a) *To attract the provisions of Section 304-B, IPC the main ingredient of the offence to be established is that soon before the death of the deceased she was subjected to cruelty and harassment in connection with the demand of dowry.*

(b) *The death of the deceased woman was caused by any burn or bodily injury or some other circumstance which was not normal.*

(c) *Such death occurs within seven years from the date of her marriage.*

(d) *That the victim was subjected to cruelty or harassment by her husband or any relative of her husband.*

(e) *Such cruelty or harassment should be for or in connection with demand of dowry.*

(f) *It should be established that such cruelty and harassment was made soon before her death.*

(g) *The expression (soon before) is a relative term and it would depend upon circumstances of each case and no straight-jacket formula can be laid down as to what would constitute a period of soon before the occurrence.*

(h) *It would be hazardous to indicate any fixed period and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Section 113-B of the Evidence Act.*

(i) *Therefore, the expression “soon before” would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate or life link between the effect of cruelty based on dowry demand and the concerned death. In other words, it should not be remote in point of time and thereby make*

it a stale one.

(j) However, the expression “soon before” should not be given a narrow meaning which would otherwise defeat the very purpose of the provisions of the Act and should not lead to absurd results.

(k) Section 304-B is an exception to the cardinal principles of criminal jurisprudence that a suspect in the Indian Law is entitled to the protection of Article 20 of the Constitution, as well as, a presumption of innocence in his favour. The concept of deeming fiction is hardly applicable to criminal jurisprudence but in contradistinction to this aspect of criminal law, the legislature applied the concept of deeming fiction to the provisions of Section 304-B.

(l) Such deeming fiction resulting in a presumption is, however, a rebuttable presumption and the husband and his relatives, can, by leading their defence prove that the ingredients of Section 304-B were not satisfied.

(m) The specific significance to be attached is to the time of the alleged cruelty and harassment to which the victim was subjected to, the time of her death and whether the alleged demand of dowry was in connection with the marriage. Once the said ingredients were satisfied it will be called dowry death and by deemed fiction of law the husband or the relatives will be deemed to have committed that offence”.

13. Further, in case of ***Sher Singh @ Partapa v. State of Haryana***, reported in **(2015) 3 SCC 724**, the Supreme Court has held thus:

“16. It is abhorrent to criminal jurisprudence to adjudicate a person guilty of an offence even though he had neither intention to commit it nor active participation in its commission. It is after deep cogitation that we consider it imperative to construe the word ‘shown’ in Section 304B of the IPC as to, in fact, connote ‘prove’. In other words, it is for the prosecution to prove that a ‘dowry death’ has occurred, namely,

- (i) that the death of a woman has been caused in abnormal circumstances by her having been burned or having been bodily injured,

- (ii) within seven years of a marriage,
- (iii) and that she was subjected to cruelty or harassment by her husband or any relative of her husband,
- (iv) in connection with any demand for dowry and
- (v) that the cruelty or harassment meted out to her continued to have a causal connection or a live link with the demand of dowry.

We are aware that the word 'soon' finds place in Section 304B; but we would prefer to interpret its use not in terms of days or months or years, but as necessarily indicating that the demand for dowry should not be stale or an aberration of the past, but should be the continuing cause for the death under Section 304B or the suicide under Section 306 of the IPC. Once the presence of these concomitants are established or shown or proved by the prosecution, even by preponderance of possibility, the initial presumption of innocence is replaced by an assumption of guilt of the accused, thereupon transferring the heavy burden of proof upon him and requiring him to produce evidence dislodging his guilt, beyond reasonable doubt."

14. In view of the above principles, if we translate the same into the present facts of the case, it would be necessary to examine the statement of witnesses. The date of incident is of 15.03.1993. With respect of the date of marriage, the mother of deceased PW-3 whose statement was recorded in the month of July, 1996 stated that her daughter deceased Laxmi Kumari was married to Bhawaray four years back and the deceased was subjected to cruelty for dowry by Bhawarsay. Father, Leeladhar (PW-10) whose statement was recorded in the month of August 1996 stated that four-five years back, she was married to Bhawarsay. At the same time, it is stated that she had daughter, her age was 6-7

years and after a year of the marriage, the daughter was born. The brother of the deceased Satya Swaroop (PW-11) stated that the age of the daughter of the deceased sister is 9 years and after almost 9 months of the marriage, the daughter was born. Daughter Santoshi who was a minor, whose statement was recorded in 1996, was shown to be 6-7 years. If the statements these witnesses are cumulatively examined, whose statements were recorded in the month of July-August 1996, it gives a primary projection that on the date of incident, which was on 15.03.1993 covered within seven years.

15. As against this, the statement of DW-2, Poonam Chandra, a proprietor of R.K. Printers who had published Ex.D-3 which is invitation card/letter of marriage shows that the date of marriage was 20.04.1985. The arrest memo of Bhawansay Chandra shows that at the time of arrest in 1993, he was shown to be 22 years thereby in the year 1985 it comes to 14 years. Consequently, the document which is filed by the defence as Ex.D-3 appears to be made up and cannot be relied upon for determining the date of marriage, as such, the submission of the appellants that the incident happened after seven years of marriage cannot be accepted. As against this, the statement of witnesses would show that the incident happened within seven years of marriage.
16. Now the question comes as to whether the prosecution has prima faice established the fact that the deceased was subjected to torture for demand of dowry soon before her death i.e. in the year 1993.
17. The statement of mother PW-3 Amar Kunwar would show

that she had stated that for demand of dowry, Bhawarsay used to torture her daughter Laxmi Kumari, therefore, a Panchayat was held in the village and the daughter was taken back by the mother to her village Kharsiya and thereafter the son in law took back the girl. It is further stated that in the same year of incident itself her daughter was assaulted by the accused and thereafter within seven days she died. In her examination-in-chief, she further attributed the entire allegations to Bhawarsay that her son-in-law has assaulted the deceased her daughter by way of club and before death of 15 days, a panchayat was held in the village. The cause of such Panchayat was elaborately stated.

18. One of the Panch Balram PW-2 stated that Bhawarsay and Laxmi Kumari the deceased were not in good relations and on this issue, a panchayat meeting was convened. In the Panchayat, appellant refused to keep Laxmi Kumari in their house whereas the deceased wanted to stay with them. In the cross-examination of this witness, it is stated that the Panchayat was convened for the reason that some family dispute was existing between the husband and wife, except that, nothing was discussed in the Panchayat. This witness has not stated that in Panchayat any demand of dowry was discussed.
19. Father of the deceased PW-10 Leeladhar has stated that her son-in-law Bhawarsay demanded TV and Cycle from their in-laws. He further stated that his wife i.e. PW-3 had gone to bring the daughter back but she was not allowed by the appellants to come with her mother. He further stated that

her daughter was assaulted and was pushed out of the house for which a Panchayat was convened. Thereafter, the daughter went back to her matrimonial home. He attributed the allegations to Bhawarsay with respect to *marpeet*. He also stated that the other accused mother-in-law, father-in-law, sister-in-law & brother-in-law used to advise his son-in-law to beat the daughter and they used to remain as silent spectators. The witness in his cross-examination stated that before two years of the incident, the deceased has stated that her in-laws wanted TV etc. At that time, his wife had also accompanied him. As against this, the mother of the deceased PW-3 had shown her ignorance about the proceedings which took place in the Panchayat.

20. The brother of the deceased Satya Swaroop Das PW-11 stated that Bhawarsay had demanded one Cycle, one Fan & one TV. Thereafter, he had mediated to understand the accused husband and further advised to stay along-with the deceased, thereafter Bhawarsay took back the girl i.e., his wife. With respect to the demand, witness PW-11 has stated that the demand was made by Bhawarsay in the year 1992 and he was alone at that time. Therefore, after going through the statements of PW-3 mother, PW-10 father and PW-11 the brother, this fact has not been established that soon before her death, what demand was made and what cruelty was meted out to the deceased. The statements of the witnesses though have referred to convening a Panchayat with respect to the proceeding of such Panchayat, PW-1 Ramprasad has only stated that because of some difference between Bhawarsay and with wife the deceased, the Panchayat was

convened in the village. PW-2 Balram who was in the Panchayat and was a Panch had not stated anything as to what was the reason assigned by the husband as they refused to keep the deceased in the house. The evidence is on record that the deceased wanted to stay in the house but the husband and others refused to keep her. It is stated by the witness that because of the family dispute, Panchayat was convened. What was the nature of family dispute, it has not been stated by the prosecution.

21. Kotwarin of the village PW-4 Himabai stated that once before the incident, she was called as some dispute was going on between the deceased and Bhawarsay the husband and when she reached, Laxmi Kumari the deceased has disclosed that Bhawarsay had assaulted. In the cross-examination, she confined her allegations to Bhawarsay that it was disclosed by Laxmi Kumari that Bhawarsay had assaulted her. PW-5 Rampat has stated that the disputes used to take place between Bhawarsai and Laxmi Kumari for the reason that deceased Laxmi Kumari was not able to do her household job properly and consequently it led to disputes one or two times which he himself has seen. He further stated that before four-five months of the incident, the deceased had gone back to her maternal home for which, the Panchayat was convened. One Ramkumar (PW-6) stated that the deceased had gone back along-with the mother to her maternal home and the dispute was existing between Laxmi Kumari, the deceased and Bhawarsay the husband, but what was the reason of the dispute has not been disclosed.
22. The daughter of deceased Santoshi who has been examined

as PW-8 has not stated anything except the fact that her mother died by consuming poison. If the statements of witnesses are evaluated, it would show that except husband Bhawarsay, appellant No.1, no one has been named.

23. In order to attract, Section 304 Part B of IPC, it is imperative on the part of prosecution to establish that cruelty or harassment is meted out to the deceased soon before her death. If such proximity test is applied to the facts of the present case, it would show that certain harassment though had taken place some time prior to the death, the same cannot be considered to be cruelty, which had been inflicted before the death of deceased especially taking into the statements of the independent witnesses, for which, the Panchayat was convened. Therefore, applying the proximity test, the presumption in terms of Section 113-A and 113-B of the Evidence Act cannot be drawn in favour of the prosecution. The evidence would also show that except the husband Bhawar Sai, the general allegations have been made against the other accused. In the circumstances, the conviction and sentence imposed upon appellants Sumant Prasad @ Suman, Chhote Bai @ Chhotehin and Amund Bai are set aside and they are acquitted of the charge.
24. However, so far as it relates to appellant No.1 as per the evidence available, his case will not be taken out from Section 498-A of IPC. Therefore, the conviction and sentence of appellant Bhawar Sai is converted to section 498-A of IPC and he is liable to be acquitted for the offence u/s 304B of IPC.
25. As stated earlier, the incident is of the year 1993 and almost

24 years have elapsed. It is stated that appellant Bhawar Sai has already suffered jail sentence of 1 year and 131 days. Considering the said facts situation of the case, in the interest of justice, no purpose will be served to again send him to jail. Therefore, the jail sentence of Bhawar Sai is held as undergone. However, he is directed to pay a fine of Rs..10,000/-, in default of payment of fine he shall undergo six months rigorous imprisonment

26. Accordingly, the appeal is allowed in part.

**Sd/-
GOUTAM BHADURI
JUDGE**