

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

CRIMINAL APPEAL NO.315 OF 2011

Between:

Madasu Rambabu

.. Appellant

and

The State of A.P., rep. by
Public Prosecutor

.. Respondent

DATE OF JUDGMENT PRONOUNCED: 26.10.2017

SUBMITTED FOR APPROVAL:

**THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE T.AMARNATH GOUD**

1. Whether Reporters of Local newspapers may be allowed to see the judgment? Yes/No
2. Whether the copies of judgment may be marked to Law Reporters/Journals Yes/No
3. Whether Their Lordships wish to see the fair copy of the judgment? Yes/No

SANJAY KUMAR, J

T.AMARNATH GOUD, J

*** THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE T.AMARNATH GOUD**

+ CRIMINAL APPEAL NO.315 OF 2011

% DATED 26th OCTOBER, 2017

Madasu Rambabu

.. Appellant

Vs.

\$ The State of A.P., rep. by
Public Prosecutor

.. Respondent

<Gist:

>Head Note:

! Counsel for the Appellant : Sri P.Prabhakar Reddy

^Counsel for the Respondent : Public Prosecutor,
Telangana

? CASES REFERRED:

1. (2013) 16 SCC 353
2. (2014) 15 SCC 163
3. (2000) 5 SCC 207 = 2000 SCC (CrI) 935
4. (2013) 4 SCC 131
5. (2001) 2 SCC 577

**THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE T.AMARNATH GOUD**

CRIMINAL APPEAL NO.315 OF 2011

J U D G M E N T

(Per Hon'ble Sri Justice Sanjay Kumar)

Madasu Nirmala Kumari was found dead in the early hours of 19.11.2008 in the sump at her house at Cheruvu Bazar, Khammam. Her husband, Madasu Rambabu, was charged with her murder, punishable under Section 302 IPC, in Sessions Case No.241 of 2010 on the file of the learned Principal Sessions Judge, Khammam. He was also charged under Section 498-A IPC of committing the offence of demanding additional dowry of Rs.50,000/- and a motorcycle. By judgment dated 21.02.2011, the Sessions Court held him guilty on both charges and sentenced him to life imprisonment apart from paying a fine of Rs.100/-, in default of which he was to suffer rigorous imprisonment for one month, for his conviction under Section 302 IPC and to rigorous imprisonment for one year apart from paying a fine of Rs.1,000/-, in default of which he was to suffer rigorous imprisonment for three months, for his conviction under Section 498-A IPC. Aggrieved thereby, Madasu Rambabu, the accused, is in appeal under Section 374(2) CrPC.

The history of the case, in brief, is as under:

The Sub-Inspector of Police, Khammam I Town (P.W.12), received telephonic information at about 8.30 AM on 19.11.2008 and visited the house of P.W.1, the father of the deceased, where he received Ex.P1 report. Therein, P.W.1 spoke of the marriage of the deceased, his second daughter, with the accused on 10.09.2004 and her harassment thereafter by the accused on suspicion and for a

motorcycle and cash. He stated that he had given Rs.1,00,000/- in cash and three tulas of gold before the marriage and he again gave Rs.50,000/- for purchase of a motorcycle by the accused. He adverted to the case filed by him under the Protection of Women from Domestic Violence Act, 2005, which was thereafter compromised. He stated that since February, 2008, his deceased daughter and the accused were living in the two rooms on the rear side of his house along with their child. On 18.11.2008 at about 9.30 PM, his deceased daughter and the accused slept in their portion and at about 6.30 AM, when his wife was cleaning the house premises, she found the body of the deceased in the water tank. He said that they found their grand-daughter crying in the room and the accused was not to be seen anywhere. His motorcycle was also missing. P.W.1 stated that the accused had left his wet clothes, changed his dress and had run away. He prayed that necessary action be taken.

Thereupon, P.W.12 registered Crime No.248 of 2008 under Section 302 IPC. Ex.P13 is the FIR. He again visited the scene of the offence where he filled in the Crime Details Form and drew up a rough sketch in the presence of mediators. Ex.P4 is the Crime Details Form along with the rough sketch. He seized the shirt and pant (M.Os.1 and 2) found near the water sump. He got photographed the body of the deceased. Ex.P2 is the set of photographs with negatives. He sent for the Tahsildar, Khammam, and upon arrival, the Tahsildar conducted an inquest over the dead body. The body was then sent to the Government Hospital, Khammam, for post-mortem examination. P.W.12 drew a water sample from the sump for diatom test. He also recorded the statements of P.Ws.1 to 5 on the same day. He then handed over the case to the In-charge Station House Officer, Women

Police Station, for further investigation. The DSP (Trainee), Khammam (P.W.13), then took up investigation. On 04.12.2008, she examined P.W.6 and P.W.10. She collected Ex.P12 medical certificate of the accused from P.W.10. On 16.12.2008, the accused surrendered before her. He was arrested and remanded to custody. The investigation was then continued by the Circle Inspector of Police, Khammam Town (P.W.14). He obtained the post-mortem examination report (Ex.P7), F.S.L. reports (Exs.P8 and 11), a report from Siddhartha Medical College (Ex.P9) and the final opinion on the post-mortem examination (Ex.P10). After completion of the investigation, he laid the charge sheet. The charges framed by the Sessions Court against the accused read as under:

FIRSTLY:

That you of the accused on 18th day of November, 2008 at about 12.00 mid night at your house situated at Cheruvu Bazar, Khammam, you of the accused forcibly put the neck of your wife by name Madasu Nirmala Kumari in the water till her death and you thereby committed an offence punishable U/s. 302 of the Indian Penal Code and within my cognizance.

SECONDLY :

That you of the accused prior to the death of your wife ie. deceased Nirmala Kumari harassed her by demanding additional dowry of Rs.50,000/- and a motor cycle and you thereby committed an offence punishable U/s. 498-A of the Indian Penal Code and within my cognizance.'

The accused denied the charges and claimed to be tried.

During the trial, the prosecution examined 14 witnesses and marked in evidence 14 exhibits. Exs.X1 and X2 were marked by the Court. The accused chose not to lead any evidence. Case properties were shown as M.Os.1 and 2. Considering the material on record, the

Sessions Court held that there were no major discrepancies in the prosecution's case and convicted the accused of both the offences and sentenced him as stated *supra*. Hence, this appeal.

At the outset, it may be noticed that the marriage of the deceased with the accused was solemnized on 10.09.2004 and she died on 19.11.2008. As she died within 7 years of her marriage, a charge under Section 304-B IPC ought to have been framed in relation to her 'dowry death', as there was a specific charge against the accused under Section 498-A IPC in relation to subjecting her to cruelty in connection with his unlawful demands for a motorcycle and cash. Unfortunately, the Sessions Court merely framed a charge under Section 302 IPC and, at that, wrongly showing it to be a case of drowning though the post-mortem examination certified that the deceased had died of asphyxia due to strangulation.

Perusal of the evidence reflects that there were no eye-witnesses to the incident whereby the deceased came to meet with her death. Neither P.W.1 nor P.W.2, the parents of the deceased, specifically stated that they saw the accused on 18.11.2008 during the night time. P.W.1 stated to this effect in Ex.P1 but in his deposition before the Court, he stated that on 18.11.2008, as usual, his deceased daughter and her daughter went to sleep in their portion. P.W.2, the mother of the deceased, initially stated that on 18.11.2008, as usual, the accused and the deceased went to sleep in their room but in her cross-examination, she said that only the deceased and she had taken their food at about 8.00 PM on that night and thereafter, the deceased and her daughter went to their portion and slept. She did not say anything about the accused. Significantly, neither P.W.1 nor P.W.2 mentioned anything about the

presence of the motorcycle of the accused at that time either. The further case of the prosecution was that the accused fled to the house of his father (P.W.6) on his motorcycle and tried to commit suicide there. Exs.X1 and X2 were marked in proof of this.

The Civil Assistant Surgeon, Government Head Quarters Hospital, Khammam, who conducted the post-mortem examination of the body of the deceased, was examined as P.W.9. He found the following ante-mortem injuries on her body:

- ‘1. Laceration on right wrist $\frac{1}{2}$ x $\frac{1}{4}$ x $\frac{1}{4}$ inch.
2. Abrasion on back of elbow on right hand $\frac{1}{2}$ x $\frac{1}{4}$ inch.
3. Abrasion on back of elbow left hand 1 x $\frac{1}{2}$ inch.
4. Abrasion on left knee 1 x $\frac{1}{2}$ inch.’

He stated that no internal injuries were seen. He certified that the cause of death was asphyxia due to strangulation. He confirmed that he did not notice any signs of drowning. He stated that he observed a faded mark of a ligature on the neck and sent the skin in the front of the neck for histo-pathological examination along with the sternum for diatom test and the viscera for chemical analysis. He identified Ex.P7 as his post-mortem examination report, Ex.P8 as the RFSL report dated 27.12.2008, Ex.P9 as the pathology report, Ex.P10 as his final opinion and Ex.P11 as the report of FSL, Hyderabad. Ex.P8 RFSL report confirmed that diatoms were not detected either on the sternum or in the water sample drawn from the sump. Ex.P11 FSL report confirmed that examination of the viscera of the deceased indicated that she was not poisoned. P.W.9 fixed the appropriate time of death between 0 – 24 hours prior to commencement of the post-mortem. In his cross-examination, P.W.9 said that he did not find any external injury on the neck of the deceased. He explained that as the body was removed from water, he could not clearly see any marks

on the neck and therefore, he sent the skin to the Department of Pathology, Siddhartha Medical College, Vijayawada. The body was normal but was slightly wet. He admitted that no injuries were noted in Column No.5 of Ex.P7 post-mortem examination report. He further admitted that he had not recorded in the said report that he suspected ligature marks on the neck. He added that on seeing, there was apparently no ligature mark around the neck of the deceased. He said that he gave his opinion on the basis of the reports from RFSL, Warangal; FSL, Hyderabad; and from Vijayawada. He further stated that the injuries on the body were not sufficient to cause death. In his further cross-examination, P.W.9 stated that he did not notice any signs of drowning and there were also no signs of death by strangulation. He said that he did not find any compression of the wind pipe and the hyoid bone was not fractured. He admitted that his opinion as to the cause of death was solely based upon the report given by the forensic laboratory after examining the skin from the neck. He said that he did not take the entire skin around the neck and that he did not find any ligature marks around the neck. He said that he did not know whether the report of the FSL was obtained by the police falsely. He stated that if death is due to strangulation, invariably there should be compression of the wind pipe.

Ex.P9 report from the Department of Pathology, Siddhartha Medical College, Vijayawada, was furnished in relation to examination of the skin from the front portion of the neck of the deceased (two pieces), which were sent for histo-pathological examination. The report certified that one piece showed a ligature mark along its length which is 0.2 cms each width, and the cut section showed congestion. The skin covered specimen received

showed vascular congestion and hemorrhages. The picture was stated to be suggestive of ante-mortem nature of the lesion. However, the evidence of P.W.9 is to the effect that he observed a faded mark of a ligature on the neck and sent the skin in the front of the neck for examination. Unfortunately, Ex.P9 pathology report does not indicate the age of the ligature mark on the skin sample sent for examination. Given the testimony of P.W.9 to the effect that the ligature mark was faded, it cannot be ruled out that this injury was not of recent origin.

The evidence of P.W.9 and Exs.P8 and P.11 lab reports put it beyond the realm of doubt that the deceased did not die due to either poisoning or drowning. P.W.9 also asserted that he found no signs of death being caused by strangulation. He stated that there was no compression of the wind pipe and the hyoid bone was not fractured. He confirmed that if death is due to strangulation, invariably there would be compression of the wind pipe. He explained that the only reason that he gave the report to the effect that the cause of death was asphyxia due to strangulation was because of the opinion expressed by the forensic laboratory upon examining the skin sample from the neck of the deceased. However, as already pointed out, P.W.9 had confirmed that the ligature mark found on the neck of the deceased was faded. The pathology department, unfortunately, did not ascertain the age of the said ligature mark. Therefore, the possibility that this ligature was not of recent origin cannot be ruled out. The benefit of doubt in this regard would invariably go to the accused. In effect, there is no conclusive proof or evidence of the death of the deceased being homicidal. In the absence of clear proof as to homicide having been committed, the question of bringing the accused to book for it does not arise. The charge against the accused

under Section 302 IPC is therefore not made out as there is no clear evidence of the death of the deceased being a homicidal death.

That having been said, this Court is conscious of the fact that accused was also charged under Section 498-A IPC. In consequence, as the deceased died within seven years of her marriage and there was a charge under Section 498-A IPC, Section 304-B IPC would stand attracted. It may be noted that under Section 304B IPC, it is not necessary to establish a homicidal death for proving the offence of 'dowry death'. It is sufficient if the death of the woman is otherwise than under normal circumstances. Any accidental death occurring otherwise than under normal circumstances would also come within its ambit. In **SURESH KUMAR V/s. STATE OF HARYANA**¹, the Supreme Court pointed out that any kind of death of a woman, whether homicidal or suicidal or accidental, would attract Section 304B IPC, if the other ingredients therein were proved and once such ingredients stand proved, the onus would shift upon the accused who must establish by cogent evidence that even such accidental death occurred under normal circumstances.

As there was also a charge against the accused under Section 498-A IPC, a concomitant presumption would normally arise under Section 113B of the Indian Evidence Act, 1872 (for brevity, 'the Act of 1872'), if the said charge is proved, that the death of the deceased was a 'dowry death' caused by his cruelty and harassment in connection with his demands for dowry. However, as already noted *supra*, no separate charge was framed under Section 304-B IPC. It is therefore in the interest of justice that the accused be charged and tried under Section 304B IPC at least at this stage.

¹ (2013) 16 SCC 353

In this regard, it would be apposite to refer to the observations of the Supreme Court in **VIJAY PAL SINGH V/s. STATE OF UTTARAKHAND**² that generally, in cases where a married woman dies within seven years of marriage, no inquiry is usually conducted to see whether there is evidence as to whether the offence falls under Section 302 IPC. The Supreme Court cautioned that where there is any evidence, direct or circumstantial, to show that the offence may fall under Section 302 IPC, the trial Court should frame a charge under Section 302 IPC even if the police has not expressed any opinion in that regard in the final report and Section 304-B IPC can be put as an alternate charge. It was further observed that in the course of the trial, if the Court finds that there is no evidence and proof, beyond reasonable doubt, is not available to establish that the death is a homicide, in such a situation, if the ingredients under Section 304-B IPC are available, the Court should proceed under the said provision.

In **KANS RAJ V/s. STATE OF PUNJAB**³, the ingredients of Section 304-B IPC were rephrased in the following words:

- ‘(a) the death of a woman was caused by burns or bodily injury or had occurred otherwise than under normal circumstances;
- (b) such death should have occurred within seven years of her marriage;
- (c) the deceased was subjected to cruelty or harassment by her husband or by any relative of her husband;
- (d) such cruelty or harassment should be for or in connection with the demand of dowry; and
- (e) to such cruelty or harassment the deceased should have been subjected soon before her death.’

The expression ‘otherwise than under normal circumstances’ was explained to mean ‘death not in the usual course but apparently

² (2014) 15 SCC 163

³ (2000) 5 SCC 207 = 2000 SCC (CrI) 935

under suspicious circumstances, if not caused by burns or bodily injury.

More recently, in **BAKSHISH RAM V/s. STATE OF PUNJAB**⁴, the ingredients of Section 304-B IPC were abbreviated in these words:

- ‘(a) that a married woman had died otherwise than under normal circumstances;
- (b) such death was within seven years of her marriage; and
- (c) the prosecution has established that there was cruelty and harassment in connection with demand for dowry soon before her death.’

Significantly, in **SHAMNSAHEB M. MULTTANI V/s. STATE OF KARNATAKA**⁵, a Bench of three Judges of the Supreme Court dealt with the issue as to whether an accused charged under Section 302 IPC could be convicted under Section 304B IPC if the charge under Section 302 IPC is not established, without affording him an opportunity to enter his defence and disprove the presumption raised thereunder, read with Section 113B of the Act of 1872. The Supreme Court observed that where the accused is called upon only to defend against a charge under Section 302 IPC, the burden of proof never shifts onto him and it remains with the prosecution, which has to prove the charge beyond all reasonable doubt. No compulsory presumption would go to the assistance of the prosecution in such a situation. If that be so, when an accused has no notice of the charge under Section 304B IPC, as he was only defending against a charge under Section 302 IPC, it would lead to grave miscarriage of justice when he is alternatively convicted under Section 304B IPC, because he is deprived of the opportunity to disprove the burden cast on him by law. The Supreme Court therefore held that if an accused is convicted under Section 304B IPC without an opportunity being

⁴ (2013) 4 SCC 131

⁵ (2001) 2 SCC 577

granted to him to enter on his defence in respect of the said charge and an opportunity is not afforded to him to discharge his burden, the conviction under Section 304-B IPC cannot be sustained.

In **SURESH KUMAR**¹, the Supreme Court following the decision in **SHAMNSAHEB M. MULTTANI**⁵, held that the initial burden of proving the death of a woman within seven years of her marriage in circumstances that are not normal is on the prosecution; such death should be in connection with or for a demand of dowry which is accompanied by such cruelty or harassment that eventually leads to the woman's death in circumstances that are not normal and after the initial burden of a deemed dowry death is discharged by the prosecution, a reverse onus is put on the accused to prove his innocence by showing, *inter alia*, that the death was accidental.

In that view of the matter, as the appellant/accused was never charged with an offence under Section 304B IPC and did not have an opportunity to rebut the statutory presumption that would weigh against him if the death of his wife is treated as a 'dowry death', it would be appropriate that the Sessions Court frame the charge at least at this stage and give him an opportunity to meet it.

As regards the conviction of the accused under Section 498-A IPC, we find that there is no discussion whatsoever by the Sessions Court on this aspect in support of its final finding in the judgment under appeal. Further, as a finding on this aspect is crucial and would impact the charge to be framed under Section 304-B IPC, we are of the opinion that this issue also needs to be adjudicated afresh.

The judgment under appeal in Sessions Case No.241 of 2010 on the file of the learned Principal Sessions Judge, Khammam, is accordingly set aside and the matter is remitted to the file of the

learned Principal Sessions Judge, Khammam, with a direction to frame an alternate charge under Section 304B IPC and adjudicate upon the charges under Section 304-B IPC and Section 498-A IPC. The Sessions Court shall permit the prosecution to adduce additional evidence, oral and documentary, to prove that the death of the deceased was a 'dowry death'. The appellant/accused shall then be permitted to recall any of the witnesses already examined for further cross-examination, if he so chooses, apart from letting in such evidence as he may wish to adduce independently. In the light of the fact that this is the second round, the Sessions Court shall endeavour to dispose of the matter expeditiously and preferably within six months from the date of receipt of a copy of this order. As the appellant/accused has already been enlarged on bail pending disposal of this appeal, he shall remain at liberty until the disposal of the case afresh by the Sessions Court. Bail bonds furnished by him shall not be discharged until the disposal of the case upon remand, pursuant to this order.

The appeal is allowed to the extent indicated above.

SANJAY KUMAR, J

T.AMARNATH GOUD, J

26th OCTOBER, 2017

Note : L.R.Copy to be marked.

(B/O) SVV/PGS