

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 551 OF 2006

The State of Maharashtra
Through Police Station, Deoni,
For Smt. Kamalbai Baburao Pandhre
Age : 60 years, occu.: household
R/o Janwda, Taluka and Dist. Bidar,
Karnataka State.

Appellant.

Versus

1. Venkat @ Meghraj Ramrao Deokate
Age : 33 years, occu. : service
R/o Deoni, District Latur.
2. Ramrao Daulatrao Deokate
Age : 60 years, occu.: business
R/o Deoni, District Latur.
3. Dhanraj Ramrao Deokate
Age : 20 years, occu. : business.
R/o Deoni, District Latur.
4. Kamlabai w/o Ramrao Deokate
Age : 55 years, occu. : household
R/o Deoni, District Latur.
5. Chaya d/o Ramrao Deokate
Age : 20 years, occu.: education
R/o Deoni, District Latur.

Respondents.
(original accused)

Mr. R.V. Dasalkar, A.P.P. for the appellant/State.
Mr. R.N. Dhorde, Senior Counsel for the respondents.

**CORAM : T.V. NALAWADE &
SUNIL K. KOTWAL,JJ.**

Date of reserving judgment :- 2nd April, 2018.

Date of pronouncing judgment : 19th April, 2018.

JUDGMENT : (PER SUNIL K. KOTWAL,J.)

1. This appeal is directed by the State of Maharashtra against the judgment and order of acquittal passed by Additional Sessions Judge, Udgir dated 07.04.2006 in Sessions Case No.30/2005, acquitting all the accused Nos.1 to 6 of the offences punishable under Sections 302, 304-B, 498-A and 201 read with Section 34 of the Indian Penal code (hereinafter referred to as the "I.P.C.") and under Section 3 and 4 of Dowry Prohibition Act. Respondents are the original accused Nos.1 to 5 respectively.

2. Shorn off unnecessary details, the prosecution case in brief is that, Kavita @ Nikita w/o Venkat Deokate married with accused No.1 on 06.05.2001. She cohabited with accused No.1 and his other family members i.e. accused Nos.2 to 6 at Mauje Deoni (Budruk). At the time of marriage, dowry of Rs. 2,00,000/- (Rupees Two Lakh), one Hero Honda Motorcycle and 2 Tolas gold were given to accused No.1. Initially the cohabitation of Kavita @ Nikita (hereinafter referred as the "deceased") was normal. However, after six months after the marriage, accused started demanding 2 Tolas gold at the eve of Diwali Festival. That demand was fulfilled. Thereafter for the period of two years everything was normal. However, thereafter again accused persons started ill treatment to deceased as she was issue-less. Accused persons demanded Rs.25,000/- from the parents of deceased and in the

alternate threatened to perform second marriage of accused No.1. That demand of Rs. 25,000/- was fulfilled. Even medical treatment was given to deceased and in the result she became pregnant. When the deceased carried seven months pregnancy, on 04.01.2005 she gave telephonic message to her brothers and mother that accused were ill treating her, and therefore, she should be taken to her parental home at the earliest.

3. On 05.01.2005, dead body of deceased was found in the bathroom in burnt condition. Accused Dhanraj Deokate submitted A.D. Report (Exh.81) to Police Station, Deoni. During A.D. Inquiry, inquest panchnama (Exh.57), spot panchnama (Exh.56) were prepared. By that time, the parental relatives of the deceased were informed about the occurrence. They reached to Deoni at night hours. They expressed doubt about death of the deceased and insisted for preparation of second inquest panchnama. Therefore, second inquest panchnama (Exh.72) was prepared by the police. Dr. Sanjaykumar Bagde (PW-8), Medical Officer, Rural Hospital, Deoni performed postmortem examination of the dead body alongwith two more Medical Officers and opined that cause of death of deceased was as a result of "asphyxia due to strangulation".

4. On 06.01.2005, mother of the deceased namely Kamlabai Pandhre (PW-12) lodged F.I.R. (Exh.78) to Police Station,

Deoni. In the result, the above-said offences were registered against accused Nos.1 to 6. On 06.01.2005, accused Nos.1 to 5 were arrested. During the course of investigation, clothes of accused Kamlabai and accused Dhanraj were seized. Kerosene can, partly burnt match stick and match box as well as pieces of burnt clothes of the deceased were seized from the spot. Seized articles were referred to Chemical Analyst for chemical examination. After completion of the investigation, charge-sheet was submitted in the Court of Judicial Magistrate, First Class, Udgir.

5. Offence punishable under Section 302 and 304-B of I.P.C. being exclusively triable by Court of Sessions, this case was committed to Sessions Court, Udgir.

6. Charge (Exh.27) was framed against accused Nos.1 to 6 for the offences punishable under Sections 302, 304-B, 498-A, 201 read with Section 34 of I.P.C. and under Section 3 and 4 of Dowry Prohibition Act. Accused pleaded not guilty and claimed trial.

7. Defence of the accused is of total denial. They contended that after the death of deceased, the parental relatives demanded amount of Rs.3,50,000/- and on refusal by accused to pay this amount through M.L.A. Khandre, they brought pressure on the Doctor and obtained false postmortem report.

8. After considering the evidence placed on record by the prosecution, the trial Court pleased to acquit all accused of all the

charges. Therefore, this appeal arises challenging the acquittal of accused Nos.1 to 5 only.

9. Heard strenuous arguments submitted by Mr. R.N. Dhorde, learned Counsel for the respondents and learned A.P.P. for the State.

10. Learned A.P.P. for the State submitted that though Medical Officer Dr. Bagde (PW-8), who has proved postmortem notes (Exh. 70), is constant on his statement regarding cause of death of deceased due to asphyxia due to strangulation, the learned Trial Court disbelieved such trustworthy evidence on flimsy ground of undue pressure by one M.L.A. from Karnataka. He pointed out that none of the prosecution witness has admitted that the said M.L.A. was present in the hospital, nor any witness has admitted the bringing of such pressure by the parental relatives of the deceased on the Medical Officer. According to learned A.P.P. finding of dead body of deceased having postmortem burns and clear finding of Medical Officer regarding cause of death due to strangulation is sufficient to hold that the death of deceased was homicidal death.

11. The next limb of the argument of learned A.P.P. is that in the case at hand from the date of marriage of the deceased she died within 7 years as a result of homicidal death and from the parental relatives of the deceased prosecution has brought on record that the deceased was subjected to ill treatment by accused

for demand of gold and amount of Rs. 25,000/-. According to A.P.P., with the aid of presumption available under Section 113-B of the Indian Evidence Act prosecution has established guilt of the accused at least for the offence punishable under Section 304-B read with Section 34 of I.P.C.

12. Next submission of learned A.P.P. is that parental relatives of deceased are consistent regarding payment of dowry of Rs. 2,00,000/- and Hero Honda motorcycle as well as 2 Tolas gold to the accused at the time of marriage. Therefore, at least offence punishable under Sections 3 and 4 of Dowry Prohibition Act, 1961 is established against the accused

13. According to A.P.P., demand of dowry was the motive behind murder of the deceased which is established on the basis of disclosure by deceased before her parental relatives about ill treatment to her by accused for demand of money. He submitted that as dead body of the deceased was found in the house occupied by only accused Nos.1 to 5 and as no explanation has been furnished by them regarding homicidal death of the deceased, with the aid of Section 106 of the Indian Penal Code, presumption can be drawn that accused are the culprits. He placed reliance on the case of **“Trimukh Maroti Kiran Vs. State of Maharashtra”** reported in **(2006 (10) SCC 681)**, **“Patel Hiralal Joitaram Vs. State of Gujrat”** reported in **(AIR 2001 SC 2944)** and **“State of Uttar Pradesh Vs.**

Ravindra Prakash Mittal” reported in (AIR 1992 (SC) 2045).

14. Learned Counsel for the respondents submitted that on the postmortem notes (Exh.70) nowhere the date of signing the postmortem notes by Medical Officer is mentioned. No advance death certificate has been placed on record by prosecution. There is inordinate delay in preparation of postmortem notes because endorsement on postmortem notes shows that it was handed over to Investigating Officer on 04.02.2005 when the postmortem was conducted on 06.01.2005. He submitted that in this background possibility cannot be ruled out that the concerned Medical Officer prepared false postmortem notes due to pressure of local M.L.A. and parental relatives of the deceased from Karnataka State.

15. Next limb of the argument of learned Counsel for respondents is that the evidence regarding ill treatment to the deceased on account of demand of money is vague and inconsistent with testimony of each witness. He pointed out that no evidence is brought on record as to exactly which ornament was given to the accused at the eve of Diwali.

16. Learned Counsel for respondents submitted that as per prosecution case itself accused Dhanraj Deokate lodged A.D. Report (Exh.81) to Police Station, Deoni regarding finding of dead body of deceased in the bathroom of his house in totally burnt condition. Learned defence Counsel pointed out that when accused

Dhanraj Deokate reached to his house at 12 noon hours for lunch, that time all the doors of the house were latched from inside and therefore, with the help of neighbours he had to make entry inside the house by removing tin sheets from the roof of the kitchen room. He also pointed out that none of the accused was present inside the house when dead body of the deceased in burnt condition was found. Learned defence Counsel submitted that no witness is examined by prosecution who had seen even any one of the accused near the spot of the occurrence at the relevant time of the occurrence. Therefore, under Section 106 of the Indian Evidence Act, burden does not lie on accused persons to give explanations regarding the circumstances, which resulted into the death of the deceased.

17. The last submission of learned Counsel for the respondents is that as initial burden to prove presence of the accused on the spot at the relevant time of the death of the deceased, is not discharged by prosecution, even the presumption under Section 113-B of the Evidence Act is not available. He placed reliance on the cases of **“Jose Alias Pappachan Vs. Sub Inspector of Police, Koyilandy and another”** reported in **(2016) 10 Supreme Court Cases 519**, **“Tomaso Bruno and another Vs. State of Uttar Pradesh”** reported in **(2015) 7 Supreme Court Cases 178**, **“P. Mani Vs. State of T.N.”** reported in **(2006) 3**

Supreme Court Cases 161, “Vikramjit Singh Alias Vicky Vs State of Punjab” reported in (2006) 12 Supreme Court Cases 306, “Mulak Raj Vs State of Haryana” reported in (1996) 7 Supreme Court Cases 308, “Manjunath Chennabasapa Madalli Vs. State of Karnataka” reported in AIR 2007 SC 2080, “Narendra Singh Vs State of M.P.” reported in (AIR 2004 SC 3249), “Dasari Siva Prasad Reddy Vs. Public Prosecutor, High Court of A.P.” reported in (AIR 2004 SC 4383), “Sohel Mehabob Shaikh Vs State of Maharashtra” reported in (AIR 2009 SC 2702) and “Hem Raj and another Vs. State of Punjab” reported in (2003) 12 Supreme Court Cases 241.

18. We have gone through the above referred Authorities relied on by learned Counsel for both the parties. Following legal principles can be culled out from these Authorities :-

(a) In appeal against acquittal, if the view taken by trial Court is a possible reasonable view, it will not be justified in reversing the order of acquittal. The Appellate Court in an appeal against acquittal will not be justified in reversing the order of acquittal unless it comes to the conclusion that the view taken by the trial Court was wholly perverse or unreasonable and it was not possible to take the view in favour of the accused on the basis of the evidence on record.

(b) Where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to

be incompatible with innocence of the accused or the guilt of any other person.

(c) Strong suspicion cannot be the basis of conviction.

(d) Where accused and deceased were not last seen together, Section 106 of Evidence Act would have no application.

(e) Section 106 of the Evidence Act does not relieve the prosecution to prove its case beyond all reasonable doubt. Only when the prosecution case has been proved, the burden in regard to such facts which was within the special knowledge of the accused may be shifted to the accused for explaining the same.

(f) Merely because the deceased died homicidal death and her body was found in the kitchen with postmortem burns, it cannot be said that the said circumstance by itself would connect all the accused or any one of them with the crime.

(g) By Section 32 (1) of Evidence Act two categories of statements are made admissible in evidence and further made them as substantive evidence. They are : (1) His statement as to the cause of his death (2) His statement as to any of the circumstances of the transaction which resulted in his death. The second category can envelope a far wider amplitude than the first category. The words 'statement as to any of the circumstances' are by themselves capable of expanding the width and contours of the scope of admissibility. When the word 'circumstances' is linked to 'transaction which resulted in his death' the subsection casts the net in a very wide dimension. Anything which has a nexus with his death, proximate or distant,

direct or indirect, can also fall within the purview of sub-section. As a possibility of getting the maker of the statements in flesh and blood has been closed once and for all the endeavour should be how to include the statement of a dead person within the sweep of the sub-section and not how to exclude it therefrom. Admissibility is the first step and once it is admitted the court has to consider how far it is reliable. Once that test reliability is found positive the Court has to consider the utility of that statement in the particular case.

19. With the help of the learned Counsels for both the parties, we have gone through the statements of witnesses and other evidence placed on record. Admittedly, in the case at hand entire prosecution case is based on circumstantial evidence. Therefore, motive plays very important role in such a matter.

20. Though the learned A.P.P. contended that demand of money and gold was the motive behind the murder of deceased, from the evidence on record it emerges that the first demand of gold, at the time of first Diwali Festival of deceased and accused No.1, was immediately fulfilled. It means that from the date of marriage i.e. from 06.05.2001 upto Diwali Festival i.e. by the end of 2001 the demand of gold was fulfilled. From the testimony of Balbhim Pandhare (PW-6) it emerges that after the above incident, the cohabitation of deceased with the accused was normal for the period of two years and only after two years, accused started beating to deceased because she was issue-less and that time

accused Ramrao and Dhanraj instigated accused No.1 Venkat to demand Rs. 25,000/- from deceased for their business. That demand of Rs.25,000/- was also immediately fulfilled by the brothers of the deceased. According to Rajendra Pandhare (PW-10), in the month of April 2003 the amount of Rs. 25,000/- was paid to the accused by him and Balbhim Pandhare (PW-6). Thus, till 2003 the demand of money was fulfilled and therefore, there was no question of motive for committing murder of the deceased in the month of January 2005.

21. From the evidence on record it emerges that at the time of death the deceased was carrying pregnancy of about 7 months. It means that wishes of the accused to get child from the deceased was also about at the verge of fulfillment at the time of occurrence. When deceased conceived prior to 7 months before the date of occurrence, all expectations of the accused were absolutely fulfilled by the deceased. Therefore, in the month of January 2005 when the incident occurred, accused had absolutely no motive to kill the deceased. Thus, we have no hesitation to hold that in view of the above circumstances of the case, prosecution cannot establish that at the relevant time of the occurrence accused had any motive to kill the deceased.

22. However, it cannot be ignored that only because prosecution cannot establish motive behind the murder of deceased,

that cannot be a sole ground to extend benefit of doubt in favour of the accused, if otherwise the circumstantial evidence placed on record is sufficient to establish each and every link of the circumstances which directly connect accused persons with the homicidal death of the deceased.

23. In the case at hand, now first question is to be determined whether death of the deceased is homicidal death, suicidal death or accidental death. From the A.D. Report (Exh.81) registered on the basis of information given by accused Dhanraj Deokate to Police Station, Deoni it emerges that on 05.01.2005, at about 12.00 noon hours, when accused Dhanraj Deokate went to his house for lunch, that time though deceased was the alone member present in the house, the doors of the house were latched from inside. Despite his repeated calls as nobody responded, he took the help of his neighbours and son of his neighbour namely Taufiq climbed on the roof of the house accused persons and he informed that the doors were latched from inside and no movement is noticed. Therefore, with the help of ladder accused Dhanraj Deokate went on the roof and by staircase entered inside the house and he opened the main entrance door of the house and allowed his neighbours Govind Bele (PW-2), Bachchemiya Pyare, Aminabai Pyare to enter inside the house. They found that door of the kitchen was closed from inside and smoke was coming out from the window

of the kitchen. Therefore, Govind Bele (PW-2) climbed on the tin sheet roof of the kitchen room and by removing one tin sheet, son of neighbour namely Jafar Bachchemiya Pyare managed to enter inside the kitchen and opened the latches of the door of the kitchen room. All of them found that deceased was lying dead in the bathroom in burnt condition and there was heavy smell of kerosene. Therefore, Dhanraj Deokate submitted A.D. Report (Exh.81) to Police Station, Deoni.

24. After preparation of spot panchnama (Exh.56) and inquest panchnama (Exh.57) of the dead body, P.I. Shelke (PW-14) referred the dead body to Rural Hospital, Deoni for postmortem examination. Dr. Sanjaykumar Bagde (PW-8) and other two Medical Officers i.e. Dr. Mithare and Dr. Deonikar performed autopsy examination of the dead body on 06.01.2005 in between 4.15 p.m. to 6.10 p.m. They found that conjunctiva of the eyes were congested and tongue was protruded, swollen and dark in colour. Blood was oozing from the mouth and nostril. While proving postmortem notes (Exh.70), Dr. Bagde (PW-8) has proved that on the skin there was absence of line of redness. The skin was burnt and spilled. The Medical Officers opined that the burns found on the body of deceased were 'postmortem burns'.

25. Dr. Bagde (PW-8) has proved that (1) there was well defined groove measuring about 2 x 1 x ½ cm situated low down in

neck, below thyroid cartilage, encircling the neck horizontally and completely. Groove was dry hard, extravasation of blood into subcutaneous tissue under the groove was found. (2) Fracture of hyoid bone was present. There was presence of haemorrhage in the tissues around the site of fracture of hyoid bone. They also noticed (3) fracture and dislocation of first and second cervical vertebra. According to Medical Officers, all these injuries were ante-mortem injuries.

26. Dr. Bagde (PW-8) has also proved that on internal examination he found that larynx and trachea were congested, rings of trachea were fractured. Both lungs were congested and showed haemorrhagic patches. On cut section dark blood exuded. There was fracture and dislocation of first and second cervical vertebra.

27. On the basis of above signs Dr. Bagde (PW-8) opined that the probable cause of death was due to "asphyxia secondary to strangulation with postmortem burns". He opined that injury No.1 in column No.17 of the postmortem notes was sufficient to cause death.

28. No doubt, from the cross-examination of Dr. Bagde (PW-8) it emerges that he has admitted that line of redness may be absent in case if a person is weak in constitution and death occurs immediately. However, this admission is of no help to the defence, because postmortem notes' Column No. 10 shows that the body of

the deceased was well nourished. Dr. Bagde (PW-8) also conceded with the observation of Dr. Modi that, "it is not possible to establish either with naked eyes or by histological examination whether burns occurred shortly before death or soon after. Circumstantial evidence alone will provide the answer". He has also admitted that the differentiation between ante-mortem and postmortem burns may not be possible in charred bodies. However, these admissions of Dr. Bagde (PW-8) do not affect his opinion that the burns found on the dead body were postmortem burns for the simple reason that well marked groove low down in neck below thyroid cartilage encircling the neck horizontally and completely, coupled with fracture of hyoid bone, presence of haemorrhage in tissue around site of fracture of hyoid bone and fracture and dislocation of first and second cervical vertebra, absolutely ruled out the possibility of ante-mortem burn injuries on the body of the deceased. It is very hard to accept that after sustaining such fracture and dislocation of first and second cervical vertebra a woman can pour kerosene on her body and she can set herself ablaze. Therefore, we are fully satisfied that on the basis of trustworthy testimony of Dr. Bagde (PW-8) corroborated by postmortem notes (Exh.70) prosecution has proved beyond reasonable doubt that death of the deceased was homicidal death due to asphyxia due to strangulation.

29. Mere delay in obtaining the postmortem notes by Investigating Officer and absence of dates below the signatures of Medical Officers, cannot be a ground to disbelieve this important medical evidence when in the postmortem notes the date and time of postmortem examination is clearly mentioned. Even obtaining such report under the pressure of one M.L.A. or parental relatives of the deceased is not probable, because no such suggestion has been given in the entire cross-examination of Dr. Bagde (PW-8). Even no prosecution witness has admitted that any pressure was brought on Medical Officers to perform postmortem examination. Preparation of second inquest panchnama (Exh.72) at the insistence by parental relatives of the deceased only indicates the anxiety of parental relatives of the deceased and nothing more. Thus, no other conclusion can be drawn except that the death of the deceased was homicidal death.

30. Now we have to consider whether the evidence placed on record is sufficient to connect the accused persons with the homicidal death of the deceased. At the outset we must observe that no evidence is placed on record by prosecution to prove that at the relevant time of the death of the deceased any one of the accused was present in the house. Prosecution has examined Govind Bele (PW-2), whose house is at the distance of 40 to 50 ft. from the house of the accused. This witness was present when

accused Dhanraj Deokate visited the house for lunch and found door of the house closed from inside. Govind Bele (PW-2) has repeated same story which is mentioned in the A.D. Report (Exh.81) as described above. From the evidence of this witness, it becomes clear that at the relevant time of the occurrence none of the accused was present at the house where the dead body of the deceased was found. This witness has also proved spot panchnama (Exh.56) and inquest panchnama (Exh.57). From the evidence of this witness it emerges that on the call given by accused Dhanraj this witness and other neighbours gathered near the house of accused persons and they found that doors of the house were closed from inside and therefore, one boy namely Taufiq climbed on the roof of the house and thereafter accused Dhanraj climbed on the roof and opened the main door by entering inside the house from the steps which were available from the roof of the house. These persons can made entry in the kitchen room only after removing tin sheet roof of the kitchen room. This evidence of Govind Bele (PW-2) is of no help to the prosecution to establish presence of any accused on the spot at the relevant time of the occurrence. On the other hand, this witness has brought on record that none of the accused was present inside the house at the time of occurrence of the incident.

31. Somnath Bhandarshette (PW-3) is the shop owner whose shop is situated near the cloth shop of accused Ramrao

Deokate. This witness has also brought on record that on 05.01.2005 since 8.00 to 8.30 a.m. accused Ramrao and Dhanraj were present in their cloth shop till 12 noon hours. Despite searching cross-examination by learned A.P.P., nothing could be elicited on record which is sufficient to establish the presence of the accused at their home at the relevant time of the occurrence.

32. Shobha Malgonda (PW-4) is the maid servant, who used to clean utensils and clothes at the house of accused persons. According to this witness, on the date of incident in the morning she had seen only deceased and her mother in law in the house. This witness was also declared hostile and noting could be elicited in her cross-examination despite lengthy cross-examination by A.P.P. On the other hand, this witness has brought on record that even accused Kamlabai had gone to her agricultural land at the relevant time of the occurrence.

33. Shivaji Vinchure (PW-5) examined by prosecution has also proved presence of accused No.1 in the school on 05.01.2005 from 9.15 a.m. till 12.30 noon hours.

34. Thus, it is evident that no evidence is available on record which remotely indicates that at the relevant time of the occurrence any one of the accused was present at the house. When no evidence is available to show that soon before the probable time of death of deceased, she was found inside the house

alongwith the accused persons, accused cannot be connected with the homicidal death of the deceased which occurred in the bathroom of the house of accused. As presence of the accused on the spot at the relevant time of the occurrence is not established, under Section 106 of the Evidence Act onus does not shift on accused to explain the circumstances in which deceased died of homicidal death.

35. Though learned A.P.P. submitted that as the deceased died within 7 years from the date of her marriage, presumption under Section 113-B of Evidence Act can be drawn against the accused, the evidence on record nowhere discloses that soon before the death of deceased, she was subjected to ill treatment by the accused for a demand of dowry. For the purpose of Section 304-B of the I.P.C. "Dowry" shall have the same meaning as in Section 2 of Dowry Prohibition Act, 1961.

"Dowry" means any property or valuable security given or agreed to be given either directly or indirectly –

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person;

at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.

36. Thus, a bare glance at Section 2 of Dowry Prohibition Act makes it clear that to prove that demand of the accused was “dowry” within the meaning of Section 304-B of the I.P.C., the prosecution must prove that the demand of money or any valuable article shall be in connection with the marriage of the deceased and accused No.1. However, according to Balbhim Pandhare (PW-6) the first demand of 2 Tolas gold was made at the eve of Diwali Festival and second demand of Rs. 25,000/- was made after two years from Diwali and that demand was for “business purpose”. Thus, demand of Rs. 25,000/- for business purpose does not fall within category of “dowry” as it has no connection with marriage of deceased with accused No.1. So also, from the cross-examination of Balbhim (PW-6) it becomes clear that as per practice and custom new clothes and gold ring etc. are offered at the eve of first Diwali after marriage. Thus, even giving of 2 Tolas gold at the eve of first Diwali cannot be termed as “dowry” within the meaning of Section 304-B of I.P.C. read with Section 2 of Dowry Prohibition Act.

37. Otherwise also, Balbhim (PW-6), who is real brother of the deceased and who took active part during the entire incidence, has nowhere deposed that on account of demand of 2 Tolas gold or amount of Rs. 25,000/- the deceased was ever ill treated by accused persons. On the other hand, Balbhim (PW-6) in his examination-in-chief itself has made it clear that the beating to

deceased was started only on the ground that deceased could not conceive for the period of two years from her marriage. Thus, such type of ill treatment to the deceased cannot become cruelty either within meaning of Section 498-A or under Section 304-B of the I.P.C. Otherwise also, these all events of demand of gold and money came to an end in the year 2003 itself because Rajendra Pandhare (PW-10) has made it clear that all the demands of the accused were fulfilled till April 2003. Rajendra Pandhare (PW-01) has made it clear that after fulfillment of all demands till April 2003 the deceased was treated nicely. Thereafter ill treatment to deceased was given because only she could not conceive. However, undisputedly deceased became pregnant prior to 7 months from the date of incident. Thus, since before 7 months from the date of the incident there was no reason or any occasion to the accused to ill treat the deceased for any other reason. Even Balbhim (PW-6) or Rajendra (PW-10) have not whispered a single word that when deceased became pregnant since thereafter there was any type of ill treatment to the deceased at the hands of accused. As per prosecution case itself, only on 04.01.2005 on telephone deceased informed her mother Kamalbai (PW-12) and brother about ill treatment to her.

38. Even Kamalbai (PW-12) has not uttered a word regarding ill treatment to deceased for a demand of gold. No doubt, Kamalbai (PW-12) deposed regarding ill treatment to deceased for

demand of Rs. 25,000/- for extension of cloth business. However, according to Kamalbai (PW-12) after payment of that amount to the accused, deceased was nicely treated for the period of two years. It is to be noted that Kamalbai (PW-12) nowhere deposed that accused at any time ill treated the deceased because she could not conceive.

39. Thus, it is clear that after April 2003 the cohabitation of the deceased with the accused was absolutely normal and she was not ill treated in any manner for any demand by the accused. According to Kamalbai (PW-12), prior to one day before the death of deceased, she talked to deceased on telephone and that time deceased told her that she was subjected to beating and somebody should be deputed to fetch her to parental home. However, this statement of Kamalbai (PW-12) is absolutely vague as to who was ill treating the deceased and what was the reason for ill treatment or beating to deceased. Everything is vague. Therefore, on the basis of such vague and inconsistent statements of these parental relatives of the deceased, which may be admissible under Section 32 (1) of the Evidence Act, prosecution cannot establish that soon before the death of deceased she was subjected to ill treatment within the meaning of Section 498-A of I.P.C., for demand of "dowry". Therefore, presumption under Section 113-B of the Evidence Act cannot be drawn against the accused persons.

40. Regarding other evidence placed on record by prosecution, the testimony of Vitthalrao Patil (PW-9) is mostly in the form of hearsay evidence and his testimony is not consistent with the testimony of both brothers of the deceased. Even he is contradicting the testimony of his sister Kamalbai (PW-12) regarding ill treatment to deceased for demand of cash. Therefore, no importance can be given to the evidence of such dubious witness.

41. Shivaji Khondgire (PW-7) is the garage owner from village Janwade. According to this witness, on 04.01.2005 on telephone deceased informed this witness regarding torture to her and accordingly this witness informed the mother of the deceased. However, testimony of this witness regarding torture is also vague, because he nowhere named any accused person in relation with torture to the deceased. So also no documentary evidence in the form of phone bill or other call data has been placed on record by prosecution to prove that really there was such telephonic conversation in between deceased and Shivaji Khondgire (PW-7) who was not directly related with the deceased.

42. Regarding testimony of Vitthalrao Hanmantrao Patil (PW-11) it is suffice to say that he is not trustworthy witness for the reason that his evidence is totally in conflict with Balbhim (PW-6) and Rajendra (PW-10) as well as Kamalbai (PW-12) regarding demand of gold and money by accused from deceased. This

witness has not brought on record documentary evidence in the form of telephonic bill or phone call data to prove his telephonic conversation with deceased as alleged by him. Therefore, evidence of this witness also deserves to be ignored.

43. Another important aspect to be noted is that, though according to Balbhim (PW-6) on 04.01.2005 on telephone deceased informed her mother and brother that her life was in danger, none of these parental relatives took any immediate step to help the deceased either by making contact with the accused or by paying visit to the house of accused which was only at the distance of 70 to 80 kms from their village. It is surprising to note that despite the alleged telephonic talk with the deceased on 04.01.2005 they did not inform the police immediately after knowledge of the death of the deceased. Even the F.I.R. is lodged by mother of the deceased on 06.01.2005 at about 2.00 p.m. No explanation has been furnished by prosecution for such inordinate delay in lodging F.I.R.

44. Regarding the payment of dowry of Rs. 2,00,000/- and 2 Tolas gold as well as gift of Hero Honda motorcycle to accused No.1 at the time of marriage, except bare words of the parental relatives, no documentary evidence such as list of settlement of marriage has been placed on record by the prosecution. Even none of the prosecution witness uttered a word that at the time of settlement of marriage accused demanded the dowry of Rs.

2,00,000/-, 2 Tolas gold and motorcycle from the parents of the deceased. Therefore, otherwise also, accused cannot be convicted under Sections 3 and 4 of the Dowry Prohibition Act for lack of demand on behalf of accused.

45. It is very disheartening to note that though deceased died in the house of accused Nos.1 to 5 in the most suspicious circumstances, the mystery regarding the homicidal death of deceased is not resolved by Investigating Officer only due to his negligence during the entire investigation. Though Investigating Officer Shelke (PW-14) deposed on oath that on 14.01.2005 he seized clothes of accused Kamlabai and on 16.01.2005 he seized clothes of accused Dhanraj from their person, question remained unanswered as to why the Investigating Officer caused such unreasonable delay in seizure of clothes of these two accused persons, when they were in his custody since 06.01.2005. Even Investigating Officer (PW-14) is so negligent while deposing before the Court that he did not whisper a word regarding proper sealing of these clothes at the time of seizure. Therefore, though C.A. Report (Exh.86) indicates that kerosene residues were detected in the clothes of accused Kamlabai and Dhanraj, on account of delay in seizure and negligence in sealing of these articles, the prosecution has lost this most important circumstantial evidence which would have been available against accused Kamlabai and Dhanraj.

46. It is to be noted that as the dead body of the deceased was found inside the house of accused and as medical evidence indicates that deceased was strangled by the assailants, it was the duty of Investigating Officer to ascertain exact time of death of the deceased, through Medical Officer (PW-8) who performed autopsy examination of the dead body. Column No.21 of the postmortem notes (Exh.70) indicates that at the time of postmortem examination the stomach of the deceased was empty and Column No.11 shows that rigor mortis was well marked and present in the whole body of the deceased. These two signs indicate that the probable time of death of deceased was within 4 to 6 hours from the time of her last meal. Thus, probably the deceased was killed after her dinner on 05.01.2005. Had the Investigating Officer ascertained probable time of death through Medical Officer, he could have pinpointed the assailants of the deceased, who must be from the family of the accused. Thus, due to total negligence on the part of the Investigating Officer, prosecution could not connect the accused with the homicidal death of the deceased.

47. Investigating Officer did not take pains to get medically examined the suspected arrested accused to ascertain whether any injuries could be found on the body of the accused which would have been caused at the time of resistance by deceased. So also Investigating Officer did not seize weapon of the offence, probably a

rope by which the deceased was strangled. No investigation was made by Investigating Officer as to exactly at which time the accused persons left their house on 06.01.2005. No investigation was done regarding the exact place inside the house where the deceased was actually strangled by the assailant. He did not investigate whether the assailants, after commission of the murder, sneaked out from kitchen room through tin roof and thereafter by staircase through the roof of the house, because as per A.D. report, ladder was available outside the house to get down from the roof without pointing attention of any outsider. Thus, it appears that the Investigating Officer, while investigating this matter, has taken every possible care to see that accused would get acquittal in the matter. In the circumstances, though strongest suspicion arises against the accused persons, in the eyes of law it cannot be substitute for proof beyond reasonable doubt. Therefore, we have to extend benefit of doubt in favour of the accused persons.

48. In view of the above discussion, after careful consideration of the evidence placed on record by prosecution, we have come to the conclusion that the view taken by learned trial Court while acquitting the accused by extending benefit of doubt, is possible view and cannot be termed as perverse finding which call for interference by this Court in this appeal against the acquittal.

49. Before parting with the judgment, we must observe that the case of **Trimukh Vs State of Maharashtra** (cited supra), relied on by A.P.P., is distinguishable on facts because in that case the accused was last seen together with the deceased soon before her death and no explanation was offered in his statement under Section 313 of the Code of Criminal Procedure. Similar was the case of **State of Uttar Pradesh Vs Ravindra Mittal** (cited supra). So also in the case of **Patil Hiralal Vs State of Gujrat** (cited supra) reliable dying declaration of the deceased was available before the Court, and therefore, on the basis of such dying declaration conviction was upheld. This case can be distinguished as no such dying declaration is available in the case at hand.

50. Accordingly our conclusion is that the judgment of acquittal of all accused of all the charges recorded by learned trial Court, cannot be interfered as possible view is taken by the trial Court. It follows that this appeal being devoid of merit deserves to be dismissed.

51. Hence, the following order.

ORDER

Criminal Appeal No. 551 of 2006 stands dismissed.

(**SUNIL K. KOTWAL**)
JUDGE

(**T.V. NALAWADE**)
JUDGE