

\$~R-59

IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on:- 7th December, 2018

+ CRL.A. 496/2002

SHIV RAM & ORS.

..... Appellants

Through: Mr. M.L. Yadav, Advocate

versus

STATE OF DELHI

..... Respondent

Through: Mr. Kewal Singh Ahuja, APP
for the State with ASI Puran
Singh, PS Gokul Puri.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

J U D G M E N T (O R A L)

1. Sudha, (hereinafter 'the deceased') was married to the third appellant (A3) on 09.12.1998. It is stated that out of their cohabitation, a male child took birth sometime in October, 1999 (unfortunately, the court is informed, the said child could not survive and died before he turned the age of two). Sudha was living with her husband (A3) in the matrimonial home, *i.e.*, house No.533, Gali No.8, Munga Nagar, Gokul Puri, within the jurisdiction of Police Station Gokul Puri, the matrimonial family including the first appellant (A1) (father-in-law), second appellant (A2) (mother-in-law), fourth appellant (A4) *nanad* (sister-in-law), another *nanad* (sister-in-law)

(tried in juvenile court) and one more *nanad* (sister-in-law) (A5), who was married and was living in her matrimonial home in house No.B-765/1, Gali No.9, Vijay Park, Maujpur, Delhi.

2. On 08.12.1999 Sudha suffered burn injuries in an accident that occurred in the kitchen at the first floor of the matrimonial home, the evidence showing the time of such incident to be sometime around 4:00 p.m. She was taken to Guru Teg Bahadur Hospital (GTB) Shahdara, by a neighbour Manju (PW-1), having arrived there at 4:35 p.m. She was examined by Dr. Sandip Jain (PW-22) and by Dr. J. Biswas (PW-21). Medico-legal certificate (MLC) was prepared (vide Ex.PW-21/A) indicating that she had suffered 70% burns. She was referred to the burns ward for further management and treatment.

3. It is stated that upon police being informed, it made contact with the Sub-Divisional Magistrate (SDM). Mr. Parkash Chander (PW-5), the SDM, came to the hospital in the morning of 09.12.1999 and upon the deceased statedly having been declared fit for statement, he examined her, reducing her statement to writing (vide Ex.PW-5/A). During the course of his inquiry, the SDM also examined Ashok Kumar (PW-3) and Urmila (PW-4), the brother and mother respectively of the victim. The SDM, thereafter, passed an order (Ex.PW-5/C) on 09.12.1999, directing the Station House Officer (SHO) of Police Station Gokul Puri to register a case. Pursuant to this the first information report (FIR) (Ex.PW-15/A) was recorded vide FIR No.589/1999 at 4:05 p.m. on 09.12.1999 and investigation taken

up for offences punishable under Sections 307/498-A/34 of Indian Penal Code, 1860 (IPC).

4. Sudha succumbed to the injuries in the course of treatment in the aforementioned hospital at 11:42 p.m. on 15.12.1999 and upon this information reaching the police, besides preparation of death report (Ex.PW-5/D) steps were taken for post-mortem examination of the dead body the offence under Section 302 IPC having been added.

5. During the course of investigation, besides PW-3 and PW-4 referred to above, Munish (PW-11), another brother of the victim, was also examined. It is alleged that the evidence showed complicity, besides of the above mentioned appellants, also of one junior sister of A3, juvenile at the relevant point of time. It is stated that separate action was initiated against the minor sister of A3 before the Juvenile Justice Board, a final report (charge sheet) under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C.) having been submitted against the appellants in the court of metropolitan magistrate seeking their trial.

6. After necessary proceedings in the court of cognizance, the case eventually came to be committed and brought before the court of sessions, where it was registered as Sessions Case No.34/2000.

7. A1 to A5 were put on trial by the court of sessions by charges framed, on 20.10.2000, for offences punishable under Sections 120-B IPC, Section 302 read with Section 120-B IPC and Section 498-A read with Section 34 IPC.

8. The prosecution led evidence by examining twenty-three witnesses, they including Smt. Manju (PW-1); Dr. Upendra Kishore (PW-2) of GTB hospital who conducted post-mortem on the dead body of the deceased; Ashok Kumar (PW-3), brother of the deceased; Urmila (PW-4) mother of the deceased; Parkash Chander (PW-5), the SDM; SI Mukesh Kumar (PW-6), drafts-man who prepared the scaled site plan; Ct. Anil Kumar (PW-7); Ct. Mukesh (PW-8); Sandeep Garg (PW-9); Head Constable Prem Chand (PW-10); Munesh (PW-11); Ravinder Kumar (PW-12); Ct. Shobir Singh (PW-13); lady Constable Asha Sharma (PW-14); HC Bal Kishan (PW-15); HC Vimal (PW-16); Ct. Mohd. Umar (PW-17); ASI Kusum Lata (PW-18); HC Yashpal (PW-19); Insp. Harpal Singh (PW-20); Dr. J. Biswas (PW-21); Dr. Sandip Jain (PW-22); and, Sham Sunder (PW-23).

9. The statements of the appellants were recorded by the trial court under Section 313 Cr.P.C., they pleading innocence, denying any complicity on their part stating, *inter alia*, that they were not even present at the time of occurrence, the position taken by them *vis-à-vis* the incident where Sudha had suffered the burn injuries to be accidental. No evidence in defence was adduced.

10. The trial court considered the evidence and decided the case by judgment dated 16.05.2002. Though it is not so expressly stated, it is implicit in the said judgment that the trial court had hesitation in accepting charge under Section 302 read with Section 120-B IPC. It also was not satisfied that the evidence *vis-à-vis* the accusations levelled against A5, married sister of the husband of the deceased, for

the reason she was living separately in her matrimonial home. The case against A5 thus failed, she having been acquitted by the trial court. The charge under Section 302 IPC also did not succeed, the trial court instead choosing to have resort to a relatively minor offence punishable under Section 304-B IPC, to return finding of guilty against other accused, *i.e.*, A1 to A4 convicting them accordingly with the aid of Section 120-B IPC. It also held the appellants guilty for offence punishable under Section 120-B IPC and section 498-A read with Section 120-B IPC. By order dated 16.05.2002, the trial Judge awarded rigorous imprisonment for seven years for offence under Section 304-B IPC and rigorous imprisonment for three years under Section 120-B IPC, observing that there was no need for separate punishment to be awarded under Section 498-A IPC.

11. The present appeal was filed challenging the above mentioned judgment of conviction and order on sentence. By the time it has come up for hearing, the first appellant Shiv Ram has died, the death having occurred on 19.07.2016. This fact has been verified and a report to this effect has been submitted by the State. In this view, the proceedings against A1 Shiv Ram have abated. The appeal, thus, is to be heard *qua* the case for prosecution against Sheela (A2), Sanjay (A3) and Parvesh (A4).

12. The charge under Section 302 IPC was founded essentially on the statement (Ex.PW-5/A) purportedly of the deceased made to the SDM (PW-5) on the morning of 09.12.1999. This statement runs into three pages, written in Hindi, primarily in question and answer form.

PW-5 testified at the trial to prove this document also stating that he had ascertained from the attending medical officer as to the fitness of the victim for making a statement at that point of time, the thumb impression of the victim having been taken on each of the three pages. Going by the version forming part of the said statement (hereinafter referred to as the 'dying declaration' relied upon by the prosecution), all the appellants and the other sisters-in-law including the one who has been acquitted had together assaulted on the person of the deceased while she was inside the house, she having been first forced on to the gas stove and once she had suffered burn injuries, they having gone out only to later return and set her afire after pouring kerosene oil on her.

13. The evidence on record includes photographs of the room where the incident statedly occurred. The photographs do not show any kerosene stove or any container which might have contained kerosene oil. Concededly, no such material was seized from the household or at the instance of any of the appellants.

14. Be that as it may, a case of this nature necessarily involves the issue of fitness of the person to make a statement of such nature in such state in which the deceased was put at the relevant point of time and, in this regard, evidence of PW-21 and PW-22 gained significance. The MLC bears endorsements in their hands. The one recorded at 4:35 p.m. on 08.12.1999 is in the hand of PW-21, while there is another endorsement at the bottom of the MLC (Ex.PW-21/A) in the hand of PW-22. Going by the evidence of these witnesses both

endorsements were recorded at the same point of time. Both are contrary to each other. While PW-21 recorded that the victim was fit for statement, PW-22 opined that she was unfit for statement. The family including the mother (PW-4) and the brothers (PW-3 and PW-11) had gathered one after the other in the hospital upon learning about the incident. Going by their testimonies it is clear that Sudha was unconscious when she was brought to the hospital, she having regained consciousness only on the next morning. At least, this is what the family witnesses would say. If it were so, the endorsement by PW-21 recorded at 4:35 p.m. on previous day that Sudha was fit for making statement is questionable.

15. Be that as it may, no statement of Sudha was recorded on 08.12.1999. A Head Constable by the name of Anwar had been deputed by the Police Station to go to the hospital and ascertain the status as to the fitness of the victim. This is what the SDM (PW-5) would also tell the court. Anwar has not been examined by the prosecution (as noted in the proceedings recorded on 06.01.2001, he had expired before he could be examined). The first formal account of police proceedings has been brought out through the mouthpiece of Inspector Harpal Singh (PW-20) who was accompanied by Constable Anil Kumar (PW-7). Their testimonies, read collectively, would leave no room for doubt that Sudha was not in a position to make any statement till the morning of 09.12.1999. Neither the police nor the SDM, assumably, would be able to ascertain the facts from her till such time.

16. But, the lament is that in spite of a woman in burnt state having been brought to the hospital, there was no need felt for a case to be registered. A human being had suffered burn injuries. Such incident could have occurred accidentally or may have been caused deliberately. Some inquiry was called for. There is nothing on record to show the police to have made any inquiries worth the name, it simply awaiting the SDM to step in. This court is unable to appreciate as to whether this was an adequate response of the police *vis-à-vis* its responsibility in terms of Section 154 Cr.P.C.

17. The case was registered on the basis of dying declaration recorded by PW-5 sometime around 11:00 a.m. on 09.12.1999. PW-5 would depose that prior to recording the statement, he had ascertained from the examining doctor as to the fitness of the victim for said purposes. The endorsement about fitness finds mention on the MLC (Ex.PW-21/A) in relation to 11:00 a.m. of 09.12.1999. The prosecution examined PW-23, a medical record technician of the hospital, to prove this endorsement. The said witness would say that the said endorsement was in the hand of Dr. Manha Changiai, there is no reason explained as to why the concerned doctor could not be called to testify. After all, his testimony was very crucial to the case. The fitness or otherwise of the state of a victim of burn injuries is crucial to the acceptance of the statement attributed to her. This court is not satisfied with the proof adduced through PW-23 about the fitness of the victim to make such a statement.

18. PW-5 informed the court that he had recorded the statement within fifteen minutes. The length of the statement itself does not go well with the state in which the alleged maker was in at the relevant point of time. She had suffered extensive injuries – as per the post-mortem report (Ex.PW-2/A), burn injuries covered all over the body. A person with such extensive burn injuries, particularly under medication that includes pain killers which would also benumb the faculties, would not have the requisite strength or sufficient faculties to respond quickly to the questions put. The detailed statement that is attributed was probably not possible to be recorded within the time as is shown to have been taken.

19. The document presented as dying declaration bears thumb impression on each page. There is no mention on the document endorsement as to whose thumb impression had been taken. In a criminal trial, assumption cannot be made. Each fact has to be strictly proved. Even if it were to be assumed that the SDM would have obtained the thumb impression of the victim, the question as to whether (or not) she was in a position to affix her thumb impression at that point of time still lingers. The autopsy report (Ex.PW-2/A) reveals that even her hands had been burnt. If it were so, it was not at all possible for the thumb impressions to be taken.

20. Going by the document purporting to be the dying declaration, kerosene oil had been poured over the person of Sudha. It does appear that in the examination of scalp hair by the forensic science laboratory reports (Ex.PW-20/G, PW-20/H and PW-20/I), as also on part of a

sack which was found in burnt condition at the place of incident, presence of kerosene oil has been detected. As noticed earlier, there is no evidence of presence of any container or stove using kerosene oil. In contrast, the autopsy surgeon vide his report (Ex.PW-2/A) would confirm that there was no smell of kerosene oil.

21. It is clear from the testimony of PW-1, the neighbor who took the victim to the hospital that she (the victim) was alone in the house when the fire incident took place. The investigating officer PW-20 is on record to state that he had been told by PW-1 that none of the appellants were present at the house at the relevant point of time. The trial Judge found it difficult to believe the presence of A5 at the scene. This itself shows that the trial Judge was not wholly satisfied and convinced about the truth of the document presented as dying declaration. There is merit in the argument of the appellants that the same set of evidence cannot be used against them to hold facts to the contrary qua them.

22. Since charge of culpable homicide had failed, it is inherent that the prosecution had not brought home to the satisfaction of the trial court that the appellants had forcibly put the victim on fire to bring about her death. The State did not challenge the said result by any appeal against acquittal on the charge under Section 302 IPC. The said result has since attained finality and thus cannot be reopened.

23. The question as to whether conviction under Section 304-B IPC can be recorded against the above-said backdrop, without a formal charge being framed has been raised by the appellants before this

court. While the possibility of conviction for the said lesser offence being returned against the framing of charge under Section 302 IPC is to be seen from the facts of the case and the charges framed, the question as to whether there was sufficient material to raise presumption under Section 113-B of the Evidence Act to return the finding of guilty under Section 304-B IPC is more critical.

24. Unnatural death, which would be a pre-requisite for the charge under Section 304-B IPC and for presumption under section 113-B Evidence Act being raised, may be of three kinds: accidental, suicidal or homicidal. As has been observed earlier, the accusations of the death of Sudha being homicidal have not been accepted and the said theory must be rejected. It has been nobody's case that Sudha died a suicidal death. If it were so, the only possible theory would be of accidental burn injuries being suffered by Sudha. It does appear that there was no sufficient investigation carried out into this aspect. But then, at this point in time, there is no occasion or possibility for further evidence to be found. On the contrary, we have the unchallenged testimony of PW-1 available she having told the court that on the way to the hospital Sudha had told her that while she was filling kerosene oil in the stove after placing it on a gunny bag, having forgotten to remove the said gunny bag, the burning matchstick had fallen on the gunny bag, it thereby catching fire, consequently setting her also on fire. This court is conscious that no kerosene stove was found at the scene. But, it is also clear that, after the incident, the house was not in control of the appellants. The SDM had paid a visit accompanied by police officials to the said house on 09.12.1999. He had to break open

the locks to inspect the premises. There is no inquiry made as to who had put those locks on the premises. It was the responsibility of the police to do so. In these circumstances, the possibility of kerosene oil stove being removed from the scene by someone cannot be ruled out. But, in the absence of any evidence to that effect it cannot be inferred that such removal of the kerosene oil stove would be an act of commission or omission by or at the instance of the appellants.

25. The fact remains that the testimony of PW-1 to the above effect has gone unchallenged and unimpeached. The prosecution cannot wish it away. After all, it was their own witness who was telling the court to that effect. No efforts were made to discredit her in this regard or bring facts to the contrary. In these circumstances, this court is left with no option but to hold that Sudha in all probability suffered the burn injuries in an accidental fire.

26. There is sufficient evidence brought through PW-3, PW-4 and PW-22 about demands of dowry and precious gifts by the appellants. There is clear evidence of Rs.50,000/- having been demanded and the deceased being harassed on that account. The finding of guilty returned by the trial court on the charge under Section 498-A IPC, therefore, deserves to be upheld. But, the question would be as to whether the conviction for such offence under Section 498-A IPC should lead to the presumption under Section 113-B of the Evidence Act.

27. In *Pushpender Singh & Ors. vs. State*, Criminal Appeal No.160/2015, (2015) SCC Online Del 12748, decided by a division

bench (of which I was a member) on 12.10.2015, similar questions were examined. After referring to the provisions contained in Section 304-B IPC and Section 113-B of the Evidence Act, and various judgments thereupon, it was observed thus :

“102. Broad principles emerging from above noted case law, to the extent germane to the issues raised before us, may be culled out as under:-

(i) The death of a married woman within seven years of the marriage, otherwise than under normal circumstances must result in a serious attempt on the part of the investigating agency, and the court, to inquire if it is a case of culpable homicide ;

(ii) If the evidence shows the husband or any of his relatives to be the actual or direct participant in the commission of the acts resulting in the death, the trial must proceed on the charge of culpable homicide;

(iii) If the evidence is forthcoming to show that the unnatural death of the married woman within seven years of her marriage was preceded “soon before” her death by she being subjected to cruelty or harassment for or in connection with demand for dowry by the husband or any of his relatives, the charge of “dowry death” is to be invoked as an “alternative charge”, or even as a single or main charge against others not implicated by reason of abetment, conspiracy etc.

(iv) The offence of “dowry death” is neither a substitute, nor “minor offence”, nor “included” in the offence of “culpable homicide”;

(v) To bring home the charge of “culpable homicide”, the prosecution must prove the accused to have intentionally committed the act causing

death or causing bodily injury resulting in death. In contrast, to bring home the charge of “dowry death”, direct nexus on the part of the accused with the act(s) causing death, or resulting in bodily injury causing death, need not be shown. The prosecution needs to prove only the fact of death being otherwise than under normal circumstances (to put it simply, it being an unnatural death), coupled with the fact that the deceased (necessarily a married woman) had been subjected to cruelty or harassment for or in connection with the demands for dowry by the husband, or any of his relatives, the death having occurred within seven years of the marriage. Upon such proof, the Court is bound to presume that the husband, or the relative, who is party to the cruelty or harassment of the specified nature is responsible for the “dowry death”;

(vi) For the charge of “dowry death”, the husband or the relative, as the case may be, need not be the actual or direct participant in the commission of the acts leading to the death;

(vii) To bring home a charge of dowry death, there must be “proximity” or a “live link” between the cruelty and harassment based on dowry demands and the consequential death leading to inference that said conduct was indulged in “soon before” the death;

(viii) The past events of cruelty or harassment, they not having become stale, continue to be relevant for raising the presumption, if the evidence shows continuity of the incriminating conduct proximate enough in terms of time to the unnatural death, even if interspersed by tentative efforts at resolution or compromise ;

(ix) A case of unnatural death of the married woman would not amount to “dowry death”, if it is

shown to have occurred on account of an accident or as a result of acts of commission or omission on the part of a third person, i.e. a person other than the husband or any of his relatives, or for reasons not connected with demands for dowry ; and,

(x) The accused against whom presumption is raised may dispel its effect by showing that he had no hand at all, in the death, and he may do so either by showing that the death was accidental or brought about by another person unconnected with the cruelty or harassment relating to the demands for dowry.”

28. Crucially, in (paras 88, 89 and 93 of) the judgment in the said case it was also observed thus:-

“88. But there could be cases, as one in hand, where some of the accused are not guilty of an offence under Section 302/304 of IPC for they were not participants or vicariously liable for the offence of culpable homicide. Such persons could be prosecuted and convicted for the offence under Section 304B IPC, if the ingredients of the said offence are established and proved against them as also the one who committed the acts constituting culpable homicide. The expressions “death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances” and “soon before her death she was subjected to cruelty or harassment by her husband for, or in connection with, any demand for dowry” have a link and the connection should be live and proximate to establish the offence under Section 304-B IPC. Conversely, it follows that where a married woman who has been subjected to cruelty or harassment on account of dowry is killed or suffers an unnatural death within seven years of marriage under circumstances or causes unrelated to such cruelty or harassment for and in connection with the demand of dowry, the case would not fall within the four corners of section 304-B IPC. For

example, where a married woman suffers an unnatural death in a dacoity, robbery or other similar circumstances, offence under Section 304B IPC is not committed, even when the deceased had been subjected to cruelty or harassment in connection with or for any demand of dowry by husband or relatives, for there is absence or lack of live link and proximate connection between the unnatural death and dowry demand.

89. The above elucidation demonstrates that death under abnormal circumstances would be covered by section 304B IPC only when relatable to or having connection with any demand of dowry by the husband or any relative “soon before” the death and not otherwise. The offence defined in Section 304B IPC is attracted when the death of a woman within seven years of marriage is due to burns or bodily injury or otherwise under normal circumstances and is connected or has contiguity with the demand for dowry and not in cases where there is no connection or link (i.e. causal connect) between the said demand of dowry and the unnatural death. The said legal position expounds the impact and implication of enacting the presumption under Section 113B of the Evidence Act. Where there exists such a connect and live link, the presumption under Section 113-B Evidence Act would have to be dislodged or disproved by the accused.

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93. The expression “otherwise than under normal circumstances” as appearing in the definition clause of Section 304-B IPC casts the net wide. Noticeably, the provision does not deal with the issue as to whether the death was homicidal or otherwise. It proceeds only on two possibilities, one of the death being due to natural causes or the other of the death being unnatural. If the death is due to natural causes, Section 304-B IPC cannot be invoked. If the death is due to burns or bodily injury, it cannot but be unnatural death. Unnatural death may be homicidal, suicidal or accidental. The cases of accidental

deaths must necessarily be excluded from the purview for the simple reason, they would generally have no connection with the cruelty or harassment of the kind required. Similarly, in case, the evidence shows the death to be a case of culpable homicide committed neither by the husband nor by any of his relative, but by a third person having no connection whatsoever with the cruelty or harassment of the deceased woman for or in connection with any demand for dowry, a case for the offence of "dowry death" would not arise as it would stand covered by the more serious offence of culpable homicide."

29. The live and proximate link as has been referred in the said judgment is missing in the present case, the death of Sudha being in all probability on account of accidental fire injuries. The presumption under Section 113-B IPC cannot be raised.

30. For the above reasons, the appeals are partly allowed. The conviction for the offence under Section 120-B IPC and Section 304-B read with Section 120-B IPC are set aside. As already noted, the charge framed was for the offence under Section 498-A read with Section 34 IPC. The trial Judge wrongly returned a finding of guilty, convicting the appellants for the charge under Section 498-A read with Section 120-B IPC. The said directions are modified. The appellants shall stand convicted on the charge under section 498-A read with Section 34 IPC.

31. In above view, the sentence awarded for offence under Section 120-B IPC and Section 304-B read with section 120-B IPC shall stand set aside. The trial Judge had awarded sentence of rigorous imprisonment for three years for offence under Section 120-B IPC refraining from awarding any punishment under Section 498-A IPC.

It will be in the fitness of facts and circumstances that the rigorous imprisonment for three years may be treated as award for the offence under Section 498-A read with Section 34 IPC. Ordered accordingly.

32. The nominal rolls of each of the three appellants, who have survived, show that they had remained in custody, including on account of period of remission earned, for more than three years. In these circumstances, it is clear that they have already served the sentences as have been imposed by the above modification. They consequently need not surrender to custody.

33. The appeal is disposed of in above terms.

R.K.GAUBA, J.

DECEMBER 07, 2018

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