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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.A. 576/2019 & CRL.M.A. 37206/2019

STATE (GNCT OF DELHI)

..... Appellant

Through: Ms. Aashaa Tiwari, APP for the State
with SI Ramavtar, PS Prasad Nagar.

versus

BHASKAR & ORS.

..... Respondents

Through: Mr. Ajay Vikram Singh, Advocate
with Ms. Priyanka Singh and
Mr.Chandra Shekhar, Advocates.

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Date of Decision: 13th January, 2020

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

MANMOHAN, J (Oral):-

1. Present appeal has been filed by the State challenging the judgment dated 13th August, 2018 passed by learned Additional Sessions Judge-04 (Central) Tis Hazari Courts, Delhi in Sessions Case No.28303/2016 arising from FIR No.126/2008 registered with police station Prasad Nagar under Sections 498A/304B/201/34 of the Indian Penal Code (hereinafter referred to as "IPC") whereunder all the respondents i.e. respondent No.1(husband of the deceased) and respondents No.2 and 3 (brothers-in-law of the deceased) had been acquitted on the ground that none of the Sections under which charges had been framed against them for death of Ms. Bhawna @ Pinky,

had been established by the prosecution beyond reasonable doubt.

2. Ms. Aashaa Tiwari, learned APP for the State states that the learned Additional Sessions Judge failed to take into consideration the subsequent opinion/report dated 12th August, 2016 submitted by Dr. Amandeep Kaur, Assistant Professor, Department of Forensic Medicine, Maulana Azad Medical College and Lok Nayak Hospital, New Delhi, wherein she had stated as under:-

“Ques.3. During the FSL examination of other two samples i.e. blood and viscera, FSL, Rohini opined that Aluminium Phosphide is found in the body of the deceased. Kindly opine whether the above mentioned poison is taken orally and otherwise. Also, you are requested to please opine whether any insect bite can cause the above mentioned poison, i.e. Aluminium Phosphide.”

Ans.3. The commonest route of poisoning in case of Aluminium Phosphide is through ingestion of the compound in the form of tablets/powder/solution which is easily available. However, poisoning can occur through inhalation of vapours or through injection of the compound in solution form. Insect bite does not cause Aluminium Phosphide poisoning.”

3. Learned APP points out that the deceased's sister had deposed that when she reached the deceased's house on the date of the incident, she found foul smell coming from her clothes and one bandage was tied on her arm which the deceased's sister-in-law ascribed to a mosquito bite. The sister of the deceased had further stated that the deceased while being removed to the hospital had taken out four fingers and gesticulated that she had been given something in the forearm.

4. Ms. Aashaa Tiwari emphasises that subsequent opinion given by Dr. Amandeep Kaur had established beyond doubt that insect bites do not cause Aluminium Phosphide poisoning.

5. Learned APP submits that the Trial Court also erred while framing the charges on 19th February, 2010 by neglecting to frame an alternate charge against the respondents under Section 302 IPC. In support of her submission, she relies upon the judgment of the Supreme Court in ***Rajbir Alias Raju & Anr. vs. State of Haryana, (2010) 15 SCC 116*** wherein it has been held as under:-

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

6. *Per contra*, Mr. Ajay Vikram Singh, learned counsel for the respondents submits that it is not mandatory to frame an alternate charge of Section 302 IPC in all matters where Section 304B IPC has been invoked. He emphasises that only if there is evidence, whether direct or circumstantial, to support the charge under Section 302 IPC, the Trial Court can and indeed ought to frame a charge of murder under Section 302 IPC. He states that in ***Jasvinder Saini & Ors. Vs. State (Government of NCT of Delhi), (2013) 7 SCC 256*** it was held that the direction issued in ***Rajbir Alias Raju's*** case (supra) was not mandatory.

7. Learned counsel for the respondents states that the testimony of the sister of the deceased-Ms. Bhawna @ Pinky is unreliable as she had admitted in her cross-examination that she had deposed against the respondents at the instance of her mother, brother, police and being sister of the deceased.

8. Mr. Ajay Vikram Singh further submits that the opinion of Dr. Amandeep Kaur is contrary to authoritative medical texts and being of advisory character should be examined by this Court rather than remanding the matter to the Trial Court after so many years. In support of his submission, he relies upon the judgment of the High Court of Gujarat at Ahmedabad in *State of Gujarat vs. Maheshwari Mills & Ors.*, **MANU/GJ/0701/2012** wherein it has been held as under:-

“12. In the case of Ramesh Chandra Agrawal v. Regency Hospital Ltd. and others (supra), the Supreme Court was dealing with an issue relating to expert opinion. The court held as thus:

11) EXPERT OPINION:

The law of evidence is designed to ensure that the court considers only that evidence which will enable it to reach a reliable conclusion. The first and foremost requirement for an expert evidence to be admissible is that it is necessary to hear the expert evidence. The test is that the matter is outside the knowledge and experience of the lay person. Thus, there is a need to hear an expert opinion where there is a medical issue to be settled. The scientific question involved is assumed to be not within the court's knowledge. Thus cases where the science involved, is highly specialized and perhaps even esoteric, the central role of expert cannot be disputed. The other requirements for the admissibility of expert evidence are:

- i) that the expert must be within a recognized field of expertise*
- ii) that the evidence must be based on reliable principles, and*
- iii) that the expert must be qualified in that discipline.*

[See Errors, Medicine and the Law, Alan Merry and Alexander McCall Smith, 2001 ed., Cambridge University Press, p. 178]

12) Section 45 of the Indian Evidence Act speaks of expert evidence. It reads as under:

45. Opinions of experts-When the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of hand writing or finger-impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger impressions, are relevant facts. Such person called experts. Illustrations:

(a) The question is, whether the death of A was caused by poison. The

opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(b) The question is whether A, at the time of doing a certain act, was by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law. The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or knowing that what they do is either wrong or contrary to law, are relevant.

(c) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinion of experts on the question whether the two documents were written by the same person or by different persons are relevant.

13) The importance of the provision has been explained in the case of State of H.P. v. Jai Lal and Ors., [MANU/SC/0557/1999 : (1999) 7 SCC 280]. It is held, that, Section 45 of the Evidence Act which makes opinion of experts admissible lays down, that, when the court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting, or finger impressions are relevant facts. Therefore, in order to bring the evidence of a witness as that of an expert it has to be shown that he has made a special study of the subject or acquired a special experience therein or in other words that he is skilled and has adequate knowledge of the subject.

14) It is not the province of the expert to act as Judge or Jury. It is stated in Titli v. Jones (MANU/UP/0107/1933 : AIR 1934 All 237) that the real function of the expert is to put before the court all the materials, together with reasons which induce him to come to the conclusion, so that the court, although not an expert, may form its own judgment by its own observation of those materials.

15) An expert is not a witness of fact and his evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent

judgment by the application of these criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions. (See Malay Kumar Ganguly vs. Dr. Sukumar Mukherjee and Others) [Criminal Appeal Nos. 1191-1194 of 2005 alongwith Civil Appeal No. 1727 of 2007, decided on 7.8.2009].

16) In the case of State of Maharashtra v. Damu s/o Gopinath Shinde and others., [MANU/SC/0299/2000 : AIR 2000 SC 1691 at page 1700], it has been laid down that without examining the expert as a witness in Court, no reliance can be placed on an opinion alone. In this regard, it has been observed in The State (Delhi Administration) v. Pali Ram, [MANU/SC/0189/1978 : AIR 1979 SC 14] that "no expert would claim today that he could be absolutely sure that his opinion was correct, expert depends to a great extent upon the materials put before him and the nature of question put to him."

17) In the Article "Relevancy of Expert's Opinion" it has been opined that the value of expert opinion rest on the facts on which it is based and his competency for forming a reliable opinion. The evidentiary value of the opinion of expert depends on the facts upon which it is based and also the validity of the process by which the conclusion is reached. Thus the idea that is proposed in its crux means that the importance of an opinion is decided on the basis of the credibility of the expert and the relevant facts supporting the opinion so that its accuracy can be cross checked. Therefore, the emphasis has been on the data on basis of which opinion is formed. The same is clear from following inference: "Mere assertion without mentioning the data or basis is not evidence, even if it comes from expert. Where the experts give no real data in support of their opinion, the evidence even though admissible, may be excluded from consideration as affording no assistance in arriving at the correct value.

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15. On the other hand, the defence had also produced an analysis report submitted by ATIRA and has examined an expert witness. The report of ATIRA reveals that the composition of the blended fabric is as per the markings stamped on the face plaits of the cloth. It has been argued by the learned Additional Public Prosecutor that the ATIRA is not a notified

Laboratory under the notification issued by the Textile Commissioner. Though, no evidence has been brought on record to indicate that the ATIRA has not been notified as a laboratory by the Textile Commissioner, there is no evidence to the contrary also. However, even if much credence is not attributed to the report of the ATIRA, it is for the prosecution to prove its case beyond reasonable doubt by leading cogent and convincing reasons. In the present case, except for the laboratory report given by the Central Testing Laboratory, Coimbatore, which merely states the percentage composition of the blended fabric, there is absolutely no material in support of the conclusions arrived at by the expert, including the method of analysis adopted by the expert. Under the circumstances, by mere dint of the fact that Central Testing Laboratory is a laboratory notified by the Textile Commissioner under the notification dated 7th March, 1988, the report submitted by the said laboratory which merely states the percentage of Polyester and Cotton in the sample cloth without anything more, cannot be placed at so high a pedestal so as to base a conviction thereon. As held by the Supreme Court in the decision cited above, an expert is not a witness of fact and his evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of these criteria to the facts proved by the evidence of the case. In the present case, apart from the fact that no expert has been examined by the prosecution, the report submitted by the Central Testing Laboratory does not contain the material together with the reasons which induced the expert to come to the conclusion on the basis of which the Court may form its own judgment by its own observation of those materials. Under the circumstances, no reliance can be placed on such report which does not even mention the nature of the tests which were carried out for the purpose of testing the composition of the blended fabric. As noticed earlier, the report of the Central Testing Laboratory forms the fulcrum of the prosecution case, on the basis of which the prosecution seeks an order of conviction against the accused. As held by the Supreme Court in the case of Ramesh Chandra Agrawal (supra), where the experts give no real data in support of their opinion, the evidence even though admissible, may be excluded from consideration as affording no assistance in arriving at the correct value. In the premises aforesaid, in the light of the fact that this court has found that the report cannot be relied upon without any supporting evidence to show as to how the expert has come to the conclusion regarding the percentage of Polyester and Cotton contained in the sample cloth, evidently the prosecution has failed to prove its case against the accused beyond reasonable doubt.”

9. Learned counsel for the respondents further contends that if Aluminium Phosphide is given by injection, it should have been found in blood and not in the stomach of the deceased. He also states that there is no evidence on record to show that the respondents had administered any injection to the deceased.

10. In rejoinder, learned APP for the State points out that the Division Bench of this Court in *Sanjay Singh vs. State; Crl.A.No.156/2000 dated 28th May, 2015*, in similar circumstances, had remanded the matter to the Trial Court for framing of an additional charge after many years. The relevant portion of the said judgment is reproduced hereinbelow:-

“7. In view of the aforesaid position, the impugned judgment convicting the appellant Sanjay Singh for the offence under Section 304-B IPC on account of unnatural death of his wife Suman when the original charge was only under Section 302 IPC, cannot be sustained and to this extent, the appeal of Sanjay Singh has to be allowed.

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11. Learned counsel for the appellant Sanjay Singh, however, submitted that this is an old case and, therefore, order of remit should not be passed. It was highlighted that appellant has already suffered incarceration of about six years, five months and seven days and has also earned remission of 11 month and 16 days as per the nominal roll dated 23rd January, 2004. The learned Addl. Public Prosecutor has, however, opposed the said submission referring to the facts, which he claims are gross and extreme. Our attention was specifically drawn to testimonies of several prosecution witnesses.

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13. We reiterate that we have not made any pronouncement or expressed our findings on merits on the said allegations. It is noticeable that in the present case the charge-sheet was filed in the year 1997. The charge-sheet was under Sections 302, 304B and

498A IPC. However, the charge was framed only under Sections 498A and 302 IPC in terms of order dated 13th May, 1998, passed by the Additional Sessions Judge. Thus, there was a lapse on the part of the Additional Sessions Judge in not framing charge in alternative under Section 304-B IPC, though the charge-sheet had invoked the said section.

14. On the question, whether there should be fresh de novo trial or whether proceedings should begin from the stage of recording of statement of the appellant Sanjay under section 313 Cr.P.C. we are inclined to follow the dictum and the directions given by the Supreme Court in the case of Shamnsaheb M. Multtani (supra), wherein, it has been directed that the trial would begin from the stage of recording of statement under Section 313 Cr.P.C. One of the reasons why we have held and given the said direction, is that charge had also been framed under Section 498A IPC. No doubt, Section 498A is wider and includes mental cruelty in addition to demand for dowry, but when we read the evidence relied upon by the prosecution and the cross-examination, it is apparent that allegations with regard to demand of dowry was a subject matter of evidence-in-chief as well as cross-examination. It would not be appropriate to direct recording of fresh evidence in the said situation. As noticed above, in the case of Shamnsaheb M. Multtani (supra) also, the Supreme Court had not directed recording of entire evidence afresh.

15. In view of the aforesaid discussion, the Criminal Appeal No.156/2000, filed by appellant Sanjay has to be allowed but with an order of remit/remand of fresh proceedings from the stage of recording of statement of the appellant Sanjay under Section 313 Cr.P.C.”

11. Having heard learned counsel for the parties, this Court finds that in the present case the deceased has died due to Aluminium Phosphide poisoning. The said poison was found in the blood and stomach of the deceased-Ms. Bhawna @ Pinky.

12. However, the Trial Court has acquitted the respondents of the charge framed under Section 304B IPC primarily on the ground that Doctor Amit Sharma (PW-12) had deposed that Aluminium Phosphide will not act if given by injection.

13. From the Trial Court judgment, it is apparent that though Dr. Amandeep Kaur, Assistant Professor, Department of Forensic Medicine, Maulana Azad Medical College and Lok Nayak Hospital, New Delhi vide her report dated 12th August, 2016 had opined that “*death in this case was due to Aluminium Phosphide poisoning*” and that the said “*poisoning can occur..... through injection of the compound in solution form*” and the said opinion had been brought on record after furnishing a copy to the respondents, yet the same was not taken into consideration by the Trial Court.

14. While it is true that the opinions of Dr. Amit Sharma (PW-12) and Dr. Amandeep Kaur are advisory and contradictory, yet the Trial Court should have examined both the opinions and given reasons as to why it was accepting one opinion and rejecting the other.

15. Further, this Court is of the view that in the present appeal, it cannot examine as to whether the opinion of Dr. Amandeep Kaur is contrary to medical texts as firstly the said submission has not been examined by the Trial Court. Moreover, as no alternate charge under Section 302 IPC had been framed, this Court if it were to reject the submission of learned counsel for respondents, would not be able to carry the matter to its legal conclusion.

16. Consequently, this Court in exercise of its power under Section 464(2) of the Code of Criminal Procedure (hereinafter referred to as “Cr.P.C”). remands the case back to the Trial Court as there has been an

omission on the part of Trial Court to frame charge and such omission has resulted in failure of justice.

17. Accordingly, the impugned judgment is set aside and the matter is remanded back to the Trial Court for framing of an alternate charge under Section 302 IPC against the accused persons. The accused persons will be given an opportunity to cross-examine Dr. Amandeep Kaur and to lead additional evidence in defence, if they so desire. The statement of the accused under Section 313 Cr.P.C. shall also be recorded afresh.

18. We clarify that we have not touched upon the merits of the case. The rights and contentions of all the parties are left open. Needless to say, the Trial Court shall arrive at its own conclusion without being influenced by any observations made by this Court. The parties are directed to appear before the District Judge (Central) on 18th February, 2020 for assigning of the present case to an appropriate Court. With these directions, the present appeal and pending application stand disposed of.

MANMOHAN, J

SANGITA DHINGRA SEHGAL, J

**JANUARY 13, 2020
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