

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

CRA 323 of 2015

Satish Chandra Pandit @ Sisir Pandit & Ors.

-Vs-

The State of West Bengal

For the Appellants: Mr. Sandipan Ganguly, Sr. Adv.,
Mrs. M. Mukherjee,
Mr. Suman Chakraborty,
Mr. Suryadipta Bairagya.

For the State: Mr. Sukanya Bhattacharyya,
Mr. M. Firaj Ahmed Begg.

Heard on: March 22, 2021.

Judgment on: June 14, 2021.

BIBEK CHAUDHURI, J. : –

1. The appellants being aggrieved against the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Kalyani, Nadia for offence punishable under Sections 498A/34 of the Indian Penal Code and under Sections 304B/34 of the Indian Penal Code have preferred the instant appeal.

2. One Rasmita Ghosh, since deceased had love affair with one Rabi Sashi Pandit during their college days. In the month of May, 2008 Rasmita married Rabi Sashi against the consent and wish of her parents. After marriage both Rasmita and Rabi Sashi used to live at the paternal home of Rabi Sashi. On 27th September, 2009 one Hitendranath Ghosh, father of Rasmita lodged a written complaint to the Officer-in-Charge Chakdaha Police Station stating, inter alia, that after the marriage, Rasmita was mentally and physically tortured by her parents-in-law and sister-in-law on demand of dowry. Whenever she visited her paternal home she used to make such complain to her parents. On 26th September, 2009 at about 5.15 pm the defacto complainant received a phone call from one Pranab Banerjee and came to know that his daughter had met with an accident and was admitted to JNM Hospital at Kalyani. Immediately he rushed to the hospital and found his daughter severely burnt. On being asked, she told that her father-in-law, mother-in-law and sister-in-law poured kerosene oil on her body at about 2.30 pm from a lamp and set her in fire intending to kill her. It was also stated in the FIR that when she was taken to hospital, her matrimonial relations forced her to make a false statement before the Medical Officer that she caught fire accidentally when a kerosene lamp tumbled on a table. On 27th September, 2009 at about 1.30 am she succumbed to her injuries.

3. On the basis of the said complaint police recorded formal FIR being Chakdaha P.S Case No.534 of 2009 dated 27th September, 2009 under Section 498A/302/34 IPC and took up the case for investigation.

4. On completion of investigation, police submitted charge-sheet against the appellants under Section 498A/302/34 of the Indian Penal Code.

5. The case was transferred to the Court of the learned Additional Sessions Judge, Fast Track, 2nd Court at Kalyani for trial. The learned trial judge framed charge against the appellants under Section 498A/34 and Section 304B/34 of the Indian Penal Code and alternatively under Section 302/34 of the Indian Penal Code.

6. At the time of trial, accused persons/appellants took specific defence that on 26th September, 2009, the husband of the deceased was repairing a C.D player with the help of an electric shouldering iron. At about 2.30pm, there was loadshading and a kerosene lamp was lit. Suddenly the said lamp tumbled on a table and kerosene poured on hot shouldering iron causing flame. Rasmita caught fire accidentally. Her husband tried to save her and douse fire her body hugging her with clothes. He also received 60 percent burn injury. Both of them were taken to hospital and admitted. Rasmita died of burn injuries and her husband was discharged from the hospital after about three months.

7. Learned trial judge examined the witnesses on behalf of the prosecution as per the charge sheet and defence and on conclusion of trial, held the accused person guilty and convicted and sentenced them accordingly.

8. Challenging the said judgment and order of conviction and sentence instant appeal is preferred.

9. It is found from the lower court record that in order to establish the charge, prosecution examined as many as ten witnesses. Amongst them PW1 and PW3 are the parents of the deceased. PW2, PW5 and PW4 are the paternal uncles and maternal uncle respectively of the deceased. PW6 held inquest over the dead body of the deceased. PW7 is a constable of police. PW9 is the Investigating Officer. PW8 and PW10 are the Medical Officer and autopsy surgeon respectively.

10. In support of the defence the husband of the deceased, one Pranab Kanti Banerjee, a neighbour of the appellants and two doctors were examined as DW1 - DW4 respectively.

11. Mr. Sandipan Ganguly, learned Senior Counsel appearing on behalf of the appellants at the outset draws my attention to the impugned judgment and submits that the learned trial judge held the appellants guilty for committing offence under Sections 498A/304B of the Indian Penal Code on the ground that she received burn injury on her body within one year of marriage. Secondly, she was subjected to mental and physical torture on demand of dowry by the appellants during her life time. It is also held by the trial judge relying upon a decision of the Supreme Court in the case of **Trimukh Maroti Kirkan vs. State Of Maharashtra** reported in **(2006) 10 SCC 681**, that the demand of dowry is so secretly made that it becomes very difficult for the prosecution to have independent and disinterested witness . But it does not mean that a crime committed in secrecy or inside the houses should go unpunished. Thirdly, the learned judge held that the specific plea of the defence was

that the deceased caught fire accidentally when a kerosene lamp fell on an electric shouldering iron causing outbreak of flames.

12. According to Mr. Ganguly all the above circumstances were not proved during trial on the basis of evidence adduced by the witnesses on behalf of the prosecution. The learned trial judge held that the appellants used to demand dowry from the deceased absolutely without any evidence on record only on the ground that the deceased had met with an unnatural death within one and half years of her marriage.

13. In order to substantiate his argument, Mr. Ganguly takes me to the evidence of PW1 to PW5 who are the parents and close relations of the deceased. From the cross examination of PW1, father of deceased Rasmita it is found that Rasmita and Rabi Sashi fell in love while they were studying in college. The father of Rabi Sashi wanted to give marriage of his son with Rasmita but PW1 did not agree to such proposal because at the relevant point of time Rasmita and Rabi Sashi were unemployed. It is also gathered from his cross examination that their marriage was arranged by the father-in-law of Rasmita. Defacto complainant did not lodge any complaint alleging, inter alia, that her daughter was treated with cruelty by the accused persons during his daughter life time. Except on omnibus allegation that the deceased was tortured and harassed by the appellants during her life time on demand of dowry, none of the witness could state specifically about the nature and manner of torture, or, in other words how the deceased was tortured and harassed by the accused persons. According to Mr. Ganguly, mere use of the words

harassed and torture cannot substantiate allegation that the victim was treated with “cruelty” and death of the deceased was caused due to demand of dowry.

14. The story of harassment and torture without any details on demand of dowry was narrated only by the witnesses closely related with the deceased. However, from their evidence it is found that the parents of the deceased and other related witnesses never visited the maternal home of the deceased after her marriage. If a daughter of a person is tortured physically by her matrimonial relation immediately after marriage on illegal demand of dowry, it is very natural for the parents to rush to her matrimonial home to settle the dispute. However, they never visited the matrimonial home of the deceased as they could not accept their daughter's marriage with Rabi Sashi (DW1). According to Mr. Ganguly this shows the intensity of discord that had arisen between two families, because the deceased had married Rabi Sashi against the wishes of her parents. Practically the father of the deceased (PW1) cut off all relation with her daughter after her marriage. He did not know that her daughter applied for School Service Commission Examination and the expenses for such examination were incurred by the appellant No.1. Under such circumstances, when the relation between two families was never cordial, if not inimical, examination of independent witnesses to prove charge under Section 498A IPC was absolutely necessary.

15. The learned Senior Counsel on behalf of the appellants further submits that the evidence of PW4 and PW5 are in the nature of hearsay.

PW5 even did not meet the deceased after her marriage. Therefore, they had no personal knowledge about the married life of the deceased and Rabi Sashi, save and except what they heard from her parents. According to Mr. Ganguly during the lifetime of the deceased none of her paternal relations made any complaint of torture allegedly inflicted upon her on demand of dowry. The defacto complainant stated that the deceased used to make such complain to him and her mother over phone. However they could not state the phone number of the deceased in their evidence. The learned court below gave undue reliance on purported oral dying declaration of the deceased where she stated that the appellants poured kerosene oil on her body from a kerosene lamp and ablazed her. It is contended by Mr. Ganguly placing reliance upon the decision of the Supreme Court in **Kantilal Martaji Pandor vs. State of Gujarat & Ors** reported in **2013 (8) SCC 781** that a dying declaration is admissible only under Section 32(1) of the Evidence Act as to the cause of death and the said evidence cannot be used to prove offence under Section 498A of the IPC. In **Bairon Singh vs. State of M.P** reported in **(2009) 13 SCC 80** it is held by the Supreme Court that a statement of a dead person is admissible in law if the statement is as to cause of death or as to any circumstance of transaction which resulted in her death, in a case in which cause of death comes into question. Such evidence admissible under Section 32(1) of the Evidence Act can not be evidence in law to establish an offence under Section 498A of the Indian Penal Code because

under Section 498A simpliciter, question of death is not and cannot be an issue for consideration.

16. It is further submitted by Mr. Ganguly that there is absolutely no evidence to hold the appellants guilty for committing offence under Section 304B of the Indian Penal Code. In order to bring him charge under Section 304B, the prosecution is under obligation to prove amongst other ingredient that the deceased must have been subjected to cruelty or harassment by her husband or any relative of her husband; secondly such cruelty or harassment should be for or in connections with demand of dowry; thirdly, the deceased was subjected to cruelty soon before her death by her husband or any other relative in connection with demand of dowry. In the FIR the defacto complainant stated that the deceased was subjected to mental and physical torture by the appellants for dowry amounting to more than one lakh and ornaments. However in his evidence the defacto complainant (PW1) and other related witnesses never felt it necessary to describe the exact conduct of the appellants which according to them amounted to harassment or torture. In support of his submission, Mr. Ganguly refers to the case of **Amar Singh vs. State of Rajasthan** reported in **(2010) 9 SCC 64**. In the said decision the Hon'ble Supreme Court clearly observed that parrot like statement of the witnesses to the effect that the deceased was '**harassed**' and '**tortured**' on demand of dowry is not sufficient to prove a charge under Section 498A and 304B of the Indian Penal Code. The witnesses are under obligation to describe exact conduct of the accused which according to

them, amounted to harassment or torture on demand of dowry. Exact conduct of the accused persons for which the deceased felt humiliated or tortured or harassed must be proved by the prosecution. In the instant case there is absolutely no evidence led by the witnesses on behalf of prosecution stating the conduct, and the manner and nature of harassment and torture allegedly for dowry for which the victim had met with an unnatural death.

17. It is pointed out by the learned Senior Counsel for the appellant next that according to the prosecution, the deceased made two dying declarations. The first dying declaration was recorded by the Medical Officer who initially treated her in the hospital where she stated that she received burn injury accidentally when kerosene oil fell from a lamp over hot shouldering iron. The deceased was brought to the hospital by one Pranab Banerjee and Madan Sikdar being the neighbours of the appellants. It is alleged by the parents and other related witnesses of the deceased that the deceased was threatened by the accused persons to tell that she received burn injury accidentally, failing which she would not get any medical treatment. Mr. Ganguly has rightly pointed out the accused persons did not accompany the deceased to hospital. She was taken by the neighbours of the appellants to hospital. Therefore, the deceased have no scope of being tutored by the appellants. It is alleged by the prosecution that after PW1 and other paternal relations of the deceased saw her in the hospital after considerable period of time from when she received her burn injury, the deceased allegedly told them that the

appellants poured kerosene oil on her body and set her in fire at about 2.30 pm on the date of occurrence. Therefore, there are two contradictory dying declarations, one recorded by the Medical Officer immediately after the victim was brought to the hospital in course of her treatment and another oral dying declaration made by the deceased at least five to six hours later to her parents. Mr. Ganguly repeatedly draws my attention to the evidence of PW8, Dr. Nirmalendu Kanjilal who stated that the patient was brought to the hospital with 80% burn injury. Her condition was very bad and it was gradually deteriorating. During cross examination she also stated that condition of the patient was such that she was not able to complete sentence after sentence. If the condition of the patient with severe burn injury was such that at the time of initial medical examination she could not utter or complete sentences, it is very hard to hold that she was mentally fit and oriented to make any dying declaration to her parents after considerable lapse of time. The parents and other relatives of the deceased met her in the hospital after about 5/6 hours from the actual time of incident. At that time her condition would obviously further deteriorate and making oral statement as to the cause of death to her parents was clouded with serious doubt. In support of his argument Mr. Ganguly refers to the following decisions:

(a) Sharda vs. State of Rajasthan : (2010) 2 SCC 85

**(b) Parimesh Tapali vs. State of West Bengal : (2014) 5 CHN
(CAL) 483**

(c) **Allauddin Momin vs. State of West Bengal : (2015) 2 CHN (CAL) 122.**

18. In **Sharda** (supra) the victim made 3 contradictory dying declarations. First two dying declarations was recorded in presence of doctor. The said doctor deposed during trial of the case categorically stating that the deceased was mentally alert and in fit condition to give her statement of her own full will and accord. In the said two dying declarations the deceased made statement that she had sustained burn injuries accidentally while cooking. After a gap of three days another dying declaration was recorded by the Magistrate where the deceased alleged that her mother-in-law had poured kerosene oil in her body and set her in fire. The Supreme Court under the above factual background held in paragraph 22 as hereunder:-

“22. Cumulative effect of the aforesaid leads to an irresistible conclusion that Exh. P-18 is not sufficient to hold the appellant guilty of commission of offence under Section 302 of the IPC. It neither inspires confidence nor is wholly trustworthy to sustain the conviction of the appellant. It was an after-thought and has been got prepared after the deceased appears to have been tutored to say so by her parents. In the light of this, it has to be completely ignored which we accordingly do so”

On the scope of evidentiary value of dying declaration, the Supreme Court observed as follows:

“25. Though a dying declaration is entitled and is still recognized by law to be given greater weightage but it has also to be kept in

mind that accused had no chance of cross-examination. Such a right of cross- examination is essential for eliciting the truth as an obligation of oath. This is the reason, generally, the court insists that the dying declaration should be such which inspires full confidence of the court of its correctness. The court has to be on guard that such statement of deceased was not as a result of either tutoring, prompting or product of imagination. The court must be further satisfied that deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the court is satisfied that the aforesaid requirement and also to the fact that declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration.

26. It is not an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. In this regard, we may profitably quote the following para from State (Delhi Admn.) Vs Laxman Kumar : (SCC pp. 498-99, para 40)

"40. We have also come to the conclusion that the High Court failed to take into account one material aspect while appreciating the evidence of the prosecution witnesses. It is a fact that Sudha had been burnt and according to the medical opinion that was to the extent of 70%. As the evidence shows, Sudha was in her senses and was capable of talking at the time when she was being removed to the hospital or even after she had been admitted as an indoor patient. The two sisters or their respective husbands had no apprehension that Sudha would not live. In case Sudha came round, she was to have lived in the family of her husband. No one interested in the welfare of Sudha was, therefore, prepared to make a statement which might prejudice the accused persons and lead to the straining of relationship in an irreparable way. Therefore, the silence or

avoidance to make a true disclosure about the cause of fire particularly so long as Sudha was alive, cannot be over-emphasised an adverse inference drawn by the High Court from the conduct of the sisters was indeed not warranted in the facts of the case.”

19. In **Parimesh Tapali** (supra) the Division Bench of this Court held that in case of multiple dying declaration which are contradictory in nature it is not prudent to accept the dying declaration that was made by the deceased after considerable period of time from the occurrence when there was scope for the deceased to meet her parents and subsequent dying declaration might be a product of tutoring.

20. In the instant case it is ascertained from the evidence PW8 that the deceased stated to him that she caught fire accidentally at the time of her medical treatment at the hospital. Medical Officer recorded the said statement in the bed head ticket. Subsequently the parents of the deceased and other relatives went to hospital to see her. During their evidence they stated that the victim made oral dying declaration before them to the effect that the appellants poured kerosene oil on her body and set her in fire. Thus there are two contradictory dying declarations, one recorded by the doctor and another stated by the related and interested witnesses.

21. According to Mr. Ganguly, oral dying declaration is a weak piece of evidence and its credibility is always doubtful. In support of his contention he refers to a decision of the Supreme Court in **Waikhom Yaima Singh vs. State of Manipur** reported in **(2011) 13 SCC 125**.

22. Mr. Ganguly further submits that during trial of the case defence has examined four witnesses DW1 Rabi Sashi Pandi is the husband of the deceased, DW2 Pranab Kanti Banerjee is a neighbor of Rabi Sashi, PW3 and PW4 are the Medical Officers.

23. Specific case of the defence is that on the date of occurrence the husband of the deceased was with the help of shouldering iron. There was no electricity and a table lamp was burning. Suddenly the said kerosene lamp tumbled on the table and the lower portion of saree of the deceased caught fire. The deceased tried to douse the fire bending downward. Immediately upper portion of her saree caught fire. Seeing Rasmita burning, Rabi Sashi took all garments from 'alna' and hugged her with the cloths to douse fire from her body. Both of them raised alarm. Hearing their cry the parents and sister of Rabi Sashi rushed to their rooms. Rabi Sashi also received 60% burn injury and he was admitted to the same hospital for about three months. After being discharged from the hospital, DW1 was medically treated by PW4. From his cross examination it is ascertained that Rasmita was taken to hospital by a neighbor and brother in law of appellant no.1.

24. DW1 Pranab Kanti Banerjee is one of the neighbours who took Rasmita to the hospital after she received burn injury. Family members of Rabi Sashi took him to the hospital. It is ascertained from the evidence of DW2 that he took the wife of Rabi Sashi to the female ward of the hospital. At that point of time, she requested him to call her parents. Accordingly, DW2 called her parents over phone. She also requested DW2

to look after her husband who also received burn injury. DW1 was examined by Dr. Nirmalendu Kanjilal (DW3). It is found from his evidence that DW1 Rabi Sashi suffered 60% burn injury. He was admitted to hospital on 26th September, 2009 and discharged on 26th December, 2009 on request. As per the statement of the patient he received burn injury while trying to save his wife from burning. The treatment sheets along with bed head ticket of Rabi Sashi are collectively marked as Exhibit-A during trial of the case. PW4 is another Medical Officer attached to Mercy Hospital as plastic surgeon at the relevant point of time. After Rabi Sashi was discharged from hospital, DW4 treated her medically for quite long time.

25. According to Mr. Ganguly credibility of defence witness is similar to that of a witness on behalf of the prosecution. From the evidence DW1 it is clearly found that the deceased received injury accidentally. It is also found that DW1 being the husband of the deceased tried his best to douse fire from the body of his wife and in that process he also received 60% burn injury. If a married wife is tortured and harassed by the parents-in-law and sister-in-law on demand of dowry the husband cannot in all probability be a mute spectator of such incident. Either he will support or protest. It is important to note that the defacto complainant or any other witnesses on behalf of the prosecution did not make any allegation against the husband of the deceased in course of their evidence. On the contrary the parents of Rabi Sashi gave marriage of his son with Rasmita in the absence of her parents. During cross examination of DW1, it is

specifically taken by the prosecution that after marriage there was no relation between the families. Thus, the parents of Rasmita severed all connection and relation with their daughter. There was no allegation that Rasmita was treated with cruelty by the appellants during her lifetime. Under such backdrop, there is no reason to disbelieve defence version of the incident.

26. Furthermore, as pointed out by Mr. Ganguly DW2 stated in his evidence that the parents and sister of Rabi Sashi did not accompany Rasmita to the hospital. Therefore, there was no occasion to tutor or threatened Rasmita to give a false dying declaration to the Medical Officer when he initially treated her.

27. Mr. Ganguly concludes pointing out that as to the death of Rasmita two contradictory stories are available. One, narrated by the prosecution to the effect that the deceased was tortured and harassed during her life time by the appellants and finally on 26th September, 2009, they poured kerosene oil on her body and ablazed her. On the contrary the defence version is that Rasmita caught fire accidentally when a kerosene lamp tumbled on the table in their room on the first floor. It is submitted by Mr. Ganguly that when two views are forthcoming on the 'circumstances of transaction which resulted in death' of Rasmita, the view favourable to the defence should be accepted. On this score, he relies on a decision of the Supreme Court in the case of **Kali Ram vs. State of Himachal Pradesh** reported in **(1973) 2 SCC 808**.

28. Ms. Sukanya Bhattacharyya, learned P.P-in-Charge on the other hand commences her submission saying that in most of the matrimonial cases the incidents happening between the married lady and her matrimonial relations are only known to the close relatives of the lady and her husband. Therefore, it is not the rule of evidence as well as prudence to reject the testimony of close relatives of deceased married lady on the ground of interestedness. On the other hand, their evidence ought to be considered as the best evidence because they are the persons who naturally come to know about the incidents that took place inside the closed door of the matrimonial home of a married lady. If a woman, after her marriage is tortured, humiliated and harassed on demand of dowry, the lady will naturally narrate such incidents to her parents and other close relations. The learned P.P invites this Court to consider the evidence of PW1 to PW5 keeping in mind the above proposition of appreciation of evidence adduced by related witnesses in a case under Section 498A/304B of the Indian Penal Code.

29. First, she submits that marriage of the deceased was solemnised with DW1 Rabi Sashi Pandit in the month of May 2008. She received burn injury on her matrimonial home on 26th September, 2009 at 2.30 pm and on the next day at about 1.30 am she succumbed to her injuries. Thus, victim Rasmita had met with an unnatural death within one and half years of marriage. It is found from the evidence on record that the parents of the victim was informed by a neighbour of the locality where the matrimonial home of Rasmita situates. She has raised a question as to

why the appellants did not inform the incident to the father of the deceased immediately after the occurrence. Had it been a case of accidental burn and the appellants had no role in such incident, the natural and probable cause of action for them was to inform the parents of Rasmita immediately after the occurrence but they remained conspicuously silent. Only when Rasmita requested DW1 Pranab Kumar Banerjee to call her parents, he informed the matter to the defacto complainant over telephone.

30. It is further submitted by the learned P.P that marriage of Rasmita with Rabi Sashi was the result of a love affair. Initially the parents of Rasmita did not agree to such marriage. There might be dispute between the two families over the said marriage. But in course of time, the defacto complainant being the father of the deceased and his wife and other relatives came to talking terms with Rasmita. PW1 stated that Rasmita told over telephone that she was being tortured by her father-in-law, mother-in-law and sister-in-law on demand of dowry of Rs.1 lakh and ornaments. Said fact cannot be taken to be false and concocted only for the purpose of this case. PW1 further stated that Rasmita came to his house lastly on 12th September, 2009 and stated to him and his mother that the appellants used to torture her both mentally and physically on demand of dowry. Rasmita had met with an unnatural death only after 14 days of her last visit to her paternal home. PW1 to PW5 who are close paternal relations of the deceased corroborated the evidence of each other as to the demand of dowry and torture and harassment inflicted upon her

by the appellants, when she refused to ask her father to pay dowry as per their demand. Considering such evidence on record the learned trial court rightly held the accused person guilty for committing offence under Section 498A/34 IPC and convicted and sentenced them accordingly. There is no reason to disbelieve the evidence of PW1 to PW5 and hence no occasion to interfere with the judgment passed by the trial court. She also submits that she cannot dispute the proposition of law that a dying declaration under Section 32(1) of the Evidence Act cannot be used for convicting the accused under Section 498A/34 of the Indian Penal Code. But at the same time, it is open for the court to consider that the prosecution was able to prove that the accused persons continuously tortured the victim on demand of dowry and ultimately caused her death in unnatural circumstances.

31. With regard to charge under Section 304B/34 of the IPC, it is submitted by the learned P.P-in-Charge that the victim died in unnatural circumstances within one and half years of marriage and soon before her death she was subjected to physical and mental torture on demand of dowry. According to the learned P.P-in-Charge, the prosecution, in the instant case was able to prove that the victim was subjected to cruelty or harassment by the appellants for or in connection with demand of dowry, soon before her death. The term “soon before” is not synonymous with the term “immediately before”. The said term would normally imply that the gap should not be large between the cruelty or harassment and the death in question, i.e there must be existence of proximity and live link between

the two. The determination of the period which can come within the term “soon before” is a matter for the court, dependent upon the facts and circumstances of the case. In the instant case from the evidence of PW1 it is ascertained that the deceased went to matrimonial home lastly on 12th September, 2009 and she had met with unnatural death within 14 days of her last visit to her paternal home. On 12.09.2009 she also stated to her parents and other paternal relations that she was harassed and tortured by the appellants on demand of dowry. Therefore, the learned trial court rightly applied the presumption of law contained in Section 113B of the Indian Evidence Act.

32. For the reasons stated above the learned P.P-in-Charge submits that there is no scope of interference and the instant appeal should fail.

33. On independent perusal of evidence on record the following undisputed factual positions are found:-

- i) Married of Rasmita and Rabi Sashi was the result of love affairs between them, solemnised in the month of May 2008.
- ii) Rasmita received burn injury at her matrimonial home on 26th September, 2009 and she died on 27th September, 2009.
- iii) The parents of Rasmita did not agree with their daughter would marry Rabi Sashi as he was unemployed.

- iv) Marriage of the said two person was arranged singularly by the father of the Rabi Sashi.
- v) The parents or any other paternal relation of Rasmita did not attend the said marriage.
- vi) Even after marriage admittedly PW1, father of the deceased or any other paternal relation of the deceased never visited her matrimonial home on any occasion.
- vii) Parents of Rasmita had no talking terms with appellants.
- viii) It is also admitted by PW1 that Rabi Sashi used to love his daughter very much.

34. All such facts clearly suggest that the parents of the deceased did not maintain any relation with the deceased after her marriage with Rabi Sashi. I have already recorded that Rabi Sashi was examined as Dw1. In his cross examination he stated there was no connection between two families after their marriage. Except PW1 and PW3 (mother of Rasmita) other three witnesses on behalf of the prosecution heard about the alleged torture and harassment allegedly inflicted upon Rasmita by the appellants from PW1 and PW3 and they had no direct knowledge about the incident.

35. It is stated by PW1 that he first came to know about the torture and harassment on her daughter by the appellants on demand of dowry in the month of March, 2009. In spite of getting such information, the defacto complainant did not take any legal step to save her daughter from alleged cruel treatment inflicted upon her by the appellant.

36. In **Kantilal Martaji Pandor** (supra) a married lady committed suicide. Prior to her death she wrote a letter to police station stating, inter alia, that her husband had starved deceased of food when she was pregnant, spent her salary on his own family, besides subjecting her to other mental cruelty. On such fact the Supreme Court was pleased to hold that the prosecution failed to prove the charge under Section 498A of the Indian Penal Code on the ground that the incident of cruelty and torture as narrated by the deceased in her letter to police was not the cause of suicide.

37. In the instant case PW1 and PW3 stated that their daughter told them that she was subjected to cruelty on demand of dowry. The evidence of other witnesses (PW2, PW4 and PW5) are in the nature of hearsay evidence because they have no direct knowledge about the incident and they deposed on the basis of what they heard from the parents of the deceased.

38. In **Inderpal vs. State of MP : (2001) 10 SCC 736** the Supreme Court held as follows:-

“4. We will consider at first the contention as to whether there is any evidence against the appellant which can be used against him for entering upon a finding that he subjected Damyanti to cruelty as contemplated in Section 498-A IPC. PW1 father of the deceased and PW8 mother of the deceased have stated that Damyanti had complained to them of her plight in the house of her husband and particularly about the conduct of the appellant. PW4 sister of the deceased and PW5 a relative of the deceased have also spoken more or less on

the same line. Exhibit P-7 and Exhibit P-8 are letters said to have been written by Damyanti. In those two letters reference has been made to her life in the house of her in-laws and in one of the letters she said that her husband had subjected her to beating.

5. Apart from the statement attributed to the deceased none of the witnesses had spoken of anything which they had seen directly. The question is whether the statements attributed to the deceased could be used as evidence in this case including the contents of Exhibits P-7 and P-8 (letters).

6. Before deciding that question we have to point out that the High Court came to a conclusion that the allegation that she committed suicide was not substantiated. A dying declaration was recorded by the Executive Magistrate in which the deceased had stated that she got burns accidentally from a stove. If that be so, death could not be the result of either any harassment or any cruelty which she was subjected to. In this context we may point out that the State has not challenged the finding of the High Court that death of Damyanti was not due to commission of suicide.

7. Unless the statement of a dead person would fall within the purview of Section 32(1) of the Indian Evidence Act there is no other provision under which the same can be admitted in evidence. In order to make the statement of a dead person admissible in law (written or verbal) the statement must be as to the cause of her death or as to any of the circumstance of the transactions which resulted in her death, in cases in which the cause of death comes into question. By no stretch of imagination can the statements of Damyanti contained in Exhibit P-7 or Exhibit P-8 and those quoted by the witnesses be connected with any circumstance of the transaction which

resulted in her death. Even that apart, when we are dealing with an offence under Section 498-A IPC disjuncted from the offence under Section 306 IPC the question of her death is not an issue for consideration and on that premise also Section 32(1) of the Evidence Act will stand at bay so far as these materials are concerned.”

In conclusion the Supreme Court held that there is not iota of evidence which can be admitted in law to be used in offence punishable under Section 498A of the IPC

39. In the instant case, it is already recorded that after the marriage of the deceased with DW1, the relation between two families were not cordial. The parents of Rasmita was indifferent to her. Only after her death the defacto complainant alleged that the deceased was subjected to mental and physical torture on demand of dowry. During her life time her parents did not keep any contact with the deceased. When the marriage of the deceased was not accepted by her parents; when even after marriage the newly wedded couple were not welcome by the defacto complainant; when no cordial relation was established between two families which are very normal after marriage of a boy and a girl, it is difficult to hold that the deceased would visit her paternal home and narrated the incidents of cruelty meted upon her allegedly by the appellants. I am in conformity with the learned P.P-in-Charge that in a case under Section 498A of the Indian Penal Code the parents and other relatives of the victim are the best witnesses but under the facts and circumstances as stated above the

role of the witnesses seems to be absolutely interested and inimical against the appellants and therefore only after the death of Rasmita the defacto complainant alleged that he was subjected to physical and mental torture on demand of dowry.

40. Learned trial court failed to consider this aspect of the matter and wrongly placed reliance on a decision of the Supreme Court in the case of **Trimukh Maroti Kirkan vs. State Of Maharashtra** reported in **(2006) 10 SCC 681**. In Trimukh, there was a positive evidence of the father of the deceased that the husband and parents-in-law of the deceased used to ill-treat her and used to harass her on account of non-payment of Rs.25,000/- by her parents for the purpose of purchasing a tempo for her husband. It was also proved in evidence that the father of the deceased went to the matrimonial home of the deceased and requested her husband and parents-in-law not to torture her on demand of Rs.25,000/- and he has no financial capacity to make such demand.

41. Under such factual background the Supreme Court held that in a case of cruelty on demand of dowry and dowry death, the close relatives of the deceased are the best and natural witness because in a family dispute the outsiders do not want to involve themselves and it is very difficult to find out neighbouring witnesses to depose in a case under Section 498A/304B of the Indian Penal Code.

42. However, fate of every case depends on its peculiar facts and circumstances. In the instant case, it is already recorded that parents of the deceased did not accept their daughter's marriage with the son of the

appellant No.1. They never visited the matrimonial home of the deceased. There was no talking term between two families. PW3 who is the mother of the deceased unequivocally admitted that the husband of his daughter used to love her very much. When a marriage was solemnized as a result of love affair between two persons and the husband loves the wife very much, is it possible to hold at the same time, the husband will shallow torture and harassment upon his wife by his parents and sister? The irresistible conclusion and reply to the above question must be in the negative.

43. With regard to the charge under Section 304B/34 of the Indian Penal Code, I like to record at the outset the following observation of the Supreme Court in the case of Kamesh Panjiyar vs. State of Bihar : (2005) 2 SCC 388:-

“12.It is to be noted that Sections 304B and 498A, IPC cannot be held to be mutually inclusive. These provisions deal with two distinct offences. It is true that cruelty is a common essential to both the Sections and that has to be proved. The Explanation to Section 498A gives the meaning of ‘cruelty’. In Section 304B there is no such explanation about the meaning of ‘cruelty’. But having regard to common background to these offences it has to be taken that the meaning of ‘cruelty’ or ‘harassment’ is the same as prescribed in the Explanation to Section 498A under which ‘cruelty’ by itself amounts to an offence. Under Section 304B it is ‘dowry

death' that is punishable and such death should have occurred within seven years of marriage. No such period is mentioned in Section 498A. If the case is established, there can be a conviction under both the sections.”

44. Therefore Section 498A and 304B IPC do not contain same ingredients and they are not mutually inclusive. In the instant case, the victim died within one year and few months of marriage. It is also proved that she had met with an unnatural death. The learned trial judge drew up the presumption of law on the basis of an alleged oral dying declaration made by the victim to her parents when they came to the hospital to see her. He also relied on the evidence of PW1 to PW5 to the effect that on 12th September, 2009 the victim came to her paternal home and told her parents that she was tortured and harassed by the accused persons on demand of dowry. PW1 did not state in his FIR that on 12th September, 2009 his daughter Rasmita came to his house and narrated the incident of torture and harassment on demand of dowry for the last time before her death to him and his wife. The said statement is subsequent development at the time of adducing evidence by the witnesses on behalf of prosecution. While the learned court below relied on oral dying declaration allegedly made by the deceased that the appellants poured kerosene oil on her body and set her in fire intending to kill her, he completely overlooked the earlier statement made by the deceased to the Medical Officer at the time of initial treatment to the effect that when her husband was repairing a CD player with hot soldering iron

a kerosene lamp tumbled on the table and kerosene fell over the said hot soldering iron and got fire accidentally. The said statement is the earliest version of the occurrence recorded by Medical Officer who initially treated her. Therefore there are two contradictory dying declarations, one written and another oral and the first dying declaration must prevail because it was recorded by an independent witness having no interest in the outcome of the case.

45. Defence version is the same as recorded by the Medical Officer. Moreover the defence version gets support from the evidence of Investigating Officer (PW1) who stated on oath that during the course of investigation he seized one soldering plug and one extension coil from the place of occurrence by a seizure list dated 7th November, 2009. Seizure of the above articles from the place of occurrence emboldens the defence case that fire was accidentally in nature. It is needless to say that an oral dying declaration is a weak piece of evidence in comparison to earlier dying declaration made by the victim which was recorded by the doctor at the time of her initial examination.

46. In view of the above discussion and on independent scrutiny of entire evidence on record and the statutory provisions as well as the law laid down by the Apex Court, this Court is of the view that the learned trial judge erroneously convicted the appellants under Section 498A/304B/34 IPC and wrongly placed onus on inadmissible and weak piece of evidence.

47. Therefore the order of conviction and sentence is liable to be set aside.

48. Accordingly the instant appeal is allowed.

49. The judgment dated 13th May, 2015 and conviction and sentence dated 14th May, 2015 passed by the learned Additional Sessions Judge, Fast Track, 2nd Court Kalyani, Nadia in Sessions Case no.22(05) 2011(Sessions Trial no.7(7) 2011) are set aside.

50. The appellants namely 1.Satish Chandra Pandit @ Sisir Pandit 2. Smiriti Rani Pandit. 3. Simi Pandit@ Sandipan Pandit are acquitted from the charge, set at liberty and release from bail bond.

51. Let a copy of this judgment be sent to the trial court immediately along with lower court record.

52. The appellants be set at liberty if they are in correctional home forthwith on production of server copy of the judgment.

(Bibek Chaudhuri, J.)