

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL APPEAL NO.128 OF 2009

Appellant : **Abdul Rajjak Abdul Gaffar,**
Aged about 40 years,
R/o Kalgaon, Tahsil Digras,
District Yavatmal

-- Versus --

Respondent : **The State of Maharashtra,**
through Police Station Officer,
Police Station Digras,
Tahsil Digras, District Yavatmal.

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Shri A.A. Choube, Adv. h/f Shri A.S. Manohar, Adv. for the Appellant.
Shri H.D. Dubey, A.P.P. for the Respondent.

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CORAM : **SMT. ANUJA PRABHUDESSAI, J.**
DATE : **2nd FEBRUARY, 2021.**

ORAL JUDGMENT :-

This appeal filed under Section 374 of the Code of Criminal Procedure, challenges the legality of the judgment, dated 05/02/2009 in Sessions Trial No.195/2004. By the impugned judgment, learned Additional Sessions Judge, Darwha has held the Appellant guilty of the offence punishable under Section 498-A of the Indian Penal Code ('IPC' for short) and sentenced him to undergo rigorous imprisonment for three years and to pay fine of Rs.1,000/-, in default to undergo simple imprisonment for one month.

02] The Appellant herein is the husband of the deceased-Salma Parvin, who committed suicide on 27/09/2002. The death of Salma was within four months of her marriage. The father of the deceased PW-4 Sheikh Sattar lodged a FIR alleging that the Appellant and his family members had subjected Salma to cruelty, to meet unlawful demands of dowry and that Salma had committed suicide because of the harassment meted out to her by the Appellant and his family members. Pursuant to the said FIR, Crime No.116/2002 came to be registered against the Appellant and his family members for offences under Sections 498-A & 304-B of I.P.C. Upon completion of investigation, charge-sheet came to be filed.

03] The Appellant and other co-accused pleaded not guilty to the charge. The prosecution in support of its case, examined nine witnesses. Statements were recorded under Section 313 of Cr.P.C. The Appellant denied having subjected Salma to cruelty and claimed that she was not happy with the marriage due to the age difference between her and the Appellant. The Appellant examined two witnesses to prove the age difference between him and the deceased.

04] The trial Court, upon appreciating the evidence on record, acquitted the co-accused for want of cogent and conclusive evidence and also on the ground that they were not the family members of the

Appellant, the husband of the deceased. The trial Court held that the evidence adduced by the prosecution sufficiently proves that Salma had died in unnatural circumstances. The trial Court observed that the evidence adduced by the prosecution proves that at the time of settlement of marriage, the parents of the deceased-Salma had agreed to pay Rs.15,000/- to the Appellant, out of which, an amount of Rs.5,000/- was paid and balance amount of Rs.10,000/- was agreed to be paid within 4 to 5 months. Relying upon the testimony of PW-4, PW5 and PW-6, learned Judge held that Salma was being ill-treated and harassed and was subjected to cruelty. Learned Judge held that Salma was driven to commit suicide in view of the cruelty meted out to her by the Appellant. Learned Judge held that the death of Salma was not a 'dowry death'. Learned Judge, therefore, acquitted the Appellant of offence under Section 304-B of IPC and held the Appellant guilty of the offence under Section 498-A of IPC and sentenced him as stated above.

05] Shri Choube, learned Counsel for the Appellant submits that in paragraph 35 of the impugned judgment, the trial Court has recorded a finding that the Appellant was in need of money and it is probable that he wanted Rs.10,000/- from the complainant and therefore, he was ill-treating Salma for failure to get the said amount.

Learned Counsel for the Appellant submits that conviction in a criminal case cannot be based on probabilities.

06] Learned Counsel for the Appellant further submits that the evidence adduced by the prosecution is full of contradictions and omissions and casts doubt on the genuineness of the prosecution case. The prosecution has not proved 'cruelty' of the nature described in Clauses (a) & (b) of the Explanation to Section 498-A of IPC. He further submits that it is on record that Salma was about 17 years of age, whereas the Appellant was 38 years of age at the time of marriage. She was unhappy as she was married against her wishes. He submits that there is every possibility of her committing suicide because of her unhappiness, hence conviction under Section 498-A is unsustainable.

07] Shri Dubey, learned Additional Public Prosecutor for the State submits that said Salma had committed suicide within four months of her marriage. This gives rise to the presumption under Section 113-A of the the Appellant had subjected her to cruelty.

08] I have perused the record and considered the submissions advanced by learned Counsel for the Appellant and learned A.P.P. for the State. It is not in dispute that Salma was married to the Appellant on 02/06/2002. She had committed suicide on 27/09/2002. Death of

Salma was within four months of her marriage. Section 113-A of the Indian Evidence Act, which raises a presumption as to abetment of suicide by a married woman within seven years of her marriage reads thus :

“113-A. Presumption as to abetment of suicide by a married woman - *When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.*

Explanation – *For the purposes of this section, “cruelty” shall have the same meaning as in section 498A of the Indian Penal Code (45 of 1860).”*

09] In Mangat Ram vs. State of Haryana - (2014) 12 SCC 595, the Apex Court has considered the scope and ambit of Section 113-A of the Act and has held thus :

“30. We are of the view that the mere fact that if a married woman commits suicide within a period of seven years of her marriage, the presumption under [Section 113A](#) of the Evidence Act would not automatically apply. The legislative mandate is that where a woman commits suicide within seven years of her marriage and it is shown that her husband or any relative of her husband has subjected her to cruelty, the presumption as defined under [Section 498-A IPC](#), may attract, having regard to all other circumstances of the case, that

such suicide has been abetted by her husband or by such relative of her husband. The term “the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband” would indicate that the presumption is discretionary. So far as the present case is concerned, we have already indicated that the prosecution has not succeeded in showing that there was a dowry demand, nor the reasoning adopted by the Courts below would be sufficient enough to draw a presumption so as to fall under [Section 113-A](#) of the Evidence Act.

31. In this connection, we may refer to the judgment of this Court in [Hans Raj v. State of Haryana](#) (2004) 12 SCC 257, wherein this Court has examined the scope of [Section 113-A](#) of the Evidence Act and [Sections 306, 107, 498-A](#) etc. and held that, unlike [Section 113-B](#) of the Evidence Act, a statutory presumption does not arise by operation of law merely on the proof of circumstances enumerated in [Section 113-A](#) of the Evidence Act. This Court held that, under [Section 113-A](#) of the Evidence Act, the prosecution has to first establish that the woman concerned committed suicide within a period of seven years from the date of her marriage and that her husband has subject her to cruelty. Even though those facts are established, the Court is not bound to presume that suicide has been abetted by her husband. [Section 113-A](#), therefore, gives discretion to the Court to raise such a presumption having regard to all other circumstances of the case, which means that where the allegation is of cruelty, it can consider the nature of cruelty to which the woman was subjected, having regard to the meaning of the word ‘cruelty’ in [Section 498-A](#) IPC.

33. *In Pinakin Mahipatray Rawal v. State of Gujarat - (2013) 10 SCC 48*, this Court has examined the scope of [Section 113-A](#) of the Evidence Act, wherein this Court has reiterated the legal position that the legislative mandate of [Section 113-A](#) of the Evidence Act is that if a woman commits suicide within seven years of her marriage and it is shown that her husband or any relative of her husband had subjected her to cruelty, as per the presumption defined in [Section 498-A](#) IPC, the Court may presume, having regard to all other circumstances of the case, that such suicide had been abetted by the husband or such person. The Court held that, though a presumption could be drawn, the burden of proof of showing that such an offence has been committed by the accused under [Section 498-A](#) IPC is on the prosecution. The Court held that the burden is on the prosecution to establish the fact that the deceased committed suicide and the accused abetted the suicide. In the instant case, there is no evidence to show whether it was an accidental death or whether the deceased had committed suicide.”

10] Under the circumstances, the only question for consideration is whether the prosecution has established beyond reasonable doubt that the Appellant had subjected the deceased Salma to cruelty. In this regard, it will be relevant to consider the testimony of PW-4 Sheikh Sattar, the father of the deceased. He has deposed that a meeting was held prior to the marriage of Appellant and Salma, and that in the said meeting, the Appellant had demanded an amount of Rs.15,000/-. He has deposed that the Appellant was paid an amount of Rs.5,000/-

and the balance amount of Rs.10,000/- was agreed to be paid within 4 to 5 months after the marriage. He has deposed that after the marriage, Salma had come to her parental house and stayed for about 15 days. When the Appellant and his relatives came to take her, they demanded an amount of Rs.10,000/- and that he had agreed to give the same within 8 to 10 days. PW-4 has further deposed that when he was told that Salma was being ill-treated, he had visited the house of the Appellant. At that time, the Appellant had asked him, whether he had brought the amount. When he told the Appellant that he was unable to arrange the money, the Appellant told him to take Salma along with him. This witness has further stated that Salma had told him to give an amount of Rs.10,000/- to the Appellant, as he was ill-treating her for non-payment of the said amount. PW-4 has further stated that Salma had visited her parental house and requested him to pay money to the Appellant, as he was assaulting and ill-treating her for non-payment of the amount. He has deposed that he could not arrange the amount and he had sent Salma to her marital home along with his son Jafar. He claims that he was told by his son-Jafar that the Appellant had questioned Salma, whether she had brought the money and he had assaulted her. He has further stated that his wife Nazira Bi and his mother-in-law Rabiya Bi had also gone to the house of the Appellant to see Salma and on returning back they told him that Salma was assaulted for non-payment of dowry.

11] It is pertinent to note that in the cross examination, this witness has admitted that there is no custom of taking dowry in Muslim community and there is custom of giving dress and ornaments to bride from the side of bride groom and vice versa. He has deposed that he had not given any dress and other articles to the Appellant at the time of the marriage and in that respect, no meeting had taken place. He has further stated that it is a custom to prepare a list of Dahej articles, which is signed by both the sides. The list of Dahej articles at Exh.80 does not make any reference to the money, which was either paid to the Appellant or agreed to be paid to the Appellant in lieu of clothes and other articles. Based on this statement and other attending circumstances, the learned Judge has held that the death of Salma was not a 'dowry death'. There is no challenge to the said finding.

12] It is to be noted that though in his examination-in-chief PW-4 has deposed that Salma was being assaulted and ill-treated for not bringing the amount of Rs.10,000/-, there are material omissions, which have been brought on record in his cross-examination. The evidence of this witness vis-a-vis the evidence of Investigating Officer PW-8 reveals that this witness had not stated in his statement under Section 161 of the Code of Criminal Procedure ('Cr.P.C.' for short) that when the Appellant and others had come to take Salma, the Appellant had demanded the amount of Rs.10,000/- and that he had agreed to

give the same within 7 to 8 days. This witness has also not stated in his statement that he had received the message that Salma was being ill-treated and that he had visited the house of Appellant and further that the Appellant had questioned him whether he had brought the money. This witness has also not stated in his statement under Section 161 of Cr.P.C. that the Appellant had brought Salma to his house and had told him to keep Salma at her parental home. He has not stated in his statement that he had received the message from the Appellant that he should send Salma back only when he would arrange the money. He had not stated in his statement that he had sent Salma back, even though he was unable to arrange money. He has also not stated in the statement under Section 161 of Cr.P.C. that his wife and his son-Jafar had told him that the Appellant had assaulted Salma in presence of the co-accused and that she was being ill-treated because of non-payment of money.

13] PW-5 Nazira Bi is the mother of the deceased. This witness has claimed that they had paid Rs.5,000/- to the Appellant and agreed to pay Rs.10,000/- within 5 to 6 months of the marriage. This witness has also stated that Salma was being ill-treated for non-payment of the amount. She claims that she had gone to the house of Salma and that she had seen a contusion on her body and bandage on her head. She claims that Salma had told her that she was being ill-treated by the

Appellant and his family members. Omissions have been brought on record regarding the meeting held prior to the marriage and that they had agreed to pay Rs.15,000/- to the Appellant. There are other material omissions as regards the information received by her about the ill-treatment of Salma and that her husband visited the house of Salma and pacified Salma by assuring that he would pay the amount subsequently. This witness had also not stated in her statement that Salma had told her about the ill-treatment for non-payment of balance amount. She also admits that she had not reported to the police that Salma had told her about the repeated ill-treatment. She had not stated that she had seen a bandage on the head of Salma and that Salma had told her that she was being ill-treated. She has further stated that since the marriage of Salma till her death, she had visited the marital home of Salma only once along with her mother. She admits that she had not stated in her statement that Salma had told her that her husband had assaulted her.

14] PW-6 Jafar is the brother of the deceased. It is the case of the prosecution that this witness had taken Salma to her matrimonial home. He claims that when he reached Kalgaon, the Appellant and his family members had questioned Salma whether she had brought the amount of Rs.10,000/-. He has deposed that the Appellant had assaulted Salma for not bringing the amount. In his cross-

examination, he states that he does not know whether his statement was recorded about one month after the incident. Though he claims that the Appellant had assaulted Salma at the instance of other co-accused viz. Ejaj and Majid, he had not stated the said fact in his statement under Section 161 of Cr.P.C.

15] It is thus seen that these witnesses have made material improvements in their depositions before the Court. The accusation of ill-treatment made against the Appellant are not reflected in the statement under Section 161 of Cr.P.C. These are not minor omissions or contradictions, but are of such nature and magnitude that they affect the core of the prosecution case. As such, the testimony of the prosecution witnesses is wholly unreliable and cannot be made basis for conviction.

16] The prosecution has failed to prove that Salma was subjected to 'cruelty', as to attract presumption under Section 113-A of the Indian Evidence Act. In my considered view, the learned Judge was not justified in convicting the Appellant on the basis of probabilities, by ignoring the cardinal principle that the offence in a criminal trial has to be proved beyond reasonable doubt and not on preponderance of probabilities.

17] Under these circumstances and in view of the aforestated discussions, the following order is passed :

ORDER

- i. The appeal is allowed.
- ii. The impugned judgment, dated 05/02/2009 passed by learned Additional Sessions Judge, Darwha in Sessions Trial No.195/2004 is set aside.
- iii. The Appellant is acquitted for the offence punishable under Section 498-A of Indian Penal Code.
- iv. Fine amount, if deposited, be refunded to the Appellant.
- v. His bail bond stands discharged

(SMT. ANUJA PRABHUDESSAI, J.)