

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

CRIMINAL APPEAL NO. 260 OF 2021

Mangesh s/o Deorao Kannake (Accused No.1)
Aged about 32 years, Occ: Labour,
R/o Hanuman Ward, Gadchiroli,
Tahsil and District Gadchiroli.

...APPELLANT

---VERSUS---

State of Maharashtra,
Through its Police Station Officer,
Police Station, Gadchiroli,
Tahsil and District Gadchiroli.

...RESPONDENT

Shri Abdul Subhan, Advocate for the appellant.
Shri M.J. Khan, APP for respondent/State.

CORAM : G.A. SANAP, J.
RESERVED ON : SEPTEMBER 08, 2022.
PRONOUNCED ON : NOVEMBER 17, 2022.

JUDGMENT :

1. In this appeal, the appellant challenges the judgment and order dated 01.04.2021 passed in Sessions Case No.87 of 2016 by the learned Sessions Judge, Gadchiroli, whereby the learned Judge convicted the appellant (accused no.1) for the offence punishable under Section 304B of the Indian Penal Code (for short, 'IPC') and sentenced him to undergo rigorous imprisonment for ten years and pay fine of ₹25,000/-, in default to undergo further simple

imprisonment for six months.

The prosecution case, in short, is as follow:

2. Informant-Suresh Khobragade, who is father of deceased Shefali lodged report on 19.06.2016 against the appellant and remaining four accused. The learned Sessions Judge acquitted accused nos.2,3 and 5. Accused no.4 died during pendency of the trial and therefore prosecution abated against her. Acquitted accused no.2 is the brother of the appellant. Acquitted accused no.3 is the brother-in-law of the appellant. Deceased accused no.4 is the mother of the appellant. Acquitted accused no.5 is the sister of the appellant. There was love affair between the appellant and deceased Shefali. Deceased Shefali and appellant on 05.06.2016 by maintaining utmost secrecy performed the marriage at Markanda temple. The appellant and the informant are the resident of Gadchiroli. After marriage, deceased Shefali went to stay with the appellant at the house of Pallavi (accused no.5). Informant and his family members did not like the marriage and therefore severed all ties with deceased Shefali.

3. It is the case of the prosecution that after 4 to 5 months of the marriage, the appellant and the acquitted accused started ill-treating

deceased Shefali. The appellant and his family members told the deceased that if her father had performed her marriage, he would have spent near about five to six lakh rupees. The love marriage has saved the money of the father of deceased Shefali. Therefore, they insisted deceased Shefali to bring five to six lakh rupees from her father as dowry. The appellant and his family members wanted to construct upper floor of the house therefore they needed money. Deceased Shefali was caught in precarious position inasmuch as she had married with appellant against wish of her parents. One day, deceased Shefali made a phone call to her mother and informed her that the appellant and other accused are making demand of five to six lakh rupees towards dowry. She further informed that on account of this demand she was subjected to ill-treatment and cruelty. On 27.05.2016, the mother of the deceased called her to the house of her neighbour Lalita Sonpipre. On 27.05.2016, there was birthday celebration of the son of Lalita Sonpipre. Under the pretext of attending birthday, deceased Shefali came to the house of Lalita Sonpipre. Mother of the deceased and deceased Shefali met there. The deceased told her mother that her in-laws are demanding five to six lakh rupees towards dowry for construction of upper floor of the house. On that count she was subjected to mental and physical

harassment. She narrated this in presence of Lalita Sonpipre. After sometime, husband of deceased went there and picked-up deceased Shefali with him to his house. On 29.05.2016, the dead body of deceased Shefali was found in the village pond. The police conveyed this information to the informant and his family members. They went to the hospital and saw the dead body.

4. The appellant on 29.05.2016 at about 15:00 hours went to the Police Station and lodged the missing report of deceased Shefali. However, by that time, dead body of deceased Shefali was found in the pond. On the basis of this report, a Merg bearing No.30/2016 was registered. The police recovered the dead body of Shefali and performed inquest panchanama of the dead body. The police forwarded dead body of Shefali to Government Hospital for *postmortem*. The Medical Officer on the basis of observations at the time of *postmortem* reserved his opinion subject to the viscera report.

5. The informant and his family members were not informed by the appellant and his family members, when deceased Shefali allegedly went missing. The informant and his family members, therefore, became suspicious that deceased Shefali was killed by the appellant and his family members. He therefore went to Police

Station, Gadchiroli on 30.05.2016 to lodge report. The police refused to take the report. On 31.05.2016, he forwarded the report by speed post to Gadchiroli Police Station but there was no response. Therefore, the informant went to the Superintendent of Police, Gadchiroli on 06.06.2016. After great persuasion on 19.06.2016 his report was recorded at Gadchiroli Police Station. On the basis of his report, a Crime bearing No.116/2016 came to be registered for the offence punishable under Section 304B read with Section 34 of the IPC against the appellant and the remaining accused. The Investigating Officer recorded the statements of the witnesses. He obtained the opinion of the Medical Officer. The Medical Officer categorically stated that death was due to strangulation with *postmortem* drowning. After investigation, charge-sheet came to be filed. On committal of the case, the learned Sessions Judge framed the charge against the appellant and other accused for the offence punishable under Section 304B read with Section 34 of the IPC. The alternate charge was framed under Section 302 read with Section 34 of the IPC.

6. The prosecution examined in all 12 witnesses. The prosecution relied upon number of documents. The learned Sessions Judge on consideration of the evidence, found the appellant alone guilty for

the offence punishable under Section 304B of the IPC. Remaining accused were acquitted. Being aggrieved by conviction and sentence the appellant is before this Court in appeal.

7. I have heard Shri Abdul Subhan, learned advocate for the appellant and Shri M.J. Khan, learned APP for respondent/State. Perused the record and proceedings.

8. The learned advocate for the appellant submitted that prosecution has failed to establish the basic ingredients of Section 304B of the IPC. Learned advocate submitted that the evidence adduced by the prosecution is not sufficient to prove the charge against the appellant. Learned advocate pointed out that on the basis of the identical evidence learned Sessions Judge has granted benefit of doubt to the remaining accused and acquitted them. Learned advocate submitted that on the basis of same evidence, learned Judge should not have convicted and sentenced the appellant. Learned advocate submitted that the informant and his family members had grudge against the appellant and his family members because daughter of the informant deceased Shefali had eloped with the appellant and performed marriage against their wish. The learned advocate took me through the evidence of the informant and his wife i.e. mother of deceased Shefali and

submitted that their evidence is not sufficient to prove the guilt of the appellant. Learned advocate submitted that on material aspects there are omissions, contradictions and inconsistencies in their evidence. As far as the remaining witnesses are concerned, the learned advocate submitted that their evidence is not sufficient to corroborate the evidence of the informant (PW1) and mother of deceased Shefali (PW3). Learned advocate took me through the evidence of PW6 and submitted that this witness was brought on scene to rope-in the appellant and his family members. The learned advocate submitted that number of prohibition cases have been registered against PW6 at Gadchiroli Police Station. It is therefore submitted that in order to oblige the police for favour, PW6 concocted a story which is totally unbelievable. Learned advocate while commenting on the evidence of the Medical Officer submitted that initially the Medical Officer was not able to give opinion as to the cause of death. Learned advocate submitted that the opinion as to the cause of death obtained later on was in connivance with the police and the informant. Learned advocate submitted that the learned Sessions Judge has committed a mistake in convicting the appellant.

9. Learned APP Shri M.J.Khan, submitted that the evidence

adduced by prosecution is a cogent and reliable. He submitted that on the basis of this evidence, the prosecution has proved guilt against the appellant beyond reasonable doubt. Learned APP submitted that there was no reason for deceased Shefali to make false complaint against the appellant and his family members and so for the informant to falsely implicate them. Learned APP submitted that the cause of death namely strangulation with postmortem drowning, indicates that the deceased was killed and her dead body was thrown in the village pond. Learned APP submitted that fortunately for the appellant he has escaped the dragnet of the offence under Section 302 of the IPC. The learned APP submitted that deceased Shefali died within 5 to 6 months of her marriage. Learned APP submitted that there is ample evidence to prove that the demand of dowry was made by the appellant and his family members. Learned APP in short supported the judgment and order passed by the learned Sessions Judge.

10. In order to appreciate rival submissions, I have minutely perused the evidence on record. Learned Sessions Judge, as can be seen from the judgment and order has not at all considered the charge framed under Section 302 read with Section 34 of the IPC. No finding has been recorded one way or the other. There is no

order of acquittal of the appellant and remaining accused for the offence punishable under Section 302 read with Section 34 of the IPC. It is seen that on the basis of materials compiled in the charge-sheet and the medical evidence, charge under Section 302 read with Section 34 of the IPC was framed as an alternate charge by the learned Sessions Judge. The charge was framed on 12.01.2018. The first witness was examined on 03.05.2018. The last witness was examined on 21.08.2019. After examination of the last witness, on 04.11.2019, the incharge of the Gadchiroli Police Station had forwarded *postmortem* notes, query report and viscera analysis report to the Civil Surgeon, Gadchiroli with request to give final opinion as to cause of death. The final opinion was given on 04.11.2019. The Panel of Doctors opined that the cause of death was strangulation with postmortem drowning. On receipt of this opinion, the prosecution made a request to recall the Medical Officer. The application was allowed and Medical Officer was examined. The accused persons by taking benefit of this order of allowing prosecution to place on record the final opinion of cause of death, cross-examined remaining witnesses. It is to be noted that learned Sessions Judge at the time of granting application for taking final opinion as to cause of death on record and granting the

permission to examine the medical officer, was expected to modify and/or alter the charge. In view of this concrete opinion the charge under Section 302 of the IPC ought to have been a principal charge against all the accused. It is seen from the record that learned Sessions Judge, by exercising powers under Section 216 of the Code of Criminal Procedure, did not alter or frame the additional charge for principal offence under Section 302 of the IPC. It is seen that the learned Sessions Judge completely ignored the opinion of the medical officer as to the cause of death. The opinion of cause of death clearly indicated that deceased Shefali was killed and thereafter her dead body was thrown in the village pond.

11. It would be profitable in the above context to consider the judicial pronouncement of the Hon'ble Supreme Court in the case of **Vijay Pal Sing and others Vs. State of Uttarakhand** reported in (2014) 15 SCC 163. Paragraphs 18, 19 and 20 would be important and same reads thus:

“18.However, it is generally seen that in cases where a married woman dies within seven years of marriage, otherwise than under normal circumstances, no inquiry is usually conducted to see whether there is evidence, direct or circumstantial, as to whether the offence falls under Section 302 of IPC. Sometimes, Section 302 of IPC is put as an alternate charge.

In cases where there is evidence, direct or circumstantial, to show that the offence falls under Section 302 of IPC, the trial court should frame the charge under Section 302 of IPC even if the police has not expressed any opinion in that regard in the report under Section 173(2) Cr.PC. Section 304B IPC can be put as an alternate charge if the trial court so feels. In the course of trial, if the court finds that there is no evidence, direct or circumstantial, and proof beyond reasonable doubt is not available to establish that the same is not homicide, in such a situation, if the ingredients under Section 304-B IPC are available, the trial court should proceed under the said provision. In Muthu Kutty and another v. State, this Court addressed the issue and held as follows:

"20. A reading of Section 304-B IPC and Section 113-B, Evidence Act together makes it clear that law authorises a presumption that the husband or any other relative of the husband has caused the death of a woman if she happens to die in circumstances not normal and that there was evidence to show that she was treated with cruelty or harassed before her death in connection with any demand for dowry. It, therefore, follows that the husband or the relative, as the case may be, need not be the actual or direct participant in the commission of the offence of death. For those that are direct participants in the commission of the offence of death there are already provisions incorporated in Sections 300, 302 and 304. The provisions contained in Section 304-B IPC and Section 113-B of the Evidence Act were incorporated on the anvil of the Dowry Prohibition (Amendment) Act, 1984, the main object of which is to curb the evil of dowry in the society and to make it severely punitive in nature and not to extricate

husband's or their relatives from the clutches of Section 302 IPC if they directly cause death. This conceptual difference was not kept in view by the courts below. But that cannot bring any relief if the conviction is altered to Section 304 Part II. No prejudice is caused to the accused- appellants as they were originally charged for offence punishable under Section 302 IPC along with Section 304-B IPC."

19. In a recent decision, this Court in Jasvinder Saini v. State (Government of NCT of Delhi), observed thus:

"15. It is common ground that a charge under Section 304-B IPC is not a substitute for a charge of murder punishable under Section 302. As in the case of murder in every case under Section 304-B also there is a death involved. The question whether it is murder punishable under Section 302 IPC or a dowry death punishable under Section 304-B IPC depends upon the fact situation and the evidence in the case. If there is evidence whether direct or circumstantial to prima facie support a charge under Section 302 IPC the trial court can and indeed ought to frame a charge of murder punishable under Section 302 IPC, which would then be the main charge and not an alternative charge as is erroneously assumed in some quarters. If the main charge of murder is not proved against the accused at the trial, the court can look into the evidence to determine whether the alternative charge of dowry death punishable under Section 304-B is established. The ingredients constituting the two offences are different, thereby demanding appreciation of evidence from the perspective relevant to such ingredients. The trial court in that view of the matter acted mechanically for it framed an

additional charge under Section 302 IPC without adverting to the evidence adduced in the case and simply on the basis of the direction issued in Rajbir case. The High Court no doubt made a half-hearted attempt to justify the framing of the charge independent of the directions in Rajbir case, but it would have been more appropriate to remit the matter back to the trial court for fresh orders rather than lending support to it in the manner done by the High Court."

20. Though in the instant case the accused were charged by the Sessions Court under Section 302 IPC, it is seen that the trial court has not made any serious attempt to make an inquiry in that regard. If there is evidence available on homicide in a case of dowry death, it is the duty of the investigating officer to investigate the case under Section 302 IPC and the prosecution to proceed in that regard and the court to approach the case in that perspective. Merely because the victim is a married woman suffering an unnatural death within seven years of marriage and there is evidence that she was subjected to cruelty or harassment on account of demand for dowry, the prosecution and the court cannot close its eyes on the culpable homicide and refrain from punishing its author, if there is evidence in that regard, direct or circumstantial."

12. It is apparent that there was confusion with regard to the offence of murder and the offence of dowry death in the mind of learned Sessions Judge. It is to be noted that the offence of dowry death is different from the offence of murder. A case of dowry death may not necessarily be a murder. However in case of murder there

can be a dowry death. The ingredients of the offence of murder and the ingredients of the offence of dowry death, as can be seen on plain reading are totally different. The learned Sessions Judge as can be seen has completely ignored this important aspect and proceeded on the assumption that offence of dowry death would take in its fold offence of murder.

13. It is seen on perusal of the judgment that the learned Sessions Judge did not frame a point for determination with regard to the charge under Section 302 read with Section 34 of the IPC. He did not discuss this charge in the judgment. In my view, this was totally contrary to the express provision of law. The witnesses were recalled after granting permission for taking final opinion of cause of death on record. It is further seen that learned Sessions Judge has accepted the case of prosecution that deceased Shefali died homicidal death. In my view, this was the crux of the matter. In this view of the matter, charge for murder ought to have been a principal charge. The learned Sessions Judge somehow or the other has missed this crux of the matter and committed grave error.

14. It is to be noted that after re-examination of the medical officer and bringing on record the final cause of death certificate, the learned Judge was not only required to add or alter the charge but

consistent with the evidence on record put this important circumstance to the accused persons in their examination under Section 313 of the Code of Criminal Procedure statement. This important evidence as to cause of death was not put to the accused person in their examination under Section 313. It is seen that this vital evidence has been made the basis of conviction and sentence of appellant. It is to be noted that by way of precaution this Court has recorded the statement of the appellant and put those circumstances to him and sought his explanation at the stage of hearing of this appeal.

15. It is seen that this error committed by the learned Session Judge has further been compounded by the prosecution. It is seen that prosecution has accepted the judgment and order passed by the learned Sessions Judge without any demur. At the trial stage, learned prosecutor incharge of the case before the Sessions Court did not apply for alteration or addition of the charge after obtaining the final opinion of cause of death. The learned APP submitted that the State has neither proposed nor filed appeal against order of acquittal of the remaining accused. Learned APP further submitted that the State has not made any grievance with regard to the manner in which the mater was proceeded and decided vis-a-vis charge under

Section 302 of the IPC. The State has not filed any appeal for enhancement of the sentence of the appellant. It is further pertinent to note that during the pendency of this appeal no steps have been taken to rectify the above position. This Court is therefore left with no alternative but to decide this appeal being an appeal against conviction and sentence for the offence under Section 304B of the IPC.

16. Dr. Mangesh Bele (PW9) had conducted post mortem of the body of deceased Shefali. He found following injuries on the person of deceased Shefali:

“(i) abrasion of size 2 x 1 cm on left eyelid,

(ii) depressed contusion over right lateral side of neck of size 4 x 0.5 x 0.5 cm reddish in colour,

(iii) depressed contusion over right lateral side of neck of size 1 cm below injury no.2.”

17. The viscera was preserved for chemical analysis (CA). The opinion as to the cause of death was reserved. Postmortem report is at Exh.71. The *postmortem* was conducted on 29.05.2016 at about 05:00 pm. According to PW9, the approximate time of death of the deceased was between 24 to 36 hours prior to *postmortem*. The uterus was gravid (6 to 8 weeks pregnant). The medical officer

(PW9) issued query report, which is at Exh.73. PW9 has categorically stated in the query report that the death in question was not due to drowning. All the injuries were *antemortem* in nature. In my view, this opinion would assume great importance. As stated above, the final opinion as to the cause of the death was not called till the examination of all the witnesses. On 04.11.2019, that request was made to the Medical Officer to give final opinion with regard to the cause of death of deceased Shefali. Dr. Mangesh Bele, Dr. Arvind Alam and Dr. Shambharkar (maiden name Vaidhya) on going through the CA report, *postmortem* notes and query report, gave final opinion as to the cause of death. According to PW9, the cause of death was strangulation with *postmortem* drowning. On the basis of this evidence, the learned Sessions Judge has recorded a finding that deceased Shefali died unnatural homicidal death due to bodily injuries and otherwise than under natural circumstance. The observation of the learned Judge that deceased Shefali died unnatural homicidal death due to bodily injuries seems to be misconceived. On the basis of evidence on record, the finding ought to have been that deceased Shefali died homicidal death due to strangulation with *postmortem* drowning. Homicidal death cannot be termed as unnatural homicide. The homicide means killing of a

man by a man. Section 299 of the IPC defines culpable homicide. Therefore, there cannot be unnatural homicidal death. It seems that this finding as to the nature of death has been recorded to bring the case within the ambit of Section 304B of the IPC. The learned Judge ought to have recorded finding with regard to the nature of death based on the oral evidence of PW9 and the *postmortem* report, as well as the final opinion of cause of death. The deceased had sustained three injuries to her neck. The injuries clearly indicated that deceased was strangled, killed and thereafter thrown in the pond. Injuries were *antemortem*. It therefore goes without saying that in this case the death was pure and simple homicidal death.

18. PW9 was cross-examined on behalf of the accused persons. Perusal of his cross-examination would show that not a single admission has been elicited in his cross-examination to discard the evidence of PW9 and *postmortem* report. Injuries found on the dead body and condition of internal organs of the dead body recorded in postmortem report clearly indicate that death was not due to drowning. I have already mentioned that essential ingredients of Section 304B (dowry death) and Section 302 (murder) are totally different. It is therefore apparent that the charge in this case under

Section 304B of the IPC could not have been substitute for a charge of murder punishable under Section 302. In the facts and circumstances, therefore, the cause of death coupled with the evidence of medical officer is sufficient to record a concrete finding that deceased Shefali died homicidal death due to strangulation with *postmortem* drowning. In view of legal position discussed above and the fact that death was homicidal, in the facts and circumstances of this case, the Court can proceed to decide the case of prosecution on merits for the offence under Section 304B of the IPC. In order to make out offence under Section 304B the basic requirements are; (i) demand of dowry and (ii) ill-treatment and harassment by her husband or any relative in connection with demand of dowry. At this stage, needless to state that due to the misconception as mentioned above the appellant and remaining accused were not made to face principal charge for the offence of murder. It is apparent on the face of record that on account of this misconception there is no whisper in the entire judgment about the charge under Section 302 of the IPC.

19. Be that as it may, it would be necessary to appreciate the evidence on record. PW1 is the father of deceased Shefali and PW3 is the mother of deceased Shefali. Evidence of PW1 is not a direct

evidence on the point of the demand of dowry and harassment on account of failure to pay the dowry. In absence of evidence of PW3 mother of deceased Shefali, evidence of PW1 could have been termed as hearsay evidence. As per the case of the prosecution, PW3 came to know about the demand of money by the appellant and remaining accused and due to the failure to meet the demand, the deceased was subjected to ill-treatment and harassment. PW3 had conveyed ill-treatment and demand of the money received by her from deceased Shefali to PW1. Before appreciating their evidence, it is necessary to state that initially there were five accused, in the case. The mother of the appellant died during pendency of the trial. The main allegation against the accused persons as can be seen from the report at Exh.45 and the evidence of PW1 was that all the accused insisted deceased Shefali to bring five to six lakh rupees as dowry from her parents and on that count she was subjected to mental and physical torture by all the accused. The learned Judge as can be seen from his judgment observed that no direct role has been attributed against the accused nos.2,3 and 5. It is observed that against them there are general allegations of harassment and ill-treatment. In my view, this observation is not factually correct. The identical role has been attributed to all the accused in the matter of five to six lakh

rupees and ill-treatment and harassment on that count. In my view, learned Judge on the basis of the same evidence extended benefit to the accused nos.2,3 and 5 and acquitted them. In my view, this is very important aspect which would be required to be borne in mind while appreciating the evidence of prosecution witnesses.

20. Before I appreciate the evidence of witnesses, it is necessary to state that deceased Shefali was beloved and pampered daughter of PW1. This fact has been admitted in evidence by PW1. Deceased Shefali had love affair with the appellant. Deceased Shefali eloped with appellant and secretly performed the marriage with him. It has come on record in the evidence of PW1 that because of this, they had grudge against the appellant and his family members. It is pertinent to note that this marriage was performed on 05.01.2016 and Shefali died on 28 or 29.05.2016. It has come on record that in their evidence when they came to know that deceased Shefali married with the appellant behind the back, the family of the PW1 severed all ties with deceased Shefali. This aspect could be very important while appreciating the evidence of PW1 and PW3. PW3 has stated that after 4 to 5 months of the marriage, deceased Shefali made a phone call to her and informed her that the appellant and his family members were asking her to bring five to six lakh

rupees from her parents for construction of upper-floor of the house. PW3 has stated that the appellant and remaining accused told deceased Shefali that if her parents had performed her marriage, they would have spent five to six lakh rupees for marriage and therefore the amount which has been saved should be given to the accused persons. In the evidence it is stated that on 27.05.2016 PW3 called deceased Shefali to the house of her neighbor PW5-Lalita Sonpipre. The deceased came there. She has stated that deceased started weeping. The deceased told her that she was being harassed for non-payment of five to six lakh rupees demanded by the accused persons. So this is the only evidence with regard to demand of money. She has stated that when deceased Shefali requested her to pay the amount, PW3 told her that since she has married without their consent therefore they could not pay money to her. PW3 was cross-examined. In her cross-examination, sufficient material has been elicited to create doubt about the case of prosecution *vis-a-vis* demand of money and ill-treatment on that count. Perusal of her cross-examination would show that the material statements in examination-in-chief have been proved to be omission from her statement. It is seen that while recording her statement by the police PW3 has stated that in April 2016 deceased

Shefali made a phone call to her and demanded five to six lakh rupees for construction of upper floor of the house. Deceased Shefali told to PW3 that if they had performed her marriage they would have spent five to six lakh rupees. This shows that deceased on her own demanded money. It therefore clearly indicates that PW3 has improved her statement before the Court and stated that deceased Shefali made this demand at the instance of the accused persons. It is seen that first part of the story narrated by PW3 has been found to be self-contradictory to her initial statement. It is therefore not possible to place explicit reliance on the story narrated by the PW3. The material improvement made by PW3 has made evidence of PW3 doubtful.

21. In this context, it would be necessary to consider the events occurred on 27.05.2016 when PW1 and deceased Shefali met at the house of neighbor Lalita Sonpipre, who has been examined as PW5. PW3 has stated that on the pretext of attending the birthday of son of Laita Sonpipre deceased Shefali come to her house. PW3 went there when she received call from Sonpipre. She has stated that there deceased Shefali started weeping and told her that she is being harassed and ill-treated on account of failure to bring five to six lakh rupees from her parents by all accused. This solitary statement has

been made the basis of the conviction of the appellant. Perusal of the evidence of PW3 would clearly indicate that she has attributed a specific role to all the accused persons with equal vehemence. It is to be noted that when this evidence is found to be of general and vague in nature against accused nos.2,3 and 5, I fail to understand how the same evidence could diminish its general and vague character against the appellant. In my view, the finding of the learned Judge is self-contradictory. It cannot be sustained. On the contrary, perusal of the evidence of PW3 would show that she had attributed serious role to accused no.5-Pallavi, the sister-in-law of deceased Shefali. It has come on record in evidence that after love marriage, the appellant and deceased Shefali were staying at the house of Pallavi. Pallavi is married to accused no.3. The appellant and deceased Shefali, as can be seen from the evidence on record, were provided shelter by accused no.5-Pallavi and therefore she was in a dominant position. In the facts and circumstances, in my view, the allegations are general and vague against the appellant as well and therefore the learned Judge ought to have extended the benefit to the appellant which he has extended to accused nos.2,3 and 5.

22. Evidence of PW1 is on the line of the evidence of PW3. PW1 has stated that in the evening of 27.05.2016 PW3 had told

him about her meeting with deceased Shefali, the demand of five to six lakh rupees and ill-treatment and harassment to her on that count. PW1 has stated that deceased Shefali had made a phone call to PW3 and told her that accused persons were making demand of five to six lakh rupees, which they had saved due to her love marriage. The statement made by PW3 on this count specifically attributing the role to the accused persons in making demand of money, has been proved to be an omission. In his evidence, he has narrated the incident occurred at the house of PW5-Lalita Sonpipre. It is seen that after this incident, PW1 neither took any action nor contacted deceased Shefali. In the context of the chronology of events, the case putforth with regard to the demand of money by the appellant and the family members appears to be improbable. There are material omissions and inconsistencies in the evidence of PW1 and PW3. Their evidence is self-contradictory. Their evidence creates doubt about occurrence of incident as stated.

23. It would be necessary to consider the evidence of the independent witnesses. PW5-Lalita Sonpipre's evidence would be very relevant because so called meeting of the PW3 and deceased Shefali took place at her house. It is the case of PW3 that when deceased Shefali narrated the incident to her, PW5 was present

there. Perusal of evidence of PW5 does not support this fact. PW5 has stated that in her presence deceased Shefali told her mother that accused treated her well for few days and now they are harassing her for bringing the money. She has stated that her mother(PW3) told deceased Shefali that since she had performed love marriage they would not pay money to her. Her evidence is silent about weeping of deceased Shefali at her house. Her evidence is also silent about demand of particular sum of money and beating for dowry. In her cross-examination, PW5 has stated that when she made enquiry with deceased Shefali about her family life, she told her that they were doing well. She has stated that when PW3 told deceased that if she had performed marriage with their consent, they would have performed her marriage well, the deceased became speechless and started weeping. She has further stated that about the family life of deceased, deceased Shefali told her that mother-in-law, sister-in-law and husband are residing together. Deceased Shefali also told that they are residing happily. PW5 has stated when this talk was going on her neighbor Jambhule Tai came there. Perusal of evidence of PW5 would show that on material aspect she has not corroborated the version of PW3. It is to be noted that the main episode took place at the house of PW5 in her presence. In this backdrop, PW5

could be the proper witness to narrate all the facts narrated by PW3, if incident as stated had occurred in her house. PW5 has admitted in her cross-examination that her neighbor Jambhule Tai had also made enquiry with deceased Shefali. The deceased told Jambhule Tai that she was doing well. In my view, therefore, evidence of PW5 instead of supporting the case of prosecution creates the path difficult for the prosecution. The combine reading of evidence of PW1, PW3 and PW5 would show that their evidence is not sufficient with regard to the demand of money as a dowry, ill-treatment and harassment on that count. PW1 and PW3 have categorically admitted that due to the marriage by the deceased Shefali with the appellant they had grudge against the appellant and his family members. It is to be noted that if the demand of dowry and ill-treatment on that count was narrated by the deceased, then PW1 without wasting time could have lodged the report. In my view, this would reflect on their conduct. Their conduct in the facts situation, appears to be contrary to the conduct of man of prudence placed in a similarly situation.

24. The prosecution has examined three important witnesses to seek corroboration to the case of prosecution. PW6 is one of

those witnesses. He has deposed that on 28.05.2016 when he was sleeping in his courtyard, at about 2 to 2:30 am he woke-up for urination and at that time, he saw two vehicles coming towards his house from filter by-pass road. He has stated that Vijay Barapatre was on one motor bike and accused Mangesh Kannake was driving another motor bike and Pallavi was holding Shefali on that motor bike. He thought that they were taking Shefali to hospital. He has stated that after half an hour they returned from the same road but Shefali was not seen with them. This witness seems to have been examined to prove that in the night intervening of 27 and 28.05.2016 at 02.00 to 02.30 a.m. deceased Shefali was carried by those accused and thrown in pond. It is pertinent to note that this witness was under the thumb of the police. Several crimes registered against him at the same police station. It is further pertinent to note that his evidence is directly contradictory to the evidence of PW7 and PW8. PW7 has stated he saw Shefali on 28.05.2016 in front of his house. It means that during the day time of 28.05.2016, he saw deceased Shefali. He has stated that deceased Shefali was going to her house carrying bread packet. PW8 has stated that on 28.05.2016 he saw deceased Shefali and the appellant going towards market on motorcycle. Therefore, evidence of PW6 is contradictory

to the evidence of PW7 and PW8. If deceased Shefali was killed or carried on the motorcycle as stated by the PW6 on 28.05.2016 at about 02.00 to 02:30 am then there was no question of PW7 and PW8 having seen deceased Shefali alive during day time of 28.05.2016. PW6 seems to be a got-up witness. Their evidence is not the direct evidence on the point of ill-treatment and demand of money.

25. There is one more circumstance which goes against the case of the prosecution. PW12 has stated that CDR and SDR of the phone carried by deceased Shefali was obtained. He has categorically stated that the last location of deceased Shefali, as per CDR, was near the bus stand. It is the case of the appellant that this CDR has been suppressed despite making repeated requests for production of the same by the prosecution. Perusal of the record would show that the accused had made an application seeking direction to the prosecution to produce the CDR and SDR. The learned Sessions Judge rejected the said application. It has come on record that house of the PW1, father of deceased Shefali is in the vicinity of the bus stand. PW12 has admitted that after obtaining the CDR and SDR of the mobile, it was handed over to PSI Lasanthe. In my view, this aspect would assume importance in view

of the categorical admission by PW1 and PW3 that they had grudge against the appellant and his family members. They have stated that their reputation was spoiled due to the marriage performed by deceased Shefali with the appellant. In my opinion, therefore, failure to produce CDR and SDR despite repeated requests by the accused is one more circumstance to create doubt about the prosecution case against the appellant. No plausible explanation has been placed on record for such non-production.

26. On minute perusal and appreciation of evidence, I am of the opinion that the prosecution has failed to prove the charge under Section 304B particularly with regard to the demand of any amount as dowry and ill-treatment on that count. In the facts and circumstances, therefore, merely because of the evidence of the doctor as to the cause of death the appellant cannot be held guilty of the offence punishable under Section 304B of the IPC.

27. It is to be noted that the learned Sessions Judge has not properly considered the case of the prosecution vis-a-vis charge of the murder under Section 302 is concern. It is seen that in the entire judgment there is no even cursory observation about the charge of murder of deceased Shefali and the evidence adduced by the prosecution. In the teeth of the specific opinion as to the cause of

death i.e. strangulation with *postmortem* drowning, the learned Judge ought to have amended and made charge under Section 302 as a principal charge against appellant and other accused. In that event circumstances relevant to the point of homicidal death brought on record would have been of some assistance to the case of prosecution. In this case, therefore the basic two ingredients of section 304B have not been made out namely; demand of dowry and the ill-treatment or harassment on that count. Therefore, in my view, the judgment and order passed by the learned Judge cannot be sustained. The appellant would be entitled to get benefit which has been extended to the accused nos.2,3 and 5 by the learned Sessions Judge. The appeal deserves to be allowed. Hence, following order:

ORDER

- (i) The criminal appeal is allowed.
- (ii) The judgment and order of conviction and sentence passed by the Sessions Judge, Gadchiroli dated 01.04.2021 passed in Sessions Case No.87/2016 is set aside.
- (iii) Appellant – Mangesh s/o Deorao Kannake (accused no.1) is acquitted of the offence under Section 304B of the Indian Penal Code.

(iv) The appellant be set at liberty forthwith, if not required in any other crime. Fine amount, if any, deposited by the appellant be refunded to him.

JUDGE

Wagh