

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

BEFORE: -

The Hon'ble Justice Soumen Sen
And
The Hon'ble Justice Uday Kumar

CRA 247 of 2017
Jyoti Kamal Ghosh & Ors.
Versus
State of West Bengal

For the Appellant : Mr. Subir Ganguly, Adv.
Mr. Sumanta Ganguly, Adv.

For the State : Mr. Debasish Roy, Public Prosecutor,
Mr. Amita Gour, Adv.
Mr. Karan Bapuli, Adv.

Hearing concluded on : 19th June, 2024

Judgment on : 9th July, 2024

Soumen Sen, J.:

1. The appeal is arising out of a judgment and order of conviction dated 22nd February, 2017 and 23rd February, 2017 passed by the learned Additional Sessions Judge, First Court, Krishnanagar, Nadia, in Sessions Trial No. VI (November) of 2011 arising out of Sessions Case No. 77(05)2009 convicting the appellants guilty for commission of offences punishable under Sections 498(A)/304(B) read with Section 34 of the Indian Penal Code.

2. During the pendency of the appeal, Tirthankar Ghosh, the husband of the victim, died. Presently, we are concerned with Jyoti Kamal Ghosh being father-in-law and Manju Ghosh being mother-in-law of the deceased.

3. Briefly stated, Tirthankar was married to Baishali on 22nd January, 2006 and in the wedlock, a child was born on 28th April, 2007. Baishali died on 30th October, 2008 at her matrimonial home after she suffered extensive burns over her body. The father of Baishali lodged a complaint of torture and attempt to murder Baishali by her in-laws. It was alleged that her in-laws were responsible for the severe burn injuries all over her body to which she ultimately succumbed.

4. The prosecution, upon investigation, filed a charge-sheet under Section 498(A)/304(B)/346 and 34 of the Indian Penal Code. Subsequently, by reason of the death of the victim, Section 302 was added.

5. In the trial, 17 witnesses have been examined on behalf of the prosecution. The defence had examined four witnesses. On the basis of the evidence, the Trial Court held the appellants guilty and convicted them with appropriate sentences.

6. The prosecution did not adduce any ocular evidence and the case is based on circumstantial evidence. The prosecution principally relied upon the evidence of the father, mother, aunt and sister of the deceased. Doctors who treated Baishali were also examined and cross-examined. The aunt of the

deceased although recorded her statement under Section 164 of the Code of Criminal Procedure was not available at the trial. However her statement was marked as exhibit 14 without objection.

7. Mr. Subir Ganguly the learned Counsel for the appellant submits that there is no evidence on record suggesting the involvement of the appellants and more particularly the present appellants namely, the father-in-law and mother-in-law of the deceased in the commission of the alleged offence. The husband of the deceased committed suicide during the pendency of the appeal. The chain of circumstances is incomplete and does not conclusively prove the involvement of the present appellants in the commission of the offence. On the basis of the evidence on record the learned Trial Court could not have held the appellants guilty of such offences. The learned Counsel has referred to the depositions of PWs 1, 2 and 3 and the doctors who had treated the patient to argue that the bed head ticket contains an endorsement on 27th October, 2008 that the burn injury was “accidental during cooking as stated by the patient.” In view of such clear statement by the victim before her death revealing the cause of her injury, the appellants could not have been convicted.

8. It is submitted that Puspita Kundu, PW2 has embellished and exaggerated her statement recorded subsequently under Section 164 of the Cr.P.C. The statement recorded before the Investigating Officer on 11th November, 2008 under Section 161 Cr.P.C. did not mention any demand for

money by the accused persons for purchasing Maruti Van or correction of horoscope. It is submitted that PW2 did not state to the IO on 11th November, 2008 that her sister had been set on fire by pouring kerosene oil. However, while recording statement under Section 164 on the following day demand for dowry and torture were added. The said witness did not state anything about dowry or attempt on the victim by the accused persons to burn her alive to the Investigating Officer while making their statement on 11th November, 2008 as would reveal from the evidence of IO during cross-examination. They claimed to have met the victim on 27th October, 2008 at JNM Hospital, Kalyani and nothing had prevented them from lodging a complaint with the concerned police station if they had any doubt about setting the victim on fire. They did not state to the IO that Baishali confided in them on 27th October, 2008 that her husband, Tirthankar, pressurised her and tortured her for money to purchase a Maruti Omni Van or demanded any money for rectifying horoscope or that she was beaten mercilessly by her husband before she was set on fire by her in-laws. However, in the statement recorded under Section 164 of the Cr.P.C. the following day, that is, 12th November, 2008 both of them alleged that Tirthankar demanded dowry. She was tortured physically and mentally and ultimately as she could not arrange the fund, she was set on fire is what alleged by the prosecution. The statement of the aunt Tulu Sengupta recorded under Section 164 Cr.P.C could not have been relied as she did not appear at the trial. Her statement could not have been marked as Exhibit 14. In fact,

PW1 the father of the victim has stated in evidence that a few days prior to the death of his daughter, Tirthankar along with his daughter had gone to Digha keeping their daughter with them.

9. The learned Counsel has submitted that the endorsement in the bed head ticket on 27th October, 2008 corroborates with the evidence of Pushpita as the victim before her death had alleged to have told Pushpita that she was not aware of the cause of her catching fire. The learned Counsel submits that even if the statements of the said witnesses are taken to be correct, it only implicates Tithankar and not his parents. Tirthankar has died, during the pendency of the appeal. He has committed suicide.

10. In view of the fact that Jyoti Kamal and Manju are in no way involved with the commission of the alleged offence and there is nothing on record to show their involvement in the commission of such offence, they could not be held liable for offences punishable under Section 498(A) read with Section 304(B) and Section 34 of the I.P.C.

11. Per contra, Ms. Amita Gour the learned Counsel for the State, submits that the evidence of the parents of the victim, aunt and her sister directly implicate Tirthankar and his parents for the commission of the alleged offence. It is submitted that all the witnesses had categorically stated that Baishali was tortured at the matrimonial home by the appellants including Tirthankar, the husband of the deceased. She was set on fire as she could not

arrange for the dowry. The witnesses have categorically stated that a sum of Rs.70,000/- has been paid to Tirthankar for purchasing a Maruti Omni Van and thereafter their daughter was pressurized to bring more money. In fact, Tirthankar, prior to the date of the incident had called his father-in-law, PW1 and informed him that he was going to divorce the victim. Tirthankar had filed a case for custody of the child. The relationship between them was acrimonious. It is submitted that P.W.6, one of the doctors who examined the victim did not vouch for the endorsement "accidental burn during cooking as stated by the patient". It is submitted that the observation and diagnosis of the doctors would show that the victim had suffered extensive burn injuries and she was possibly not in her senses to make any such statement before a Doctor on 27th October, 2008. It is submitted that it is the consistent case of Tirthankar that the victim succumbed due to stove blast. In fact, it was for Tirthankar to explain the cause of death as Tirthankar was all along with deceased and he also claimed to have suffered some burn injuries.

12. Tirthankar had failed to clear the doubt with regard to the cause of death and accordingly, the finding of the Trial Court with regard to the cause of death and involvement of Tirthankar are to be sustained. In so far as the parents of Tirthankar are concerned, it is submitted that P.W 2 and Tulu Sengupta in their evidence have stated that just before the incident the victim was in the balcony with her father-in-law, daughter and husband and she lost her consciousness on being assaulted and as such she was unable to say how

she caught fire and after she regained consciousness she shouted for help. The relatives of the deceased have deposed against all three of them with regard to mental and physical torture.

13. In view of the aforesaid, learned counsel for the State has prayed for dismissal of the appeal and upholding the conviction.

14. In the conspectus of the aforesaid facts and the evidence on record, we need to assess the order of conviction.

15. We have carefully read the evidence of prosecution witnesses as well as defence witnesses. We have also read the statement of Tirthankar under Section 313 Cr.P.C. There is no dispute that Baishali died due to burn injuries. Inquest report shows burn injuries on palms, abdomen, back, hands, legs and neck. Initially she was admitted to Jaharlal Nehru Memorial Hospital (in short JNH) at Kalyani. She was diagnosed with 90% burn injury. She was referred to N.R.S Medical College and Hospital, Kolkata for further treatment. Tirthankar at the time of admission on 28th October, 2008 has reported that his wife suffered burn injuries due to stove bursting. At the time of admission at NRS, Baishali was “conscious but drowsy. Burn over face, chest, abdomen, both hands, both legs from groin to foot and most of the part in the back side except middle. The condition of the patient, as appeared from the medical report was serious and deteriorating. She was fighting her battle for life. Dr. Nirmalendu Kanjilal PW6 who examined Baishali on 27th October, 2008 at JNM Hospital, Nadia, in his evidence has stated that Baishali was admitted with

70% burn injury and the nature of burn injury can be caused if any inflammable articles is put on the patient and set on fire. Such type of burn injury may be caused if a person under fire “caught hold of another person or when the person tried to push away the person under fire trying to catch hold of him/her”. He however, denied to have put any signature corresponding to the endorsement “Accidental death during cooking as stated by the petitioner”. She was found to be drowsy and semi conscious. Dr. Anshuman Ray, P.W 15 examined Baishali at J.N.M Hospital on 27th October, 2008. He opined that the burn injury suffered by Tirthankar on his left hand was superficial and this type of injury may be caused if a person in burn condition holds another person and that person pushes or catches hold of other person. PW 15 corroborates the statement of PW 6 with regard to the nature of injury suffered by Tirthankar.

16. Dr. Suparna Basu, P.W 9, who examined Baishali on 28th October, 2008 at N.R.S Hospital, has stated that Tirthankar gave history of injury as stove blasting. The doctor found Baishali semi-conscious and in drowsy condition. She was found to have 90% burn injury approximately. Such type of injury can be caused if someone poured explosive inflammable articles and set on fire. However, the Doctor did not get any smell of kerosene oil on her body. Doctor opined that when a person is burnt with the help of kerosene oil, carbon layer is normally found in the body as kerosene oil contains carbon monoxide. However, the Doctor did not find any carbon layer on her body. He

has stated that it is difficult to say that whether such injuries can be caused when wearing apparels of a person catches fire from a gas oven.

17. Although, it was alleged on behalf of the appellant that there was a demand for dowry and pursuant to such demand a sum of Rs.70,000/- (Seventy Thousand) was paid to Tirthankar or the in-law of Baishali, the bank statement and ledger produced on behalf of the present appellants would not show that any such amount was transferred to the bank account of the present appellants. However, it is quite clear from the evidence that the relationship between Tirthankar and his wife was not cordial and they were entangled in a custody battle. An innocent house wife would not ordinarily commit suicide within a period of three years of marriage having a child barely six months old when she died unless she had faced physical and mental torture or there are existence of grave circumstances which became intolerable. In fact, all the prosecution witnesses stated that Baishali used to tell them about the physical assault by Tirthankar and mental torture by her in laws.

18. According to PW 2, the victim has claimed to have said that she was physically beaten on the fateful night by Tirthankar in a drunken state as she refused to arrange further money for him from her father. However, according to PW 2, victim could not say definitely as to how she caught fire. Nonetheless, according to the appellants, she was rescued by the husband who alleged to have suffered superficial burn injury on his left hand as revealed

from the evidence of PW 15, the Doctor who examined him on October 27, 2008 at J.N.M. Hospital, Kalyani.

19. If the stove blast is not found to be the cause of death, then there has to be some other cause for which she caught fire and at that time, only she and her husband were present when the incident occurred. The seizure list does not mention any stove. It is not in dispute that Tirthankar was last seen with his wife when she caught fire and ultimately succumbed. Tirthankar could not offer any explanation with regard to cause of death of the victim and under what circumstances she caught fire. It is now clear that she did not suffer injury due to stove blast. Tirthankar was hiding facts. We have read the entire evidence of the witnesses being PWs 1, 2 and 3 wherefrom it appears that she used to be assaulted by Tirthankar and on the fateful night he was drunk and had beaten his wife mercilessly and soon thereafter she caught fire and ultimately she died due to burn injuries. The statement of Tulu Sengupta under Section 164 Cr.P.C also corroborates substantially the evidence of PW2. Tulu however was not cross-examined as she did not appear.

20. Apart from the family relations two witnesses namely Sukla Mondal, PW4 and Sabita Saha PW5 deposed as prosecution witnesses. They claimed to have known Baishali since childhood.

21. Sukla PW4 in her evidence has stated that the victim's in-laws used to torture her physically and mentally. They demanded Rs.70 thousand for purchasing Maruti Van of Navy Blue Color. After hearing of the burn injuries

she along with her family members, parents and sister along with two to three other persons went to JNM Hospital, Kalyani. Puspita sister of Baishali and Tulu Sengupta aunt of Baishali had stayed in her room in the hospital. Subsequently she received information that Baishali was taken to NRS Hospital, Kolkata. However, during cross-examination she could not recollect as to whether Tirthankar had demanded any money for purchasing the car or that the parents-in-law of Baishali had demanded any such amount for purchasing the car or towards astrologer's fee. She did not ascertain the cause of death from any neighbour in her matrimonial home. Baishali and her husband used to visit her parents house regularly.

22. Sabita Saha PW5 in her deposition has stated that she heard the incident two and half months after Baishali's death. She had no personal knowledge as to what happened in the hospital. Whatever she deposed was based on the information received from Tulu Sengupta.

23. Mukul Halder, PW8 has also deposed that Baishali used to tell him that she was ill treated at her in-laws place for demand of money for various purpose including purchasing a car.

24. The defence has adduced four witnesses. DW1 is the Post Master of Katagang Post Office. He produced computerized extract of the ledger of account no. 1027046 of accused Jyoti Kamal Ghosh and Manju Ghosh to show a sum of Rs.74,850/- was deposited on the said account on 27th November,

2007 and Rs.74,500/- was withdrawn leaving balance of Rs.550/- only. However, the source of deposit and purpose of withdrawal has not been proved.

25. DW2, was initially a prosecution witness though neither produced nor examined by the prosecution at the trial. He resiled from his earlier statement made before the police under Section 161 of the Cr.P.C. He stated that he has never heard or seen any kind of torture being inflicted by the accused persons on the wife of Tirthankar. The kitchen is situated on the first floor and Tirthankar used to reside on the ground floor of the house. He is a driver by occupation. His house is situated in the front of the house of the accused persons and intervened by a road. He drove the accused Tirthankar and his wife to JNM Hospital Kalyani on the relevant date of the incident. He claimed that on the way Tirthankar's wife told that while boiling milk of her child her nighty caught fire and thereby she sustained burn injury on her person.

26. DW3, the Inspector of Post Office produced the original ledger copy of the joint account of the present appellant to show that a sum of Rs.74,850/- was deposited in the RD account and on maturity on transferred in Savings Account on 22nd November, 2007.

27. DW4, another neighbor of the accused who was also earlier a prosecution witness and examined by the IO has stated that he used to visit the house of the accused persons. The accused persons used to treat Baishali properly and there was no issue of any demand of dowry.

28. The law with regard to conviction on the basis of circumstantial evidence has been lucidly explained in the judgment of the Apex Court in **Sharad Birdhichand Sarda v. State of Maharashtra**;¹ in the following words:

“152. Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129]. This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh [(1969) 3 SCC 198 : 1970 SCC (Cri) 55] and Ramgopal v. State of Maharashtra [(1972) 4 SCC 625 : AIR 1972 SC 656]. It may be useful to extract what Mahajan, J. has laid down in Hanumant case (1952) 2 SCC 71.

“12. It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the Accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the Accused and it must be such as to show that within all human probability the act must have been done by the Accused.’

¹ (1984) 4 SCC 116

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an Accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade v. State of Maharashtra* [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033: 1973 CrL LJ 1783] where the observations were made: [SCC P. 807 para 19].

‘19.....Certainly, it is a primary principle that the Accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.’

(2) the facts so established should be consistent only with the hypothesis of the guilt of the Accused, that is to say, they should not be explainable on any other hypothesis except that the Accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the Accused and must show that in all human probability the act must have been done by the Accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.” (emphasis in original).

29. In **Musheer Khan @ Badshah Khan & Anr. Vs State of Madhya Pradesh**,² the nature of circumstantial evidence and the burden of proof of prosecution have been stated as under:

“39. In a case of circumstantial evidence, one must look for complete chain of circumstances and not on snapped and scattered links which do not make a complete sequence. This Court finds that this case is entirely based on circumstantial evidence. While appreciating circumstantial evidence, the Court must adopt a cautious approach as circumstantial evidence is "inferential evidence" and proof in such a case is derivable by inference from circumstances.

40. Chief Justice Fletcher Moulton once observed that "proof does not mean rigid mathematical" formula since "that is impossible". However, proof must mean such evidence as would induce a reasonable man to come to a definite conclusion. Circumstantial evidence, on the other hand, has been compared by Lord Coleridge "like a gossamer thread, light and as unsubstantial as the air itself and may vanish with the merest of touches". The learned Judge also observed that such evidence may be strong in parts but it may also leave great gaps and rents through which the accused may escape. Therefore, certain rules have been judicially evolved for appreciation of circumstantial evidence.

41. To my mind, the first rule is that the facts alleged as the basis of any legal inference from circumstantial evidence must be clearly proved beyond any reasonable doubt. If conviction rests solely on circumstantial evidence, it must create a network from which there is no escape for the accused. The facts evolving out of such circumstantial evidence must be such as not to admit of any inference except that of guilt of the accused. {See Raghav Prapanna Tripathi and Ors. v. State of U.P. : AIR 1963 SC 74}.

² **2010 (2) SCC 748**

42. *The second principle is that all the links in the chain of evidence must be proved beyond reasonable doubt and they must exclude the evidence of guilt of any other person than the accused.*

{See: State of UP v. Ravindra Prakash Mittal : 1992 CrL.L.J 3693(SC) - (Para 20)}

43. *While appreciating circumstantial evidence, we must remember the principle laid down in Ashraf Ali v. Emperor 43 Indian Cases 241 at para 14 that when in a criminal case there is conflict between presumption of innocence and any other presumption, the former must prevail.*

44. *The next principle is that in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and is incapable of explanation upon any other reasonable hypothesis except his guilt.*

45. *When a murder charge is to be proved solely on circumstantial evidence, as in this case, presumption of innocence of the accused must have a dominant role. In Nibaran Chandra Roy v. King: 11 CWN 1085 it was held the fact that an accused person was found with a gun in his hand immediately after a gun was fired and a man was killed on the spot from which the gun was fired may be strong circumstantial evidence against the accused, but it is an error of law to hold that the burden of proving innocence lies upon the accused under such circumstances. It seems, therefore, to follow that whatever force a presumption arising under Section 106 of the Indian Evidence Act may have in civil or in less serious criminal cases, in a trial for murder it is extremely weak in comparison with the dominant presumption of innocence.*

46. *The Same principles have been followed by the Constitution Bench of this Court in Govinda Reddy v. State of Mysore : AIR 1960 SC 29 where the learned Judges quoted the principles laid down in Hanumant Govind Nargundkar and Anr. v. State of Madhya Pradesh : AIR 1952 SC 343. The ratio in Govind (supra) quoted in paragraph 5, page 30 of the reports in Govinda Reddy (supra) are:*

In cases where the evidence of a circumstantial nature, the circumstances which lead to the conclusion of guilt should be in the first instance fully established, and all the facts so established should be consistent only with the guilt of the accused. Again the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words there must be a chain of evidence so complete as not to leave any reasonable doubt for a conclusion consistent with the innocence of the accused and it must be shown that within all human probability the act must have been committed by the accused.

The same principle has also been followed by this Court in Mohan Lal Pangasa v. State of U.P. AIR 1974 SC 1144.”

30. It can thus clearly be seen that it is necessary for the prosecution that the circumstances from which the conclusion of the guilt is to be drawn should be fully established leaving no room for doubt about the involvement of the accused persons. In other words, the entire chain of evidence must be complete and the conclusions which are arrived at after examining the chain of evidence must point towards the culpability of the accused and to no other conclusion.

31. The dying declaration of the victim is an important material to decide the issue. Although there is no form prescribed for recording the statement of a victim in the nature of dying declaration or the manner of recording conversation between the parties in any particular manner, however, with a view to obviate prejudice or possibility of exaggeration certain checks and balances are to be followed if the statement of the victim were to be treated

as dying declaration. The evidence shows that her sister and aunt stayed with her in the room at JNM Hospital, Kalyani before she was transferred to NRS Hospital, Kolkata. There could be a possibility of some conversation provided that victim was semi-conscious. The IO during cross examination has referred to G.D.E being no. 1374 of Kalyani Police Station dated 27th October 2008 regarding dying declaration of the victim but he has not seen the said declaration. The medical record shows that at the time of admission at NRS on October 28, 2008 she was conscious but drowsy as it appears from Exhibit 7. However, PW 9 the doctor who examined Baishali found her semi-conscious and drowsy. A portion of the statement restricted to merciless assault as the immediate cause of her unconsciousness within which time she caught fire before she regained consciousness and cried loud for help is common in both the statements recorded under Section 164 Cr.P.C. She did not specifically name her husband or in-laws as she became unconscious. However, the circumstances are such that it can lead to a strong possibility of her being set on fire. The word 'possibility' at this stage would graduate to certainty and becomes conclusive when we consider the statement of the husband under Section 313 read with the medical evidence and the demand for dowry by the husband. The investigating officer did not find any stove at the place of occurrence nor any bottle of kerosene oil. It is also clear from the evidence that there was a demand for a Maruti Van and a sum of Rs.50,000/- irrespective of the fact whether that amount was actually paid by the father-in-law or the

father of Tirthankar. That there was a demand for a Maruti Van which is akin to a dowry and a further sum of Rs.50,000/- is established.

32. We are unhappy with the manner in which the investigating officer has conducted himself in not collecting and producing G.D.E being No.1374 of Kalyani Police Station dated 22nd October, 2008 regarding dying declaration of the victim. It is unfortunate that the IO did not collect G.D.E being no. 1374 of Kalyani Police Station dated 22nd October, 2008 regarding the dying declaration of the deceased and has completely failed to discharge his duties cast upon him. The IO is required to collect all relevant and material evidence concerning the matter to unearth the truth. He also failed to seize several other materials, articles including the Mobile Phone by which the victim/deceased used to inform her parent about the torture inflicted upon her at the matrimonial house. Neither the IO collected the call list nor did he verify as to who was the registered owner of the Maruti Van. The failure to seize some of the important articles and G.D.E mentioned above ultimately did not benefit the accused persons and such loopholes in the investigation were left perhaps to help the accused at the cost of the victim. To acquit the accused persons solely on that ground would be adding insult to injury.

33. The statement of PW2 and Tulu Sengupta would show that the immediate cause of death is a demand for a sum of Rs.50,000/- by Tirthankar over and above his earlier claim for purchase of a Maruti Van and was refused by Baishali. There is no evidence suggesting that the surviving appellants

have any role to play or they have instigated Tirthankar to make any such demand on that right or towards dowry immediately before her death.

34. The dying declaration reflected from the statement of PW2 Puspita Kundu and Tulu Sengupta are consistent with each other on material particulars. It is trite law that uncorroborated dying declaration can be accepted if the court found it made voluntarily and reliable taking into account all facts and circumstances of the case. As observed earlier if the relations of Baishali wanted to implicate the accused persons then they could have easily put words in the mouth of Baishali which would have directly implicated her husband and in laws. None of the said relations have stated that Baishali told them that her husband or father in law has set her on fire. However, she stated that she was mercilessly beaten by her husband as a result whereof she became unconscious and then when she regained consciousness she found burning sensation all over her body and cried loudly for help. Off course, Tulu in her statement under Section 164 (Exbt. 14) has made statement that Baishali, during physical assault by her husband suddenly realized that some liquid was poured on her person and immediately thereafter she caught fire and what happened thereafter she could not recollect. The nature of the injury as appeared from the evidence of Doctor and medical reports would show that she had suffered extensive burn injury not accidentally and now it can be safely concluded that the case of burning was not stove blast as alleged by Tirthankar.

35. The prosecution case as made out has been fully corroborated by the prosecution witnesses in their respective testimony as mentioned above. The evidence on record shows that the husband of the victim called the complainant over his mobile phone and told him to take away his daughter as he was going to divorce her, but since it was raining the complainant requested Tirthankar to wait till the next morning and in the meantime to make some arrangements. At that time he could hear his daughter crying standing by the side of Tirthankar and this fact has been corroborated by the prosecution witness particularly PW1, PW2 and PW3 father, sister and mother of the victim and there was no reason to disbelieve such evidence. The mental and physical torture of the deceased at least by Tirthankar has been adequately established by the parents, sister and aunt of the victim. The defence taken by Tirthankar and his parents that the Maruti Van was purchased out of fund of his father was not proved at the trial. The owner of the vehicle nor the blue book of the vehicle or any document from Naba Kumar Chatterjee who claimed to be the seller were produced.

36. The evidence of DW2 and DW4 who claimed to be the neighbours seem to be protecting the accused persons. They did not even utter a single word regarding the stove blast causing burn injury to the deceased. Being a neighbor and as a normal human behavior, one would have expected them if not rushed at least to visit place of occurrence. Although DW2 claimed that Baishali while in the car had told that while boiling milk for her child, her nighty caught fire

is disbelievable. Read with the other evidence including the opinion of the doctors who have examined Baishali, the cause of burn by stove blast is not established.

37. In order to attract Section 304B of IPC, the following essentials are to be satisfied:

- i. The death of a woman must have been caused by burns or bodily injury or otherwise than under normal circumstances.
- ii. Such death must have occurred within seven years of her marriage.
- iii. Soon before her death, the woman must have been subjected to cruelty or harassment by her husband or by relatives of her husband.
- iv. Such cruelty or harassment must be for or in connection with demand for dowry.
- v. Such cruelty or harassment is shown to have been meted out to the woman soon before her death.

(See Smt. Shanti and Anr. v. State of Haryana: AIR 1991 SC 1226; Sanjay kr. Jain v. State of Delhi: AIR 2011 SC 363)

38. The ingredients have been pithily stated in ***Bakshish Ram v. State of Punjab***,³ in the following words:

³ 2013 (4) SCC 131: 2013 AIR SCW 1914

- “a. that a married woman had died otherwise than under normal circumstances.
- b. such death was within seven years of her marriage; and
- c. the prosecution has established that there was cruelty and harassment in connection with demand for dowry soon before her death.”

39. If all the other ingredients of Section 304-B of the IPC are fulfilled, any death (whether homicidal or suicidal or accidental) and whether caused by burns or by bodily injury or occurring otherwise than under normal circumstances shall, as per the legislative mandate, be called a “dowry death” and the woman’s husband or his relative “shall be deemed to have caused her death”. The Section clearly specifies what constitutes the offence of a dowry death and also identifies the single offender or multiple offenders who has or have caused the dowry death.

40. The evidentiary value of the presumption is stated in Section 113-B of the Evidence Act, 1872 (the Act). The key words in this Section are “shall presume” leaving no option with a Court but to presume an accused brought before it of causing a dowry death guilty of the offence. However, the redeeming factor of this provision is that the presumption is rebuttable. Section 113-B of the Act enables an accused to prove his innocence and places a reverse onus of proof on him or her. (see **Suresh Kumar v. State of Haryana**⁴)

⁴ 2013 AIR SCW 6698; 2014 CRI. L. J. 551

41. The interplay between Section 304-B of the IPC and Section 113-B of the Evidence Act has been elucidated by a three Judges Bench of the Hon'ble Supreme Court in **Shamnsaheb M. Multtani v. State of Karnataka**⁵ in paragraphs 27, 28 and 30 are reproduced below:

"27. The postulates needed to establish the said offence are: (1) Death of a wife should have occurred otherwise than under normal circumstances within seven years of her marriage; (2) soon before her death she should have been subjected to cruelty or harassment by the accused in connection with any demand for dowry. Now reading section 113B of the Evidence Act, as a part of the said offence, the position is this: If the prosecution succeeds in showing that soon before her death she was subjected by him to cruelty or harassment for or in connection with any demand for dowry and that her death had occurred (within seven years of her marriage) otherwise than under normal circumstances "the court shall presume that such person had caused dowry death."

28. Under Section 4 of the Evidence Act "whenever it is directed by this Act that the Court shall presume the fact it shall regard such fact as proved unless and until it is disproved." So the court has no option but to presume that the accused had caused dowry death unless the accused disproves it. It is a statutory compulsion on the court. However it is open to the accused to adduce such evidence for disproving the said compulsory presumption, as the burden is unmistakably on him to do so. He can discharge such burden either by eliciting answers through cross-examination of the witnesses of

⁵ 2001 (2) SCC 577; AIR 2001 SC 921

the prosecution or by adducing evidence on the defence side or by both.

30. But the peculiar situation in respect of an offence under Section 304B IPC, as discernible from the distinction pointed out above in respect of the offence under Section 306 IPC is this: Under the former the court has a statutory compulsion, merely on the establishment of two factual positions enumerated above, to presume that the accused has committed dowry death. If any accused wants to escape from the said catch the burden is on him to disprove it. If he fails to rebut the presumption the court is bound to act on it”.

42. In ***Yashoda v. State of Madhya Pradesh***,⁶ it was held that once the ingredients of Section 304-B of the IPC are fulfilled the onus shifts to the defence to produce evidence to rebut the statutory presumption and to show that the death was in the normal course with which the accused was not connected.

43. In relation to accidental death and the applicability of Section 304-B of the IPC as well as the presumption under Section 113-B of the Act was considered by the Hon’ble Supreme Court in ***Nallam Veera Stayanandam v. Public Prosecutor, High Court of A.P.***,⁷ where it was held:

“It is true from the evidence led by the prosecution it has been able to establish that the appellants were demanding dowry which was a harassment to the deceased. It is also true that the death of the deceased occurred within 7 years of the marriage, therefore, a

⁶ AIR 2005 SC 1411; 2004 AIR SCW 7299

⁷ AIR 2004 SC 1708; 2004 AIR SCW 1160

presumption under Section 113B of the Evidence Act is available to the prosecution, therefore, it is for the defence in this case to discharge the onus and establish that the death of the deceased in all probability did not occur because of suicide but was an accidental death.”

44. A Similar view was taken in **Sharad v. State of Maharashtra**,⁸ and **Pathan Hussain Basha v. State of A.P.**⁹ However, **Hira Lal**¹⁰ on a conjoint pleading of Section 304-B of IPC and 113-B of the Evidence Act it was held as under:

“A conjoint reading of Section 113-B of the Evidence Act and Section 304-B IPC shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. Prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the 'death occurring otherwise than in normal circumstances”.

45. The aforesaid view has been followed in a number of decisions as noticed in **Suresh Kumar** (*supra*). In **Suresh Kumar** (*supra*) on consideration of all the earlier decisions and following ratio as laid down in **Multtani**¹¹ it was held that the initial burden of proving the death of a woman within seven years of her marriage in circumstances that are not normal is on the prosecution; such death should be in connection with or for a demand of dowry which is

⁸ 2012 (5) SCC 548: AIR 2012 SC 1818

⁹ 2012(8) SCC 594: AIR 2012 SC 3205

¹⁰ AIR 2003 SC 2865: 2003 AIR SCW 3570

¹¹ AIR 2001 SC 921: AIR 2001 SCW 532

accompanied by such cruelty or harassment that eventually leads to the woman's death in circumstances that are not normal. After the initial burden of a deemed dowry death is discharged by the prosecution, a reverse onus is put on the accused to prove his innocence by showing, inter alia, that the death was accidental.

46. The burden of rebutting the presumption was on Tirthankar, unfortunately he did precious little to rebut this presumption.

47. The legislative intent of Section 304B has to be kept in mind in deciding the case of dowry death. Such crimes are generally committed in privacy and secrecy at home. By reason of very nature of commission of such crime, independent and direct evidence might be difficult if not impossible and that is why the legislature has included Section 113A and Section 113B in the Evidence Act, 1872 by way of amendment in 1983.

48. A conjoint reading of Section 113B of the Evidence Act and Section 302B IPC makes it clear that if a death is caused by any burn or bodily injury or unnatural within seven years of marriage and if it is shown that soon before her death such woman has been subjected to cruelty or harassment for or in connection with any demand for dowry court shall proceed on the presumption that the person who have subjected her to cruelty or harassment in connection with the demand for dowry, have caused a dowry death within the meaning of

Section 304B IPC (see ***Parvati Devi v. State of Bihar now State of Jharkhand***)¹².

49. Once the prosecution is able to show that the death is neither natural nor accidental and fulfills all or any of the ingredient of Section 304B the prosecution would presume to have discharged its initial burden. The prosecution cannot be asked to prove the ingredient of dowry death beyond reasonable doubt as any such interpretation would defeat the very purpose of Section 304B. Once such initial burden is discharged by prosecution initial presumption of innocence of accused would get replaced by deemed presumption of guilt of the accused and burden would be shifted on the accused to rebut that deemed presumption of guilt by proving beyond reasonable doubt his innocence.

50. However at the same time adequate opportunity is required to be given to the accused to prove his innocence. In fact, the burden to prove innocence is more upon accused under Section 113B as by reason of the expression “shall presume”, once the ingredients of the offence are established, the court would proceed with the trial requiring the accused to prove its innocence beyond reasonable doubt. It is well settled that a person on death bed would not tell a lie. Admittedly the victim had suffered a serious burn injury and made certain statements implicating her husband. On a principle that a man will not meet with his master with a lie in his mouth, the court can

¹² AIR 2022 SC 1268

accept the said statement, as sacrosanct without any corroboration. The dying declaration is considered to be substantive evidence only for the reason that a person in acute agony is not expected to tell a lie and in all probabilities it is expected from such person to disclose the truth. The burn injury on the basis of the statement of P.W. 2 and Tulu Sengupta read with the evidence of doctor was clearly not accidental or suicidal. The doctors who have immediately examined the victim are competent to depose on the nature of the injuries. Notwithstanding the opinion of the doctor who conducted the post mortem that it is not possible to opine as to whether the cause of death was homicidal, suicidal or accidental and such injuries may be sustained in accidental case also. The appellants have claimed it to be accidental. The victim has claimed to have stated to her parents, sister and aunt earlier that her husband and in-laws were pressurizing for dowry. However, there must be existence of proximate and live link between the cruelty or harassment concerned and the death in question. The dying declaration said to have been made to her sister and aunt does not establish a live link between the two, namely, "soon before" or "immediately before" the occurrence of her death at least so far as the surviving appellants are concerned.

51. The demand for dowry by Tirthankar was however established.

52. On such consideration, we feel that the finding of the Trial Court with regard to involvement of Tirthankar in the commission of the offence and

inflicting physical assault on the victim is justified. Admittedly, Tirthankar was last seen with the victim and he also suffered superficial burn injury.

The statement of Tirthankar recorded under Section 313 was evasive and one of denial. He had failed to explain circumstances under which she caught fire. The story of stove blast is not proved. The cause of fire is within the special knowledge of Tirthankar. Tirthankar suppressed material fact and failed to rebut presumption of dowry death under Section 304B. The death occurred within three years of marriage. The incriminating circumstances that inculpates the accused husband has not been properly explained. The evidence of dowry harassment by the husband “soon before her death” was established [see. ***Prem Singh v. State of Haryana***¹³].

53. However, so far as the parents of Tirthankar are concerned, we do not find any cogent evidence with regard to their involvement in the commission of the offence save and except we find from the statement of Pushpita Kundu and Tulu Sengupta that the victim had informed that her father-in-law was present in the balcony on the date of incident and they were inside the room. The name of the mother-in-law featured nowhere when the alleged burning took place. Both PW1 and PW2 have stated of ill behavior of the father-in-law, mother-in-law and sister-in-law. Sister-in-law has been acquitted. They however did not implicate the surviving appellants with the

13. AIR 1998 SC 2628; 1998 C.R.L.J. 4019

demand for dowry soon before the death of Baishali and in their statement recorded during investigation. The allegations of dowry against the in-laws could be an emotional outburst after the death of the victim in such circumstances.

54. It cannot be definitely concluded on the basis of the evidence that the parents-in-law of the victim had caused any cruelty or harassment in connection with demand for dowry soon before death or any time before.

55. On the contrary it appears from the evidence of defence witnesses that about Seventy Four Thousand (Rs.74,000/-) withdrawn by the father-in-law of the victim in the month of November much prior to the amount demanded by Tirthankar for purchasing the Maruti Van although it was not proved that such amount was for purchase of the car. The prosecution has failed to show any amount was paid by the father-in-law of Tirthankar towards purchasing the said car. However, that there was a demand by Tirthankar cannot be denied. The demand for further amount and its refusal seems to be the reason of mercilessly assault and thereafter what happened is now known and a fait accompli for Tirthankar notwithstanding the little mercy he had shown in admitting his wife in a hospital.

56. The prosecution before the trial court has failed to establish the circumstances from which an absolute inference of guilt of the present surviving appellants can be drawn under Section 304B. The chain of circumstances leading to the alleged guilt of the present surviving

appellant/accused are not established. Since the conclusion of a criminal trial is based on the theory of conclusive proof and not on preponderance of probability, we hold that the learned trial Court is not justified in coming to a finding that the charge of dowry death as against the present appellants have been proved beyond reasonable doubt. There is no evidence suggesting that in all probabilities her death had been the aftermath of cruelty perpetrated by the surviving appellants. On the contrary it can be safely concluded that the immediate cause of death was cruelty perpetrated by Tirthankar immediately before Baishali caught fire and it fulfills the ingredient of Section 304B.

57. On such consideration, we allow the appeal filed by Jyoti Kamal Ghosh and Manju Ghosh. However, we are of the view that Tirthankar Ghosh is guilty and his conviction is upheld. In view of the fact that Tirthankar is already dead, it cannot be executed.

58. The appeal succeeds in part.

59. The appeal is accordingly, disposed of.

60. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance of all requisite formalities.

I agree

(Soumen Sen, J.)

(Uday Kumar, J.)