

**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

BEFORE

SHRI JUSTICE RAJENDRA KUMAR (VERMA)

CRIMINAL APPEAL NO.554 OF 1998

BETWEEN :-

**BASSU ALIAS SHIV PRASAD, SON
OF TULSIRAM GAWAL, AGED
ABOUT 25 YEARS, RESIDENT OF
VILLAGE PIPARWANI, P.S.
TENDUKHEDA, DISTRICT
NARSINGHPUR**

...APPELLANT

(BY SHRI NEERAJ ASHAR – ADVOCATE)

AND

STATE OF M.P.

...RESPONDENT

(BY SHRI A.K. VERMA – PANEL LAWYER)

Reserved on	:	18/01/2023
Pronounced on	:	17/03/2023

*This Criminal Appeal having been heard and reserved for judgment, coming on for pronouncement this day, **Shri Justice Rajendra Kumar (Verma)** pronounced the following :*

J U D G M E N T

This Criminal Appeal under Section 374 (2) of the Code of Criminal Procedure, has been preferred by the appellant being aggrieved by the judgment of conviction and sentence dated 31.01.1998 in S.T. No. 56/1997 passed by learned Additional Sessions Judge, Gadawara, District-Narsinghpur, whereby the learned Judge has convicted the appellant for the offence punishable under Section 304-B of the Indian Penal Code (hereinafter referred to as 'IPC') and sentenced him to undergo R.I. for seven years.

2. According to prosecution story, on 22.02.1997, at about 03:00 P.M., the appellant/accused was going somewhere and his wife Lalta Bai (deceased) was trying to stop him which resulted into altercation between them and the appellant/accused took her into room beating. Kamla Bai and Vinita saw the whole incident. Thereafter, Kamla Bai, Bhoori Bai and Vinita saw the appellant/accused going towards village by bicycle. Being suspicious of Lalta Bai's silence, Vinita and Kamla Bai went towards the house of the appellant/accused and found that the door was locked from inside and there was sound of flapping and on peeking inside the room, Lalta Bai was found to be hanged in thatch wood. On receiving the information regarding unnatural death of deceased, police registered the *marg intimation report* and enquired the

matter. During enquiry, police conducted post-mortem of the deceased so also recorded statements of the witnesses whereby it was revealed that marriage of deceased-Lalta Bai was solemnized 8 months prior to the incident and the deceased was brought to her matrimonial house only 8 days prior to the incident by her father-in-law, namely, Tulsiram. On account of demand of dowry, the deceased was subjected to harassment by the appellant/accused. Due to said harassment, she went her parental home and on getting assurance of her well-keeping, she returned back to her matrimonial house alongwith her father-in-law Tulsiram. Being annoyed from non-fulfillment of desire, the appellant started torturing the deceased and on the date of the incident, he assaulted her by means of axe and caused her death.

3. After completing the investigation, police filed the charge-sheet. The appellant/accused abjured his guilt and claimed to be tried and took the plea of alibi. In order to substantiate the prosecution case, the prosecution has produced 12 prosecution witnesses. The trial Court also recorded the statements of accused under Section 313 of Cr.P.C. The defence has also examined one witness. After considering the evidence

adduced by the parties, the learned trial Judge, came to the conclusion that the appellant is guilty for the offence as mentioned above.

4. Learned counsel for the appellant has submitted that the judgment passed by learned trial Court is bad in law and contrary to the facts and evidence of the case. The evidence led by the prosecution witnesses suffers from serious infirmity. There is no eye-witness of the incident and the case of prosecution is based upon circumstantial evidence. It is further submitted that the learned trial Court has wrongly relied upon the testimony of PW-2 and PW-3 who are child witnesses and have seen nothing which incriminates the appellant. It is submitted that the statements of parents of the deceased i.e. PW-8 and PW-9 are also not reliable and are after-thoughts. As per prosecution, the appellant assaulted the deceased with axe but no blood stain was found thereupon. It is also submitted that the prosecution has completely failed to establish that the deceased was subjected to harassment for demand of dowry, even then the learned trial Judge recorded the conviction. No such prior report or complaint with regard to demand of dowry and cruelty committed with the deceased, has ever been made by her or by her relatives. So far as the injuries on the body of the deceased are concerned, same were occurred

due to falling down while setting her loose from hanging rope. Learned trial Judge also committed error in not accepting the testimony of defence witness. It is submitted that no ingredient is present to constitute the offence under Section 304-B of IPC.

5. On the other hand, learned counsel for the respondent-State opposed the submissions made by the appellant's counsel submitting that the prosecution succeeded to prove its case beyond any reasonable doubt. There is specific allegation against the appellant for demand of dowry and cruelty soon before death of the deceased. The deceased suffered unnatural death within a period of one year from her marriage, thus, presumption of Section 113-B comes into play which is against the appellant. It is further submitted that the prosecution witnesses have stated sufficient against the appellant to secure his conviction. They have duly supported the case of prosecution. Learned trial Court has rightly considered the evidence of the case. With the aforesaid submissions, he prays for dismissal of the instant appeal.

6. Heard and perused the record.

7. While arguing the instant appeal, learned counsel for the appellant has raised the following grounds -

- “(1) That, the prosecution failed to prove that there was a demand of dowry as statement of important witnesses including family members of deceased are suffering from material contradictions and omissions. Being family members, the statement of parents of deceased is not reliable.*
- (2) That, the prosecution failed to prove that the deceased was subjected to cruelty soon before her death.*
- (3) Lastly, the conviction of appellant is based only upon presumption and evidence available on record is not sufficient to permit the same.”*

8. Before dealing with the merits of the case, it would be appropriate to discuss the legal aspects first.

9. The offence involved in the case under the IPC is Section 304-B of IPC which is reproduced herein-under -

“304-B. Dowry death.—(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called “dowry death”, and such husband or relative shall be deemed to have caused her death. Explanation.—For the purpose of this sub-section, “dowry” shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.”

10. Under the Indian Evidence Act, 1872, there is presumption of Section 113-B which is related to Section 304-B of IPC. These provisions are also quoted hereinunder -

“113-B. Presumption as to dowry death.—When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. Explanation.—For the purposes of this section, “dowry death” shall have the same meaning as in section 304B, of the Indian Penal Code, (45 of 1860)”

11. Further, by passing various decisions, the Hon’ble Supreme Court has summed-up the principle to constitute the offence under Section 304-B IPC. In the case of **Kansraj Vs. State of Punjab** reported in **(2000) 5 SCC 207**, the Hon’ble Supreme Court has elucidated the following ingredients to prove dowry death -

“(a) the death of a woman was caused by burns or bodily injury or had occurred otherwise than under normal circumstances;

(b) such death should have occurred within 7 years of her marriage;

(c) the deceased was subjected to cruelty or harassment by her husband or by any relative of her husband;

(d) such cruelty or harassment should be for or in connection with the demand of dowry; and

(e) to such cruelty or harassment the deceased should have been subjected to soon before her death. ”

12. Further, in the case of ***Suresh Kumar v. State of Haryana*** reported in **(2013) 16 SCC 353**, the Hon'ble Supreme Court also has held as under –

27. Importantly, Section 304-B IPC does not categorize death as homicidal or suicidal or accidental. This is because death caused by burns can, in a given case, be homicidal or suicidal or accidental. Similarly, death caused by bodily injury can, in a given case, be homicidal or suicidal or accidental. Finally, any death occurring “otherwise than under normal circumstances” can, in a given case, be homicidal or suicidal or accidental. Therefore, if all the other ingredients of Section 304-B 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

28. The evidentiary value of the identification 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.”

13. Further, in the case of *Bansi Lal v. State of Haryana* reported in (2011) 11 SCC 359, the Hon’ble Supreme Court observed as under -

“19. It may be mentioned herein that the legislature in its wisdom has used the word “shall” thus, making a mandatory application on the part of the court to presume that death had been committed by the person who had subjected her to cruelty or harassment in connection with any demand of dowry. It is unlike the provisions of Section 113-A of the Evidence Act where a discretion has been conferred upon the court wherein it had been provided that court may presume abetment of suicide by a married woman. Therefore, in view of the above, onus lies on the accused to rebut the presumption and in case of Section 113-B relating to Section 304-B IPC, the onus to prove shifts exclusively and heavily on the accused. The only requirements are that death of a woman has been caused by means other than any natural circumstances; that death has been caused or occurred within 7 years of her marriage; and such woman had been subjected to cruelty or harassment by her husband or any relative of her husband in connection with any demand of dowry.

20. Therefore, in case the essential ingredients of such death have been established by the prosecution, it is the duty of the court to raise a presumption that the accused has caused the dowry death.....”

14. Bare reading of the above mentioned provisions and verdicts given by the Hon’ble Supreme Court, it appears that when death of a

married woman is caused by burns or bodily injuries or occurs otherwise than under normal circumstances within a period of seven years of her marriage and the woman was subjected to cruelty or harassment by her husband or any relative of her husband and such cruelty of her husband should be for or in connection with the demand of dowry and such cruelty or harassment, the deceased should have been subjected to soon before her death be called as dowry death and the woman's husband or his relative shall be deemed to have caused her death. Section 304-B of IPC does not categorize death as homicidal or suicidal or accidental.

15. Further, two things have to be seen in respect of offence punishable under Section 304-B IPC; first, to make sure whether the ingredients of the Section have been made-out against the accused and if the findings are affirmative, then secondly, to ascertain that the accused is deemed to have caused the death of the woman.

16. Further, when a married woman dies of unnatural death either suicidal or homicidal, due to harassment or cruelty made in connection to any dowry demand soon before her death by her husband or relative of husband, presumption of Section 113-B comes into effect and under such circumstance, the Court shall presume that such person had

caused the dowry death. Once the ingredients of Section 304-B IPC are fulfilled by the prosecution, the onus shifts to the defence to produce evidence to rebut the statutory presumption and to prove that the death was in the normal course and the accused was not connected.

17. Since, learned trial Court has given its affirmative finding with regard to dowry death of the deceased by the appellant, therefore, this Court has to examine whether the findings of learned trial Court are correct or not?

18. Now, I am embarking upon to examine the evidence available on record.

19. On perusal of record, it is undisputed that marriage of deceased Lalta Bai was solemnized with the appellant and she died of unnatural death within one year of her marriage.

20. With respect to cause of death, the prosecution has produced Dr. N.K. Pandey (PW-7) who noticed following injuries on the body of deceased -

5. मृतका के शरीर पर निम्न उपहतियां पाई थी -

1. बूज 1 इंच X 1/2 इंच नाक के उपर और नाक की हडडी टूटी हुई थी विच्छेदन में खून जमा हुआ पाया था ।

2. बूज 4 X 4 इंच कपाल में दाहिने टेम्पोरल हडडी के पास विच्छेदन में टेम्पोरल अस्थि का भंग पाया था जो लंबाई में था ।

3. बोनी कनाल तथा इयर कनाल में जमा हुआ खून भरा था ।
4. बूज 4 X 3 इंच गर्दन की तरफ निचले तिहाई हिस्से में ।
5. मुंह तथा नाक के हिस्सों में भी बूज था । नाक के बायें रंध में जमा हुआ खून भरा था ।
6. मृतका के मस्तिष्क की झिल्ली में दाहिनी तरफ रक्त का संचय था खून के थक्के थे । मस्तिष्क अपने आधार पर अस्थि भंग के कारण कुचला हुआ था ।
7. हृदय का दाहिना प्रकोष्ठ भरा हुआ था वायां रिक्त था । पेट में अघपचा भोजन भरा हुआ था तथा पीलापन था । छोटी आंत स्वस्थ किन्तु पीताम थी बड़ी आंत स्वस्थ थी । गर्भाशय तथा योनि में कोई उपहति नहीं थी स्वस्थ थे ।
8. उपरोक्त के अतिरिक्त सभी आंतरिक अंग पीताम थे ।
9. शव परीक्षण मैने एवं डॉक्टर सी.एस.चौहान ने संयुक्त रूप से किया था । मैने शव परीक्षण पर प्रतिवेदन लिखा था जिसके अवलोकन में पाई गई सभी विवरण यथावत लिखे थे । डॉक्टर सी.एस.चौहान मेरे अवलोकन से एवं अभिमत से सहमत थे ।
10. मृतका के शरीर पर पाई गई सभी उपहतियां मृत्यु पूर्व की थी व प्रकृति के सामान्य क्रम में मृत्यु कारित करने पर्याप्त थी । उसकी मृत्यु उसे शरीर पर विशेषतः मस्तिष्क में अस्थि भंग के कारण उत्तकों के कुचल जाने को स्थिति से उत्पन्न कोमा के कारण हुई थी । मृत्यु परीक्षण से 36 से 48 घंटे के भीतर अवधि में हुई । प्रतिवेदन प्र.पी. 12 पर क से क एवं ख से ख भाग पर मेरे हस्ताक्षर एवं ग से ग डाक्टर सी.एस.चौहान के हस्ताक्षर हैं ।
11. दिनांक 8.3.97 को आरक्षक शिवकुमार कर्मांक 259 मेरे पास थाना प्रभारी का आवेदन प्र.पी.13 सहित एक कुल्हाड़ी लेकर आया था । यह अभिमत चाहा गया था कि क्या मृतका ललिता बाई के शरीर पर पाई गई चोटें कुल्हाड़ी से आना संभव थी व उसके गर्दन पर फांसी लगाने के निशान पाये गए थे ।

Since, the deceased succumbed to bodily injuries caused with blunt object on her head, that too within seven years of marriage under other than normal circumstances, it clarifies that first two ingredients of Section 304-B are satisfied.

21. As far as demand of dowry is concerned, the evidence on record suggests that Prem Bai (PW-8) mother of deceased and Jagdish (PW-9) father of deceased as well as Baseer Mohd. (PW-10) are found unanimous on the point of demand of Rs.10,000 /- to start a business and threatening to dire consequences on non-fulfillment thereof by the appellant/accused. These witnesses seem to be consistent in their cross-examination on the said point. Moreover, PW-8 and PW-9 deposed that the deceased had disclosed that the appellant used to harass her on account of demand of money. Being tortured, the deceased also returned back to her parental house and did not want to go again to her matrimonial house, however, on the assurance of well-keeping by the father of accused, she got ready to go there.

22. However, being family members of the deceased, the credibility of PW-8 and PW-9 has been doubted by the appellant's counsel and in that context, in the case of *Rohtash Kumar v. State of Haryana* reported in (2013) 14 SCC 434, the Hon'ble Supreme Court has held as under :-

“25. It is a settled legal proposition that evidence of a prosecution witness cannot be rejected in toto, merely because the prosecution chose to treat him as hostile and

cross-examined him. The evidence of such witnesses cannot be treated as effaced, or washed off the record altogether. The same can be accepted to the extent that their version is found to be dependable, upon a careful scrutiny thereof.

26. In *State of U.P. v. Ramesh Prasad Misra* [(1996) 10 SCC 360 : 1996 SCC (Cri) 1278 : AIR 1996 SC 2766] this Court held, that evidence of a hostile witness would not be rejected in entirety, if the same has been given in favour of either the prosecution, or the accused, but is required to be subjected to careful scrutiny, and thereafter, that portion of the evidence which is consistent with either the case of the prosecution, or that of the defence, may be relied upon.

27. Therefore, the law permits the court to take into consideration the deposition of a hostile witness, to the extent that the same is in consonance with the case of the prosecution, and is found to be reliable in careful judicial scrutiny.”

23. The principle relating to interested witnesses/close relatives has also been laid-down by the Hon’ble Supreme Court in the case of **Surinder Singh Vs. State of Haryana** reported in (2014) 4 SCC 129, relevant para is reproduced herein:-

“33. Before closing, the most common place argument must be dealt with. In all cases of bride burning it is submitted that independent witnesses have not been examined. When harassment and cruelty is meted out to a woman within the four walls of the matrimonial home, it is difficult to get independent witnesses to depose about it. Only the inmates of the house and the relatives of the husband, who cause the cruelty, witness it. Their servants, being under their obligation, would never

depose against them. Proverbially, neighbours are slippery witnesses. Moreover, witnesses have a tendency to stay away from courts. This is more so with neighbours. In bride burning cases who else will, therefore, depose about the misery of the deceased bride except her parents or her relatives? It is time we accept this reality. We, therefore, reject this submission.”

24. Therefore, the evidence of witnesses (PW-8 and PW-9) cannot be discarded merely because they are relatives of the deceased. Relationship is not a factor to affect credibility of a witness. However, close scrutiny is required before accepting their evidence.

25. Learned counsel for the appellant has also argued that there is no evidence to show that any demand of dowry was made soon before the death of the deceased. In this context, in the case of **Kans Raj (supra)**, the Hon'ble Supreme Court has defined the meaning of phrase 'soon after' used in the provision of Section 304-B of IPC, relevant para is quoted as under:-

“15.It is further contended on behalf of the respondents that the statements of the deceased referred to the instances could not be termed to be cruelty or harassment by the husband soon before her death. “Soon before” is a relative term which is required to be considered under specific circumstances of each case and no straitjacket formula can be laid down by fixing any time-limit. This expression is pregnant with the idea of proximity test. The term “soon before” is not synonymous with the term “immediately before” and is opposite of the expression

“soon after” as used and understood in Section 114, Illustration (a) of the Evidence Act. These words would imply that the interval should not be too long between the time of making the statement and the death. It contemplates the reasonable time which, as earlier noticed, has to be understood and determined under the peculiar circumstances of each case. In relation to dowry deaths, the circumstances showing the existence of cruelty or harassment to the deceased are not restricted to a particular instance but normally refer to a course of conduct. Such conduct may be spread over a period of time. If the cruelty or harassment or demand for dowry is shown to have persisted, it shall be deemed to be “soon before death” if any other intervening circumstance showing the non-existence of such treatment is not brought on record, before such alleged treatment and the date of death. It does not, however, mean that such time can be stretched to any period. Proximate and live link between the effect of cruelty based on dowry demand and the consequential death is required to be proved by the prosecution. The demand of dowry, cruelty or harassment based upon such demand and the date of death should not be too remote in time which, under the circumstances, be treated as having become stale enough.”

26. Therefore, now it becomes clear that the phrase ‘soon before her death’ in Section 304-B IPC does not mean ‘immediately prior to death of deceased’. However, the prosecution must establish the existence of “proximate and live link” between the dowry death and cruelty or harassment for dowry demand by the husband or his relatives.

27. In the present case, the incident took place within one year of marriage and only within eight days when the deceased returned to her matrimonial house from her parental house on assurance of well-keeping by her father-in-law. Therefore, this is not a case where the allegation was leveled after lapse of more than enough time which would fatal the case of prosecution. The aforesaid chain of circumstances proves that there existed a live and proximate link between the instances of demand of dowry and the death of deceased.

28. Therefore, looking to the evidence as discussed above, this Court is of the considered view that learned trial Court rightly found that the appellant/accused was demanding money from the deceased and constantly torturing her for the same.

29. Now, the only issue which arises to be decided by this Court is as to whether learned trial Court was right in presuming that the appellant/accused caused dowry death of the deceased.

30. From the above analysis, it is clear that the prosecution was able to successfully prove that the death of deceased occurred due to bodily injuries within seven years of her marriage under other than normal circumstances. It has further been proved that soon before her

death, she was subjected to harassment and cruelty pursuant to demand of dowry by the appellant. Since, the ingredients of Section 304-B of IPC stand satisfied, the presumption under 113-B of the Indian Evidence Act operates against the appellant, who is deemed to have caused the offence specified under Section 304-B of IPC, therefore, the burden shifts on the accused to rebut the aforesaid presumption.

31. On perusal of record, it appears that the appellant took the plea of alibi stating that on the day of incident, he was not present on the spot, indeed, he went to her sister's house and on the next day, he came to know about the incident. The appellant/accused also produced Choti Bai (DW-1) in support of his plea. In this regard, the evidence given by Kamla Bai (PW-2), Bhoori Bai (PW-5) and Kundan (PW-4) are important. As per Kamla Bai (PW-2), on the day of incident when she was coming from school, she saw appellant/accused was going somewhere saying he is going to his sister's house on his bicycle and the deceased was stopping him. Thereafter, she saw accused was going towards village. Feeling different from daily affairs of deceased, on suspicion, Kamla Bai went to house of the deceased where she saw deceased was hanging. Bhoori Bai (PW-5) also supported the statement

of Kamla Bai to the extent that they saw the accused was going towards the village and thereafter, deceased did not come out from her house and ultimately found dead. Kundan (PW-4) was the person who got the deceased off from hanging. Therefore, considering the evidence given by PW-2, PW-4 and PW-5, it can be said abundantly that the appellant was seen lastly with the deceased prior to the incident.

32. Learned counsel for the appellant questioned the credibility of Kamla Bai (PW-2) being child witnesses. In this regard, the law is very clear that a child witness if found competent to depose to the facts and reliable one, such evidence could be the basis of conviction. In other words, even in absence of oath, the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanor must be like any other competent witness and there is no likelihood of being tutored.

33. In the case at hand, the statement of Kamla Bai (PW-2) to the extent that she saw the appellant/accused going towards the village after the incident, has not been challenged by the defence.

34. Therefore, the presumption given under Section 113-B of Evidence Act goes against the appellant and he failed to rebut the same herein. Learned trial Court rightly disbelieved the evidence given by Choti Bai (DW-1). The finding given by the trial Court regarding conviction under Section 304-B of IPC, is hereby, affirmed.

35. So far as the sentence is concerned, the trial Court has imposed the minimum sentence under section 304-B of the I.P.C. Thus, the sentence imposed by the trial Court is affirmed.

36. The appeal *sans merit* and is hereby dismissed. Impugned judgment of conviction and sentence, as passed by the trial Court is affirmed. The appellant is on bail. His bail bonds are cancelled and he is directed to immediately surrender before the trial Court for undergoing the remaining jail sentence.

37. Let a copy of this judgment along with its record, be sent to the Court below for information and compliance.

38. The appeal fails and is, hereby, **dismissed**.

(RAJENDRA KUMAR (VERMA))
JUDGE

Prachi