

A.F.R
RESERVED

Court No. - 13

Case :- CRIMINAL APPEAL No. - 421 of 1992

Appellant :- Rama Shanker & Others

Respondent :- State Of U.P.

Counsel for Appellant :- Brijesh Verma, R P Mishra, Rahul Shukla

Counsel for Respondent :- Govt. Advocate

Hon'ble Mrs. Ranjana Pandya, J.

1. Challenge in this appeal is to the judgment and order dated 30.9.1992 passed by Additional Sessions Judge, Unnao in S.T. No. 80/1990 (State Vs. Rama Shanker & Others), under Sections 498-A and 304-B I.P.C., Police Station-Kotwali, District-Unnao, whereby the accused Rama Shanker alias Ram Shanker, Mahaveer and Smt. Vidyawati were found guilty under Sections 498-A and 304-B I.P.C. and were sentenced to 3 years' rigorous imprisonment under Section 498-A I.P.C. and 10 years' rigorous imprisonment under Section 304-B I.P.C., however accused Ram Prasad was acquitted.

2. Filtering out unnecessary details, the prosecution story in brief is that a written report was lodged by Rajendra Prasad, father of the deceased stating that his daughter was married on 13.6.1987 to Rama Shanker. Sufficient dowry was given in marriage. But when the deceased came to her parental house for the first time, her husband demanded a motorcycle. When the informant said that he was financially

weak, then they started demanding T.V. Due to this reason, dispute took place between both the families. On 20.5.1989 the brother of the deceased went to the matrimonial house of the deceased, at which a demand for rupees 10-15 thousand was made from him to enable the accused Rama Shanker to do business. This demand was made by the mother-in-law of the deceased. This demand could also not be fulfilled by the informant, due to which on 30.5.1989 some dispute took place due to which all the accused conspired and burnt the deceased to death as such a written report was lodged.

3. On the basis of this written report P.W. 5 Ram Dev Mishra, Head Constable scribed the chik report, which was proved by him as Exhibit Ka-5. Further this witness scribed the G.D., which was proved by him as Exhibit Ka-6. P.W. 6 is Chhedan Lal Kannaujia, who scribed the G.D. regarding the death of the deceased on 31.5.1989 at 11:11 a.m. The inquest report was prepared coupled with the photo dead body, challan dead body, letter to the C.M.O. concerned, letter to the R.I., which were proved by this witness as Exhibit Ka-7 to Ka-11. Dead body was sealed and sent for autopsy through Constable Sri Ram and Rajneesh. One stove was taken into possession from the place of incident. Its memo was prepared and proved by this witness as Exhibit Ka-12.

4. C.O. Adileshwar Mishra conducted the investigation. He recorded the statements of the witnesses and inspected the

spot. He proved the site plan as Exhibit Ka-13. Investigation ended into a charge-sheet, which was proved by this witness as Exhibit Ka-14. Autopsy on the body was done by Dr. V.K. Nigam, P.W. 3. He found the following ante mortem injuries on the body of the deceased :-

(i) Multiple contusions over right upper arm and forearm on lateral side;

(ii) 1-3 degree burnt present on whole of front of face, neck, front of chest, abdomen, both upper and lower extremities, except sole. Line of redness present over margins of burnt parts. Blisters present on the body containing fluids which are on most part of body.

On internal examination the uterus was found gravid bearing a male dead child measuring 18 cms. long. Peritoneum, trachea, larynx and pleural membranes were found congested. Lungs and spleen were also found congested. Cause of death as opined by the Doctor was extensive antimortem burn injuries causing shock. This witness proved the postmortem report as Exhibit Ka-2.

5. Besides these witnesses, the prosecution also proceeded to examine the informant P.W. 1 Rajendra Prasad, who proved the written report as Exhibit Ka-1 and brother of the deceased namely Shyam Bihari P.W. 2.

6. After the prosecution evidence was closed, the statement of the accused was recorded under Section 313 Cr.P.C., who denied the occurrence. The father-in-law and mother-in-law stated that they were living separately from the deceased. The accused Rama Shanker has stated that he was married to the deceased 7-8 years prior to the incident. He has further stated that he had gone to do work and the inquest proceedings were held on information given by the in-laws of the deceased. However, no defence was adduced.

7. After hearing counsel for the parties, learned lower court found the accused-appellants guilty and sentenced them as has been specified in Para 1 of the judgement.

8. Feeling aggrieved, the accused-appellants have come in appeal.

9. Appellant No. 2 Mahaveer and appellant No. 3 Smt. Vidyawati died during the pendency of the appeal. Hence, appeal stood abated in respect of appellant Nos. 2 and 3.

10. I have heard Shri R.P. Mishra, learned counsel for the appellant, Shri Vivek Tiwari, learned A.G.A. for the State and perused the trial court record.

11. Learned counsel for the appellant has submitted that there was absolutely no evidence before the trial court to convict the accused under Section 498-A and 304-B I.P.C. and the trial court committed illegality in convicting the accused persons on the basis of evidence, which could not be relied upon. He has further submitted that the evidence of the informant and his son is not reliable. The F.I.R. is delayed and since no explanation for the delay has been offered, hence chances of embellishment and false implication cannot be ruled out.

12. On the other hand learned A.G.A. has submitted that the findings of fact recorded by the trial court is based on evidence, hence appeal is liable to be dismissed.

13. Perusal of the chik report shows that the occurrence is said to have taken place sometime on 30.5.1989, whereas report of the incident was lodged on 1.6.1989 at 1705 hrs. As far as delay is concerned, the written report, which is Exhibit Ka-1 is silent on this point. P.W. 1 Rajendra Prasad has stated that he came to know about the incident on 31.5.1989. Even if the statement is taken on its face value to be correct, there is no reason why report was not lodged by the informant on 31.5.1989. However, this witness has stated that he was present when the inquest report was prepared. He has further stated that initially he gave a written report to the police, but the police officers said that it was having cuttings, again he

wrote a legible report on the next day and gave it to the police officers, whereas he destroyed his previous written report.

14. In cross-examination, he has stated that copy of the written report was given to him, when he returned. The brother of the deceased P.W. 2 Shyam Bihari has also stated that when he came to know about the incident, he reached the spot at 2:00 to 2:30 hrs in the day time. After he reached, his father also came to the spot. The inquest report was prepared in the presence of the informant and his son and on the same day the body was sent for postmortem. There is major discrepancies in the statements of the witnesses. As regards the preparation of inquest report and the postmortem, inasmuch as perusal of the inquest report shows that it was prepared on 31.5.1989, whereas postmortem was conducted on the body of the deceased on 1.6.1989. Thus, the delay in lodging the F.I.R. stands unexplained on the part of the prosecution.

15. As far as conviction of the accused under Section 304-B and 498-A is concerned this is a case of circumstantial evidence. As far as the factum of death of the victim is concerned there is no direct evidence in this case about the crime and the prosecution story rests on circumstantial evidence.

16. Hon'ble the Apex Court in the case of **Sharad Birdhichand Sarda Vs. State of Maharashtra** has formulated five golden rules-Panchsheel for the proof of a case based on circumstantial evidence. In Para 153 of report it has been observed :

"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."

17. 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 & another vs State of Maharashtra (1973)2 SCC 793**, where the following observations were made:

"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 conclusion."

(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."

18. These five golden principles, if we may say so, constitute Panchsheel of the proof of a case based on circumstantial evidence.

19. Before I proceed to evaluate the evidence on record led by the prosecution in support of the charges framed against the accused, it is necessary to examine the law relating to 'dowry death'. The Hon'ble Supreme Court has highlighted all the aspects of law relating to 'dowry demand' and 'dowry death' in recent case of ***Prem Kanwar Vs. State of Rajasthan- 2009(1) JT 197***. Paras 6 to 12 of the reports are as under:-

"6. In order to attract Section 304-B IPC, the following ingredients are to be satisfied:

i) The death of a woman must have been caused by burns or bodily injury or otherwise that under normal circumstances;

ii) Such death must have been occurred within 7 years of the marriage;

iii) Soon before her death, the woman must have been subjected to cruelty or harassment by her husband or any relative of her husband; and

Criminal Appeal No. 421 of 1992
(Rama Shanker & Others Vs. State of U.P.)

iv) Such cruelty or harassment must be in connection with the demand of dowry.

Section 304-B and Section 498-A reads as follows:-

"304-B Dowry death- (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than 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 subsection, 'dowry' shall have 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"

498-A: Husband or relative of husband of a woman subjecting her to cruelty- Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation- For the purpose of this section cruelty means-

(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman: where harassment is with a view to coercing her or

any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

7. The term "dowry" has been defined in Section 2 of the Dowry Prohibition Act, 1961 (in short "dowry Act") as under:-

"Section 2. Definition of 'dowry'- In this Act, 'dowry' means any property or valuable security given or agreed to be given either directly or indirectly."

(a) by one party to a marriage to the other party of the marriage; or

(b) by the parents of either party to a marriage or to any other person, to either party to the marriage or to any other person, at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dowry or mehr in the case of person whom the Muslim Personal Law (Shariat) applies.

Explanation I- For the removal of doubts, it is hereby declared that any presents made at the time of a marriage to either party to the marriage in the form of cash, ornaments, clothes or other articles, shall not be deemed to be dowry within the meaning of this section unless they are made as consideration for the marriage of the said parties.

Explanation II- The expression "valuable security" has the same meaning in Section 30 of the Indian Penal Code(45 of 1861)."

8. Explanation of Section 304-B refers to "dowry" as having the same meaning as in section 2 of the Act', the question "what is the periphery of the dowry as defined therein? The argument is, there has to be an agreement at the time of the marriage in view

*of the words "agreed to be given" occurring herein, and in the absence of any such evidence it would not constitute to be dowry. It is noticeable, as this definition by amendment includes not only the period before and at the marriage but also the period subsequent to the marriage. This position was highlighted in **Pawan Kumar and others vs State of Haryana (1998 (3) SCC 309)**.*

9. The offence alleged against the accused is under Section 304-B IPC which makes "demand of dowry" itself punishable. Demand neither conceives nor would conceive of any agreement. If for convicting any offender, agreement for dowry is to be proved; hardly any offenders would come under the clutches of law. When section 304-B refers to "demand of dowry", it refers to the demand of property or valuable security as referred to in the definition of "dowry" under the Act. The argument that there is no demand of dowry, in the present case, has no force. In cases of dowry death and suicides, circumstantial evidence plays an important role and inferences can be drawn on the basis of such evidence that could be either direct or indirect. It is significant that section 4 of the Act, was also amended by means of Act 63 of 1984, under which it is an offence to demand dowry directly or indirectly from the parents or other relatives or guardian of a bride. The word "agreement" referred to in Section 2 has to be inferred on the facts and circumstances of each case. The interpretation that the accused seek, that conviction can only be if there is agreement for dowry, is misconceived. This would be contrary to the mandate and object of the Act. "Dowry" definition is to be interpreted with the other provisions of the Act including section 3, which refers to giving or taking dowry and Section 4 which deals with a penalty for demanding dowry; under the Act and the IPC. This makes it clear that even demand of dowry on other ingredients being satisfied is punishable. It is not always necessary that there be any agreement for dowry.

10. Section 113-B of the Evidence Act is also relevant for the case at hand. Both Sections 304-B IPC and Section 113-B of the Evidence Act were inserted as noted earlier by the dowry Prohibition (Amendment) Act 43 of 1986 with a view to combat the increasing menace of dowry death. Section 113-B as follows:-

"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 persons have caused the dowry death.

Explanation- For the purposes of this section 'dowry death' shall have the same meaning as in Section 304-B of the Indian Penal Code (45 of 196)."

11. The necessity for insertion of the two provisions has been amply analyzed by the Law Commission of India in its 21st Report dated 10th August, 1988 on "Dowry Deaths and Law Reform" Keeping in view the impediment in the pre-existing law in securing evidence to prove dowry related death, legislature thought it wise to insert a provision relating to presumption of dowry death on proof of certain essentials. It is in this background presumptive Section 113-B in the Evidence Act has been inserted. As per the definition of 'Dowry death' in section 304-B IPC and the wording in the presumptive section 113-B of the Evidence Act, one of the essential ingredients, amongst others, in both the provisions is that the concerned woman must have been "soon before her death" subjected to cruelty or harassment for or in connection with demand of dowry. Presumption under section 113-B is a presumption of law. On proof of the essentials

mentioned there in, it becomes obligatory on the Court to raise a presumption that the accused caused the dowry death. The presumption shall be raised only on proof of the following essentials:

- (1) The question before the Court must be whether the accused committed the dowry death of a woman (This means that the presumption can be raised only if the accused is being tried for the offence under Section 304-B IPC).*
- (2) The woman was subjected to cruelty or harassment by her husband or his relatives.*
- (3) Such cruelty or harassment was for, or in connection with any demand for dowry.*
- (4) Such cruelty or harassment was soon before her death.*

12. A conjoint of Section 113-B of the Evidence Act and Section 304-B IPC shows that there must be materials to show that soon before the 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.' The expression 'soon before' is very relevant where Section 113-B of the Evidence Act and Section 304-B IPC are pressed into service. Prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by prosecution. 'Soon before' is a relative term and would depend upon the circumstances of each case and no strait-jacket formula can be laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test both for the proof of an offence of dowry death as well as for raising a presumption under Section 113-B of the Evidence Act. The expression 'soon

before her death' used in the substantive Section 304-B IPC and Section 113-B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression 'soon before' is not defined. A reference to expression 'soon before' used in section 114-B Illustration (a) of the Evidence Act is relevant. It lays down that Court may presume that a man who is in the possession of goods 'soon after' the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. The determination of the period which can come within the term 'soon before' is left to be determined by the Courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression 'soon before' would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. There must be existence of a proximate and live-link between the effects of cruelty based on dowry demand and the concerned death. If alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of the woman concerned, it would be of no consequence."

20. Now I proceed to consider the four ingredients which are essential to establish a case for the offence punishable under section 304-B IPC.

21. As far as ingredient No.(i) is concerned, perusal of the inquest report Exhibit Ka-7 shows that the whole body of the deceased was burnt. Perusal of the postmortem report Exhibit Ka-2 also shows that besides multiple contusion over left upper arm the deceased had suffered 1-3 degree burns on

the whole of the front face, neck, front chest abdomen, both upper and lower extremities except sole. Line of redness was present over margins. Blisters were present on the body containing fluids, which were present on most part of the body. Although P.W. 1 Rajendra Prasad and P.W. 2 Shyam Bihari have admitted their presence at the time of preparing inquest report, but they are said to have kept silent over the matter, when the cause of death was being recorded in the inquest. But it is established on record that the deceased died an unnatural death.

22. Coming to point No.(ii), reference to Exhibit Ka-4 would be relevant at this point, which is copy of the entry in the G.D., which states that the father-in-law of the deceased gave an information to the police stating that the deceased was making tea on stove, when the deceased was burnt to death. Even in the inquest report Exhibit Ka-7 it is clear that the information of death of the deceased was given by Mahaveer, father-in-law of the deceased, in which he had stated that she died due to fire. As far as P.W. 2 Shyam Bihari has stated that marriage took place on 13.6.1987, although the accused has stated that the marriage took place 7-8 years prior to the incident, but nothing more has been said. Hence, the prosecution has been able to prove that the deceased died an unnatural death in her matrimonial home within 7 years of her marriage.

23. Now it has to be seen whether the prosecution has been able to prove that "soon before" her death, the woman was subjected to cruelty or harassment by her husband or any relative. As stated earlier "soon before her death" is a relative term, which would depend upon the circumstances of each case and strait-jacket formula can be laid down about the period of "soon before her death".

24. Since point Nos. (iii) and (iv) are being taken together it is also to be proved that the such cruelty or harassment was in connection with demand of dowry and she was subjected to cruelty or harassment by her husband or any relative soon before her death.

25. P.W. 1 is the father of the deceased, who has stated that after marriage and before her death deceased visited her parental house 3 or 4 times. She used to tell her mother that she was being beaten by her brother-in-law and parents-in-law. Her father-in-law and mother-in-law are demanding motorcycle as additional dowry.

26. Obviously, the beneficiary of the motorcycle could not be the mother-in-law. Even otherwise since the sole surviving appellant is the husband of the deceased, the matter has to be examined in that perspective.

27. P.W. 1 Rajendra Prasad has stated that about two months prior to the occurrence, when the deceased came home her mother saw black spots on her body. The deceased told her mother that these were signs of assault by her in-laws. He has further stated that a demand of rupees 10-15 thousand was made by the mother-in-law of the deceased to enable the husband of the deceased to do some business. It is trite law that demand of an amount to enable the husband to do business would not come within the definition of dowry as has been laid down in **2009 (66) ACC 379 Bhairon Singh Vs. State of Madhya Pradesh.**

28. As far as demand of motorcycle is concerned Shyam Bihari, P.W. 2 has stated that at the time of "Kalewa" Rama Shanker demanded a T.V. and motorcycle. "Kalewa" is a custom in the Hindu Society where before the bride is being sent to her matrimonial house, the groom sits at a particular place and makes a request for certain things. This type of custom is prevalent in many parts of the country. Hence, if at the time of "Kalewa" the groom requested for a motorcycle and T.V. as a gift as per the prevalent custom it would not amount to demand dowry, especially when there is no evidence on record to show that this demand of motorcycle and T.V. was repeated by the husband of the deceased or his family members again after "Kalewa". If, prosecution fails to prove demand of dowry as defined in Section 2 of the Dowry Prohibition Act and, if it is on record that money was asked

for meeting some domestic expenses it cannot be termed to be demand of dowry as has been laid down in **2009 Cr.L.J. Page 4262 Sunil Bhiku Yadav & Others Vs. State of Maharashtra.**

29. It is for the prosecution to show the existence of all the ingredients of the offence under Section 304-B so as to shift the burden to prove on the accused in terms of Section 113-B of the Evidence Act, if the initial burden is not discharged by the prosecution Section 113-B of the Evidence Act would not at all come into play.

30. P.W. 2 Shyam Bihari, brother of the deceased states that a motorcycle and T.V. was asked for at the time of "Kalewa" meaning thereby sometime in the year 1987. The incident took place in the year 1989. In the intermittent two years, there is nothing on record in the statement of P.W. 2 Shyam Bihari that the demand for T.V. and motorcycle was repeated by any of the accused persons. He has taken a new case that about rupees fifteen thousand were demanded for doing business, which as per the settled law does not come within the definition of dowry as has been laid down by the Hon'ble Apex Court in **(2013) 3 SCC Page 684 Vipin Jaiswal Vs. State of Andhra Pradesh.**

31. Reverting back to the statement of P.W. 1 father of the deceased has stated that about one and half to two months

when the deceased came home, she had black spots on her body, which she told her mother to be symptoms of assault. As I have stated earlier "soon before" her death, she was subjected to cruelty has definitely to be established.

32. It has further to be proved that such cruelty or harassment was in connection with the demand of dowry. Neither P.W. 1 Rajendra Prasad nor P.W. 2 Shyam Bihari have stated that the deceased was subjected to cruelty or harassment in connection with the demand of dowry. Thus, both the witnesses Rajendra Prasad and Shyam Bihari have miserably failed to prove (iii) and (iv) ingredients, which was required to be proved by the prosecution.

33. Perusal of the information given by the father-in-law of the deceased at the police station makes it evident that the father-in-law had informed the police about the accidental death of the victim. This was done at report No. 13, at 11:10 hrs in the G.D. dated 31.5.1989 by the father-in-law namely Mahaveer who himself has stated that the deceased was making tea and she caught fire and she died. The recovery of the stove was also affected from the place of incident, which recovery memo is Exhibit Ka-12. Hence, all the ingredients of Section 498-A and 304-B have not been proved by the prosecution.

34. Thus, on the basis of what has been stated above and on the basis of evidence I conclude that the prosecution has miserably failed to prove its case against the accused.

35. Learned trial court misread the evidence and has wrongly convicted the accused, which conviction cannot be sustained in the eyes of law and is liable to be acquitted and the appeal is liable to be allowed. Hence, the impugned conviction and sentence dated 30.9.1992 passed by Additional Sessions Judge, Unnao in S.T. No. 80/1990 (State Vs. Rama Shanker & Others), under Sections 498-A and 304-B I.P.C., Police Station-Kotwali, District-Unnao is hereby set aside.

36. Accordingly, the appeal is ***allowed***.

37. The appellant is in jail. He shall be released forthwith in this case. The provisions of Section 437A Cr.P.C. shall be complied with.

38. Let a copy of this order be sent to the trial court concerned.

Order Date :- 24.10.2016

Anurag/-