

(1995) 06 BOM CK 0071

In the Bombay High Court

Case No : Criminal App. No. 533 of 1993

Nandkishore alias Kishore Bhimrao Kshirsagar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 15-06-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 215, 313, 377(1), 391, 464(1)

Evidence Act, 1872 — Section 113B

Penal Code, 1860 (IPC) — Section 302, 304, 304B, 34, 498A

Citation : (1996) 5 BomCR 315 : (1995) CriLJ 3706 : (1996) 1 MhLj 145

Hon'ble Judges : Vishnu Sahai, J;G.R. Majithia, J

Bench : Division Bench

Advocate : R.D. Ovelekar and Ranjeet More, for the Appellant; K.H. Chopda, for the Respondent

Judgement

Vishnu Sahai, J.—The appellant Nandkishore alias Kishore Bhimrao Kshirsagar was tried along with his father Bhimrao Dhondiram Kshirsagar, his mother Shakuntala Bhimrao Kshirsagar and his brother Sanjay Bhimrao Kshirsagar for offences punishable under Sections 302 read 34, I.P.C., 498A read with 34 I.P.C., and 304B read with 34, I.P.C. After the trial vide judgment and order dated 30th March 1993 passed by the Sessions Judge Sangli in Sessions Case No. 24 of 1993 the appellant Nandkishore alias Kishore Bhimrao Kshirsagar was convicted under Sections 304B, I.P.C. and 498A, I.P.C.; whereas on the first count he was sentenced to undergo 7 years rigorous imprisonment and to pay a fine of Rs. 5000/-, in default to further undergo 6 months rigorous imprisonment; under the second count he was sentenced to a term of 2 years rigorous imprisonment and to pay a fine of Rs. 1000/-, in default of payment of fine to further undergo 3 months rigorous imprisonment. The substantive sentence were directed to run concurrently. It may be mentioned that the appellant was acquitted u/s 302 read with 34, I.P.C. and the other three accused persons named above were acquitted on all the counts viz. 302 read with 34, I.P.C., 304B read with 34, I.P.C. and 498A read with 34, I.P.C.

2. The appellant challenged his conviction and sentence in this Court by preferring Criminal Appeal No. 533 of 1993. While admitting it on 11-10-1993, a Division Bench of this Court comprising of M. L. Pendse and M. F. Saldanha JJ was pleased to issue notice of enhancement to the appellant. Suo Motu Petition No. 52 of 1993 arises out of the aforesaid notice. Clubbed along with Criminal Appeal No. 533 of 1993 and Suo Motu Petition No. 52 of 1993 is Criminal Appeal No. 682 of 1993, preferred by the State of Maharashtra, u/s 377(1) Cr.P.C., for enhancement of the sentence awarded to the appellant by the learned trial Judge. The aforesaid appeal was admitted on 6-6-1994 by a Division Bench of this Court comprising of Mohta J (as he then was) and Bahuguna, J.

3. Since all the three connected matters arise out of the same incident, we propose disposing them of by a common judgment.

4. The prosecution case in brief, as it emerges from the recitals contained in the F.I.R. and the evidence of the witnesses recorded in the trial Court, runs as follows :

The informant Mahadeo Nana Bamane (P.W. 1) was a primary school teacher and a resident of village Atake. The deceased Surekha was his daughter and Malti, his wife. Sanjaykumar Madadeo Bamane (P.W. 2) is his son from his first wife.

The informant settled the marriage of his daughter Surekha with the appellant Nandkishore Bhimrao Kshirsagar, whose father Bhimrao Dhondiram Kshirsagar (acquitted accused) was a Land Acquisition Officer at the time of the incident. Before the marriage it was settled between the informant Mahadeo and Bhimrao Dhondiram Kshirsagar, vide Exhibit 19, that he would give ornaments and Rs. 11.011/- in cash to the appellant and two golden necklace would be given to Surekha by Bhimrao Dhondiram Kshirsagar.

On 27-1-1991 Surekha was married to the appellant of Miraj. After the marriage her name was changed to Bhagyashree. In the marriage the informant spent in all amount Rs. 60,000/- to Rs. 70,000/-. After the marriage Surekha went and started residing with the appellant, her father-in-law Bhimrao mother-in-law Sou. Shakuntala and brother-in-law Sanjay (acquitted accused) at MiraJ.

Some-times in the month of March 1991 the informant went to Miraj to bring Surekha for their village fair and the appellant and the three acquitted accused told him that Surekha could come back, approximately after one week. The informant along with Surekha came to Village Atake. However, only after one day of Surekha's coming to Atake, the appellant came to Atake in a militant mood and told the informant that he wanted to take Surekha away with him. After consulting Surekha the informant permitted the appellant to take her away. During her stay at Atake, Surekha told the informant that the appellant and the acquitted accused persons were physically and mentally ill-treating and torturing her. She confided that she had to get up early in the morning and was required to clean and wash the house and also to collect cow-dung. She also had to cook food. She complained despite slogging like a slave the appellant used to get

angry with her.

It is alleged that on 9th March 1991 Surekha's step brother Sanjaykumar (P.W. 2) and mother went to meet her at Miraj. She also complained to them about the cruelty and ill-treatment meted out to her by all the accused persons. She told them that the accused persons used to wake up her up at mid-night and ask her to do every type of menial work like cleaning of clothes, collecting cow-dung etc. Surekha also told them she was not getting sufficient food and was also denied articles of bare necessity, like towel, hair-oil, tooth-brush, tooth-paste and clothes etc. On hearing this, understandably Sanjay and his mother advised Surekha to bear the treatment for some days as they were married recently and the accused persons were rich.

On 7th April 1991 the informant went to the house of the appellant and acquitted accused at Miraj. At that time Surekha was at Bedag where her husband had a one room country house, along with a shed, in which he ran his poultry farm. Acquitted accused Bhimrao Dhondiram Kshirsagar at the aforesaid time was at the house and the informant along with him went to Bedag. He found that both the appellant and Surekha were present at their country house in Bedag. The informant found Surekha was in a depressed mood. Her face was pale. When he gave her coconut oil, tooth paste and comb she told him that instead he should give Rs. 50,000/- to her husband for his poultry-farm. The informant expressed his inability to Surekha to pay the aforesaid amount on the ground that he had been drained of his resources in her marriage which had barely taken place 2 1/2 months ago. However, he told Surekha's father-in-law Bhimrao that he should personally look into the treatment which was being meted out to Surekha and at that Bhimrao replied that there was nothing to worry, for these were the usual problems, common to all marriages and that in due course Surekha and Nandkishore would get adjusted with each other. On the night of 7-4-1991 the informant returned from Miraj to Atake.

On the evening of 8th April 1991 at about 8/8.30 p.m. when the informant returned home he learnt from his younger son Pratap that Surekha had been burnt and was admitted in hospital at Miraj. He also learnt that his wife in a car sent by the accused persons, at about 4 p.m. that very day, had left for MiraJ.

The next day, that is, on 9th April 1991 first the informant's son Sanjaykumar (P.W. 2) and then the informant left for Miraj. There at their house and there acquitted accused persons told the latter that on account of blazing of a stove Surekha was burnt but there was nothing to worry for she had only sustained minor injuries on her legs and thighs. The same day informant came to Mission Hospital Miraj where Surekha was admitted in the intensive care unit. However he was not allowed by the doctors to meet her. At the hospital the informant met the appellant who consoled him, saying that Surekha had sustained minor burn injuries only and there was nothing to worry. The next day i.e. on 10th April 1991 he was only permitted to see her from a distance of 10 feet, for a very short time.

On 13th April 1991 Surekha is said to have succumbed to the injuries in the hospital.

5. Going backwards, the evidence on record shows that Surekha was admitted late on the night of 7th April 1991 at Mission Hospital, Miraj, as a case of accidental burns. Police constable on duty, at the Mission Hospital, informed Miraj Rural Police Station about the accidental burns of Surekha and on 8-4-1991 at about 11 a.m. an entry to this effect was made at Miraj Rural Police Station.

On 8-4-1991 her two dying declarations were recorded there; one by Executive Magistrate of Miraj and the other one by P.S.I. Sureshkumar Ganapati Patil. In the aforesaid dying declarations she is alleged to have stated that she got accidentally burnt when the stove on which she was making tea burst and that she had no complaint against anybody. She also stated that relations between her and her husband were good. In the dying declaration recorded by P.S.I. Patil she went on to the extent of saying "Nothing remains to be paid or received in connection with the said marriage. I did not suffer any kind of ill-treatment at the hands of my husband, brother-in-law, sister-in-law, mother-in-law or father-in-law."

6. P.S.I. Patil P.W. 12 made an enquiry on the allegations of the appellant and the acquitted accused persons to the effect that Surekha had been accidentally burnt. He draw up the panchanama of the place of the incident. He found one stove, and burnt pieces of sari and blouse at the place of the incident. He attached the stove under a panchanama. On 9-4-1991, he recorded statement of the informant. On 13-4-1991, he made inquest panchanama of the dead body of Surekha. On 2-5-1991, he handed over the investigation to Smt. Rashmi Avasti, A.S.P. Sangli.

The investigation conducted by Smt. Avasti, A.S.P. was proved by police constable Ashok Kamble P.W. 9 who accompanied her during investigation and recorded the statements dictated by her. On 2-5-1991 the supplementary statement of the informant Mahadeo and the statement of Sanjaykumar (P.W. 2) were recorded. On 6-5-1991 the statement of the informant was recorded in her own hand-writing by A.S.P. Avasti.

On 17-8-1991 P.I. Bhaskar Bapu Shinge (P.W. 11) of C.I.D. Crime Branch, Sangli was entrusted with the investigation. Between 17-9-1991 to 24-10-1991 he recorded statement of some persons. On 24-10-1991 the F.I.R. of the instant case was lodged by the informant Mahadeo (P.W. 1) and the same bears his signature. On 25-10-1991 he recorded the statements of some persons in connection with the settlement of marriage of Surekha with the appellant. On 4-1-1992 he recorded the statement of Malhari Shankar Nagargoje (P.W. 8).

7. The bulk of the investigation in the instant case was conducted by police Inspector Jayant Yellappa Nandkishor (P.W. 10) of C.I.D. Crime Branch, Sangli. On 10-3-1992 he examined 10 persons. on 11-3-1992 he recorded the statements of Vimal Laxman Bamane (P.W. 5) and some other witnesses. On

29-4-1992 he made an enquiry from the office of the Chemical Analyst as to whether there would be sprinkling of kerosene on the person of the deceased, as a result of blazing of stove. To his query, he received the reply in the contrary. After completing the investigation he submitted the chargesheet against the appellant and the there acquitted accused on three counts viz. 302/34, I.P.C., 304-B/34, I.P.C. and 498/34, I.P.C.

8. Going backwards, the post-mortem examination of the dead body of Surekha was conducted by Dr. Varsha Vasudeo Dharwadkar (P.W. 6) and Dr. Mrs. V. M. Karad (not examined), on 13-4-1991 between 6 p.m. to 7 p.m. The autopsy report shows that both lower limbs had been burnt; sub coetaneous tissues were of yellow colour; pus was present; small part of the abdomen was also burnt, and there was pus in all the burns. According to Dr. Varsha Dharwadkar, the deceased died on account of cardio respiratory failure due to septicemia resulting from 48% burns. In her opinion the aforesaid injuries were sufficient in the ordinary course of nature to cause death of the deceased.

9. The case was committed to the Court of Sessions in the usual manner. In the trial Court, charge on three counts namely 302 read with 34, I.P.C., 304-B read with 34, I.P.C. and 498-A read with 34, I.P.C. were framed against the appellant and the acquitted accused persons. To the aforesaid charges, they pleaded not guilty and claimed to be tried. The defence of the appellant was that on the date of incident, while the deceased was making tea on a stove, there was blazing of the stove, resulting in her getting accidental burns.

10. In the trial Court, genuineness of a number of documents like panchanama of the scene of the offence; the panchanama of attachment of clothes produced by the appellant; forwarding letter to the Chemical Analyst; the report of the Chemical Analyst; the certificate of medical examination of the appellant; given by the Casualty Medical Officer, General Hospital Sangli; the post-mortem report; and the dying declaration of the deceased made before the Executive Magistrate, was admitted. In the trial Court, apart from voluminous documentary evidence, which included the two dying declarations recorded by the Executive Magistrate, Miraj, Exhibit 40 and that recorded by PSI Patil, Exhibit 42, as many as 12 witnesses were examined by the prosecution. In defence, no witness was examined.

11. After assessing the evidence on record, the trial Judge acquitted the three co-accused persons namely Bhimrao Dhondiram Kshirsagar, Shakuntala Bhimrao Kshirsagar and Sanjay Bhimrao Kshirsagar, on all the charges. He also acquitted the appellant of the charge u/s 302 read with 34, I.P.C. but convicted and sentenced him under Sections 304B, I.P.C. and 498A, I.P.C.

12. We have heard Mr. R. D. Ovelekar along with Mr. Rajiv More for the appellant and Mr. K. H. Chopda, for respondent in Criminal Appeal No. 533 of 1993. We have heard Mr. K. H. Chopda for appellant and Mr. R. D. Ovelekar along with Mr. Rajiv More for respondent in Criminal Appeal No. 682 of 1993. We have heard Mr.

K. H. Chopda for the applicant and Mr. R. D. Ovelekar along with Mr. More for respondent in Suo Motu Petition No. 52 of 1993. We have been taken through the evidence on record and the material exhibits by the learned counsel for the parties. After giving out anxious consideration to the matter, we are of the opinion that the learned trial Judge erred in convicting the appellant u/s 304B, I.P.C. In our view, he deserves to be acquitted on that count. However, in our view, the conviction of the appellant u/s 498A, I.P.C., has been recorded correctly by the learned trial Judge and deserves to be confirmed by us. We are further of the view that there is merit in Criminal appeal No. 682 of 1993 filed by the State of Maharashtra for enhancement of the sentence of Nandkishore Bhimrao Kshirsagar and his sentence on that count deserves to be enhanced.

13. We may straightaway mention that the acquittal of the appellant u/s 302 read with 34, I.P.C. has become final, inasmuch as the State of Maharashtra has not chosen to file an appeal against.

14. We may also mention that the defence of the appellant, viz., as a result of blazing of the stove on which the deceased was making tea, she got burnt and ultimately succumbed to those injuries on 13-4-1991, appears to be a tissue of lies, for reasons more than one.

Firstly, the report of the Chemical Analyst shows that there was no question of kerosene being present on the clothes of the deceased, in case there was blazing of the stove. The report of the Chemical Analyst further shows that even the undergarment (knicker) which the deceased was putting on was burnt.

Secondly, the burns found were confined to both the limbs and a small part of the abdomen of the deceased. The complete absence of burns on the upper part of the body of the deceased, particularly her face, belies the defence story that she suffered accidental burns.

Thirdly, the panchanama of the stove shows that there was one german pot on it and in our view if the same was there, there was hardly any possibility of burning a sari as a result of blazing of stove.

Fourthly, the evidence of Malhari (P.W. 8) which is to the effect that on 7-4-1991 at about 6 to 6.30 p.m. when he went to collect wages from the appellant he saw that the appellant and the deceased were inside the room, the doors of which were half closed, leaving a gap of 6" and that from the aforesaid gap he saw that there were burns on the body of the deceased and both the appellant and the deceased were in a standing position and the appellant was putting his right hand on her mouth, and by the other hand he had caught hold of her hands from behind, completely falsifies the story of the deceased receiving accidental burns. After going through the evidence of Malhari we find the same to be in accordance with probabilities. We also find that there was no cogent reason for him to falsely implicate the appellant.

The last circumstances which blasts the theory of accident and the claim of the

appellant that he tried to save the deceased is that the medical examination of the appellant was conducted as late as 5th June 1993. In the medical report of the appellant no scar of burn was found and had the case of the appellant been true he would have got himself medically examined without any loss of time.

15. We would also like to express out displeasure in the manner in which the two dying declarations of the deceased appear to have been recorded. In both of them she stated that while preparing tea on a stove, the stove was burst and she got accidentally burnt. In the preceding paragraph we have given out reasons as to why we are loath to believe the story of the deceased getting accidental burns. A persual of both the dying declarations betrays the fact that they were not statements given by the deceased but, she only signed them. In spite of the fact that she was in the intensive care unit and was hovering between life and death, the two dying declarations betray an unusual coherence and spontaneity. In both of them, she gave a clean chit not only to her husband and acquitted accused persons but, also went on to say that she had no complaint against anybody nor did she suspect anybody. In fact, in the dying declarations recorded by PSI Patil she went on the extent of saying "Nothing remains to be paid or received in connection with the said marriage. I did not suffer any kind of ill treatment at the hands of my husband, brother-in-law, sister-in-law mother-in-law or father-in-law."

16. In fact, we fail to understand firstly the necessity of PSI Patil recording a dying declaration especially when earlier dying declaration had been recorded by a Magistrate. Secondly, we fail to understand that although the deceased was hovering between life and death, in the Intensive Care Unit of the Mission Hospital, as to how could she give a dying declaration to PSI Patil, which nearly runs into 3 full caped typed pages. Thirdly, the conduct of PSI Patil in not even getting a certificate of fitness by the doctor to the effect that the deceased was in a fit mental condition, to make the dying declaration shows to what extent he was prepared to go in the instant case, to help the appellant and the acquitted accused persons.

17. The evidence is that the father of the appellant Bhimrao Dhondiram Kshirsagar who was a Land Acquisition Officer, at the time of the incident, was more or less continuously in the hospital during the days when the deceased was admitted and it appears to us that on account of his position dying declarations were written and the deceased only made to sign the same. It also appears to us that on account of presence of her husband and the other acquitted accused in the hospital, the deceased was in no position to act to the contrary. The psychology of the deceased understandable. She must be feeling that in case she survived, she had to live with these very people and therefore ,she just signed on the alleged dying declarations which appears to be certificates of good conduct issued to the appellant and the acquitted accused persons.

18. We may also mention that the learned trial Judge has chosen to reject the dying declaration recorded by the Executive Magistrate on the ground that

neither the doctor who gave certificate of fitness nor the Executive Magistrate have been examined. In our view, the learned trial Judge was wholly justified in not placing any reliance on the aforesaid dying declaration. Mr. Ovalekar learned counsel for the appellant strenuously urged that the doctor and the Executive Magistrate be examined by us, in exercise of our powers u/s 391, Cr.P.C. It is true that in an appropriate case where justice warrants the appellate Court is vested with the powers to adduce additional evidence. In this case, we are not inclined to accede to the request of Mr. Ovalekar because matters would be improved after the recording of the evidence of the doctor and the Executive Magistrate. As we have mentioned earlier that the contents of the dying declaration recorded by the Executive Magistrate, show that the same was not voluntarily given. The Executive Magistrate can only prove the dying declaration and the doctor can only state that the deceased was in a fit mental condition to make it. In our view it is not necessary to examine them.

19. Mr. Ovalekar learned counsel for the appellant vehemently urged that the conviction of the appellant u/s 304B, I.P.C., is unsustainable for two reasons :

Firstly, because there is no reliable and trustworthy evidence with regard to the averments pertaining to the demand of Rs. 50,000/- allegedly said to have been made by the appellant through his wife to the informant Mahadeo P.W. 1. and secondly, even if it is assumed that there was a demand, it would not fall within the ambit of Section 304B, I.P.C. and consequently, the conviction of the appellant under the aforesaid section would be unsustainable in law.

20. We would first like to take up the second contention of Mr. Ovalekar. Section 304B of the IPC, reads thus :-

"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 purposes of this sub-section, "dowry" shall have the same meaning as in S. 2 of the Dowry Prohibition Act, 1961.

(2) Whoever commits dowry shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."

Section 2 of the Dowry Prohibition Act 1961, defines dowry as follows :-

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 to the marriage or

(b) by the parents of either party to a marriage or by 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 dower or mahr in the case of person to whom the Muslim Personal Law (Shariat) applies."

21. Section 304B, I.P.C. came up for consideration before their Lordships of the apex Court in the decision reported in Smt Shanti and Another Vs. State of Haryana, , Their Lordships held that Section 304-B, I.P.C., has four components :-

(1) The death of a women should be caused by burns or bodily injury or otherwise than under normal circumstances;

(2) Such death should have occurred within seven years of her marriage;

(3) She must have been subjected to cruelty or harassment by her husband or any relative of her husband;

(4) Such cruelty or harassment should be for or in connection with demand for dowry.

22. In our judgment, the four components mentioned in paragraph 21, must exist conjunctively. Then alone, the offence of dowry death, as contemplated by Section 304, I.P.C., would be complete.

23. In our judgment, an analysis of Section 304B of the I.P.C. would also show, that it would only be dowry death if cruelty or harassment meted out to the woman either by her husband or by any of his relatives, is either for or on connection with any demand for dowry. In other words there should be a nexus between cruelty or harassment on the one hand and the demand for dowry on the other. The two must co-exist and should not be independent of one another. In the instant case it transpires from a close perusal of the evidence of Mahadev (P.W. 1), the father of the deceased, that the deceased had not stated to him that she was subjected to cruelty or harassment, either by her husband (the appellant) or by his relatives (the acquitted accused persons) on account of non-fulfilment of the monetary demand. The evidence of the complainant is crystal that although the deceased had complained to him and other family members on a number of occasions right from the inception of about the cruelty and harassment being meted out to her by the appellant and the co-accused persons but it was only as late as 7-4-1991 did she tell Mahadev that he should give Rs. 50,000/- to her husband for his poultry farm. There is no an iota of evidence to the effect that on account of the non-fulfilment of this monetary demand of Rs. 50,000/- made by the appellant, the deceased was either harassed or treated cruelly by the appellant or any of his relatives.

In other words, in the instant case the prosecution has lamentably failed to establish any connection or nexus between the cruelty and harassment of the deceased by the appellant and co-accused persons on one side and the non-fulfilment of the monetary demand of Rs. 50,000/- on the other.

We would like to emphasise at the cost of repetition that a close reading of Section 304-B clearly shows that it is not every cruelty or harassment which would fall within the ambit of expression "dowry death". It is only the cruelty or harassment which is connected with any demand for or in connection with dowry which would fall within the mischief of that section.

24. Mr. Chopda, Additional Public Prosecutor vehemently contended that it is implicit in the evidence of Mahadeo P.W. 1 that the ill-treatment and harassment of Surekha by the appellant and the co-accused persons was on account of non-fulfilment of the monetary demand of Rs. 50,000/- made by the appellant. Consequently, in his contention, the death of the deceased would fall within the ambit of the expression "dowry death", as defined in Section 304B, I.P.C., and the presumption contained in Section 113B of the Indian Evidence Act would have to be raised against the appellant. We regret that we cannot accede to the submission of Mr. Chopda.

It is well-settled that in interpreting a penal statute, the principle of strict construction, should be applied. Way back as the year 1952, the apex Court followed this principle in paragraph 6 of its judgment reported in *W.H. King Vs. Republic of India and Another*, . In the aforesaid paragraph Their Lordships observed thus :

"As the statute creates an offence and imposes a penalty of fine and imprisonment, the words of the section be strictly construed in favour of the subject. We are not concerned so much with what might possibly have been intended as with what has been actually said in and by the language employed."

In our judgment it follows as a necessary corollary from the aforesaid principle that while considering the evidence, in cases involving breach of penal statutes, Courts do not add or subtract any word from the evidence, unless of course the same is ambiguous and its meaning not clear. In our view a reading of the evidence of Mahadeo P.W. 1 makes it explicit that there was absolutely no connection between harassment and cruelty meted out to the deceased on one hand and the monetary demand of Rs. 50,000/- on the other. From his evidence, it transpires that the two in the instant case are independent of one another.

25. Since the death of the deceased was not a dowry death within the meaning of Section 304B, I.P.C., the presumption provided by Section 113B of the Indian Evidence Act would not come into play. This would become apparent from a perusal of Section 113B of the Indian Evidence Act.

Section 113B of the Indian Evidence Acts reads thus :

"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."

A reading of this section would show that the presumption therein would only be raised if dowry death is proved. Dowry death has been defined in Section 304B, I.P.C. and as seen earlier, the same has not been established in the instant case. Hence the presumption contemplated by this section cannot be raised against the appellant.

For the aforesaid reasons, in our view, the conviction of the appellant u/s 304B cannot be legally sustained.

26. We also agree with the contention of Mr. Ovelekar that there is no trustworthy evidence in respect of dowry demand.

In the first place, we find that the statement of Sanjay Kumar P.W. 2 is to the effect that the financial position of the appellant was good and that being so, we do not think it to be probable that the appellant would have made the demand. Secondly, we find that there is contradiction between the testimony of P.W. 1 Mahadeo and Vimal Laxman Bamane, P.W. 5 on the question of demand; whereas the former has stated that only the appellant was making demand of Rs. 50,000/- the latter stated that the deceased told her that both the appellant and his father Bhimrao Dhondiram Kshirsagar (acquitted accused) made the demand. Thirdly, we are not inclined to place any reliance on this story of demand because, it saw the light of the day nearly seven months after the incident, when on 24-10-1991 the FIR of the incident was lodged by Mahadeo P.W. 1. Fourthly, the conduct of Mahadeo was such that he could have, in our opinion, invented the story of demand in his belated FIR, Mahadeo in his statement in the trial Court has stated that after the 13th day ceremony in connection with the death of the deceased, he asked her father-in-law Bhimrao Dhondiram Kshirsagar to give Rs. 50,000/- towards the marriage expenses which he had incurred. He also admitted that through Shri Sitaram Karande, Advocate from Karad, he sent notices dated 4-9-1991 and 3-10-1991 demanding therein Rs. 50,000/- from the accused.

In such a state of evidence, in our opinion, it would not be safe to accept the story of demand which as mentioned earlier, saw the light of the day for the first time, nearly seven months after the incident. In such a situation, this Court has no option, but to acquit the appellant u/s 304B, I.P.C.

27. The next question which remains to be adjudicated upon is as to whether the learned trial Judge was justified in convicting the appellant u/s 498A, I.P.C., and if the answer to that question is in the affirmative, then the ancillary question which would arise would be as to whether the appeal filed by the State of Maharashtra for enhancement of the sentence of the appellant should be allowed and the appellant's sentence be enhanced.

In our view the answer to both the questions would have to be in the affirmative.

28. In the instant case there is overwhelming credible and dependable evidence

for sustaining the conviction of the appellant u/s 498A, I.P.C.

We find that as many as four witness namely, P.W. 1 Mahadeo Nana Bamane, the informant and father of the deceased, Sanjay Kumar Mahadeo Bamane P.W. 2, brother of the deceased, Prabhavati Pandurang Bamane, P.W. 4 a relation of the complainants and Vimal Laxman Bamane P.W. 5, niece of the complainant, have deposed about the cruelty meted out to the deceased by the appellant.

In the earlier part of our judgment while narrating the prosecution case we have referred to the informants evidence pertaining to cruelty. Let us briefly recapitulate the facts pertaining to cruelty again. From the evidence of the informant it emerges that when the deceased came to his house at the time of the village fair, she complained to him that she was being physically and mentally ill-treated by the appellant and the acquitted accused. She also complained that she was required to get up early in the morning, made to clean and wash the house and collect the cow-dung. She also complained that she was required to cook food. She also told the informant that in spite of doing all this her husband (the appellant) used to get angry with her.

29. The evidence of P.W. 2 Sanjay Kumar, the step brother of the deceased, is that when on 9th March, 1991 he and his mother had gone to see Surekha she told them that the accused used to wake her up at mid-night and ask her to do any type of work, including cleaning of clothes, collecting of cow-dung etc. She also complained to them that she was not getting sufficient food and was being denied basic necessities like towel, hair-oil, tooth paste, tooth brush, clothes etc.

30. The evidence of Prabhavati, P.W. 4, and Vimal Laxman Bamane, P.W. 5, is that when Surekha came at the village fair she told them about the ill-treatment given to her by her husband, in-laws and brother-in-law. She told them that even she was denied basic amenities such as hair-oil, towel, comb and other sundry articles. She told them that her husband (the appellant) used to return late at night and if she she before his arrival he used to get angry, the result being, she was required to remain without food.

The aforesaid recitals of cruelty have also been detailed in the F.I.R. We are not prepared to hold that they are the figment of imagination of these witnesses. The evidence of these witnesses shows that right from the inception of her marriage she was complaining to them of the cruelty meted out to her by the appellant.

31. However, even if, by way of abundant caution, the evidence of Mahadev (P.W. 1) and Sanjaykumar (P.W. 2), the father and step bother of Surekha respectively, is eliminated because they are highly interested witnesses and could have had animus against the accused persons, particularly Bhimrao Dhondiram Kshirsagar, for he did not give them Rs. 50,000/-, there remains the evidence of Prabhavati Bamane and Vimal Laxman Bamane. The evidence of each of these witnesses is individually sufficient to sustain the conviction of the appellant u/s 498A, I.P.C.

Taking up the evidence of Prabhavati we find that she is only a distant relation of

the complainant, who was her cousin brother-in-law. She knew Surekha since 14 years before her death. Hence it was natural for Surekha to have confided in her. Her statement appears to us to be extremely natural and in our view has a ring of truth. She had no reason to falsely implicate the appellant. In our view her statement alone would be sufficient to sustain the conviction of the appellant u/s 498-A, I.P.C. The statement of Vimal (P.W. 5) falls in the same category as that of Prabhavati. She stated that the informant was her uncle and that she knew Surekha since her child-hood. She also stated that her relations with Surekha were very cordial and friendly. Surekha used to come to her house on Saturdays and Sundays and sometimes she used to go her house. Consequently it was only natural for Surekha to have confided in her. Her statement too is not only natural and has a ring of truth but also in tune with probabilities. She too had no reason to falsely implicate the appellant. In our view like Prabhavati her solitary statement was sufficient to confirm the guilt of the appellant u/s 498A, I.P.C. The statements of Prabhavati and Vimal in our opinion lend tremendous reassurance to the statement of the informant Mahadev (P.W. 1) his son Sanjaykumar (P.W. 2).

32. Mr. Ovalekar, learned counsel for the appellant strenuously contented that on account of the five circumstances enumerated below the conviction of the appellant u/s 498A, I.P.C. cannot be sustained :

- (a) The evidence adduced by the prosecution in respect of cruelty is of highly interested witnesses;
- (b) The FIR in which recitals of cruelty appears for the first time was lodged nearly seven months after the incident;
- (c) In the statement of Mahadev (P.W. 1), recorded on 9-4-1991 by PSI Patil there is no mention that any cruelty was meted out by the appellant to the deceased;
- (d) In both the dying declarations there is no mention of any cruelty; and
- (e) The charge framed against the appellant was u/s 498A(b) and the cruelty deposed to by the witnesses would fall under Clause 498 A (a), I.P.C. and inasmuch as the charge has not been amended, the appellant has been prejudiced.

33. We have carefully examined the aforesaid submissions of Mr. Ovelekar and we regret that we find them to be devoid of substance.

Taking up Mr. Ovelekar's first contention first, we would like to emphasis that it would be only natural to except that a wife would disclose allegations of such a nature against her husband only to her close relations. This is because the apprehension is that the person who is told about such a thing should be dependable enough to keep it to himself. Apart from it, the question of self respect of the person who makes such a disclosure is also involved and therefore such disclosures are only made to near relations.

We may further mention that the norms of appreciation of evidence only warrant that the evidence of interested witnesses should be scrutinised with caution. It is not the law that such evidence should be mechanically rejected. We have exercised caution in evaluating the testimony of these witnesses. Further, as mentioned above Prabhavati, P.W. 4, and Vimal P.W. 5, were only distant relations of the informant Mahadev (P.W. 1), and in our view had no reason to falsely implicate the appellant. We have observed above that the statements of both Prabhavati and Vimal are natural and have a ring of truth.

Now this brings us to the second contention of Mr. Ovelekar, viz., that the averments pertaining to cruelty being meted out by the appellant to the deceased saw the light of the day, for the first time nearly 7 months after the incident when the F.I.R. was lodged.

It is true that in the instant case the death of the deceased took place on 13-4-1991 and the FIR was lodged on 24-10-1991. But a cogent explanation for the delay has come on record. The informant Mahadev has stated in paragraph 7 of his statement that two to four times he had met PSI Patil but he did not take any cognizance of his complaint. In his cross-examination he stated that he made a complaint on 26-4-1991 and his son made a complaint on 27-4-1991 but the police did not take any cognizance of their complaint. He also stated that he had made applications to higher authorities, making allegations against the police for not taking cognizance and paying for investigation by CID. He has further stated that the delay in the filing of the FIR was also on account of the fact that after Surekha's death his wife had become sick. In our view the delay in the lodging of FIR has been plausibly explained.

Here, we would also wish to emphasise that the FIR is not a substantive piece of evidence and the apex Court has held that it can be used for the limited purpose of contradicting and corroborating the maker. The real question is as to whether the substantive evidence led in support of the accusation of cruelty inspires confidence. As stated above, in our opinion, it does.

The third contention of Mr. Ovelekar only appears to be attractive on the first blush. The informant Mahadev was expecting that Surekha would survive and since she had to live with her husband and the acquitted accused he did not want to annoy them. He also stated that Surekha's husband (appellant) and acquitted accused Bhimrao Dhondiram Kshirsagar told him that Surekha had got accidental burns and sustained some minor injuries and would be cured in a short time. We would like to emphasise that it was only on 10-4-1991 that the doctors allowed Mahadev (P.W. 1) to see Surekha in the hospital for the first time and it was only after seeing the dead body of Surekha on 13-4-1991 that he realised that his daughter was not accidentally burnt. Understandably on 9-4-1991 he was carried away by the above mentioned facts stated to him by the appellant and co-accused Bhimrao. In this context it may be mentioned that the evidence of Mahadev is to the effect that the appellant's father Bhimrao himself took him in the car to the police station for making the statement. It appears that Bhimrao

told the informant Mahadev Bamane that their honour was at stake and there was danger of their being falsely implicated in this case and consequently he should give a statement to the police that he had no complaint against them. In our view for the aforesaid reasons, in good faith he gave the statement to P.S.I. Patil, on 9-4-1991. To our thinking this statement was also occasioned by his desire to save Surekha's marriage, at any cost.

How desperate the family members of Mahadeo were to save Surekha's marriage can be gauged by the fact that when in the month of March 1991 Surekha complained to Sanjaykumar and her mother about the ill-treatment meted out to her, they advised her to bear this treatment for some days as she was recently married and the accused persons were very rich.

This brings us to the 4th contention of Mr. Ovelekar, viz., that in both the dying declarations of the deceased there is no mention about the cruelty, being meted out to her by her husband and other members of his family. In the paragraph 15 to 18 of our judgment we have already given the reasons as to why we are not inclined to place any reliance on the two dying declarations.

We would now like to take up the last contention of Mr. Ovelekar, viz., the charge framed against the appellant was u/s 498A(b) and the cruelty deposed to by the witnesses would fall u/s 498A(a), I.P.C. and inasmuch as the charge has not been amended, the appellant has been prejudiced in making his defence. We regret that we do not find any merit in the same.

Section 215 of the Code of Criminal Procedure which deals with the effect of errors in framing of charge, reads thus :

"215. Effect of errors - No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice."

Section 464(1) of the Code of Criminal Procedure reads thus :

"464 (1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby."

A perusal of Sections 215 and 464(1), Cr.P.C. would show that an error in the framing of the charge would not be regarded as material unless it has occasioned in failure of justice. In the instant case the allegations of cruelty have been unfolded by the witnesses in their statements in the trial Court which were recorded in the presence of the appellant. The appellant had ample opportunity to cross-examine the witnesses on those allegations and in fact his counsel did cross-examine them. We may mention that no objection pertaining to charge was

taken up by appellant's counsel in the trial Court. We also wish to emphasise that the evidence pertaining to cruelty as unfolded by the prosecution witnesses has been put to the appellant in his statement u/s 313, Cr.P.C. In such a situation no prejudice has been caused to the appellant and there has been no failure of justice on account of the aforesaid infirmity in the charge. It is too late in the day for the appellant to make any grouse regarding the infirmity in the charge.

As a matter of fact when there is a charge u/s 304B, I.P.C. it is not imperative in law to frame a separate charge u/s 498A, I.P.C. We say this on the strength of the observations made by their Lordships of the apex Court in paragraph 6 of their judgment reported in Smt Shanti and Another Vs. State of Haryana, , to the following effect : "Further a person charged and acquitted u/s 304B can be convicted u/s 498A without charge being there, if such a case is made out."

As pointed out above not only in the instant case was a charge u/s 498A, I.P.C. framed against the appellant but there was also cogent, reliable and unimpeachable evidence to which we have referred to above, to the effect that cruelty was meted out by the appellant to the deceased. For the abovesaid reasons there is no merit in the aforesaid contentions of Mr. Ovelekar and we accordingly reject the same.

34. The fall out of the above discussion is that the learned trial Judge acted correctly in convicting the appellant u/s 498A, I.P.C. and we confirmed the conviction of the appellant recorded under the aforesaid section.

35. This brings us to Criminal Appeal No. 682 of 1993 preferred by the State of Maharashtra for the enhancement of the sentence of the appellant (respondent in the aforesaid appeal). We are alive to the principle that ordinarily in the matter of sentence the appellate Court does not interfere, for the question of sentence is a matter of discretion of the trial Court. However, if that discretion has been injudiciously exercised the appellate Court can and should interfere with it. We have given our anxious consideration to the question as to whether the sentence of the respondent should be enhanced or not ? In our considered view the answer to this question has to be in the affirmative.

In our judgment taking into consideration the circumstances :-

that the deceased died within less than 3 months of her marriage to the respondent; that practically from the very inception of the marriage, the respondent instead of treating her as an equal partner and giving affection and respect to her, meted out to her cruelty of a sordid and grave nature, to which we have referred to above; and the antisocial nature of the offence, coupled with the fact that such offences are increasingly on the rise these days, and hence a deterrent sentence would be necessary to curb the growing menace, the instant, is one of those cases which warrants the imposition of the maximum jail sentence provided by Section 498A, I.P.C.

In our judgment the ends of justice require that the jail sentence of the appellant

u/s 498A, I.P.C. be enhanced from 2 years R.I. to 3 years R.I. and the sentence of fine of Rs. 1000/- and that in its default is maintained.

36. In the result, Criminal Appeal No. 533 of 1993, preferred by the appellant against his conviction under Sections 304B and 498A, I.P.C. is partly allowed and partly dismissed. The conviction and sentence of the appellant under Sec. 304B, I.P.C. is set aside. In case he has paid the fine of Rs. 5000/- imposed thereunder, the same shall be refunded to him. We, however, uphold the conviction of the appellant u/s 498A, I.P.C.

Criminal Appeal No. 682 of 1993 preferred by the State of Maharashtra for enhancement of sentence of the appellant is allowed. The jail sentence of 2 years rigorous imprisonment awarded to the appellant u/s 498A, I.P.C. is enhanced to 3 years rigorous imprisonment and the sentence of fine of Rs. 1000/- and that in its default imposed by the trial Court is maintained. In case the appellant has not paid the fine, he may do so within a period of 6 months from today.

Suo motu petition No. 52 of 1993 is allowed in terms of the order passed in Criminal Appeal No. 682 of 1993.

We are informed that the appellant is in jail. He shall remain there till he serves out his sentence.

In case an application for certified copy of our judgment is made the same shall be issued at an early date.

37. Order accordingly.