

(1997) 06 BOM CK 0039
In the Bombay High Court
Case No : Criminal Appeal No. 418 of 1993

Rambhau Waibhat and another	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 18-06-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Evidence Act, 1872 — Section 3, 59, 61, 9
Penal Code, 1860 (IPC) — Section 302, 304, 34, 498

Citation : (1998) BomCR(Cri) 625 : (1998) 1 MhLj 469

Hon'ble Judges : R.G. Deshpande, J; A.D. Mane, J

Bench : Division Bench

Advocate : S.N. Loya and Joydeep Chatterji, for the Appellant; A.B. Gaikwad, Assistant Public Prosecutor, for the Respondent

Judgement

A.D. Mane, J.—This appeal is directed on behalf of the original accused Nos. 1 and 3, the son and father respectively, against their conviction and sentence passed on 6-12-1993 by the learned 2nd Addl. Sessions Judge, Beed in Sessions Case No. 75/1988. The appellant No. 1 is the original accused No. 1; whereas the appellant No. 2 is the original accused No. 3. Original accused No. 2 Maruti is the second son of original accused No. 3; whereas the original accused No. 4 is the wife of original accused No. 3. They were all tried on account of death of wife, namely, Usha of original accused No. 1 in suspicious circumstances.

2. In this judgment, we may refer the original accused Nos. 1 and 3 as appellant Nos. 1 and 2 respectively. The appellant No. 1 married Usha on 12-6-1987. She lived with him in his village Pimparnai till 25-10-1987, except on some occasions when she had been to her parents' place on account of festivals. On 25-10-1987 she was found dead and information about her death was conveyed to her parents immediately. Within couple of hours after seeing the dead body of Usha, her father P.W. 7, Dattatraya lodged his complaint-cum-F.I.R. at Exh. 24 with Neknoor Police Station and a crime being Cr. No. 105/87 came to be registered under sections 302, 498-A read with section 34 of the Indian Penal Code, against

the original accused Nos. 1 to 4.

3. In the F.I.R. (Exh. 24,), P.W. 7 Dattatraya, made a mention that at the time of marriage of Usha with the appellant No. 1, he agreed to pay Rs. 4,000/- as a dowry and he paid Rs. 3,000/- at the time of marriage and it was promised to pay the balance amount after the marriage. After the marriage, Usha used to come to his parents' place and she used to tell to pay Rs. 1,000/- towards the balance dowry amount, to the father-in-law of Usha. She told further that she was subjected to ill-treatment as the balance amount of Rs. 1,000/- was not paid. It was also mentioned in the F.I.R. that on seeing the dead body of Usha on 25-10-1987 at about 8.30 a.m. he had noticed that his daughter's face was found blackish, her lips reddish black, and he suspected mark of assault on her. Moreover, he also noticed that the mouth and tongue of Usha was crushed, beneath the teeth. On that basis, he alleged that his daughter Usha was beaten on account of her failure to bring the balance amount of dowry and, as such, either she was killed by poisoning or she was murdered by the accused persons.

4. P.S.I. Ramrao (P.W. 13) attached to Neknoor Police Station conducted the investigation on receiving the F.I.R. at about 12.30 noon from P.W. 7 Dattatraya. In course of his investigation, he recorded the statements of six witnesses who happened to be the neighbours of the appellants and also give witnesses. He also conducted the Inquest Report (Exh. 13). There is post-mortem report (Exh. 21). P.W. 6 Dr. Radhkrishna who conducted autopsy on the dead body on 25-10-1987 between 10.30 and 11.30 a.m. could not ascertain the cause of death. He, therefore, reserved his opinion till the CA report. On receipt of CA report, he gave his opinion vide his letter addressed to the P.S.I, on 19-11-1987 (Exh. 20) mentioning that, the cause of death is "shock causing sudden reflex cardiac arrest due to vaso-vagal inhibition due to smothering". The C.A. report (Exh. 22) disclosed no recognisable poison in viscera.

5. The charge was framed against the appellants and others, punishable u/s 302 read with section 34 I.P.C. as well as 498-A read with section 34 I.P.C. However, an additional charge was framed as per Exh. 69 on 14-10-1993, u/s 304-B read with section 34 I.P.C. To the charge that was framed, the accused denied the same and pleaded not guilty u/s 313 of the Criminal Procedure Code. The appellants specifically denied having committed any of the offences alleged. Not only that but they had denied the circumstances which appeared adverse to them in the evidence of prosecution witnesses.

6. The learned trial Judge, however, convicted the appellant No. 1 u/s 302 I.P.C. simplicitor and sentenced him to suffer life imprisonment. The learned Judge further convicted the appellant Nos. 1 and 3 u/s 304-B read with section 34 I.P.C. and each of them was sentenced to suffer RI for seven years. Not only that, but the appellants were also convicted u/s 498-A read with section 34. However, no separate sentence was imposed on them.

7. In this appeal, Shri S.N. Loya, the learned Counsel appearing for the

appellants seriously questions the propriety, legality and correctness of the order of conviction of the appellants either u/s 302 or u/s 304-B as well as section 498-A I.P.C. The learned Counsel urged that the learned trial Judge committed grave and serious error in placing reliance on the police statements of the six witnesses and treating the same as substantive evidence in convicting the appellant No. 1 u/s 302 I.P.C. The learned Judge of the trial Court has also misread the evidence of the prosecution for the purpose of conviction u/s 304-B I.P.C. when the evidence on record regarding the alleged story of demand of balance amount of Rs. 1,000/- as dowry amount, suffers from lack of reliability, apart from the same being invention and after-thought story.

8. The learned Counsel further submits that the evidence of the interested witnesses on the point of settlement of marriage and the balance amount of Rs. 1,000/- to be paid towards dowry amount, was absolutely unreliable. The learned trial Judge, however, totally failed to appreciate the evidence of the witnesses before reaching to the conclusion that the prosecution was able to prove that it was a dowry death. In the absence of any evidence to prove that there was a dowry death, the conviction u/s 304-I.P.C. was illegal. It is also submitted that when the prosecution failed miserably to prove the dowry death, the evidence which is inseparable in regard to the ill-treatment as alleged, ought not to have been believed. Therefore, the conviction even u/s 498-A I.P.C. was also unsustainable in law. It is, therefore, submitted that conviction of the appellants is bad in law and the appellants are entitled to clear acquittal.

9. On the other hand, Mr. A.B. Gaikwad, the learned A.P.P. supported the findings recorded by the learned trial Judge, more particularly, on the point of conviction of the appellants under sections 304-B and 498-A read with section 34-I.P.C. Mr. Gaikwad, the learned A.P.P. in course of his arguments did not think it proper to press for the conviction u/s 302 I.P.C. as against the appellant No. 1 as the same is not supported by any legal evidence. Mr. Gaikwad, however, made a great deal of emphasis on the evidence of other set of witnesses who spoke about the demand of balance amount of Rs. 1,000/- as dowry amount as also the ill-treatment meted out to deceased-Usha as appearing in their evidence to support his contention that the conviction u/s 304-B cannot be said to be illegal. It is urged that once the demand for Rs. 1,000/- as dowry amount is proved and evidence regarding ill-treatment as disclosed by the deceased Usha herself to her father or relatives is acceptable, the death was a dowry death and, therefore, presumption u/s 113-B of the Evidence Act could be raised. Once the presumption is raised, the burden shifts on the defence and in absence of any sound explanation offered by the appellants as to the cause of death of deceased Usha, the conviction as recorded, does not require any interference in appeal.

10. Keeping in view the submissions advanced on behalf of the appellants as well as on behalf of the respondent-State, we think that we have to inquire into the following points :---

(i) Whether the conviction of the appellant No. 1 u/s 302 I.P.C. is proper in law ?

(ii) Whether the conviction of the appellant Nos. 1 and 2 u/s 304-B or 498-A read with section 34 is also proper in law ?

11. We may mention that the learned A.P.P. was quite justified in conceding the position that prosecution has miserably failed to bring home the guilt to the appellant No. 1 u/s 302 I.P.C. The prosecution has examined the neighbours of the appellants, viz., P.W. 1 Laxmibai; P.W. 2 Vijaya; P.W. 3 House bai; P.W. 4 Laxman; P.W. 5 Jyotirarn. These witnesses are, no doubt, residing in the neighbourhood of the house of the appellants in the said village. The appellants normally reside in the house situated in the field which is half a furlong away from the village. The house in the village is, however, used for storage of corns and some one is allowed to sleep to guard the corn in that house.

12. The prosecution examined these five witnesses to prove two circumstances. The first circumstance is that the appellant No. 1 and deceased used to come in the house in village for sleeping. The second circumstances is that the appellant and deceased -Usha had, in fact, came on the fateful night to sleep in that house. All these five witnesses, however, turned hostile and they were cross-examined by the prosecution.

13. On going through the entire prosecution evidence, we may mention that there is absolutely no direct or circumstantial evidence to render corroboration by independent source to the hostile witnesses' evidence. While it is true that merely because a witness is declared hostile his evidence cannot be rejected on that ground alone, it is equally well settled that when once a prosecution witness is declared hostile, the prosecution clearly exhibits its intention not to rely on the evidence of such witness. Such a witness requires to be corroborated from some independent source to make that part of the statement, which the prosecution wants to believe to be believable. In other words, the evidence of a hostile witness may not be rejected outright, but the Court has at least to be aware that prima facie if a witness is found to have made different statements at different stages, he must be one having no regard for truth. Thus, the rule of prudence requires that if a hostile witness is thoroughly discredited witness, whole of his testimony should be rejected. Evidence of hostile witness cannot be relied upon.

Therefore, the previous version as brought on record during the course of cross-examination by the prosecution of the witnesses cannot be used as a substantive evidence in order to hold that the prosecution proved the charge for an offence punishable u/s 302 I.P.C. The learned trial Judge, however, to our surprise, read the portion of evidence as appearing in their cross-examination when witnesses were confronted with their previous statement before the police as the substantial evidence to hold that the prosecution has proved the offence u/s 302 I.P.C. as against the appellant No. 1. For instance in para No. 15 of the judgment, after quoting the portion A,B,C in previous statement before the police as brought out in cross-examination of the witnesses, the learned trial Judge states as follows :---

"Though the witnesses are declared hostile the fact remains that P.W. 2 to 5 have stated before police during their statements recorded u/s 161 of Cr.P.C. that the accused No. 1 Rambhau and the deceased came to sleep in their house situated in the village at about 8.00 p.m. with a Ghongdi and Chadar and they slept in the said night in the room. Hence there is sufficient evidence to show that accused No. 1 and deceased were sleeping in the said room during the said tragic night and the deceased was found dead early in the morning by him and the villagers gathered."

The finding recorded by the learned trial Judge as stated above, is wholly illegal. It may be stated that the learned trial Judge having accepted the evidence of hostile witnesses in the above fashion, further, said that, "the accused No. 1 did not tell how the deceased died". This conduct of the accused is also taken into consideration. Therefore, coupled with the medical evidence which we may refer to later on, the finding recorded by the learned trial Judge is that the appellants committed the offence punishable u/s 302 I.P.C.

14. The approach of the learned trial Judge is totally erroneous in appreciating the evidence which requires to be admissible or inadmissible in nature. As we have observed that there is no independent source to render any assurance through the evidence of hostile witnesses from the point of view of rendering any support to what they have stated before the police. Once their evidence is to be excluded from consideration, we find no iota of evidence on record to prove the complicity of the appellant No. 1 for commission of offence punishable u/s 302 I.P.C. We, therefore hold that the conviction of the appellant No. 1 u/s 302 I.P.C. was illegal and the appellant No. 1 is entitled to be acquitted u/s 302 I.P.C.

15. That takes us to consider whether the conviction of the appellant u/s 304-B and 498-A read with section 34 I.P.C. is proper in law. In support of the prosecution version, the prosecution relied on evidence of six witnesses including P.W. 7 Dattatraya, who is author of F.I.R. We may mention, at the outset, that in F.I.R. (Exh. 13) the material facts alleged are twofold. Firstly, that when the marriage was settled it was agreed that Dattatraya would pay Rs. 4,000/- as dowry amount to appellant No. 1 or his father, appellant No. 2. Out of Rs. 4,000/- Dattatraya paid Rs. 3,000/- on the day of the marriage itself, whereas agreed to pay the balance amount of Rs. 1,000/- later on. The second statement of act alleged in the F.I.R. is that on the last visit of deceased Usha, she stated to P.W. 7 Dattatraya to pay Rs. 1,000 to her father-in-law as he always demands it and she was being subjected to ill-treatment for that. The question arises whether the evidence adduced at the trial is consistent or inconsistent with this statement of facts as alleged in the F.I.R. and that too which facts are within the personal knowledge of the person who is the author of the F.I.R. This is so because a great deal of criticism is levelled against the evidence of witnesses that they are interested witnesses, their evidence is parrot-like story and it is afterthought story. It is, therefore, necessary to appreciate the evidence of these witnesses with due care and caution.

15-A. We, therefore, turn to evidence of P.W. 7 Dattatraya Ghodke. He stated that the marriage was settled in the presence of P.W. 8 Babasaheb; P.W. 10 Pandurang and others. It was settled that he would pay Rs. 4,000 to the appellant No. 1 and to perform the marriage. Rs. 3,000/- were paid to the appellant No. 2, two days prior to the marriage and he promised to pay Rs. 1,000 at the time of Diwali festival towards dowry. He further stated that after marriage, his daughter Usha came to his house and stayed for about 10/12 days. During her stay, she told him that the accused were demanding Rs. 1,000/- which was to be paid to them out of dowry amount and on that account they used to ill-treat and beat her. He further stated that besides ill-treatment in respect of dowry, she told him that the accused were ill-treating her on the ground that she does not know anything about the cooking etc. She further told that her mother-in-law used to say that she does not know how to cook.

16. This witness P.W. 7 was confronted with the statement in F.I.R. (Exh. 13). Several contradictions were proved and brought on record in course of his cross-examination. Firstly, that he never stated in his F.I.R. that three other accused, namely appellant No. 1, acquitted accused Nos. 2 and 4 were asking Usha to give Rs. 1,000/-, Secondly, that they used to ill-treat her on that count.

It may be appropriate to mention here that in his cross-examination, he tried to tell that P.W. 10 Pandurang had told him twice, thrice that appellant No. 2 was pressing hard to pay Rs. 1,000 towards balance amount of dowry. But significantly, he was also contradicted with this version. He stated that he had thrice visited the matrimonial house of Usha, but none of the accused asked about the so called dowry amount of Rs. 1,000/- nor he has enquired about the alleged ill-treatment to deceased Usha in the house of the accused. This kind of conduct of the witness is eloquent and inconsistent with his version about demand of balance amount of dowry by any of the accused.

It is, therefore, clear that P.W. 7 Dattatraya has not only improved upon his initial version at the trial but has introduced an altogether different story regarding the demand of Rs. 1,000/- and ill-treatment.

17. In order to appreciate the evidence of P.W. 7 Dattatraya, it is pertinent to read the evidence of other witnesses on the same statement of facts to see how each of them failed in their evidence to lend assurance to their version. It may be stated that the evidence of other four witnesses instead of rendering any corroboration destroys the very fabric of the prosecution's initial version.

18. P.W. 8 Babasaheb Ghodke, no doubt, corroborates that the marriage was settled and P.W. 7 Dattatraya agreed to pay Rs. 4,000 as dowry. He paid Rs. 3,000 in cash to the accused. Significantly, though he is one of the witnesses to the marriage settlement, he does not corroborate the testimony of P.W. 7 Dattatraya that he had agreed to pay Rs. 1,000 later on as the balance amount of dowry. Further, in his version in-chief he comes out with the case that deceased- Usha had disclosed him that the accused were demanding Rs. 1,000/-

and ill-treating her. Not only that but deceased Usha told him that if Rs. 1,000/- were not paid to her father-in-law, he would kill her. In course of his cross-examination, he does not tell why he could not tell these things either to P.W. 7 Dattatraya or his wife nor could he explain why he did not tell about what he heard from deceased-Usha to her parents. It appears from his version that he has informed the same for the first time to P.W. 7 Dattatraya only, when he was going to Police Station for lodging the complaint on seeing the dead body of Usha.

19. P.W. 8 was with P.W. 7 Dattatraya in Police Station for about 2/3 hours before the statement of Dattatraya came to be recorded, by the police in the Police Station. Even assuming for the sake of argument that this witness has disclosed to P.W. 7 Dattatraya what he has heard from deceased Usha while they were going to Police Station on that day, we fail to understand why Dattatraya himself has not narrated what deceased Usha had already told to him when she last resided with him before her death. Neither P.W. 7 Dattatraya nor P.W. 8 Babasaheb corroborated what Usha said during her lifetime. It was highly improbable that had it been the case what P.W. 7 Dattatraya was told by Usha about the demand of Rs. 1,000 by appellant No. 2 and ill-treatment meted out to her earlier on account of non-payment of Rs. 1,000/- he would remain silent before he could lodge his F.I.R. and add something at the trial. P.W. 7 Dattatraya would have been the last person not to disclose to P.W. 8 what he had heard from Usha earlier before her death on the day when he saw the dead body of Usha. Therefore, non-disclosure of any demand of Rs. 1,000 from any of the accused or ill-treatment meted out to Usha at the hands of the accused, makes it difficult to believe the version of P.W. 7 as well as P.W. 8.

20. We, therefore, do not agree with the statement of P.W. 8 that he could disclose what Usha disclosed to Dattatraya only when he was going to Police Station. This version also appears to be highly improbable. Had it been the fact that this witness knew how Usha was treated in the house of accused previously, in that case, even he would have been the first person to make known this fact to P.W. 7 Dattatraya or his wife. But the silence on his part makes it difficult to believe that part of his version.

21. In this context, we may mention that in his cross-examination he stated that he told Dattatraya about the ill-treatment meted out to Usha at the hands of the accused, 8/15 days prior to the death of Usha when Usha was living at accused's place. Significantly, Dattatraya does not corroborate this statement in his evidence. Nevertheless it becomes difficult to find support to his omnibus statement that deceased Usha herself disclosed either demand of Rs. 1,000/- or ill-treatment from the accused to her as asserted by him in his examination-in-chief.

22. That takes us to P.W. 9, Vasudeo. He is one of the persons present at the time of settlement of marriage. His version is identical to say that marriage was settled and, Rs. 4,000/- were to be paid in lieu of dowry to the accused Rambhau. Out of that Rs. 3,000/- were paid at the time of marriage whereas the

remaining amount of Rs. 1,000/- was agreed to be paid after some days. He stated that after the marriage Usha had come to her parents' place. His version is that whenever Usha used to meet him, she used to tell that the accused were ill-treating her on account of Rs. 1,000/- of dowry amount. He further stated that he came to know about the said ill-treatment one month prior to Diwali and at that time Usha was residing at Safepur. Safepur is the place where Usha's parents reside. Next his version is that Dattatraya came to him after 8/ 10 days when Usha informed him about the ill-treatment and demand of Rs. 1,000/- for payment to accused. On enquiry with Dattatraya as to for what purpose he required Rs. 1,000/-, at that time, Dattatraya told him that Usha complained ill-treatment at the hands of accused on account of Rs. 1,000/-. He did not give the money as he had no money at that time.

23. Now, if regard be had to the testimony as appearing in his cross-examination, it can straightaway be said that his version is as disclosed above, suffers from serious contradictions. The fact of stay of 15 days of Usha in parents' house is also contradictory. Not only that but the fact of his disclosure to P.W. 7 Dattatraya as to what he heard from Usha is also contradictory. Significantly, he clearly mentioned in his statement in cross that Usha never complained him about the ill-treatment at the hands of the accused persons on account of Rs. 1,000/-. She even did not tell that the accused used to ill-treat and beat her. Admittedly, he has stated that his house is near to the house of P.W. 7 Dattatraya. Therefore, if really Usha disclosed either about some ill-treatment in the house of her husband or demand of Rs. 1,000/- as a balance amount of dowry as the reason for ill-treatment, we fail to understand why this witness remained silent throughout. Significantly, P.W. 7 Dattatraya also does not in any way corroborate the testimony of this witness having told him that he required Rs. 1,000/- because there was a demand for balance amount of Rs. 1,000/- from any of the accused. The evidence of this witness is nothing but self-condemnation.

24. P.W. 10 Pandurang, also hails from the village of P.W. 7 Dattatraya; he is distantly related to the accused. He was also one of the person present at the time of settlement of marriage of accused/appellant No. 1 with deceased-Usha. He, no doubt, corroborates P.W. 7 Dattatraya that at the time of settlement of marriage it was agreed that the accused would be paid Rs. 4,000 as dowry. Rs. 3,000/- to be paid at the time of marriage, whereas remaining amount of Rs. 1,000/- to be paid after the marriage. He stated that after marriage, Usha used to come to her parents' house. After 2/4 months of the marriage, P.W. 2 Kashinath reminded him about payment of Rs. 1,000/-. It is his version that accordingly he told P.W. 7 Dattatraya to pay Rs. 1,000/- to the appellant No. 2 prior to Diwali. Next his version is that seven days before the incident, the appellant No. 2 also met him in the Bazar at Neknoor and appellant No. 2 asked him to pay Rs. 1,000/-. He stated that accordingly he informed to Dattatraya. According to this witness, the appellant No. 2 had told him that Rs. 1,000 be paid before Diwali. However, Dattatraya told him that the amount will be paid after

harvesting of the crop.

25. It may be noted that nowhere in examination-in-chief this witness supported the say of P.W. 7 Dattatraya that the balance amount of Rs. 1,000/- was agreed to be paid after Diwali or after harvesting of the crop. Even the balance amount, according to them, was agreed to be paid later on and no fixed period was agreed. This witness, however, comes with a case as learnt from appellant No. 2 that the amount to be paid prior to Diwali. Not only that but the P.W. 7 Dattatraya is said to have told him that he would pay the amount of Rs. 1,000/- after harvesting the crop. In course of his cross-examination this witness for the first time comes with a case that the amount of Rs. 1,000/- was agreed to be paid after Diwali, that too after harvesting the crop. Indeed this is nobody's case. Therefore, introduction of this aspect of the matter throws a considerable doubt on the veracity of the prosecution version itself about the balance of Rs. 1,000/- to be paid as a dowry amount as settled by parties at the time of settlement of marriage. The conduct of this witness is also eloquent. He never asked the appellant No. 2 as to why he would require the amount before Diwali, when it was agreed that the amount was to be paid after Diwali. Though it appears that there is small discrepancy in the evidence of this witness for the prosecution but we feel that discrepancy of this type suggests "tutoring" on the point of demand of Rs. 1,000/- by appellant No. 2 as a part payment of dowry amount agreed at the time of settlement of marriage before Diwali. The evidence of this witness in our considered opinion suffers from the very infirmity as in the case of evidence of other earlier witnesses.

26. That takes us to the next witness P.W. 11 Rangnath Ghodke, who is grandfather of deceased-Usha. No doubt, he is consistent in saying that Rs. 4,000/- were settled as dowry for marriage and out of this Rs. 3,000 were paid to the accused. He says that the marriage took place in the month of Jyeshtha. According to him, Usha used to come to his house after the marriage and she used to complain about the demand made by the accused in respect of Rs. 1,000/-. He further stated that accused were ill-treating Usha and also abusing her on account of payment of Rs. 1,000/-. It may be stated that this witness does not say as to whether Rs. 1,000/- were to be paid before or after Diwali. It is his plain version that amount of Rs. 1,000 was agreed to be paid after the marriage. He does not corroborate any of the witnesses about demand made by the appellant No. 2, either to P.W. 7 Dattatraya through someone or to P.W. 10 Pandurang. That means that he is not in the know of the subsequent things as asserted by the earlier witnesses about the demand made by any of the appellants of Rs. 1,000/- before Diwali. We have already seen that theory of demand of Rs. 1,000/- deposed to by earlier witnesses suffers from improbability factor.

27. P.W. 11 Rangnath, stated further that on his way to Pimparnai, Usha said to him doubt Rs. 1,000/- to be paid to her-father-in-law as he was ill-treating her. This statement of fact was highly improbable. If there was any ill-treatment for

not paying Rs. 1,000/- and when Usha had admittedly stayed with him along with other members of his family, the question arises why Usha did not disclose these things to him earlier. It is rather unnatural to believe that he could come to know from Usha only on that day when they were proceeding to Pimparnai by walk after getting S.T. bus from Safepur to Limba Ganesh. As a matter of fact, even his earlier version in examination-in-chief is sharply contradicted with the version before the police. He was confronted with the previous statement before the Police about the complaint made by Usha in respect of ill-treatment. It may be sated, that this witness has to admit that after marriage of Usha he went to the house of the appellants four times and stayed there for some days. But, significantly, at no point of time Usha is said to have made any complaint about any sort of ill-treatment in the house of the appellants. No, doubt, this witness is an aged member of the family of P.W. 7 Dattatraya; but his possibility of supporting the prosecution version out of love and affection towards Usha, cannot be ruled out. Quite apart, his version also becomes difficult to believe in view of aforesaid discrepancies in his evidence.

28. The last witness is P.W. 12 Vimalbai Ghodke, who is the mother of deceased Usha. Her evidence shows that there was not only ill-treatment on the count of Rs. 1,000/- to be paid to the accused but she stated that when Usha was brought prior to Diwali to their place and where she lived for about 8/10 days, Usha narrated that she was subjected to cruelty. What kind of cruelty it was however, not stated by her. In course of cross-examination when she was confronted with the previous statement before the Police, her version -in-chief is proved to be contrary. She never stated before Police about any ill-treatment or beating as disclosed to her by the deceased Usha when deceased Usha was staying with her before Diwali. We do not find that her evidence would render any assistance to the prosecution version.

29. It is well-settled that oral evidence of witness if there is more than one witness deposing on identical statement of facts, has to be appreciated by considering as to how they fair in cross-examination vis-a-vis each other. We find that even if the evidence is tested individually and with reference to deposition of other witnesses, we find that there is no guarantee of truth which can be obtained from evidence of these witnesses to lend any assurance to the prosecution version that Usha was ill-treated either by the appellant No. 1 or by appellant No. 2 on account of failure of Usha to bring the remaining amount of Rs. 1,000 as part payment of dowry, as settled at the time of marriage.

30. We may mention that the learned trial Judge has, however, accepted the evidence of these witnesses without proper scrutiny, with due care and caution and influenced by a circumstance of unnatural death occasioned in the present case. We, however, disagree with the findings recorded by the learned trial Judge that Usha was subjected to any kind of ill-treatment on account of payment of Rs. 1,000/- as part of the dowry amount agreed between the parties at the time of settlement of marriage.

31. Mr. A. B. Gaikwad, the learned A.P.P., however, submits that death of Usha was unnatural. The deceased Usha had sustained injuries as told by P.W. 6 Dr. Jadhav which are supported by his post-mortem notes Exh. 21. Next, Mr. Gaikwad, the learned A.P.P. also urged that as per the opinion of the Doctor, the death was caused due to shock causing sudden reflex cardiac arrest due to vaso-vagat inhibition due to smothering. Moreover, the C.A. report says that there was no poison found when viscera was sent for examination. Therefore, here is a case where death appears to be unnatural especially when it is neither suicidal nor death by poison. The learned Addl. Public Prosecution emphasised that there cannot be a case of any accidental death. It was a dowry death. In this context, the learned A.P.P. invited our attention to the observation of Their Lordships of the Apex Court in the case reported in *Kundula Bala Subrahmanyam and Another Vs. State of Andhra Pradesh*, and argued that object of provisions of section 304-B I.P.C. may be kept in view vis-a-vis the Dowry Prohibition Act. He emphasised that this is a piece of social legislation, keeping in view the growing menace of the social evil. Therefore, the role of courts under the circumstances assumes greater importance and it is expected that the courts would deal with such cases in a more realistic manner and not allow the criminals to escape on account of procedural technicalities or insignificant lacunae in the evidence of the prosecution.

32. There cannot be any doubt that to attract the provisions of section 304-B, the prosecution is required to establish (1) that the death of woman is caused by any burns or bodily injury or it occurs otherwise than under normal circumstances; (2) such death occurs within seven years of her marriage; (3) before her death she was subjected to cruelty or harassment by her husband or any relatives of the husband; (4) such cruelty or harassment was caused in connection with demand of dowry. In view of the findings recorded by us as above, it cannot be said that prosecution is able to establish the ingredients (3) and (4) noted above. It is true that deceased Usha died within couple of months after the marriage. The medical evidence is, however, as follows :--

P.W. 6 Dr. Jadhav, stated that when he examined the body of deceased Usha, he found natural eyes closed, tongue inside the mouth, blood stained discharge oozing through mouth and nostrils. He further stated that he found an abrasion on labia majora left side 1 cm. x 1/2 cm. x skin deep, irregular in shape, blood stained around the vulva. He also found abrasion on medial aspect of left leg into middle 1/3rd, 2 cm. x 1 cm. x skin deep, shape irregular, direction vertical. So also an abrasion on the back of right elbow 1 cm. x 1/2 cm. skin deep, shape irregular, whereas contusion over left cheek, just below left eye, 1 1/4 cm. x 1 cm. size irregular, colour bluish and subcutaneous ecchymosed of blood present. The Doctor further opined that the injuries were caused by hard and blunt object within 6 to 12 hours before death. All the injuries were ante-mortem. He noticed that stomach was containing semisolid undigested material present and the death had occurred within four hours of the last meals.

33. The opinion as to the cause of death, however, was reserved. The viscera which was preserved was sent to Chemical Analyser and report of Chemical Analyser was received on 17-11-1987 which shows absence of any poisoning.

34. Later on, the Dr. opined that the death was caused due to "shock causing sudden reflex cardiac arrest due to vaso vagal inhibition due to smothering".

35. The Doctor was cross-examined at great length and he had admitted that the injuries as noticed on the dead body were not sufficient to cause death of Usha. Secondly, he stated that in case of adults smothering results into suffocation or asphyxia. In such cases, the signs of congestion is available in lungs and brain at the time of post-mortem. Similarly, the marks of violence are found around the mouth as well as on the inner outer side .However, the marks of violence may not be found if smothering is done by soft substance like cloth or pillow. Significantly, the Doctor deposed that he did not find congestion either in lungs or in the brain in this case. He however added that if some foreign substance accidentally happens to go in air passages that can stirnilate vague and vaso vagal attack may come. Smothering includes obstruction or insertion of foreign substances in mouth or air canal. Reflex is a sudden reaction of vascular and neurogeric origin. In such vaso-vagat attack reflex cardiac arrest may result. As per Exh. 20, according to him, that was one of the most probable causes of death. But at the same time, the Doctor has to admit that, "it does not exclude any other possibility of remote cause of death". Moreover in cross-examination he stated that he cannot opine in this case that death was natural or accidental.

36. The question arises whether the medical evidence could be accepted as to the cause of death as cogent and reliable. Mr. Loya, the learned Counsel appearing for the appellants, brings to our notice the decision reported in the case of State of Himachal Pradesh Vs. Nikku Ram and others, . In that case, the proposition enunciated is that where the injuries as found on the person of the deceased not sufficient to have caused her death, despite demands for dowry, the offence would not attract the mischief u/s 304-B I.P.C. Mr. Gaikwad, the learned A.P.P. has not shown a contrary decision to the aforesaid proposition. The question still arises whether the opinion expressed by Doctor could be said to be acceptable in the given circumstances of the cases, especially when the Doctor specifically admits that the opinion given by him is one of the most probable causes of death. It is, however, at the same time, the Doctor could not dispute that the cause of death does not exclude any other possibility of remote cause of death, such as, death by sudden fear or death by accident due to fear.

37. In H.W.V. Cox, Medical Jurisprudence & Toxicology, Sixth Edition at page 253, it is stated that the terminology is confused and "suffocation", "smothering" and "asphyxia" are all used in a rather confused way. Smothering usually implies that the external nasal passages have been blocked by a fabric being pressed over them, usually by a deliberate criminal action.

38. Besides the Panchnamas of the scene of offence (Exh. 10) and Inquest

Report (Exh. 13) does not in any way suggest the finding of any cloth fabric in the room where the body of the deceased was found nor do the witnesses say that when the body was in the room before arrival of police or even after arrival of police including the Panchas that any fabric was found at the place of scene of offence. No incriminating circumstance of any sort was found in the place of scene of offence.

39. In case of suffocation, at page 266 Cox observed that the death may be rapid and silent. The main feature is obstruction of the airways so that there is no access of oxygen to the lungs and no opportunity for the expiration of carbon dioxide. Both these factors lead to increasingly violent attempts at respiration in some cases, though it must be noted that especially in children and old people, death may be rapid and silent, there being none of the frantic attempts to breathe which are more characteristic of stronger adult. It must also be noted that some deaths are very rapid indeed, such as those noted when the external orifices of mouth and nose are blocked by a sheet of plastic. Death can be extremely rapid and not accompanied by any violent paroxysms or other classical manifestation of asphyxia. In these cases, there may be congestion, asphyxial harmormages or other signs which were formerly thought to be inevitable in an asphyxial process. Therefore there must be some other mechanism involved, related to sudden depletion in oxygen supply and the most likely explanation is a reflex cardiac arrest.

40. In Modi's "Medical Jurisprudence & Toxicology" Twenty First Edition, at page 211 it is, however, said that Vagal Inhibition causes sudden cardiac arrest from fright or terror, or it may be caused during a sudden an unexpected fall in the water often the water striking against the chest and pit of the stomach.

41. In this context, we may refer to the evidence of P.W. 7 Dattatraya. He stated that on receiving information, he went to the house where the deceased was lying in the house of the appellants. He made enquiries with the appellant No. 2 and his wife and they told him that they did not know anything as they were in the land. Next he stated that he waited near the dead body of deceased Usha for about one hour and confirmed that somebody had committed her murder. The fact that he suspected something foul is also noted in the F.I.R. It is evident from the prosecution evidence that the appellants ordinarily reside in the house which is in the field. There is another house in the village where they used to store foodgrains. It is stated by P.W. 7 Dattatraya that accused were not using house situated in the village for the residential purpose and, however, somebody used to sleep in the said house for the protection of the corns etc. It also came in his evidence that there are some 100/125 houses in the village, surrounding the house of the appellants.

42. The witnesses examined by the prosecution especially P.W. 10 Pandurang stated that eight days before the death of Usha, a message was received from the appellant, either appellant No. 1 or 2 that appellant No. 1 separated from his father and there is no one to prepare his food and, therefore, Usha should

return. On receiving that message, Usha was sent with P.W. 11 Rangnath to the place of the appellants.

43. If we consider the situation of the house in the village viz. that it was not used as a usual residence, in the absence of participation by any of the accused in causing injuries to Usha as found on her person or causing her death in the manner suggested in the medical evidence, it is inherently improbable to connect the appellants and none else as perpetrators of the crime. It is evident that deceased Usha was young, she was newly married, the possibility of her sudden death due to fear cannot be ruled out, particularly when injuries sustained by her on her private parts are suggestive of a case of rape or attempt to rape. The medical evidence in the given case may support to the death in course of attempt to rape. Therefore, even if we accept the medical opinion as to the cause of death that will only indicate that death was homicidal. That necessarily means that death was other than in the normal circumstances.

44. Mr. Loya, the learned Counsel for the appellants also submits that as observed in Modi's Medical Jurisprudence (21st Edition), page 172, in some cases of snake bite death occurs from shock due to fright before the poisonous symptoms commence. The medical evidence, however, rules out the possibility of snake-bite. The Doctor did not notice any symptoms of snake-bite.

45. Taking the maximum view of the matter even if we accept the opinion of the Medical Officer, it can only be proved that the death was homicidal, but we cannot jump to the conclusion that death was unnatural to attract the provisions of section 304-B I.P.C. The offences u/s 302, 304 part I and II and 304 Part B are mutually exclusive and ingredients of these offences are distinct. Homicidal death is one which falls outside the category of dowry death for which a separate punishment is provided for. Therefore, it is not possible to subscribe with the argument of learned A.P.P. that the case in hand is that of a dowry death. Moreover, the medical opinion as given in the case is not certain because other possibilities are not ruled out for the cause of death.

46. Taking resume of all the circumstances and the evidence adduced by the prosecution in this we are of clear opinion that it is neither a case of dowry death nor a case made out against the appellants either under sections 302 or 498-A of Indian Penal Code.

47. The learned trial judge has also convicted the appellants u/s 498-A I.P.C. but, as discussed above, the evidence falls miserable short of prove the essential ingredients of section 498-A in the matter of alleged cruelty and harassment to the deceased- Usha. In the absence of evidence of demand of part of dowry from any of the appellants, the learned trial judge has committed an error of law on the face of the record in convicting the appellant No. 1 u/s 302 I.P.C. and also the appellants u/s 304-B and 498-A read with section 34 I.P.C.

48. The result is, therefore, the appeal must succeed. The appeal is allowed. The conviction and sentence passed against the appellants are hereby set aside and

the appellants are acquitted by giving them benefit of doubt for want of reliable evidence. The appellant No. 1 be set at liberty forthwith, if not required in any other offence.

49. Appeal allowed.