

(2017) 11 CHH CK 0011
In the Chhattisgarh High Court
Case No : 948 of 2011

Shailendra Kumhare

APPELLANT

Vs

State Of Chhattisgarh

RESPONDENT

Date of Decision : 13-11-2017

Acts Referred:

Code of Criminal Procedure, 1973, Section 161, Section 313 - Examination of witnesses by police - Power to examine the accused
Indian Penal Code, 1860, Section 498-A, Section 304-B -
Evidence Act, 1872, Section 4, Section 113-A - "May presume"

Citation : (2017) 11 CHH CK 0011

Hon'ble Judges : Goutam Bhaduri

Bench : Single Bench

Advocate : Shri Mahendra Dubey, S.R.J. Jaiswal

Judgement

1. Heard. Instant appeal is against the judgment dated 3/12/2011 passed in Sessions Trial No.02/2011 by the 2nd Additional Sessions Judge, Mahasamund (C.G.) whereby the appellant has been convicted under section 304-B of IPC and sentenced to RI for 10 years and fine of Rs.1000/-, in default of payment of fine to undergo RI for 2 months and further the appellant is convicted under section 498-A of IPC and sentenced to RI for 2 years.

2. As per the case of the prosecution, deceased Harshlata was married to the appellant on 10/02/2010. After marriage when she joined her matrimonial home after 10-15 days she was subjected to torture for demand of dowry i.e. demand of T.V., cooler and further demand of amount was made which was informed to the mother of the deceased. Mother of the deceased thereafter went to the place of her daughter at Gariyaband and tried to make mediate and to advise the appellant. However things did not improve and torture for demand of dowry continued. Eventually she suffered burn injury on 2/07/2010 while preparing tea.

Thereafter, she died on 9/07/2010. So unnatural death within seven years of marriage took place. During the merge and enquiry investigation was carried out and eventually charge sheet was filed under section 304-B of IPC against the appellant.

3. During the course of trial, appellant abjured his guilt and claimed to be tried. The prosecution on their behalf had primarily relied on the statement of mother of the deceased Shobha Masih PW-1, father Hemendra Masih PW-2 and the other witnesses i.e. Naib Tehsildar Smt. Poonam Sharma was examined as PW-3, SDOP G.L. Patle was examined as PW-4, ASI Jugal Kishore was examined as PW-5 who recorded the merge diary alongwith Sajanram Thakur PW-6 ASI and Jeevanlal Sahu PW-7 ASI. The Doctor who conducted the postmortem namely S.K. Bagh was examined as PW-9. Primarily on their statements the trial court after evaluating the evidence convicted the accused/appellant as aforesaid. Hence this appeal.

4. Learned counsel for the appellant would submit that statement of mother of the deceased PW-1 Shobha Masih would reflect that she has contradicted the demand and instead it has been proved that the appellant used to extend financial support to the in-laws and therefore no question of demand ever can arise. It is further submitted that statement would show that dying declaration was recorded that of the deceased but same was not produced by the prosecution before the court and therefore it would lead to adverse inference. It is further submitted that statement of IO PW-4 would show that during the investigation it was found to be an accident, consequently, no offence was made out under Section 304-B of IPC. It is further contended that the explanation given by the accused under section 313 of Cr.P.C. the factum of accident is corroborated so plausible explanation was also given about the incident. Further it is contended that statement of the mother PW-1 would show that no demand was ever made at the time whenever she visited her daughter's place and after the incident after four months statement alleging demand of dowry was made so false implications have been made. It is contended that the conviction by the court below cannot be sustained and prayed that accordingly the same may be set aside.

5. Per contra, learned State counsel opposes the argument and submits that order passed by the court below is well merited which do not call for any interference.

6. I have perused the documents and the statements and records of the court below.

7. As per statement of PW-1 Shobha Masih the mother marriage of the appellant with her daughter Harshlata was performed on 10/02/2010. This date of marriage has not been disputed by the accused. Record further suggest that the deceased being wife of the appellant, she died of burn injury on 9/07/2010 so unnatural death was caused within 7 years of marriage. The postmortem report

is Ex.P-12 wherein reason is assigned that death was due to cardio respiratory arrest as a result of burn and therefore complication and the burn were shown to be ante mortem in nature. As per doctor S.K. Bagh PW-9 who conducted the postmortem the death was due to 2 to 3 degree of burn. Chin and the whole face was burnt, left hand was also completely burnt and different parts of the body were also burnt to different degree.

8. Section 304-B of the IPC which defines "Dowry death" reads as under:- "304-B. Dowry death-

(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death
Explanation.-For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961)

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

9. Therefore, since death in unnatural circumstances was caused within 7 years of the marriage and whether the deceased was subjected to cruelty for demand of dowry soon before her death the evidence lead by the prosecution is examined. With respect to such facts the statement of mother PW-1 Shobha Masih would be relevant.

10. PW-1 Shobha Masih has contended that her daughter was married to the appellant on 10/02/2010. Thereafter when she came after one week from her matrimonial home she was all right and she stayed back for 15 days and went back. Thereafter she started receiving phone calls from her daughter. The daughter had told that since TV, cooler, CD were not given therefore the appellant after consuming liquor used to beat her. Consequently, after one month of such incident in order to make the appellant understand she went to inlaws place of her daughter and discussed the issue with the mother of the appellant who in turn assured this witness she will advise her son i.e. the appellant not to beat the deceased. She further stated that thereafter the torture continued so her daughter came back to her mother's place. It is further stated that thereafter to take her back frequent requests were made by the family members of the appellant to send the daughter back and cause was shown of a marriage which was to take place in the house of appellant. Therefore the daughter was again sent back. The witness has further stated that her daughter thereafter went to village Chaprid. While on their way to Chaprid village, the appellant had again beaten her daughter brutally. This fact of beating revealed when the mother received a phone call from village Chaprid from her daughter and the

deceased and told this witness that she was beaten brutally and requested her mother to take her back.

11. Thereafter the appellant took the deceased to Jagdishpur wherein also she was beaten brutally. Witness further stated that when her daughter came to her place she had shown all the signs of beating by the appellant. Witness further stated that thereafter daughter and the appellant stayed for 2-3 days in her house and again went back to place Gariyaband and from Gariyaband they went to village Bhiropur and from Bhiropur she received phone call from her daughter that her husband used to beat her after consuming liquor and requested her to rescue, however at that time she did not went to her place. She further stated that on 1st July, 2010 i.e. a day before the incident of burn the mother PW-1 received a phone call from the appellant wherein he demanded an amount of Rs.50,000/-. The witness stated that the appellant gave a threat that if she loves her daughter then she must come till morning with an amount of Rs.50,000/-. She further stated that while her daughter was being beaten she heard the sound on phone. Thereafter when she talked to her daughter, daughter asked her to come with the money till morning and the phone thereafter was snatched by some one. Subsequently on 2nd July, 2010 she received the news that her daughter suffered the burn injury and was admitted to the hospital and when she went to hospital she saw that her daughter was severely burnt.

12. In the cross-examination though it was stated that certain money was given as per rituals of their marriage to the girl's side and Rs.20,000/- was given by the appellant but this fact that demand was subsequently made after the marriage in respect of goods and lastly the demand of amount of Rs.50,000/- just a day before the incident has not been diluted. Cross-examination would further suggest that after one week her daughter came at that time her daughter stated that she was all right. The said statement appears to be quite natural. The fact that the deceased was not subjected to cruelty for demand of dowry cannot be presmued. The period of demand stated to have begun after one month of the marriage and daughter had disclosed that demand for TV, cooler and CD was made by the appellant. Witness was confronted with her statement under section 161 of Cr.P.C. marked as Ex.D-1. In statement under section 161 of Cr.P.C. also the fact of demand of T.V., cooler exist. Statement under Section 161 of Cr.P.C. also contains the statement that before a day of the incident amount of Rs.50,000/- was demanded by the appellant i.e. the son-in-law and on the next day incident happened. There is no denial of such fact. The witness PW-1 though has stated in the cross-examination that certain monetary help of Rs.15,000/- was made by the appellant to some of the relative of deceased but even if such monetary help was given by appellant it can not be inferred that because of such help no demand could have been made by appellant. Fact that said demand was not disclosed to the police or any member of their society becomes immaterial in view of the fact that it is not expected that immediately if any demand is made in cases of matrimonial tie up, the family of bride would go public to make it known to public at large. In her cross-examination she stated that her daughter had

disclosed that before the incident in the night the appellant after consuming liquor brutally assaulted and therefore she set herself ablaze if is considered alongwith the statement that the mother received phone call wherein a demand of Rs.50,000/- was made on 1/07/2010 by the appellant corroborate the fact that the appellant made the demand and in absence thereof subjected the daughter of PW-1 i.e. wife to brutal assault. Therefore the deceased was subjected to cruelty soon before her death can be presumed.

13. The statement of PW-2 father Hemendra Masih also corroborate the fact that her daughter had called up her mother and told her that she was subjected to torture for demand of cooler, TV CD etc. Even the statement of PW-1 to the fact that daughter has disclosed that she had committed suicide is accepted, still the burden of proof of abatement can not be ignored. The proposition as laid in the case of Baljeet Singh and another Vs. State of Haryana reported in (2004) 3 SCC 122 would show that even if it is proved that woman has committed suicide and the said suicide is within period of 7 years from the date of marriage and the person who is burnt with are subjected to cruelty, the court may presume that such suicide has been abetted by the husband or by the relative of her husband

14. Relevant para 10 of the said case (supra) is reproduced as under:- "10. The explanation to said section says the word "dowry death" shall have the same meaning as in Section 304-B of the IPC which means such death should be otherwise than in normal circumstances and within 7 years of marriage. On a conjoint reading of these sections, it is clear that for drawing a presumption under Section 113-B of the Evidence Act firstly there should be a death of a woman otherwise than in normal circumstances, within 7 years of marriage and the prosecution having shown that soon before her death she was subjected to cruelty or harassment in connection with any demand for dowry by persons accused of having committed the offence. Unless and until these preliminary facts are established by the prosecution, it is not open to the courts to draw a presumption against the accused invoking Section 113-B of the Evidence Act. We are supported in this view of ours by a judgment of a three-Judge Bench of this Court in the case of Ramesh Kumar vs. State of Chhattisgarh (2001 (9) SCC 618) wherein this Court held thus: "Before the presumption may be raised, the foundation thereof must exist. A bare reading of Section 113-A shows that to attract applicability of Section 113-A, it must be shown that (i) the woman has committed suicide,

(ii) such suicide has been committed within a period of seven years from the date of her marriage, (iii) the husband or his relatives, who are charged had subjected her to cruelty.

On existence and availability of the above said circumstances, the court may presume that such suicide had been abetted by her husband or by such relatives of her husband. Parliament has chosen to sound a note of caution. Firstly, the presumption is not mandatory; it is only permissive as the employment of expression "may presume" suggests. Secondly, the existence and availability of

the abovesaid three circumstances shall not, like a formula, enable the presumption being drawn; before the presumption may be drawn the court shall have to have regard to "all the other circumstances of the case". A consideration of all the other circumstances of the case may strengthen the presumption or may dictate the conscience of the court to abstain from drawing the presumption. The expression "the other circumstances of the case" used in Section 113-A suggests the need to reach a cause-and-effect relationship between the cruelty and the suicide for the purpose of raising a presumption. Last but not the least, the presumption is not an irrebuttable one. In spite of a presumption having been raised the evidence adduced in defence or the facts and circumstances otherwise available on record may destroy the presumption. The phrase "may presume" used in Section 113-A is defined in Section 4 of the Evidence Act, which says "Whenever it is provided by this Act that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it."

15. The statement of SDOP PW-4 G.L. Patle would show that after he was initially examined on 5th April, 2011 he was recalled on 21/11/2011 with the merg diary and the case diary. As per his statement merg register which was recorded at Basna as also at Raipur both diaries did not contain the dying declaration, therefore it could not be presumed that dying declaration was recorded which was in favour of the appellant. Fact that death was caused within a year of the marriage even if are taken to be suicide when statement of PW-1 wherein she categorically stated that her daughter was subjected to cruelty and a demand of Rs.50,000/- was made alongwith other article the appellant can not escape the rigors of presumption of abetment u/s 113-A of Indian Evidence Act.

16. The Hon"ble Supreme Court in case of Devinder alias Kala Ram & Others v. State of Haryana reported in (2012) 10 SCC 763 has laid down the principles as under:- "11. On a plain reading of Section 304-B IPC, it is clear that where the death of a woman is caused by any burns or bodily injury 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 husband shall be deemed to have caused dowry death. Thus, where death of a woman has been caused by burns as in the present case, the prosecution has to show:

- (i) that such death has taken place within seven years of her marriage and
- (ii) that soon before her death she has been subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry.

Once these two facts are established by the prosecution, the husband or the relative shall be "deemed" to have caused the dowry death of the woman. The word "deemed" in Section 304-B IPC, however, does not create a legal fiction but creates a presumption that the husband or relative of the husband has caused

dowry death.

12. Section 113-B of the Indian Evidence Act, 1872 also provides that once it is shown that soon before her death a 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. The expression "shall presume" has been defined in Section 4 of the Indian Evidence Act, 1872, relevant part of which is extracted hereinbelow:

"4....Shall presume".-Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved." Thus, Section 113-B read with Section 4 of the Indian Evidence Act, 1872 would mean that unless and until it is proved otherwise, the Court shall hold that a person has caused dowry death of a woman if it is established before the Court 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.

13. Section 3 of the Indian Evidence Act, 1872 states that unless a contrary intention appears from the context, the word "disproved" would mean a fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist. Thus, if after considering the matters before it, the Court believes that the husband or the relative of the husband has not caused dowry death, the Court cannot convict such person or husband for dowry death under Section 304-B IPC. Section 304-B IPC, and Section 113-B of the Indian Evidence Act, 1872, in other words, only provide what the Court shall presume if the ingredients of the provisions are satisfied, but if the evidence in any case is such that the presumptions stand rebutted, the Court cannot hold that the accused was guilty and was punishable for dowry death."

17. The Supreme Court in case of *Bajnath & Ors. Vs. State of Madhya Pradesh* reported in (2017) 1 SCC 101 has held thus in paras 25, 26, 27 & 28:- "(25) Whereas in the offence of dowry death defined by Section 304-B of the Code, the ingredients thereof are:

(i) death of the woman concerned is by any burns or bodily injury or by any cause other than in normal circumstances and

(ii) is within seven years of her marriage and

(iii) that soon before her death, she was subjected to cruelty or harassment by her husband or any relative of the husband for, or in connection with, any demand for dowry.

The offence under Section 498-A of the Code is attracted qua the husband or his relative if she is subjected to cruelty. The explanation to this Section expositis "cruelty" as:

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

(ii) harassment of the woman, where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

(26) Patently thus, cruelty or harassment of the lady by her husband or his relative for or in connection with any demand for any property or valuable security as a demand for dowry or in connection therewith is the common constituent of both the offences.

(27) The expression "dowry" is ordained to have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961. The expression "cruelty", as explained, contains in its expanse, apart from the conduct of the tormentor, the consequences precipitated thereby qua the lady subjected thereto. Be that as it may, cruelty or harassment by the husband or any relative of his for or in connection with any demand of dowry to reiterate is the gravamen of the two offences.

(28) Section 113-B of the Act enjoins a statutory presumption as to dowry death in the following terms:

"113-B. Presumption as to dowry death. -

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

18. Applying aforesaid principles in this case and reading of the evidence, the factum of cruelty cannot be said to be disproved as there is no other course left except to believe the statement of the witness mother PW-1 who has categorically established that deceased was subjected to cruelty for demand of dowry soon before her death and death was caused within 1 year of marriage. Since such death was caused within one year of the marriage, therefore presumption under section 113-B read with Section 4 of the Indian Evidence Act has to be drawn.

19. Therefore, after close scrutiny of the case, I am of the opinion that the prosecution has been able to prove the case and the learned court below has not erred in giving the finding of dowry death. Therefore, the conviction and consequently the sentence made to the appellant is upheld.

20. In the result, the appeal is dismissed.