

(2008) 02 GUJ CK 0058
In the Gujarat High Court
Case No : Criminal Appeal No. 334 of 2006

Tejuma! Dayaldas Mulani (Sindhi)

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 26-02-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 211, 211(2), 211(4), 215, 221
Dowry Prohibition Act, 1961 — Section 3, 7
Evidence Act, 1872 — Section 113A, 113B
Penal Code, 1860 (IPC) — Section 107, 109, 114, 302, 304B

Citation : (2008) 2 GLR 953

Hon'ble Judges : M.R. Shah, J;J.R. Vora, J

Bench : Division Bench

Advocate : Samir J. Dave, for the Appellant; A.J. Desai, APP, for the Respondent

Final Decision : Dismissed

Judgement

J.R. Vora, J.—Instant Appeal is preferred by the appellant u/s 374 of the Code of Criminal Procedure against the judgment and order rendered by Additional Sessions Judge, Court No. 16, Ahmedabad City, on 19th of January, 2006, in Sessions Case No. 144 of 2002 against his conviction and sentence. Including present appellant, in the said Sessions Case, in all there were three accused and accused Nos. 2 and 3 came to be acquitted by the Trial Court for all the charges levelled against them, while present appellant-accused No. 1 came to be convicted by the Trial Court for the offences punishable under Sections 304B, 306 and 498A of the Indian Penal Code. Appellant was sentenced to undergo rigorous imprisonment of 8 years for the offence proved against him u/s 304B of the Indian Penal Code; rigorous imprisonment of five years and to pay fine of Rs. 5,000/-, in default to undergo simple imprisonment of one year for the offence proved against him u/s 306 of the Indian Penal Code and rigorous imprisonment of two years and to pay fine of Rs. 2,000, in default to undergo simple imprisonment of six months for the offence proved against him u/s 498A of the Indian Penal Code. Though all the accused including the present appellant was

charged for the offences punishable under Sections 3 and 7 of the Dowry Prohibition Act, but no separate sentence was awarded by the Trial Court to the appellant in this respect.

2. It is the case of the prosecution that victim of the incident Shaluben had married to the present appellant in the year 1999. Other two accused, who are acquitted by the trial court, were elder brothers of the appellant. Shaluben was residing with her husband at Sardarnagar Block No. 268-A at Ahmedabad. On 3rd of August, 2000, according to the prosecution case, while she was preparing tea, caught fire and died on 4th of August, 2000 at Civil Hospital, Ahmedabad. Police had recorded Accidental Death, bearing No. 36 of 2000 and the matter was inquired into. On the day of the incident, appellant No. 1 informed Devandas Bachwani, father of the deceased that deceased had suffered some injuries in her leg. When Devandas Bachwani reached at the residence of the deceased, he found that, his other daughters and appellant No. 1 were taking the deceased to hospital in rickshaw and deceased was in very serious condition. His son was also with him. His daughter was not able to speak. He narrated the history before the Doctor that his daughter was fed up and, therefore, she had committed suicide. During treatment she died. He was not satisfied with the accidental death inquiry made by Police Sub-Inspector Dhanjibhai Bodad, who has been examined as PW-6. According to PW-6 Mr. Bodad, when he received information, he reached at Sardarnagar Police Station, and on inquiry, Shaluben stated that he was observing fast on account of religious vow and she was to keep herself awoken for the whole night. Since he was feeling sleepy, she went in kitchen, and on gas, prepared tea for herself and while she was wearing a gown, the same caught fire from the flames of the gas. Dhanjibhai Bodad called the Executive Magistrate for recording dying declaration. PW-2 Pathan Akbarkhan Hussainkhan, Executive Magistrate, recorded dying declaration of the deceased at 8.35 hours on the morning of 3rd of August, 2000, wherein she stated that, while she was preparing tea and hot utensil was caught by her through one piece of cloth, that piece of cloth had caught fire, which she had thrown on floor, and from the said burning piece of cloth, her clothes caught fire. At that time, her husband appellant was watching TV in the other room. On hearing her shouts, husband ran towards her and tried to quench fire, in which he also got injuries on his hand. Thereafter, it appears that, Devandas Bachwani was not satisfied at all with the inquiry made by the police in accidental death and he pursued the matter vigorously with the State Government and it appears that he filed some proceeding before the High Court also. However, in pursuance of an application filed by the father of the deceased, it appears that, Sardarnagar Police Station, contacted the father of the deceased through second PSI, Bharatbhai Aayer, who recorded the complaint of Devandas Bachwani, which is placed on record at Exhibit-21. It has been clearly stated in Exhibit-21 that his deceased daughter was subjected to cruelty during her short marriage span by the appellant and he was instigated by other two accused. According to the further prosecution case, appellant was doing occupation of rickshaw driving and deceased was forced by

the appellant to bring Rs. 50,000/- from her parents. Deceased had requested to provide that amount to her husband, but on account of poor financial condition of father of the deceased, the demand could not be met by him, and on account of that, deceased was subjected to cruelty, physical and mental as well. Deceased was complaining about the cruelty executed upon her to her parents and her sisters, but Devandas Bachwani, father of the deceased, tried to persuade her to stay with appellant with the hope that by the time, everything might be peaceful and on this account while she was fed up, she committed suicide pouring kerosene and in Exhibit-21, father of the deceased Devandas Bachwani, expressed his suspicion about truthfulness of the inquiry done by the police in accidental death wherein alleged dying declaration and statement was recorded of the deceased. On 21st of November, 2000, complaint of the father of the deceased came to be recorded by Bharatbhai Aayer, PSI, Sardarnagar Police Station and he investigated the offence and ultimately filed charge sheet before Metropolitan Magistrate, Court No. 17, at Ahmedabad against in all three accused. The case was committed to the Court of Sessions and was numbered as Sessions Case No. 144 of 2002. Thereafter the said Sessions Case was made over to Additional Sessions Judge i.e. the Trial Court. Principal City Sessions Judge, Ahmedabad City, framed charges against the accused at Exhibit-2 on 8th of October, 2002, for the offences punishable u/s 498A, 306 to read with Section 114 of the Indian Penal Code as well as under Sections 3 and 7 of the Dowry Prohibition Act. The charge was read over to the accused and they pleaded not guilty and, hence, accused were tried in the said Sessions Case.

3. To prove its case, prosecution examined as many as 10 witnesses and produced on record voluminous documentary evidence. An important documentary evidence-Postmortem Note is placed at Exhibit-15; Dying Declaration recorded by Executive Magistrate on 3rd of August, 2003 of the deceased is placed at Exhibit-17; Yadi to Executive Magistrate is placed at Exhibit-18; Inquest Panchnama is placed at Exhibit-19; complaint filed by Devandas Bachwani, father of the deceased on 22 of November, 2000 is placed at Exhibit-21; panchnama of scene of offence is placed at Exhibit-23; complaint recorded of the deceased by Dhanjibhai Bodad, is placed at Exhibit-26, which is alleged to have been recorded on 3rd of August, 2000 in the early morning; at Exhibit-29 acknowledgment from Forensic Science Laboratory, Ahmedabad, and forwarding letter along with muddamal by the police to Forensic Science Laboratory is placed at Exhibit-30; application filed by Devandas Bachwani, father of the deceased, for transfer of said trial from the trial court is placed at Exhibit-35, wherein also he has reiterated that death of the daughter has not been properly inquired into accidental death inquiry and that he had filed Special Criminal Application before the High Court in this regard and government was also requested by his application dated 7th of September, 2000 to do the needful. Some of the papers of accidental death inquiry are also placed on record. Vide Exhibit 47 report of an Officer of the Forensic Science Laboratory, who had visited the place of offence, is produced; case papers of the treatment

given to the deceased is also produced at Exhibit-51 by PW-10 Dr. Yogesh Mahendra Yadav, who had first point in time treated the deceased.

4. In oral evidence, as aforesaid, in all 10 witnesses have been examined.

4.1 PW-1 Dr. Jayantibhai Virjibhai, is examined at Exhibit-14, who conducted the postmortem of the deceased on 4th of August, 2000 at about 12.05 hours. He produced on record the postmortem notes and he deposed that almost the whole body of the deceased was burnt. There is no dispute that cause of death was on account of extensive burn.

4.2 PW-2 Pathan Akbarkhan Hussainkhan, is Executive Magistrate, who recorded the Dying Declaration of the deceased on 3rd of August, 2000, at about 8.05 hours. According to him, on receiving yadi from police, he visited Civil Hospital at Ward No. E/1, bed No. 3, and recorded the Dying Declaration in questionnaire form. In Dying Declaration, it was stated by the deceased that while he was preparing tea late at night and tried to grab utensil, by a piece of cloth and said piece of cloth caught fire, which she had thrown on the floor and consequently from the flames of said piece of cloth, her clothes also caught fire and she was burnt.

4.3 PW-3 Complainant Devandas Bachwani, is examined at Exhibit-20. He deposed that deceased Shaluben had married to appellant in 1999 and was staying with her husband. Other accused were elder brothers of appellant. He deposed that how was he called by the appellant on pretext that his daughter had got injuries on her legs. She was taken to hospital by his daughters and appellant. He reached at the hospital. The victim was not in a position to speak. After 24 hours she died during treatment. He produced on record his complaint at Exhibit-21. He stated that his daughter was treated with cruelty. He stated that appellant was demanding Rs. 50,000/- from her daughter for purchase of new rickshaw. He has been cross-examined in detail about how the marriage of Shaluben and the appellant was arranged. He stated that his daughter and son-in-law were staying all alone in one house and that other accused were staying adjacent to the house of his daughter and the entry of the said house was from the house of the appellant. He stated in his deposition that his daughter was frequently visiting her house sometimes all alone and sometimes accompanying with appellant. He was asked about where he was, when he received message from his son-in-law appellant. He was confronted with his statement recorded during accidental death on 3rd of August, 2000 wherein he stated that his daughter and the appellant were staying with peace and there was no question of any cruelty executed upon his daughter, no complaint, any time, had been made by his daughter against her husband. During these two years, the couple had no issue. Though in examination-in-cross, the witness denied to have stated before the police, as above. He stated further that when his statement was recorded on 3rd of August, 2000, he was under tension and till he filed the complaint on 22nd of November, 2000, he was at Ahmedabad only.

4.4 PW-4 Babubhai Dahyabhai, examined at Exhibit 22, is a panch of panchnama Exhibit-23 of scene of offence, but he has not supported the prosecution case.

4.5 PW-5 Jitubhai Gordhandas, examined at Exhibit-24, is second panch of panchnama Exhibit-23 of scene of offence and he has also not supported the prosecution case.

4.6 PW-7 Bharatbhai Aayer, examined at Exhibit-27 is an Investigating Officer. According to him, he was entrusted with the investigation of accidental death No. 36 of 2000 of the Sardarnagar Police Station. In this process, he had called Devandas Bachwani, father of the deceased and he offered his complaint about cruelty and suicide committed by his daughter Shaluben, which was recorded by him on 22nd of November, 2000. He recorded the statements of the witnesses and on receiving Forensic Science Laboratory report, he submitted charge sheet. In his cross-examination, he admitted that he was entrusted with all papers of the said accidental death and inquiry conducted by Mr. Dhanjibhai Bodad. He recorded the statements of the neighbours of the deceased.

4.7 PW-6 Dhanjibhai Bodad, examined at Exhibit-25, is the Police Officer of Sardarnagar Police Station, who inquired into accidental death being Entry No. 36 of 2000. According to him, on receiving information, he visited Civil Hospital and recorded complaint of the deceased wherein she stated that she was observing religious Vow of Dasama and accordingly she was observing fast and she was to be awoken for the whole night. At late night hours and early hours of 3rd of August, 2000, she was watching TV with her husband in other room, when she felt drowsy, she went to the kitchen for preparing tea for herself. While she was preparing tea on gas, her gown caught fire and she was burnt. According to this witness, he called the Executive Magistrate, who had recorded the Dying Declaration. According to this witness, he recorded the statements of other persons including Devandas Kimatmal, Rajkumar Devandas, Nirmlaben @ Sonalben, sister of the deceased, Umaben, etc. According to this witness, in the presence of an Officer of Forensic Science Laboratory, a panchnama of scene of offence was drawn and pieces of clothes, which were half burnt, were seized from the place of offence. On the other room, near door, soot was appearing and sample was collected from the said soot. In his examination-in-cross, contradictions in the statements of the complainant and sisters of deceased were proved. The statements are the statements of Draupadi and Sonaben.

4.8 PW-8 Sonaben, wife of Manoharlal Bagnani, is examined at Exhibit-39. She is sister of the deceased. She stated that the name of Shaluben before marriage was Padma and her in-laws kept her name Shalu. After marriage, appellant was behaving with Shalu roughly and cruelty was executed upon her. Appellant was beating her and was demanding money to be brought from her parents. She was not even provided sufficient food at least four times in a week. Deceased was beaten by the appellant and on account of disappointment, deceased was visiting her parental house and when witness was also visiting her parental house, deceased used to communicate this witness that how was she treated by the

appellant with cruelty, mental as well as physical. Deceased was complaining about the appellant in the presence of younger sister Draupadi and younger brother Raju. She was also complaining that appellant was in habit of taking alcohol and was in habit of demanding money. The financial condition of her father was not good and, therefore, they could not accede to the demands of the appellant. Accused Nos. 2 and 3 were instigating the appellant to bring amount from his in-laws. On receiving message, she and her husband reached at the house of the deceased and deceased was made to sit on floor, getting support of bed. She was smelling of kerosene. When she asked deceased about the incident, she could only indicate appellant No. 1 by gesture. Thereafter, along with her younger sister, deceased was taken in rickshaw, which was driven by her husband and they were going towards hospital and on way they met with their father. When they reached at Civil Hospital, deceased was in very serious condition and was not able to speak. Police had visited and they had requested police that deceased was not in a position to speak and how her statement could be recorded. In the meantime, they found that accused No. 2 Prembhai was dictating something to the police. Police had obtained signatures of her and Draupadi and her brother on some papers. She has been cross-examined in detail. She stated that at her house deceased was conscious, but when she was shifted to the hospital in rickshaw, she was unconscious. Police had not inquired anything from her. She was confronted by her statement recorded by Mr. Dhanjibhai Bodad in accidental death inquiry. She denied that in earlier statement she stated that the couple was residing with peace and there was no quarrel amongst them. She denied to have stated before Mr. Bodad that only on account of the fact that even after two years of marriage span, they had no issue, she committed suicide. She denied that during treatment her sister was in fully conscious condition. She admitted that her sister was of pious and religious nature. She denied that her sister was observing vow of dasama. She denied the allegation that at the instance of her father, she falsely deposed that deceased was subjected to cruelty by appellant.

4.9 PW-9 Draupadi Bachwani, examined at Exhibit-39, is also sister of the deceased and reached at the house of the deceased along with PW-8 Sonaben. She also stated about cruelty executed by husband of deceased and demand of Rs. 50,000/- for purchasing new rickshaw. Almost in similar manner as PW-8, she described how deceased was treated by the appellant. In rickshaw when deceased was taken to the hospital, appellant was frequently inquiring from the deceased that what she intended to state about the incident. She denied all the allegations that she had given statement in accidental death inquiry before police and that deceased was conscious when her statement and dying declaration were recorded. She has also been cross-examined by the defence and was confronted with the earlier statement wherein she had stated that there was no cruelty executed upon her sister by appellant and that their life was peaceful. She denied to have stated this fact before police.

5. Last witness PW-10 Dr. Yogesh Mahendrabhai Jadav, is examined at

Exhibit-56, very important witness, deposed that on 3rd of August, 2000, while he was serving in Casualty Department as Medical Officer at about 3.30 a.m. Shalu was brought before him. Her father was accompanying her and her father gave a history of burning, he informed hospital duty constable. While he examined her though she was conscious, but smell of kerosene was coming from her body. The Doctor thereafter narrated the injuries received by her due to burns. The witness deposed that there were 100% burns and during treatment she died on 4th of August, 2000 at about 2.00 a.m. At Exhibit-57 he produced on record the case papers. In his examination-in-cross, he stated that though he tried to inquire from the deceased, but since she was seriously burnt, she was not speaking. He further stated that he also had treated appellant No. 1, who had also burn injuries on hand. In history, appellant had stated that, since her wife had got burn injuries and he tried to save her, he had also received burn injuries. He produced on record the case papers and certificate in respect of appellant also.

6. This is all the evidence of the prosecution.

7. The Trial Court thereafter recorded further statements of the accused in which their case was of total denial. The learned Trial Judge thereafter heard the prosecution as well as the defence and came to the above conclusion and, hence, this Appeal.

8. Learned Advocate Mr. Samir A. Dave, on behalf of the appellant was heard extensively. He submitted that the prosecution has failed to prove the case against the appellant beyond doubt and that the case of the prosecution is full of contradictions. The complaint came to be filed after three months and no reasonable and plausible explanation has been offered by the prosecution for filing late complaint. For the demand of dowry and for the cruelty, there is no cogent evidence to believe that on account of that cruelty, deceased committed suicide. On the contrary, it has been established on record that appellant No. 1 also received injuries while quenching fire and to save his wife and that indicates that there was no quarrel between the couple. PW-10 Dr. Yogesh Mahendrabhai Jadav has produced on record the treatment papers in this regard. It is submitted that considering the statement of the deceased recorded by PW-6 Dhanjibhai Bodad, and her dying declaration Exhibit-17, as narrated by PW-2 Pathan Akbarkhan Hussainkhan, there is no room of doubt that the incident was of an accident and not even of suicide. In both the statements, deceased herself, stated that when she was observing vow of dasama and she was to be awoken whole night, while preparing tea, she caught fire. No further evidence, in fact, according to learned Advocate, requires to come to a conclusion that the incident was merely an accident and there was no cruelty executed on the part of the appellant. It is submitted that accused Nos. 2 and 3 are acquitted by the trial court and no acquittal appeal is preferred by the State. It is submitted that in accidental death inquiry, PW-3 Devandas Bachwani, PW-8 Sonaben Manoharlal and PW-9 Draupadi Bachwani stated that deceased was never subjected to any

cruelty by the appellant and that their life was peaceful. The statements of these three witnesses are proved in the evidence of witness No. 6 Dhanjibhai Bodad and there can be no other circumstances to decide that the incident was a simple accident. No independent witnesses came to be examined by the prosecution though some statements are recorded and PW-6 witness Dhanjibhai Bodad stated that no incriminating circumstances emerged from such statements. There are therefore, according to learned Advocate for the appellant, two views emerges from prosecution case and first set of evidence, which is proved during prosecution evidence, indicates that the deceased was the victim of an accident and was never subjected to cruelty while, however, after three months, complaint to the contrary of first set came to be filed and the relatives of the deceased took different view and the accused were charge sheeted. It is submitted that the learned Trial Judge erred and failed to appreciate this vital aspect of the case.

9. Learned Advocate for the Appellant Mr. Dave also vehemently urged that it has been established during the evidence that even after two years span of marriage, the deceased was issue less. As a probability, learned Advocate submitted that, if at all, the court comes to the conclusion that the incident was of suicide, then also, not having issue, may be a cause for committing suicide.

10. Learned Advocate further argued on the issue of law that appellant No. 1 was convicted for the offence punishable u/s 304B of the Indian Penal Code. It is vehemently submitted that the Trial Court failed to frame charge against the appellant for the offence punishable u/s 304B of the Indian Penal Code. Our attention was drawn to Exhibit-2 charge, where according to learned Advocate Mr. Dave, no specific charge was framed and read over to the appellant and, therefore, the conviction of the appellant for the said offence, was bad in law and wholly erroneous. It has been submitted that, according to the provisions of Section 211(2) of the Criminal Procedure Code, when law creates the offence and gives it a specific name, the offence may be described in the charge by that name only and the charge should be specific. The learned Trial Judge committed error in this respect, which caused prejudice to the accused and, therefore, the appellant accused cannot be convicted for the offence punishable u/s 304B of the Indian Penal Code, for which no charge at all was framed. Learned Advocate relied upon decisions of the Apex Court in the matter of Sohan Lal @ Sohansingh, as reported in AIR 2003 SC 4463 : (2003) CCR 230, wherein the Apex Court in Para-7 clearly observed that charge could be specifically stated as per Section 211(4) of the Criminal Procedure Code. In the said case, against the accused, no specific charge was framed u/s 109 of the Indian Penal Code. Failure to frame charge in respect of substantive offence of Section 109 of the IPC, it certainly prejudice to the accused in the trial. As per the facts of that case, accused Sohan Lal @ Sohan Singh was called upon to face trial only for the charges u/s 304B of the Indian Penal Code and a charge u/s 302 IPC nor u/s 109 of the IPC was levelled against him in the charge sheet. The Apex Court observed that in the absence of a charge being framed against the accused Sohan Singh u/

s 302 or u/s 109 of the IPC, it would certainly cause prejudice to him, if he was convicted under either for these offences at the end of trial. The Apex Court observed that, therefore, it was not permissible for the Trial Court to convict the accused Sohan Lal for the offence u/s 302 to read with Section 109 of the IPC, the Apex Court set aside the conviction of Sohan Lal u/s 302 to read with Section 109 of the IPC because no specific charge was framed in this respect.

11. Learned Advocate for the appellant Mr. Dave relying heavily upon this decision, submitted that since no specific charge was framed against the present accused appellant u/s 304B of the IPC, the question of convicting him for the same, would not arise at all, and conviction of the trial court cannot be upheld by this Court as being against the law.

12. Learned Advocate Mr. Dave also relied upon a decision of the Apex Court in the matter of Bhagwan Das Vs. Kartar Singh and Others, wherein in paras, 15, 16, 17 and 18 the Apex Court observed that harassment of wife by husband or in-laws due to differences per se does not attract Section 306 to read with Section 107 of the IPC, if the wife commits suicide. The Apex Court confirming the view taken by the High Court, observed that, it happens that there may be discords and differences in the matrimonial home and a wife is often harassed by the husband or in-laws. This however would not by itself and without something more to attract Section 306 of the IPC to read with Section 107 of the IPC. Learned Advocate emphasized that what is material has to establish the facts and circumstances from the evidence adduced that cruelty allegedly meted out to the victim had, in fact, induced her to end the life by committing suicide. In the present case, according to learned Advocate, there is, in fact, no evidence at all to attract Section 306 of the IPC as so called harassment to wife within the meaning of cruelty as defined u/s 498A could not be established.

13. Learned Advocate Mr. Dave also relied upon a decision of the Apex Court in the matter of Harjit Singh v. State of Punjab, as reported in (2006) 1 SCC (Cri) 417, wherein in respect of Section 304B, the Apex Court observed that, by virtue of Section 304-B of the IPC, a legal fiction is created, and in its effect, prosecution must establish that soon before the death of the deceased, she was subjected to cruelty or harassment by her husband or any of his relatives for, or in connection with, any demand for dowry, and then and then, such death could be labelled as dowry death. Presumption under Section-113B of the Evidence Act could be raised only on those circumstances. In the said decision, Supreme Court also observed that what was necessary to establish charge u/s 306 of the IPC, learned Advocate for the appellant submitted that none of the ingredients attracted in the present case either of the offence u/s 304B or u/s 306 of the Indian Penal Code.

14. Learned Advocate Mr. Dave also relied upon a decision of the Apex Court in the matter of Anil @ Raju Namdev Patil v. Administration of Daman & Diu, Daman as reported in (2008) 1 SCC (Cri) 72, for examination of charge u/s 304B. In the said case, it was held that, the offence for which no charge was framed, no

conviction could be sustained as it causes prejudice to the accused. In fact, the Apex Court propounded principles as regard the cases where the accused is convicted for the offence in respect of which no charge is framed. Culling out the proposition of law the Apex Court observed that it must be borne in mind that accused should not suffer any prejudice by reason of misjoinder of charges, a conviction for lesser offence is permissible, it should not result in failure of justice and that if there is substantial compliance, misjoinder of charges may not be fatal and such misjoinder must be arising out of mere misjoinder to frame charges. With respect to the facts of the said case, the Apex Court observed that the ingredients for commission of offence u/s 364 and 364A of the IPC are different. The Apex Court observed that it is obligatory on the part of the trial court to frame a charge which would answer the description of the offence envisaged u/s 364A IPC. The omission to frame such a charge, result in prejudice to the appellants because Section 364A is higher offence than Section 364 of the IPC. The conviction u/s 364A of the IPC in absence of charge framed, was held to be unsustainable.

15. Learned Advocate Mr. Dave, therefore, urged that the learned Trial Judge erred in convicting the appellant, firstly, because no ingredients of cruelty or of the offence u/s 306 of the IPC could be proved beyond doubt by the prosecution and that no charge at all was framed by the Trial Court for the offence punishable u/s 304B of the Indian Penal Code. Therefore, it is urged that the Appeal be allowed and the conviction and sentences awarded to the appellant be set aside. It is prayed that the appellant be acquitted of the charges levelled against him.

16. As against that, learned APP Mr. A.J. Desai, vehemently urged that it has been amply proved through the evidence of PW-3 Devandas Bachwani, PW-8 Sonaben Manoharlal and PW-9 Draupadi Bachwani that the deceased was subjected not only to cruelty but demand of amount for the purchase of rickshaw was made, which could not be met with, resulting in harassment of the wife at the hands of her husband and his two brothers. The evidence and investigation in respect of accidental death inquiry, is not reliable and truthful, and for which the learned Trial Judge has assigned cogent reasons. While appreciating the evidence, it clearly appears that with 100% burn injuries, how the deceased could have given her statement to the police officer or to the Executive Magistrate. FSL report indicating smelling of kerosene on the clothes recovered from the body of the deceased and from the place of offence indicates suicidal death only. This is more corroborated by PW-10 Dr. Yogesh Jadav. The case against the appellant is amply proved by the prosecution and there is no reason to interfere in this Appeal so far as conviction of the appellant is concerned. In respect of omission to frame the charge of offence u/s 304B of the Indian Penal Code, learned APP Mr. Desai submitted that, the decisions of the Apex Court, cited by learned Advocate for the appellant, would not apply to the facts of this case. In the present case, the ingredients of the charge u/s 304B of the Indian Penal Code was read over and explained to the appellant. Only that Section was not written in the charge and, therefore, no prejudice would cause to the

accused because he knew very well that for what facts, he was to face a trial. The prosecution did not tender evidence of the facts which were not covered under the charge framed at Exhibit-2. Learned APP Mr. Desai relied upon a decision of the Apex Court in the matter of K. Prema S. Rao and Another Vs. Yadla Srinivasa Rao and Others, . In Three Hon"ble Judges" Bench decision, it has been held by the Apex Court that mere omission or defect in framing charge, does not disable the Criminal Court from convicting the accused for the offence which is found to have been proved on the evidence of record. This defect can be cured by Sections 221 and 215 of the Code of Criminal Procedure. It is, therefore, urged that when the essential ingredients of the offence brought out to the notice of the appellant accused, question of omission to frame charge would not arise at all. It is further submitted by learned APP Mr. Desai that therefore on the facts, the ingredients of Section 306 of the IPC are amply proved as well as ingredients of the offence u/s 304B of the IPC are also proved. It is, therefore, urged that since the judgment and order under challenge is well reasoned order, there is no reason to interfere with the findings and the Appeal is required to be dismissed.

17. We have considered the rival contentions advanced in this appeal. We have re-appreciated the whole evidence recorded during the trial. We have taken into consideration complete and comprehensive evaluation of all vital features of the case and the broad and reasonable probabilities arising out of the circumstances emerging from the evidence recorded and contentions raised.

18. With reference to the peculiar circumstance surfaces during re-appreciation of evidence on record, it must be borne in mind that the appreciation of evidence is a matter where the court is required to exercise due diligence and evaluation must be done by the standard of a wisdom of a prudent person. The set up and the circumstances in which the crime is committed, the quality of evidence, nature of temperament of the witnesses, the level of understanding and power of perception of individual witness and probability in ordinary course of nature about the occurrence of the incident are the vital features to be carefully scanned and endeavour must be to find out the truth from the evidence recorded eliminating the falsehood which might have been intermingled with the facts of the case. Cast iron perfection in respect of prosecution case is an utopia and analyzing, sifting and assessing the evidence and the circumstances on record as to trustworthiness and truthfulness of the witnesses is sine qua non for judicial scrutiny to reach at the truth. Unnecessary obsession of suspicion and doubt towards the perception of the say of the witnesses must be avoided. What is the substratum of the prosecution case must be discerned carefully to reveal the truth, which might have been attempted to hide behind the smoke screen, sometimes of faulty investigation, and sometimes by magnifying pointless details by the defence. It is never expected that crimes in the society are occurring with mathematical precision and, therefore, evaluating such incident with mathematical niceties would result into injustice. The court must not be helpless to find out the truth only because some minor impediments shelters the real

factum. Crimes are not fantasy and fiction, but real events, and such crimes are to be proved through a mechanism, which are always claimed by human errors. The court should be bold enough to tread upon such minor details coming in way of trudging towards the truth.

19. While leading to the path of searching the truth and evaluating the whole case, we find that initially an attempt is made to convert suicidal death into accidental one. It has come in the prosecution case that on early morning on 3rd of August, 2000, when deceased was admitted to hospital, the police was informed. In pursuance of such information, PW-6 Dhanjibhai Bodad, PSI, Sardarnagar Police Station, reached at the Civil Hospital and alleged to have recorded the statement of the deceased, wherein it is alleged that deceased narrated the story about her burning accidentally. Immediately, Executive Magistrate was summoned to record dying declaration. PW-6 Dhanjibhai Bodad also recorded a statement of the deceased which is on record at Exhibit-26 wherein the thumb impression of right toe alleged to have been taken on such statement. It is also alleged that statements of father of the deceased and sisters of the deceased were recorded by Mr. Dhanjibhai Bodad, at that very juncture, wherein these witnesses stated that the life of couple was without any turmoil and was peaceful and the incident was of accident. True it is also that, Patan Akbarkhan Hussainkhan, PW-2, Executive Magistrate, recorded dying declaration of the deceased on 3rd of August, 2000 from 8.35 to 8.50 hours wherein also the story of accidental death alleged to have been revealed and, therefore, these circumstances would undoubtedly tempt the defence to rely heavily upon these circumstances to contend that death was accidental, which was as an after thought, converted into suicidal one with the story of cruelty, to book accused on false charge, and that such evidence implicating the accused which is an after thought, does not inspire any confidence.

20. It must not be the approach of the courts in criminal trial to evaluate the evidence of prosecution with total air of suspicion. It must be noted that the say of the witnesses must not be taken on its face value and judicial conscious requires scrutiny of each circumstances to satisfy itself about its truthfulness. When we assessed the circumstances with strict judicial scrutiny, we unhesitatingly reached to the conclusion that these circumstances of initial stage which establishes the theory of accidental death of the deceased not at all inspire confidence and is required to be detached as being extricable falsity from the prosecution case to arrive at just conclusion. We assessed the above evidence in following manner.

21. Necessary it is to take into consideration some vital evidence of Forensic Science Laboratory analysis, particularly panchnama of scene of offence was prepared in presence of one Expert of Forensic Science Laboratory and certain samples were seized. Report in this respect is on record at Exhibit-47 wherein from the piece of a cloth seized from the scene of offence and the cotton samples taken, indicated the presence of kerosene in piece of clothes and in the said

samples. Not only that, muddamal of piece of cloth sent to the Forensic Science Laboratory and cotton samples also indicated that, those samples contained petroleum hydro carbon i.e. kerosene, which is placed on record at Exhibit-29 in the form of opinion of Forensic Science Laboratory. This is altogether independent and dispassionate evidence to be taken into consideration which negatives the theory of accident, as has been projected initially through the evidence of PW-6 Dhanjibhai Bodad, PSI, Sardarnagar Police Station and the evidence of the Executive Magistrate, PW-2 Pathan Akbarkhan Hussainkhan. Undoubtedly, dying declaration of deceased is material piece of evidence, but at the same time, circumstances surrounding recording of dying declaration must be viewed and assessed carefully to come to any conclusion as to reliability of dying declaration. Finding of kerosene at the place of offence and in the piece of clothe and from soot recovered at the scene of offence, is so weighty circumstances, to eliminate the circumstance of incident to be coloured as accident. Not only that, but when we come to the panchnama of scene of offence at page 171, which is at Exhibit-23, though PW-4 Babubhai Dahyabhai and PW-5 Jitubhai Gordhandas, panch witnesses have turned hostile and not supported the prosecution case, but in our view, this panchnama has been amply proved in the evidence of PW-6 Dhanjibhai Bodad, it is amply proved that incident is of suicidal death only and nothing else. It is also proved that this panchnama is prepared in the presence of an Expert and Officer of Forensic Science Laboratory, report of Forensic Science Laboratory, as aforesaid, is placed on record at Exhibit-47. We do not find any hindrance in accepting this panchnama of scene of offence. Necessary it is to observe that the initial version coming out from the prosecution about the accidental death report at Exhibit-47, which is from an independent witness, indicates that the incident had not occurred in the kitchen of the said residence, but in a room adjoining to kitchen, and that too, near wooden doors. From such wooden doors, soot samples were gathered and, therefore, the theory that the accident occurred in the kitchen while the deceased was preparing tea for herself is nothing but an attempt to thwart the crime. Forensic Science Laboratory opinion could not be dislodged by the defence nor even single reason is found from the record that such report which indicated the presence of kerosene on the clothes and soot gathered by way of samples should not be relied upon. What is established is the fact that deceased poured kerosene over her and committed suicide and these circumstances are corroborated by other evidence on record. The matter does not end here. It must not be escaped from the overall scrutiny that one more absolutely independent witness i.e. PW-10 Dr. Yogesh Mahendrabhai Jadav, removes the smoke screen of accidental death in toto. In his evidence, he stated that from the body of the deceased when he examined smell of kerosene was present on the body of the deceased and her father gave a history that she was fed up and had poured kerosene over herself. According to this witness, the deceased had 100% burn and in his cross-examination, he also stated that he tried to inquire from the deceased, but she could not speak as she was very seriously burnt. There is no reason to disbelieve this aspect to come to the conclusion that the deceased having suffered 100%

burns was not able to speak, then how a statement by PW-6 Dhanjibhai Bodad and dying declaration by PW-2 Pathan Akbarkhan Hussainkhan came to be recorded of the deceased. Right from the inception, the consistent say of the father of the deceased was that the deceased was fed up and had poured kerosene over her and had committed suicide. We are constrained to observe that manipulation on the part of the concerned to record statement of the deceased and the statement cannot circumvent and conceal the truth that the deceased committed suicide pouring kerosene not in the kitchen but near the door of adjoining room from where necessary samples were collected in the presence of Mr. Dhanjibhai Bodad and in the presence of independent witness i.e. Officer of Forensic Science Laboratory when panchnama of scene of offence was prepared. We have no hesitation at all to conclude that the statements recorded by Mr. Dhanjibhai Bodad of the witnesses including the statement of the deceased and the dying declaration alleged to have been recorded of the deceased by PW-2 Pathan Akbarkhan Hussainkhan is the circumstance would not inspire confidence at all to be the truthful circumstance and must be discarded as being manipulated and unreliable facts brought on record. In support of the say of PW-10 Dr. Yogesh Jadav, case papers are produced on record at Exhibit-57 and those case papers speak for itself which could not have been fabricated or manipulated.

22. While eliminating the theory of accidental death, now we assess the remaining evidence on record to find out the truth.

23. We scrutinized the evidence of PW-3 Devandas Bachwani, PW-8 Sonaben Manoharlal and PW-9 Draupadi Bachwani. All the three witnesses i.e. father and sisters of the deceased deposed in unambiguous term that how the deceased was subjected to cruelty by present appellant. The allegation is that the appellant was instigated by other two accused being his elder brothers. The learned Trial Judge acquitted accused Nos. 2 and 3 and no acquittal appeal is preferred by the State against that finding of the Trial Court and, therefore, it is not the subject matter of this Appeal. So far as the appellant is concerned, we are unable to accept the submission of defence that the say of these three witnesses was not trustworthy. All the three witnesses withstand grueling cross-examination by the defence, but their version could not be shaken at all. The fact is established that during the span of two years of marriage life, the deceased was made to suffer physical as well as mental harassment by the hands of appellant and she used to visit her parental home frequently and was complaining about her ill fate to her parents and her sisters who were married. True that, these witnesses are related witnesses but having regard to set up of the case, it cannot be expected that the prosecution be forced to bring independent witnesses to prove fact which is happening in relation to husband and wife. Only that care be taken while assessing the evidence of relative witnesses and by taking of such care, when we assessed the evidence of PW-3 Devandas Bachwani, PW-8 Sonaben Manoharlal and PW-9 Draupadi Bachwani, it leaves no room of doubt that they were extremely truthful witnesses, impeccable, unimpeachable and corroborated by

other circumstances of the case and one of which is, as above stated, elimination of the theory of accidental death. When it is established that deceased died suicidal death and that too having poured kerosene over herself, we do not find any rhyme or reason that why a lady who married to someone at latter age should commit suicide. We are unable to accept the circumstance that the deceased was disappointed on account of the fact that she had no issue. It must be noted that, in ordinary circumstance, when marriage span was of only two years, was not that long period to disappoint a person about having no issue and, therefore, when we in these circumstances carefully scrutinized the say of PW-3 Devandas Bachwani, PW-8 Sonaben Manoharlal and PW-9 Draupadi Bachwani, we lead to only conclusion that deceased was subjected to cruelty and she was forced to obtain money from her parents because appellant, being rickshaw driver, wanted to purchase new rickshaw. The circumstances are more corroborated by the fact that PW-3 Devandas Bachwani, father of the deceased was of weaker financial condition as he himself was a rickshaw driver and that he knew that if any amount was given to the appellant, he would squander the said amount as he was in the habit of taking alcohol and was a drinker. These facts established by weighty evidence, cannot be dislodged by the defence and from these proved circumstances, we come to the conclusion that, the Trial Court was right in discarding the evidence of PW-2 Pathan Akbarkhan Hussainkhan and PW-6 Dhanjibhai Bodad and accept the evidence of PW-3 Devandas Bachwani, PW-8 Sonaben Manoharlal and PW-9 Draupadi Bachwani, to book the appellant for the offences punishable under Sections 498, 306 and 304B of the Indian Penal Code. We find that all the ingredients of offence under Sections 306 and 304 Part-B of the Indian Penal Code are amply proved in the present case. It is amply proved that the death of the deceased was caused by burns in the circumstances which were not normal. It is also proved that such death occurred within two years from the date of her marriage. It is also amply proved that victim was subjected to cruelty or harassment by her husband i.e. appellant. It is also proved that such cruelty and harassment was for or in connection with the demand of dowry i.e. to bring Rs. 50,000/- from the parents of the deceased to purchase a new rickshaw. It is also established that such circumstances i.e. cruelty and harassment was made soon before her death. It is amply proved on record that before some days of her death, deceased had visited her parental home and had expressed her grievances. It is to be noted that soon before the death phraseology used in law, cannot be stretched to mean that immediately before the death. It could only mean that death and such harassment had nexus and proximity of time so far as to be included in the phraseology of soon before death. We find in the present case, a continuous harassment to the victim at the hands of the appellant and it leaves no room for doubt that the ingredients of Section 306 of the IPC and u/s 304B of the Indian Penal Code were amply proved. This is the fit case wherein from the circumstances as narrated above, a presumption must arise u/s 113B of the Evidence Act which could not be answered by the defence during trial. Therefore, the decision of the Apex Court in the matter of Harjit Singh v. State of Punjab (supra) would not be helpful to the

defence so far as this aspect is concerned. Likewise, decision of the Apex Court in the matter of Bhagwan Das v. Kartar Singh (supra) would not come to help the appellant as in the circumstances of the said case, the Apex Court observed that to prove the case u/s 306 of the Indian Penal Code, something more is required than disputes and discords in the matrimonial home. In the said case, the facts are narrated by the Hon'ble Apex Court in paras 4 and 8 of the decision, but the present one is not the case of usual discords and disputes between the husband and wife, but the present case is undoubtedly a case of cruelty executed by the husband upon the wife beyond normal or usual disputes and discords of matrimonial life.

24. Learned Advocate Mr. Dave vehemently submitted that the appellant could not have been convicted for the offence punishable u/s 304B as no such charge could be framed against the accused for such offence. Reliance is placed on two decisions i.e. the decision in the matter of Sohan Lal @ Sohan Singh v. State of Punjab (supra); Anil @ Raju Namdev Patil v. Administration of Daman & Diu, Daman (supra). In the case of Sohanlal, he was charge-sheeted only for the offence of dowry death, punishable u/s 304B of the Indian Penal Code and no charge u/s 302 or for abatement u/s 109 of the Indian Penal Code was framed against him. In those circumstances, the Apex Court observed in para-7 that Section 211 of the Code Criminal Procedure requires that the charge against the accused be precisely stated and that failure to frame a charge with regard to the substantive offence of Section 109 IPC, caused prejudice to the accused in trial court because he was called upon to face trial only for the charge u/s 304B of the IPC. Neither charge u/s 302 IPC nor u/s 109 IPC was levelled against the accused Sohan Lal. In those circumstances, the Apex Court came to the conclusion that it was not permissible for the Trial Court to convict the first accused Sohan Lal, for the offence punishable u/s 302 to read with Section 109 IPC. Like wise, learned Advocate Mr. Dave also placed reliance upon the decision of the Apex Court in the matter of Anil @ Raju Namdev Patil v. Administration of Daman & Diu, Daman (supra), wherein the Apex Court observed that there was distinction between the ingredients of the offence u/s 364A and 364 of the Indian Penal Code. When charge was framed u/s 364 and u/s 364A of the Indian Penal Code, conviction by the Trial Court for the offence u/s 364A in absence of framing charge, would be bad and causing prejudice to the accused. In para-54, the Apex Court set out the propositions of law when accused is convicted for the offence in respect of which no charge is framed and those propositions are (i) the appellant should not suffer any prejudice by reason of misjoinder of charges; (ii) a conviction for lesser offence is permissible; (iii) it should not result in failure of justice and (iv) if there is a substantial compliance, misjoinder of charges may not be fatal and such misjoinder must be arising out of mere misjoinder to frame charges.

25. The contentions raised are required to be evaluated keeping in mind the facts of this case. This is not the case in which for a distinct offence, ingredients of which were not brought to the notice of the accused and he was convicted for the

said offence. Present one is the case wherein the ingredients of the offence was amply brought to the notice of the accused and only omission in the charge on the part of the Trial Court to mention the Section of IPC, i.e. 304B. Necessary it is to see the charge framed at Exhibit-2 wherein it has been categorically explained and read over to the accused that a cruelty was executed upon the deceased by the accused and intention of such cruelty was dowry and that dowry was in respect of demanding Rs. 50,000/- to purchase of auto rickshaw by the appellant, and on that count, the deceased committed suicide. So, the question of accused being taken by surprise as no ingredients of the offence was disclosed to the accused, would not arise at all. The accused could not be said to have been prejudiced only because it is omitted by the Trial Court to mention Section 304B IPC in the charge. More particularly, when all the ingredients of the offence u/s 304B of IPC brought to the notice of the accused and they were fully aware of the facts for which they were to stand trial. The contentions raised about omission to frame charge u/s 304B and the conviction of appellant on account of that was bad, therefore, is misconceived and the present case is undoubtedly not covered by the decision of the Apex Court in the case of Anil @ Raju Namdev Patil v. Administration of Daman & Diu, Daman (supra) and Sohan Lal @ Sohan Singh v. State of Punjab (supra). This situation is well explained by the Apex Court in The Hon"ble Three Judges" Bench decision in the matter of K. Prema S. Rao and Another Vs. Yadla Srinivasa Rao and Others, , almost in similar facts, with regard to omission or defect in framing the charge, the Apex Court has observed in paras 22, 23, 24 and 25 as under:

22. Mere omission or defect in framing charge does not disable the Criminal Court from convicting the accused for the offence which is found to have been proved on the evidence on record. The Code of Criminal Procedure has ample provisions to meet a situation like the one before us. From the Statement of Charge framed u/s 304B and in the alternative Section 498A, IPC (as quoted above) it is clear that all facts and ingredients for framing charge for offence u/s 306, IPC existed in the case. The mere omission on the part of the trial Judge to mention of Section 305, IPC with 498A, IPC does not preclude the Court from convicting the accused for the said offence when found proved. In the alternate charge framed u/s 498A of IPC, it has been clearly mentioned that the accused subjected the deceased to such cruelty and harassment as to drive her to commit suicide. The provisions of Section 221 of Cr.P.C. take care of such a situation and safeguard the powers of the criminal Court to convict an accused for an offence with which he is not charged although on facts found in evidence, he could have been charged for such offence. Section 221 of Cr.P.C. needs reproduction:

221. Where it is doubtful what offence has been committed (1) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having

committed some one of the said offences.

(2) If in such a case the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of Sub-section (1), he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

24. The provision of Sub-section (2) of Section 221 read with Sub-section (1) of the said Section can be taken aid of in convicting and sentencing the accused No. 1 of offence of abetment of suicide u/s 306 of IPC along with or instead of Section 498A of IPC.

25. Section 215 allows criminal Court to ignore any error in stating either the offence or the particulars required to be stated in the charge, if the accused was not, in fact, misled by such error or omission in framing the charge and it has not occasioned a failure of justice. See Section 215 of Cr.P.C. which reads:

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.

26. As provided in Section 215 of Cr.P.C. omission to frame charge u/s 306, IPC has not resulted in any failure of justice. We find no necessity to remit the matter to the trial Court for framing charge u/s 306, IPC and direct a retrial for that charge. The accused cannot legitimately complain of any want of opportunity to defend the charge u/s 306, IPC and a consequent failure of justice. The same facts found in evidence, which justify conviction of the appellant u/s 498A for cruel treatment of his wife, make out a case against him u/s 306, IPC of having abetted commission of suicide by the wife. The appellant was charged for an offence of higher degree causing "dowry death" u/s 304B which is punishable with minimum sentence of seven years rigorous imprisonment and maximum for life. Presumption u/s 113A of the Evidence Act could also be raised against him on same facts constituting offence of cruelty u/s 495-A, IPC. No further opportunity of defence is required to be granted to the appellant when he had ample opportunity to meet the charge u/s 498A, IPC.

27. Thus, in the present case, the accused had ample opportunity to meet with the case u/s 304B of the Indian Penal Code as all the essential ingredients were mentioned in the charge. It could not be said that any prejudice therefore was caused to the accused. This is a case of formal defect or mere omission in mentioning the Section 304B of the Indian Penal Code in the charge and the appellant was well equipped to meet with the said charge and in fact the accused has defended for those allegations also. This is not a case wherein charge is framed for one offence containing one ingredient and without framing charge, the accused came to be convicted for altogether other offence containing

different ingredients than charged. For the above noted reasons, we are unable to accept this contention of the learned Advocate for the appellant.

28. Though, learned Advocate for the appellant also submitted on the aspect of reduction of sentence awarded by the Trial Court, but we do not find any reason to reduce the sentence awarded having regard to the facts and circumstances of the case and in the set in which the crime is committed. Thus, we have appreciated the evidence on record afresh and have considered the vital aspects of the case with reference to the contentions raised. We have taken the totality of the situation in consideration including reasons given by the Trial Court for convicting the appellant and ultimately after careful consideration, we come to the conclusion that there is no reason at all to interfere in the judgment and order of conviction and sentence impugned in this Appeal and, hence, the following order:

For the aforesaid reasons, the Appeal fails and is dismissed. Muddamal be disposed of as directed by the Trial Court.