

(2018) 05 DEL CK 0519
In the Delhi High Court
Case No : Criminal Appeal No. 365 OF 2017

Wasim	Vs	APPELLANT
State Of Nct Of Delhi		RESPONDENT

Date of Decision : 24-05-2018

Acts Referred:

Constitution Of India, 1950 — Article 136
Indian Penal Code, 1860 — Section 107, 302, 304B, 306, 498, 304B
Code Of Criminal Procedure, 1973 — Section 161, 221(1), 221(2), 222, 313
Evidence Act, 1872 — Section 113A, 113B

Citation : (2018) 05 DEL CK 0519

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : Kanhaiya Singhal, Prasanna, Meenakshi Chauhan

Final Decision : Disposed Of

Judgement

Mukta Gupta, J

1. Wasim challenges the impugned judgment dated 17th February, 2017 convicting him for offences punishable under Sections 498A/306 IPC and the order on sentence dated 18th February, 2017 directing him to undergo rigorous imprisonment for a period of three years and to pay a fine of Rs. 10,000/-, in default whereof to undergo simple imprisonment for a period of one month, for offence punishable under Section 498A IPC and rigorous imprisonment for a period of four years and to pay a fine of Rs. 50,000/-, in default whereof to undergo simple imprisonment for a period of six months, for offence punishable under Section 306 IPC.
2. Assailing the conviction, learned counsel for the appellant contends that the appellant was charged for offence punishable under Section 304B IPC

but was convicted for offence punishable under Section 306 IPC. Section 306 IPC cannot be said to be a minor offence in relation to offence

punishable under Section 304B IPC within the meaning of Section 222 Cr.P.C. for the reason that the two offences are of distinct categories.

Reliance is placed upon the decision of this Court reported as (2016) 232 DLT 318 Smt. Ramo Devi v. State. Secondly, from the suicide note, it is

clear that the deceased had not blamed anyone for her death. She also did not mention about any harassment including alleged extra marital affair of

the appellant. Furthermore, it cannot be said that the appellant harassed the deceased soon before her death or instigated her to commit suicide

because the appellant had gone to Nagercoil, Kanyakumari on 24th October, 2015 for his job and the deceased committed suicide on 27th October,

2015 when the appellant was not even present in Delhi. Reliance is placed upon the decision of the Supreme Court reported as 2006 (1) CAR (SC) 49

Harjit Singh v. State of Punjab. There are major contradictions in the testimony of the family members of the deceased. There was no mention of

dowry demand in statements of Ashwani and Sunita recorded under Section 161 Cr.P.C. and before the SDM. However, they improved their version

in their depositions the Court. There is delay of 9 days in lodging the FIR. Poonam has not been examined as a witness to prove the alleged extra

marital affair, hence, the same cannot be the basis of conviction.

3. Learned APP for the State on the other hand submits that the call detail records from September 2015 to November 2015 between the appellant

and Poonam explicitly reflect the extra marital affair between them. Furthermore, from the testimony of the brother, mother and father of the

deceased the prosecution has proved its case that the appellant had threatened the deceased to leave him.

4. Process of law was set into motion on 27th October, 2015 at around 6:36 P.M., when an information was received from wireless operator that a

lady had hanged herself near MCD school, Nirthari Village. Aforesaid information recorded vide DD No. 74B (Ex. PW-21/A) was entrusted to SI

Bijender Dahiya (PW-23) who along with Ct. Sandeep (PW-21) reached House No. 534, Nithari Village. By that time, body of the deceased Moni @

Moniya had already been brought down from the hanging condition. It was noticed that the door had been pushed open from outside and Moniya had

committed suicide by bolting the door of the said room from inside. Broken latch (chitkani) was found lying. Crime team was called at the spot. Spot

was photographed by Ct. Rakesh Kumar (PW-8). One suicide note (Ex.PW12/A) inside a magazine, a ball pen and a pair of slippers were found lying

in the room which were seized vide memo Ex. PW-21/C. One white sheet along with one chunni with which Moniya committed suicide were also

seized vide Ex.PW-21/B. Body was sent to SGM Hospital for preservation in mortuary and postmortem was got conducted. Statement of Ashwani,

brother of deceased, was recorded vide Ex.PW-7/A by Amit Kumar Singh (PW-7), Executive Magistrate.

5. FIR No. 1376/2015 (Ex.PW-2/A) was registered under Sections 498A/304B IPC at PS Aman Vihar on the basis of complaint of Sunita (mother of

deceased) and on 4th November, 2015, further investigation was handed over to SI Praveen Kumar (PW-16). On 5th November, 2015, he went to

Village Hirenkudna, parental house of deceased, where he met Sunita (mother of deceased), Ashwani @ Sonu (brother of deceased) and Sukhbir

Singh (father of deceased). He made enquiries from them and recorded their statements under Section 161 Cr.P.C.

6. On 7th November, 2015, SI Praveen Kumar (PW-16) went to the house of Wasim who was not cooperating in the investigation, so he was taken to

the Police Station. He made thorough inquiry from Wasim and arrested him vide arrest memo Ex. PW-10/A. His personal search was conducted vide

Ex.PW-10/B.

7. On 19th November, 2015, further investigation was handed over to SI Jitender Joshi (PW-20). He collected the admitted handwriting of the

deceased from Prathmik Balika Vidyalaya, Mubarakpur Dabas where she was working as a teacher. Teacher's diary was seized vide seizure memo

Ex. PW-14/A which was subsequently sent to FSL for opinion of handwriting expert. CDRs of Wasim as well as one girl Poonam with whom it was

alleged that Wasim was having extra marital affair were collected. After completion of investigation, charge sheet was filed. Vide order dated 15th

March, 2016, charge was framed for offences punishable under Sections 498A/304B IPC.

8. Sukhbir (PW-10), father of the deceased, deposed that on 27th October, 2015 he had received a call from the jeth of the deceased who informed

that Moniya was unwell and asked him to come there immediately. Thereafter, he called his son Ashwani and asked him to reach the matrimonial

home of Moniya with his mother. When they reached there, they found out that Moniya had committed suicide by hanging herself. On 30th October,

2015, his wife told him that Moniya had informed her that Wasim used to beat her and demand money. She also informed that Wasim was having illicit

relationship with a girl Poonam and wanted Moniya to divorce him.

9. Sunita (PW-11), mother of the deceased, stated that after 2-3 days of marriage, both Moniya and Wasim had come to their house. Moniya revealed

that her husband had asked to bring money from her parents. She wanted that the marriage should not be in any trouble, therefore, she gave a sum of

Rs. 40,000/- in May and again Rs. 50,000/- in October to Moniya without telling her husband or her son. Moniya had also told her that Wasim wanted

a bigger car and air-fare to go to his workplace in Tamil Nadu and for return. Moniya also told that Wasim had another girl Poonam in his life and he

used to talk to her on phone for hours and when she objected, Wasim used to beat her severely.

10. Ashwani (PW-12), brother of the deceased, stated that Wasim was posted as teacher in Tamil Nadu. After marriage, Moniya started living at her

matrimonial home situated in Nithari village. Wasim used to come from Tamil Nadu. Before marriage they learnt that there was some quarrel

between Wasim and his mother but the same was patched up by the time of the marriage. Moniya had told him that Wasim was having an affair with

another girl Poonam and she had learnt that Wasim had even brought Poonam to his house prior to marriage but his family was against the match. He

also stated that he told Moniya to bear for some time and that he would talk to Wasim in this regard. Moniya had come to her parental home in

October, 2015 and had stayed for 20-25 days. On 27th October, 2015, Wasim took Moniya to the matrimonial house. He further clarified that Wasim

took Moniya to the matrimonial home on 21st October, 2015. During his cross examination, he admitted that he did not reveal the fact regarding

payment of Rs. 40,000/- and Rs. 50,000/- by her mother to Moniya when he made his statements on 27th October, 2015 and 28th October, 2015.

11. Dr. Manoj Dhingra (PW-1) In-charge Mortuary, SGM Hospital stated that on 28th October, 2015, he conducted the postmortem on the body of

Moniya and observed one external injury, i.e. ligature mark around the neck with width 1.4 cm and circumference 24 cm, present above thyroid

cartilage in midline of neck running obliquely upwards and backwards on both the sides and absent at nape of neck. It was 7.3 cm below chin; 1.2 cm

below right ear; 2.7 cm below left ear. Mark was dry, brownish red, parchmented. Cut section showed glistening white subcutaneous tissue. No

damage was seen to neck muscles. Cause of death was due to asphyxia as a result of ante mortem hanging. Detailed post mortem report was proved

vide Ex. PW-1/A. He subsequently opined that the injury mentioned in the MLC was possible by the white sheet (chadar) or similar cloth. Subsequent

opinion was proved as Ex.PW-1/B.

12. Santosh Devi (PW-13), Principal, Nithari Uttari Nigam Prathmik Balika Vidyalaya, Mubarakpur Dabas, Delhi stated that the deceased was

working as a contract nursery teacher in the school. She stated that Sheela Devi (PW-14) school attendant, had handed over one register to the police

which contained admitted handwriting of the deceased. Register was proved vide Ex.PW-13/A. Sheela Devi (PW-14) corroborated the testimony of

Santosh Devi (PW-13).

13. Maulvi Gulam Rasool (PW-3) stated that he has been Imam and Maulvi of Masjid at Village Hiran Kudna for more than ten years and he had

prepared and written the nikahnama of Moniya and Wasim dated 2nd May, 2015. Nikhanama was proved vide Ex.PW-3/A.

14. Israr Babu (PW-4), Nodal Officer, Vodafone Service Ltd. proved the Customer Application Forms (CAF) of mobile number 9911625212 issued in

the name of Wasim vide Ex.PW-4/A along with aadhar card as ID proof and 9953240261 issued in the name of Poonam vide Ex.PW-4/D along with

election card as ID proof. CDR of the aforesaid mobile numbers for the period 1st September, 2015 to 7th November, 2015 were proved vide

Ex.PW4/B and Ex.PW-4/E respectively.

15. M.L. Meena (PW-22), Senior Scientific Officer, FSL Rohini stated that on 14th January, 2016 one sealed wooden box with the seal of SGMH

Mortuary Mangol Puri Delhi-83 was deposited by Ct. Vinod containing stomach and pieces of small intestine in a jar, pieces of liver, spleen and

kidney in another jar and blood sample in a third jar. On chemical, microscopic and TLC examination, no common poison could be detected from the

aforesaid exhibits. His report was proved vide Ex. PW-22/A.

16. The main issue urged by learned counsel for the appellant is that the appellant could not have been convicted for the offence punishable under

Section 306 IPC as charge for offence punishable under Section 304B IPC only was framed and no charge for offence punishable under Section 306

IPC was framed against him.

17. The issue that an accused who has been charged for offence punishable under Section 304B IPC can be convicted for offence punishable under

Section 306 IPC in the absence of a charge on this count, is no longer res integra having been settled by the Supreme Court in the decisions reported

as AIR 2003 SC 2865H *Ira Lal & Ors. Vs. State (Government of NCT) Delhi* and 2013 (7) SCC 108 *Gurnaib Singh Vs. State of Punjab*.

Distinguishing the decision of the Supreme Court in (2001) 2 SCC 577 *Shamshad M. Multani Vs. State of Karnataka*, the Supreme Court in these

two decisions held that though 304B IPC cannot be treated as a minor offence of 302 IPC for the reasons the ingredients of the two offences are

different and there is no presumption available under Section 113 (b) of Indian Evidence Act for an offence punishable under Section 302 IPC

however after the amendment in the Evidence Act with the introduction of Section 113(a), Indian Evidence Act, a presumption akin to Section 113(b)

of the Indian Evidence Act is available for offence punishable under Section 306 IPC. Thus in a given case, if the prosecution is not able to prove that

soon before death there was a demand of dowry but proves that there was cruelty which was sufficient to abet commission of suicide, offence

punishable under Section 306 IPC would be made out. In such a case presumption under Section 113(a) of the Indian Evidence Act is required to be

raised and the accused can be convicted for offence punishable under Section 306 IPC.

18. In *Gurnaib Singh's* case, Supreme Court held as under:-

11. Mr V. Madhukar, learned counsel for the respondent State, resisting the aforesaid submissions, has contended that marshalling of the

evidence by the trial court and the reappraisal by the High Court withstand close scrutiny and there is no justification to interfere with the

concurrent finding of guilt. Alternatively, it is put forth by him that assuming that the offence under Section 304-B IPC is not brought home,

still the material on record would justify a conviction under Section 306 IPC which would not impel this Court to interfere with the quantum of sentence.

12. To appreciate the rival proponent's arguments advanced at the Bar, we think it apposite to refer to Section 304-B IPC which deals with dowry death. It reads as follows:

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

13. To get the said provision attracted, certain ingredients are to be satisfied. Scanning the said provision, this Court in *Satvir Singh v.*

State of Punjab [(2001) 8 SCC 633; 2002 SCC (Cri) 48] has stated thus: (SCC p. 641, para 14)

14. The essential components of Section 304-B are: (i) Death of a woman occurring otherwise than under normal circumstances, within 7 years of marriage.

(ii) Soon before her death she should have been subjected to cruelty and harassment in connection with any demand for dowry. When the

above ingredients are fulfilled, the husband or his relative, who subjected her to such cruelty or harassment, can be presumed to be guilty

of offence under Section 304-B. To be within the province of the first ingredient the provision stipulates that "where the death of a woman

is caused by any burns or bodily injury or occurs otherwise than under normal circumstances". It may appear that the former limb

which is described by the words "death caused by burns or bodily injury" is

a redundancy because such death would also fall within

the wider province of "death caused otherwise than under normal circumstances". The former limb was inserted for highlighting that

by no means death caused by burns or bodily injury should be treated as falling outside the ambit of the offence.

14. In this context, it is apposite to refer to Section 113-A of the Evidence Act, 1872. The said provision is extracted below:

"113-A. Presumption as to abetment of suicide by a married woman.—When the question is whether the commission of suicide by a

woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of

seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may

presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of

her husband.

15. Section 113-B, which provides for presumption as to dowry death, was inserted with a view to fight against the plague of dowry death.

The said provision is as follows:

"113-B. Presumption as to dowry death.—When the question is whether a person has committed the dowry death of a woman and it is

shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any

demand for dowry, the court shall presume that such 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).

16. Interpreting the aforesaid provisions in juxtaposition with Section 304-B IPC, this Court, in *Hira Lal v. State (Govt. of NCT of Delhi)*

[(2003) 8 SCC 80: 2003 SCC (Cri) 2016], has expressed thus: (SCC p. 86, para 9)

"9. A conjoint reading of Section 113-B of the Evidence Act and Section 304-B IPC shows that there must be material to show that soon

before her death the victim was subjected to cruelty or harassment. The

prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of 'death occurring otherwise than in normal circumstances'. The expression 'soon before' is very relevant where Section 113-B of the Evidence Act and Section 304-B IPC are pressed into service. The prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption operates. Evidence in that regard has to be led by the prosecution. The learned Judges, while proceeding further and interpreting the expression 'soon before', opined thus: (Hira Lal case [(2003) 8 SCC 80: 2003 SCC (Cri) 2016], SCC p. 87, para 9)

'9. The determination of the period which can come within the term 'soon before' is left to be determined by the courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression 'soon before' would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. There must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the death concerned. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence.'

17. Keeping in view the aforesaid principles, it is to be seen whether the deceased was driven to commit suicide because of the harassment meted out to her in connection with demand for dowry. The learned trial Judge as well as the High Court has accepted the evidence of the brother, PW 1; the father, PW 4 and PW 5, Numberdar of the village that there was demand for dowry. The learned counsel for the appellant would submit that the finding recorded on this score is not based on the material on record but founded on surmises. To test the acceptance of the said submission, we have thought it apt to scrutinise the evidence of PWs 1, 4 and 5:

17.1. PW 1, brother of the deceased, has only made a bald statement that the accused persons were not satisfied with the dowry and were asking his sister to bring a sum of Rs 50,000. Similar is the testimony of PWs 4

and 5. That apart, nothing has been stated by the witnesses.

It has been deposed by the father that the deceased had written two to three letters stating about the demand for dowry but the said letters

have not been brought in evidence. That apart, the brother, PW 1, in cross-examination, has refuted the same. It is also noticeable that PW 4

had not told his other daughters about the demand for dowry which is expected of a father.

17.2. Thus, on the base of such sketchy evidence, in our considered opinion, it is difficult to concur with the finding that there was demand

for dowry by the accused husband and the harassment pertained to such a demand. The conclusion on this score, we are inclined to think,

is based on certain a priori notions. When such a conclusion is arrived at which is manifestly erroneous and unsupported by the evidence

on record, needless to say, this Court, in exercise of power under Article 136 of the Constitution, can re-evaluate and interfere. This has

been so stated in *Alamelu v. State* [(2011) 2 SCC 385: (2011) 1 SCC (Cri) 688], *Heinz India (P) Ltd. v. State of U.P.* [(2012) 5 SCC 443 :

(2012) 3 SCC (Civ) 184 : (2012) 3 SCC (Cri) 198]and *Vishwanath Agrawal v. Sarla Vishwanath Agrawal* [(2012) 7 SCC 288 : (2012) 4

SCC (Civ) 224 : (2012) 3 SCC (Cri) 347].

18. Presently we shall dwell upon the other limb of cruelty as engrafted under Section 498-A. Section 498-A deals with husband, or relative

of husband of a woman, subjecting her to cruelty. The said provision along with the Explanation reads as follows:

“498-A. Husband or relative of husband of a woman subjecting her to cruelty.” Whoever, being the husband or the relative of the

husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and

shall also be liable to fine.

Explanation.—“For the purposes of this section, ‘cruelty’ means—

(a) 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) of the woman; or

(b) 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.â?

Clause (a) of the Explanation to the aforesaid provision defines â??crueltyâ? to mean â??any wilful conduct which is of such a nature as

is likely to drive the woman to commit suicideâ?. Clause (b) of the Explanation pertains to unlawful demand. Clause (a) can take in its ambit mental cruelty.

19. It has come out in evidence that there was ill treatment by the mother-in-law and the husband. The bride was in her early twenties. She was

turned out of the matrimonial home on certain occasions. This aspect has been established beyond doubt. There can be no dispute that in a family life,

there can be differences, quarrels, misgivings and apprehensions but it is the degree which raises it to the level of mental cruelty. A daughter-in-law is

to be treated as a member of the family with warmth and affection and not as a stranger with despicable and ignoble indifference. She should not be

treated as a housemaid. No impression should be given that she can be thrown out of her matrimonial home at any time. In the case at hand,

considering the evidence of the prosecution witnesses, we are disposed to think that it is a case where the bride was totally insensitively treated and

harassed. It is not that she has accidentally consumed the poison. She had deliberately put an end to her life. The defence had tried to prove that she

was suffering from depression and because of such depression, she extinguished the candle of her own life. The testimony of the doctors cited by the

defence has not been accepted by the learned trial Judge as well as by the High Court. They have not been able to bring in adequate material on

record that she was suffering from such depression as would force her to commit suicide. On a perusal of the evidence of the said witnesses, we find

that the finding recorded on that score is absolutely impeccable. In view of the same, the evidence brought on record that she was treated with cruelty

and harassed deserves to be given credence to and, accordingly, we do so.

20. There is no dispute that no charge was framed under Section 306 IPC. Though the charge has not been framed under Section 306 yet on a

question that has been put under Section 313 CrPC, it is clear as crystal that they were aware that they are facing a charge under Section 304-B IPC

which related not to administration of poison but to consumption of poison by the

deceased because of the demand of dowry and harassment. It is major evidence in comparison to Section 306 IPC which deals with abetment to suicide by a bride in the context of Explanation clause (a) of Section 498-A IPC. The test is whether there has been failure of justice or prejudice has been caused to the accused.

21. In *Gurbachan Singh v. State of Punjab* [AIR 1957 SC 623: 1957 Cri LJ 1009,]this Court examined the question of prejudice and held as under:

(AIR p. 626, para 7)

“7. In judging a question of prejudice, as of guilt, courts must act with a broad vision and look to the substance and not to technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself.”

22. In *Shamnsaheb M. Multtani v. State of Karnataka* [(2001) 2 SCC 577 : 2001 SCC (Cri) 358], a three-Judge Bench, while dealing with the concept of “failure of justice”, has opined thus: (SCC pp. 585-86, paras 23-24)

“23. We often hear about “failure of justice” and quite often the submission in a criminal court is accentuated with the said expression. Perhaps it is too pliable or facile an expression which could be fitted in any situation of a case. The expression “failure of justice” would appear, sometimes, as an etymological chameleon (the simile is borrowed from Lord Diplock in *Town Investments Ltd.v.*

Deptt. of the Environment [1978 AC 359: (1977) 2 WLR 450: (1977) 1 All ER 813 (HL)]). The criminal court, particularly the superior court should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage.

24. One of the cardinal principles of natural justice is that no man should be condemned without being heard (*audi alteram partem*). But the law reports are replete with instances of courts hesitating to approve the contention that failure of justice had occasioned merely because a person was not heard on a particular aspect. However, if the aspect is of such a nature that non-explanation of it has contributed to

penalising an individual, the court should say that since he was not given the opportunity to explain that aspect there was failure of justice

on account of noncompliance with the principle of natural justice.â??

23. In *Narwinder Singh v. State of Punjab* [(2011) 2 SCC 47: (2011) 1 SCC (Cri) 601,] while accepting the finding of the High Court that the

prosecution has not been able to establish the charge under Section 304-B IPC and had, therefore converted the punishment to one under Section 306

IPC, this Court observed that cruelty or harassment sans demand of dowry which drives the wife to commit suicide attracts the offence of abetment

of suicide under Section 306 IPC. The Court further observed that mere omission or defect in framing charge would not disable the court from

convicting the accused for the offence which has been found to be proved on the basis of the evidence on record. In such circumstances, the matter

would fall within the purview of Sections 221(1) and (2) CrPC.

24. In *K. Prema S. Rao v. Yadla Srinivasa Rao* [(2003) 1 SCC 217: 2003 SCC (Cri) 271,]the Court, analysing the evidence, ruled thus: (SCC p. 227,

para 25)

â??25. â?| The same facts found in evidence, which justify conviction of the appellant under Section 498-A for cruel treatment of his wife,

make out a case against him under Section 306 IPC of having abetted commission of suicide by the wife. The appellant was charged for an

offence of higher degree causing â??dowry deathâ?? under Section 304-B which is punishable with minimum sentence of seven years'

rigorous imprisonment and maximum for life. Presumption under Section 113-A of the Evidence Act could also be raised against him on

same facts constituting offence of cruelty under Section 498-A IPC. No further opportunity of defence is required to be granted to the

appellant when he had ample opportunity to meet the charge under Section 498-A IPC.â??

25. In the case at hand, the basic ingredients of the offence under Section 306 IPC have been established by the prosecution inasmuch as the death

has occurred within seven years in an abnormal circumstance and the deceased was meted out with mental cruelty. Thus, we convert the conviction

from one under Section 304-B IPC to that under Section 306 IPC. As the accused has spent almost five years in custody, we limit the period of

sentence to the period already undergone.

19. Supreme Court while dealing with the aforesaid issue in the decision reported as (2014) 12 SCC 595 Mangat Ram v. State of Haryana also held:

28. We have already indicated that the trial court has found that no offence under Section 304-B IPC has been made out against the accused, but it

convicted the accused under Section 306 IPC, even though no charge had been framed on that section against the accused. The scope and ambit of

Section 306 IPC has not been properly appreciated by the courts below. Section 306 IPC reads as under:

“306. Abetment of suicide.—If any person commits suicide, whoever abets the commission of such suicide, shall be punished with

imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.” Abetment of suicide is

confined to the case of persons who aid or abet the commission of the suicide. In the matter of an offence under Section 306 IPC, abetment

must attract the definition thereof in Section 107 IPC. Abetment is constituted by instigating a person to commit an offence or engaging in a

conspiracy to commit, aid or intentional aiding a person to commit it. It would be evident from a plain reading of Section 306 read with

Section 107 IPC that, in order to make out the offence of abetment or suicide, necessary proof required is that the culprit is either

instigating the victim to commit suicide or has engaged himself in a conspiracy with others for the commission of suicide, or has intentionally

aided by an act or illegal omission in the commission of suicide.

29. In the instant case, of course, the wife died few months after the marriage and the presumption under Section 113-A of the Evidence Act could be

raised. Section 113-A of the Evidence Act reads as follows:

“113-A. Presumption as to abetment of suicide by a married woman.—When the question is whether the commission of suicide by a

woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of

seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may

presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of

her husband.â??

30. We are of the view that the mere fact that if a married woman commits suicide within a period of seven years of her marriage, the presumption

under Section 113-A of the Evidence Act would not automatically apply. The legislative mandate is that where a woman commits suicide within seven

years of her marriage and it is shown that her husband or any relative of her husband has subjected her to cruelty, the presumption as defined under

Section 498-A IPC, may attract, having regard to all other circumstances of the case, that such suicide has been abetted by her husband or by such

relative of her husband. The term â??the Court may presume, having regard to all the other circumstances of the case, that such suicide had been

abetted by her husbandâ? would indicate that the presumption is discretionary. So far as the present case is concerned, we have already indicated that

the prosecution has not succeeded in showing that there was a dowry demand, nor would the reasoning adopted by the courts below would be

sufficient enough to draw a presumption so as to fall under Section 113-A of the Evidence Act.

32. We are of the view that the circumstances of the case pointed out by the prosecution are totally insufficient to hold that the accused had abetted

his wife to commit suicide and the circumstances enumerated under Section 113-A of the Evidence Act have also not been satisfied.

33. In *Pinakin Mahipatray Rawal v. State of Gujarat* [(2013) 10 SCC 48 : (2013) 4 SCC (Civ) 616 : (2013) 3 SCC (Cri) 80,1 t]his Court has examined

the scope of Section 113-A of the Evidence Act, wherein this Court has reiterated the legal position that the legislative mandate of Section 113-A of

the Evidence Act is that if a woman commits suicide within seven years of her marriage and it is shown that her husband or any relative of her

husband had subjected her to cruelty, as per the presumption defined in Section 498-A IPC, the court may presume, having regard to all other

circumstances of the case, that such suicide had been abetted by the husband or such person. The court held that, though a presumption could be

drawn, the burden of proof of showing that such an offence has been committed by the accused under Section 498-A IPC is on the prosecution. The

court held that the burden is on the prosecution to establish the fact that the deceased committed suicide and the accused abetted the suicide. In the

instant case, there is no evidence to show whether it was an accidental death or whether the deceased had committed suicide.

20. As regards the contention of learned APP for State that extra marital relations would amount to cruelty Supreme Court in the decision reported as

AIR 2016 SC 5430 K.V Prakash Babu v. State of Karnataka while dealing with the issue whether involvement of husband in an extra-marital affair

invites his conviction for offence punishable under Section 306 IPC for abetment to commit suicide by the wife, observed as under:

15. Slightly recently in Ghusabhai Raisangbhai Chorasiya v. State of Gujarat, the Court perusing the material on record opined that even if the illicit

relationship is proven, unless some other acceptable evidence is brought on record to establish such high degree of mental cruelty the explanation (a)

to Section 498-A of the IPC which includes cruelty to drive the woman to commit suicide, would not be attracted. The relevant passage from the said

authority is reproduced below:â?

â??True it is, there is some evidence about the illicit relationship and even if the same is proven, we are of the considered opinion that

cruelty, as envisaged under the first limb of Section 498A Indian Penal Code would not get attracted. It would be difficult to hold that the

mental cruelty was of such a degree that it would drive the wife to commit suicide. Mere extramarital relationship, even if proved, would be

illegal and immoral, as has been said in Pinakin Mahipatray Rawal (supra), but it would take a different character if the prosecution brings

some evidence on record to show that the accused had conducted in such a manner to drive the wife to commit suicide. In the instant case,

the accused may have been involved in an illicit relationship with the appellant no. 4, but in the absence of some other acceptable evidence

on record that can establish such high degree of mental cruelty, the Explanation to Section 498-A which includes cruelty to drive a woman to

commit suicide, would not be attracted.â??

16. The concept of mental cruelty depends upon the milieu and the strata from which the persons come from and definitely has an individualistic

perception regard being had to one's endurance and sensitivity. It is difficult to generalize but certainly it can be appreciated in a set of established

facts. Extra-marital relationship, per se, or as such would not come within the

ambit of Section 498-A Indian Penal Code. It would be an illegal or immoral act, but other ingredients are to be brought home so that it would constitute a criminal offence. There is no denial of the fact that the cruelty need not be physical but a mental torture or abnormal behaviour that amounts to cruelty or harassment in a given case. It will depend upon the facts of the said case. To explicate, solely because the husband is involved in an extra-marital relationship and there is some suspicion in the mind of wife, that cannot be regarded as mental cruelty which would attract mental cruelty for satisfying the ingredients of Section 306 Indian Penal Code.

17. We are absolutely conscious about the presumption engrafted under Section 113-A of the Evidence Act. The said provision enables the Court to

draw presumption in a particular fact situation when necessary ingredients in order to attract the provision are established. In this regard, we may

reproduce a passage from Pinakin Mahipatray Rawal (supra):â?" Criminal law amendment and the rule of procedure was necessitated so as to meet

the social challenge of saving the married woman from being ill-treated or forcing to commit suicide by the husband or his relatives, demanding dowry.

Legislative mandate of the section is that when a woman commits suicide within seven years of her marriage and it is shown that her husband or any

relative of her husband had subjected her to cruelty as per the terms defined in Section 498-A Indian Penal Code, the court may presume having

regard to all other circumstances of the case that such suicide has been abetted by the husband or such person. Though a presumption could be

drawn, the burden of proof of showing that such an offence has been committed by the accused under Section 498-A Indian Penal Code is on the

prosecution.â?? We have reproduced the aforesaid passage only to highlight that the Court can take aid of the principles of the statutory presumption.

18. In the instant case, as the evidence would limpidly show, the wife developed a sense of suspicion that her husband was going to the house of

Ashwathamma in Village Chelur where he got involved with Deepa, the daughter of Ashwathamma. It has come on record through various witnesses

that the people talked in the locality with regard to the involvement of the appellant with Deepa. It needs to be noted that Deepa, being not able to

digest the humiliation, committed suicide. The mother and the brother of Deepa paved the same path. In such a situation, it is extremely difficult to

hold that the prosecution has established the charge under Section 498A and the fact that the said cruelty induced the wife to commit suicide. It is

manifest that the wife was guided by the rumour that aggravated her suspicion which has no boundary. The seed of suspicion planted in mind brought

the eventual tragedy. But such an event will not constitute the offence or establish the guilt of the accused-appellant under Section 306 of the Indian

Penal Code.

19. Having said that we intend to make it clear that if the husband gets involved in an extra-marital affair that may not in all circumstances invite

conviction under Section 306 of the Indian Penal Code but definitely that can be a ground for divorce or other reliefs in a matrimonial dispute under

other enactments. And we so clarify.â??

22. On the facts of the present case, it is apparent that the deceased suspected her husband to be in an extramarital relation which fact she stated to

her family members also, however there is no evidence that in order to seek divorce from the deceased there was cruelty to the extent that she was

driven to commit suicide. Thus, this Court finds that the prosecution has not made out any case for raising a presumption that on account of mental

cruelty by being involved in an extramarital relationship Wasim abated the commission of suicide by the deceased.

23. This brings the Court to another facet of facts of the case i.e. whether the acts of Wasim had a live and proximate link to the death of the

deceased as admittedly prior to the incident the appellant was not in Delhi. Nothing has been shown that before the death of the deceased she was

subjected to such a mental and physical cruelty by the appellant which abated her committing suicide. There is no proximate and live link between the

cruelty or demand of dowry and the suicide committed as already held by the learned Trial Court.

24. However in view of the fact that though not soon before death but soon after the marriage there was demand of dowry and money was taken, this

Court deems it fit to uphold the conviction under Section 498A IPC. Consequently the conviction and order on sentence of the appellant for offence

punishable under Section 306 IPC is set aside however, for offence punishable under Section 498A IPC is maintained.

25. Appeal is disposed of.

26. Copy of this order be sent to Superintendent Central Jail Tihar for updation of the Jail record.
27. TCR be returned.