

MANU/WB/0547/2005

Equivalent Citation: 2006(3)CHN260, (2005)ILR 2Cal323

IN THE HIGH COURT OF CALCUTTA

C.R.A. No. 487 of 2001

Decided On: 29.07.2005

Appellants: **Subhasish Singha and Ors.**
Vs.

Respondent: **State of West Bengal**

Hon'ble Judges/Coram:

D.P. Sengupta and A.K. Bhattacharya, JJ.

Counsels:

For Appellant/Petitioner/Plaintiff: Sekhar Basu, Tapas Kr. Ghosh and Souvik Mitra, Advs.

For Respondents/Defendant: Md. Kazi Safiullah, P.P.

JUDGMENT

A.K. Bhattacharya, JJ.

1. The hearing stems from an appeal preferred against the judgment and order of conviction and sentence passed by the Id. Additional Sessions Judge, 1st Court, Hooghly in Sessions Trial No. 48 of 1992 on 15.10.2001.

2. Shortly put, and shorn of details, the prosecution case is that the marriage of Smritirani Singha, third sister of the de facto complainant (P.W. 10) took place with accused Subhasish on 02.08.1987 when various kinds of dowry, as demanded by her father-in-law Pranab Kumar Singha, were given. After the marriage she was subjected to insult and abuse by her father-in-law, mother-in-law Annapurna Singha and grandmother-in-law Bangabala Singha (since deceased before framing of charge), over the issue of more dowry, and at the time of her visit to her father's house at Varanasi, she used to narrate about such torture. After the birth of her daughter, the degree of torture upon her, both physical and mental, increased. On many occasions the said accused persons assaulted her and threatened her with dire consequences, and her husband never protested against it. On 16.07.1990 at about 6.30 a.m. the said grandmother-in-law set fire on her and her child after pouring kerosene oil for which both of them with severe burn injuries were removed to Burdwan Medical College & Hospital where the child expired on that date at about 9.30 p.m. and she is fighting with death. On receipt of the said information the complainant came to hospital from Varanasi, and as he was busy in connection with treatment of his sister, there was some delay in lodging the FIR. Hence, all the three accused persons were charged under Sections 498A/34 and 304B/34 IPC.

3. The defence case, as suggested to P.Ws. and as contended by the accused persons during their examination under Section 313 Cr.P.C. is that the victim died on account of bursting of stove. She was not subjected to any ill-treatment or torture by the accused persons over the issue of dowry nor the accused persons demanded any dowry.

4. 24 witnesses were examined on behalf of the prosecution, while none was

examined on behalf of the defence, and after considering the facts, circumstances and materials on record, the Id. Court below found all the three accused persons guilty under Sections 304B/34 & 498A/34 IPC and sentenced them to suffer imprisonment for life under Section 304B but did not pass any separate sentence under Section 498A IPC.

5. Being aggrieved by, and dissatisfied with, the said order, the accused persons have preferred the present appeal.

6. All that now requires to be considered is whether the Id. Court below was justified in passing the aforesaid order and sentence.

7. To start with, Clause (c) of Sub-section (1) of Section 354 Cr.PC in mandatory terms requires amongst others to specify in the judgment, the section of the Indian Penal Code or other law under which the accused is convicted. Sub-sections (3) & (4) of the said section speak of conviction followed by passing sentence. Section 374 Cr.P.C. provides for appeal from conviction. In the present case, though the Id. Court below found the accused persons guilty under Sections 304B/34 IPC and 498A/34 IPC, no order of conviction was passed under the aforesaid provisions and they were sentenced to suffer imprisonment for life under Section 304B IPC which, though curable under Section 465 Cr.P.C. is a serious lacuna. The Code is a Code of Procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that, an accused person gets a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice. If he does, if he is tried by a competent Court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is 'substantial' compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venial by the Code and the trial is not vitiated unless the accused can show substantial prejudice, as was held in the case of Willie Slaney v. State of M.P. reported in MANU/SC/0038/1955 : 1956CriLJ291 .

8. The vital witnesses in this case are P.Ws. 10 to 17 and 20 to 24.

9. P.W. 1 when returning from field found the victim was being taken to hospital by the accused persons on account of sustaining burn injury and he never heard of any misbehavior of the accused persons towards the victim Smriti. P.W. 2 who was declared hostile by the prosecution, expressed his ignorance about the cause of death of the victim and her child. P.W. 3 who too was declared hostile heard about the death of the victim and her child. P.Ws. 4 & 8 were simply tendered. P.Ws. 5 to 7 expressed their ignorance as to how the accused persons behaved with the victim.

10. According to the evidence of P.W. 10 (de facto complainant), the marriage of his sister Smriti took place with accused Subhasish as per Hindu rites & customs on 02.08.1987 and she died after some days of the incident of burning and her child Tumpa died on the same date. On 16.07.1990 at about 6.00 p.m. on receipt of an anonymous phone from Debipur that Smriti on being ill was admitted to Burdwan Hospital, he went to the said hospital from Benaras on the next date at 4.30 p.m. and found her body was charred by burning. On his query, she reported that her grandmother-in-law Bangabala poured kerosene oil on her from back and set a burning stick on her resulting in burn injuries of her and her child. He saw Subhasish under a shed in the ground floor of the hospital and her stepmother-in-law in the verandah near the bed of her sister. On query, Subhasish informed that Smriti

received burn injury on account of bursting of stove. The victim Smriti further informed that Bangabala, Pranab and Annapurna used to torture upon her mentally and physically over the issue of dowry. The diamond ring given by them to Subhasish was the real bone of contention as the diamond was small. After the birth of child the accused persons pressurized them to give a button fitted with diamond, but they could not meet up the said demand. The accused persons demanded more dowry. He tried to settle the dispute between his sister and the accused persons. His sister reported to him just after marriage that she was not happy with the behaviour of the accused persons as they tortured upon her in different ways including using abusive language. They made arrangement for transferring his sister from the hospital to a nearby nursing home at Burdwan, as her condition was serious, and thereafter with permission of Pandua P.S. they took her on 08.10.1990 for better treatment to B.H.U. Hospital, Benaras where she expired on 24.10.1990. He lodged a written complaint (Ext. 2) with O.C., Pandua P.S. P.W. 11, elder sister's husband of the victim, in whose house the marriage of the victim and accused Subhasish was finally settled, stated that after marriage Smriti went to his house and complained of misbehaviour of her father-in-law and grandmother-in-law. There was a dispute over a diamond ring, as the diamond ring given was smaller than the expectation of the accused persons. After birth of her female child, a further dispute started, as the accused persons expected birth of a male child. Before seven days of the incident, Smriti came to his house for the last time wearing a torn sari with her child wearing dirty garments and informed his wife (P.W. 13) that she was compelled to come there on account of torture by the accused persons. After three days when an employee of the accused persons came to his house for bringing her back, she did not agree to return but she was persuaded by him to go back to her matrimonial house. P.W. 12 father of the victim, stated that when she came to his house after marriage, she complained of physical and mental torture upon her by the accused persons over the issue of a diamond ring, as the same, as demanded by Subhasish, was smaller than their expectation. He further learnt from her that she was subjected to torture by Subhasish by way of pulling her hair, and other accused persons tortured her by using filthy language. As per evidence of P.W. 13, elder sister of the victim, negotiation of marriage of Smriti with Subhasish was settled at her house. In connection with Astamangala when she visited at her father's house at Benaras, she expressed her unhappiness in the matrimonial relation, as she complained of mental and physical torture upon her. She was assaulted by her mother-in-law and husband who also touched a burning cigarette on her hand. On her query, Subhasish informed that it was not done wilfully. Her father gave 20/22 bharies of gold, Rs. 20,000/- in cash, a diamond fitted gold ring and some furniture, but the accused persons expressed their dissatisfaction over the said diamond ring. The second trouble started when Smriti gave birth to a female child. As Subhasish expected a male child, the accused persons expressed their dissatisfaction. Thereafter the accused persons demanded a gold button fitted with diamond, and as her father could not meet up such demand, the degree of torture upon her increased. Two months before the incident when she went to her father's house at the time of marriage ceremony of her youngest sister, she did not want to go back to her matrimonial house to avoid further torture of the accused persons as she was threatened with dire consequences. A week before the incident she came to her house for the last time wearing a torn and dirty sari with her child in a dirty dress. On query, she started to cry and informed that her husband tried to kill her by throttling and she refused to go back to her matrimonial house. After 5/6 days when an employee of the accused persons came to their house for taking her back, she refused to go and she persuaded her to go back. After about 2/3 days of her departure the incident took place. On the date of incident at, about 10.30./11.00 a.m. the driver of the accused persons who came to take her to Burdwan Hospital reported that Smriti received burn injury. At the

hospital she saw her sister with 80% burn injuries and her child was also burnt. On query, she informed that when she was feeding her child she felt a cold sensation on her back, got a smell of kerosene oil and then she found herself ablaze and Annapurna and Bangabala standing nearby with matchsticks in their hands. On being asked, Subhasish who was at the hospital, did not say anything. Her father bore all the expenses for the treatment of her sister. She saw none of the accused persons except Subhasish who came on one or two occasions to look after her sister. P.W. 14, mother of the victim, deposed that Smriti informed her that the accused persons did not behave well with her and they rebuked over the issue of dowry given by them at the time of marriage. She saw her for the last time two months before the incident at the marriage ceremony of her youngest daughter when she reported about mental and physical torture upon her by the accused persons. She with her husband (P.W. 12) came to Burdwan Hospital and on her query she reported that her grandmother-in-law poured kerosene oil on her back and set a lighted stick thereby causing her burn injuries. Similar is the evidence of P.W. 15, a family friend at Benaras, who used to look after the victim at B.H.U. Hospital and stated that on query from the victim he came to know that her grandmother-in-law poured kerosene oil on her back and set a lighted stick on her person resulting in her burn injuries and she requested that her parents-in-law, husband and grandmother-in-law should not be spared. Similar is also the evidence regarding sustaining burn injuries by the victim, as deposed by P.W. 16, another family friend, who further stated that the victim informed her at Burdwan Hospital that her parents-in-law and husband were also present at the time of setting fire by grandmother-in-law and that the accused persons did not behave well with her. P.W. 17, a neighbour at Boragari, who expressed his ignorance as to how the accused persons behaved with the victim, stated that accused Pranab and Annapurna used to reside in their house at Debipur which is about one hour walking distance away from the P.O. at Boragari. P.W. 18 also expressed his ignorance as to how the accused persons behaved with the victim. P.W. 19, another neighbour at Boragari, went to the P.O. from the house of her work nearby, found the victim groaning and struggling with burn injuries and expressed ignorance as to how the accused persons behaved with the victim. P.W. 20, who claims to be a member of local G.P. deposed that accused persons behaved well with the victim but after passing of the days torture started upon her over the issue of dowry. He along with Gangadhar Laha went to the house of the accused persons to settle the dispute and advised the accused persons not to torture the victim but in vain. The accused persons generally lived at Boragari but after construction of house at Debipur at a distance of 5/6 minutes, they used to reside in both the houses. The incident took place at about 6.00 a.m., they went to the P.O. at about 6.30 a.m. and found the victim struggling with burn injuries and her child lying beside her. He came to know that fire was set on her person. Subhasish married for the second time within one year of the incident and his father too married for the second time after the death of mother of Subhasish by fire. P.W. 22. M.O. of Burdwan Medical College & Hospital, spoke about admission of the victim and Tumparani in the hospital on 16.07.1990 with burn injuries, death of Tumparani on the same date and leaving of the victim on 28.08.1990 on D.R. Bond. P.W. 21, autopsy surgeon of B.H.U. Hospital, after holding PM examination over the dead body of the victim on 25.10.1990 at about 11.50 p.m. found infected healing and freshly healed burn injuries all over the body except top of the head, bed sore of different sizes on the back, epidermal area etc. and opined that death was due to septicaemic shock, anemia and hypoproteinaemia as a result of infected extensive burn injuries. The burn injuries were of severe nature which reached upto bones and it is very difficult to say that it is a case of typical suicide because the top of head was found unaffected with the burn injuries. He did not give definite opinion regarding cause of death whether suicidal or homicidal or accidental in the absence of any column in the report in U.P.

and neighbouring States. P.W. 23 is the first I.O. who was declared hostile by the prosecution and P.W. 24 is the second I.O. who after completion of investigation submitted chargesheet against the accused persons under Sections 498A/304B IPC. This is the overall evidence on the part of the prosecution.

11. Before we open the discussion, and indeed as paving the way for it, we may shortly dispose of one or two little legal questions as were raised by Mr. Sekhar Basu, Id. Counsel for the appellants, so that the desk may be clear for dealing with the main issues which actually deserve to be dealt with here.

12. Mr. Basu on referring to the formal FIR (Ext. 1) and the evidence of P.W. 10 that as the statement of his sister was recorded by a Magistrate he thought that a criminal case was automatically started contended that though the incident took place on 16.07.1990 at about 06.30 hrs., the FIR was lodged on 26.07.1990 at about 18.15 hrs. and since the said explanation for delay cannot be said to be reasonable, it gives rise to suspicion about the prosecution story. The question of delay in lodging FIR is to be considered in the background of human factors involved. When the victim being seriously injured was rushed to the hospital and the relatives were under shock for sometime and were then mainly concerned with the treatment, as is involved here, the delay in lodging FIR is not at all fatal. In the case on hand, it is the evidence of PW 10 that after reaching Burdwan from Varanasi on 17.07.1990 he was busy in connection with treatment of his sister, whose condition was serious and when he went to Pandua P.S. to get information whether a case was started over the incident of his sister, O.C., Pandua P.S. threatened him that a registered letter was received by the P.S. against them and ultimately when he filed a written complaint (Ext. 2) on 26.07.1990, he reluctantly accepted the same. Delay in lodging FIR when is not deliberate, it is of no consequence, as was held in the case of Saktu v. State of U.P. reported in MANU/SC/0223/1972 : AIR1973SC760 . Considering the above evidence of P.W. 10 the delay in lodging FIR stands sufficiently explained.

13. Mr. Basu next assailed the charge to be defective contending that addition of the words "in cash" in the charge under Section 498A/34 IPC though there is no material in this regard and absence of the words "soon before her death" which is one of the main ingredients of the offence under Section 304B have made the charge invalid and has caused failure of justice. The basic requirement is that the charge must be so framed as to give the accused a fairly reasonable idea of the case he is to face. Sections 215 & 464 Cr.P.C. cure every conceivable type of error and irregularity in charge that can possibly arise. The object of the charge is to give an accused notice of the matter he is charged with. If the necessary information is conveyed to him and no prejudice is caused to him because of the charges the accused cannot succeed by merely showing that the charges framed were defective, as was held in the case of Kalian Singh v. State of Haryana reported in MANU/SC/0125/1971 : 1971CriLJ806 . In judging the question of prejudice, as of guilt, the Court must act with a broad vision and look to the substance and not to the 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, as was observed in Slaney case (supra). To say prejudice has been caused is not enough and it must also be shown in details how and why the prejudice has been caused, as was observed in the case of Sukha v. State of Rajasthan reported in MANU/SC/0026/1956 : 1956CriLJ923 . Where accused knew everything that was being urged and refuted the facts, he cannot be prejudiced. Even where the charge was not correctly framed but it was clear from the answer accused gave under Section 313 Cr.P.C. that he understood exactly the case against him he was not prejudiced in any way. So, addition of the words "in cash" in the charge under

Section 498A/34 IPC and absence of the words "soon before her death" in the charge under Section 304B/34 IPC cannot be said to have caused any prejudice to the accused persons nor it can be any ground for holding the charge defective.

14. To sustain a charge under Section 304B IPC, four ingredients necessary to be established are: (i) Death of a woman must have been caused by burns or bodily injury or otherwise than under normal circumstances, (ii) such death must have occurred within seven years of her marriage, (iii) the woman must have been subjected to cruelty or harassment by her husband or by relatives of her husband in connection with demand for dowry, (iv) such cruelty or harassment is shown to have been meted out to the woman soon before her death, while two ingredients in respect of an offence under Section 498A IPC are (1) the married woman must be subjected to cruelty or harassment and (2) such cruelty or harassment must have been shown either by husband of the woman or by the relatives of her husband.

15. "Cruelty" within the Explanation to the said Section 498A means any wilful conduct which is of such a nature as is likely to drive a woman to commit suicide, or such wilful conduct which is likely to cause grave injury or danger to life, limb or health whether mental or physical of the woman, or harassment to the woman whether such harassment is with a view to coercing her for any property or valuable security. In other words, the expression "cruelty" postulates such a treatment as to cause reasonable apprehension in the mind of the wife that her living with the husband will be harmful and injurious to her life. The provisions of Sections 304B and 498A IPC deal with two distinct offences. Though "cruelty" is a common essential to both the sections, the meaning of "cruelty" has been enumerated in the Explanation to Section 498A, whereas there is no such Explanation to Section 304B. Having regard to the common background to those offences, the meaning of "cruelty or harassment" in Section 304B will be the same as is found in the Explanation to Section 498A. In this connection, reference may be made to the case of *Shanti v. State of Haryana* reported in MANU/SC/0507/1991 : 1991CriLJ1713 . Section 113B of the Evidence Act creates a presumption of dowry death, when the question before the Court is whether the person has caused dowry death of a woman and it is proved by evidence that 'soon before her death' such woman had been subjected to by such person to cruelty or harassment in connection with the demand for dowry. Only when the prosecution proves by cogent evidence that 'soon before her death', the woman was subjected to cruelty or harassment for or in connection with any demand for dowry there can be a presumption that the death is a dowry death. Ordinarily, offence against a married woman is committed within the four corners of a house and normally direct evidence regarding cruelty or harassment on the woman by her husband or relatives of the husband is not available, and so while deciding as to whether the woman was harassed or ill-treated by her husband, or his relatives, various factors and some circumstances can be considered by the Court, e.g. dying declaration of the woman, if any extra-judicial confession by the accused, motive, place, time, demand, if any, physical and mental cruelty shown towards wife, conduct of the husband as also of relatives of the husband etc.

16. So far the first and second ingredients above of Section 304B IPC are concerned, there is no dispute that the marriage of the victim Smriti with accused Subhasish took place on 02.08.1987 and she died on 24.10.1990 at BHU Hospital, Benaras on account of burn injuries i.e. within seven years of her marriage, as is disclosed from the evidence of P.Ws. 1, 10, 11, 13 to 16, 19 to 22.

17. As regards third ingredient above, the allegation of mental and physical torture, according to FIR (Ext. 2), is mainly against father-in-law, mother-in-law and grandmother-in-law over the issue of demand of more dowry, to which husband was

a mere spectator. But the evidence adduced by P.W. 10 is bit otherwise, as he stated that the diamond ring given by them to Subhasish was the real bone of contention since the diamond was of smaller size and after birth of her child (about two years back), the accused persons pressurized them to give a button fitted with diamond. In corss-examination he deposed that the first dispute arose over the demand of winter garments for Smriti and her husband which appears to be self-contradictory since in evidence-in-chief he stated that diamond ring was the main issue for torture upon his sister. Though he stated that the accused persons demanded more dowry, he did not mention of any other dowry. Therefore, it stands that the diamond ring was already given by them to Subhasish at the time of marriage, but the accused persons were dissatisfied with the size of diamond. Undoubtedly, FIR is not an encyclopedia which is expected to contain all the details to be stated in Court, but omission to state an important fact which ought to have been disclosed is a serious lacuna. In the present case, though the FIR contains all the details, none of the above fact of dissatisfaction over the diamond ring which was the real bone of contention, demand of winter garments for Smriti and her husband and demand of gold button fitted with diamond after birth of the female child has been borne out there. It is admitted by him that he did not state to I.O. that the accused persons abused his sister in filthy language. There is no earlier statement, under Section 161 Cr.PC on his behalf, as is evident from the evidence of first I.O. (P.W. 23), that Smriti was tortured both physically and mentally by the accused persons or that the accused persons misbehaved with her just after marriage or that he bore all the expenses of the victim while she was in Burdwan Medical College & Hospital. Moreover, that he bore all the expenses for the treatment of his sister at Burdwan Hospital which is supported by P.W. 13 in different language that her father bore all the expenses for the treatment, is contradicted by P.W. 11 who admitted that almost all the expenses were borne by the accused persons. P.W. 12 did not claim that he bore the expenses for the treatment of his daughter. P.W. 13 in the same tune of her brother P.W. 10 deposed regarding dissatisfaction of the accused persons over the diamond ring as offered by them and after birth of female child of her sister, demand of a gold button fitted with diamond which could not be met up and thus it resulted in increase of the degree of torture. It is her further evidence that during her visit to her father's house on the occasion of Astamangala ceremony, she expressed her unhappiness in matrimonial relations. She was tortured in her matrimonial house mentally and physically and she was assaulted by her mother-in-law and husband which does not appear to be consistent with the testimony of P.W. 10 who deposed that parents-in-law & grandmother-in-law tortured upon her mentally and physically. Subhasish touched a burning cigarette on her hand and on query he reported to her that it was not done wilfully which is absent in the evidence of other witnesses. Here too, there is no earlier statement under Section 161 Cr.P.C. on her behalf, as is evinced from the evidence of P.W. 24, that her sister expressed unhappiness in her matrimonial relations at the time of Astamangala ceremony or that Annapurna and Subhasish tortured upon her both physically and mentally, or that Subhasish touched a burning cigarette on her hand, or that after birth of the female child the unhappiness increased, or that duo to their failure to give gold button fitted with diamond, as demanded by them, the degree of torture upon her sister increased. P.W. 12 stated that they gave a diamond ring as per demand of accused Subhasish and the said diamond ring was the main dispute as it was smaller in size than their expectation. Accused Subhasish tortured her by pulling her hair and other accused persons tortured by using abusive language. Apart from the fact that there is no such earlier statement under Section 161 Cr.P.C. on his behalf, this is an uncorroborated testimony which does not find place in the testimony of any other witness. As per evidence of P.W. 14, the accused persons did not behave well with her daughter and they rebuked her over the issue of dowry given by them at the time of her marriage. That the accused persons misbehaved

with her daughter is absent in her earlier statement under Section 161 Cr.P.C. She nowhere stated that the accused persons were dissatisfied with the diamond ring as the diamond was of smaller size than their expectation or for that reason accused Subhasish tortured upon her by pulling her hair and other accused persons abused her, as deposed by her husband P.W. 12. Had there been any demand on behalf of the accused persons for a gold button fitted with diamond, and any torture upon the victim due to failure to deliver the same, she being the mother and P.W. 11 being the husband of her elder sister would have known it; but there is no such evidence on their part that the accused persons, after birth of the female child, demanded a gold button fitted with diamond from them, and it thus nullifies the story of said demand of gold button fitted with diamond. All that P.W. 11 stated, after marriage the first dispute arose over a diamond ring as the accused persons expressed that the diamond ring was smaller than their expectation. It is his further evidence that father-in-law and grandmother-in-law misbehaved with Smriti. Nowhere he complained of any torture by mother-in-law or husband upon her. He stated that after birth of female child the dispute started as the accused persons expected a male child but there is no such evidence on the part of either P.W. 10 or P.W. 12 or P.W. 14, and the evidence adduced by P.W. 13 is that they expressed their dissatisfaction. It is his further evidence that when Smriti used to visit his house she used to cry as she was subjected to torture by the accused persons which appears to be self-contradictory since earlier he stated that father-in-law and grandmother-in-law misbehaved with her. Nevertheless, nowhere his wife (P.W. 13) stated that during the visit of Smriti to her house she used to cry on account of torture by the accused persons nor there is any earlier statement under Section 161 Cr.P.C. on his behalf that the accused persons tortured upon her in her matrimonial house, or that first dispute arose over a diamond ring or that her father-in-law misbehaved with her over the issue of dowry, or Smriti during her visit to his house used to weep on account of torture by the accused persons, or the accused persons were dissatisfied due to birth of a female child. It is the evidence of P.W. 13 that the Annaprasan ceremony of her sister's daughter was performed in a gorgeous way and they attended such ceremony. Though this issue is not so vital in the present case as dissatisfaction over the issue of birth of female child does not fall within the purview of cruelty, it may be mentioned that had there been any discontent for birth of female child, the first rice ceremony would not have been performed in so gorgeous manner. As per evidence of P.W. 20, who claims to be a member of local Gram Panchayat since 1988, initially the accused persons behaved well with the victim, but after passing of the days torture started upon her over the issue of dowry. He along with Gangadhar Laha went to the house of the accused persons to settle the dispute and they advised the accused persons not to torture upon the victim but in vain. The said Gangadhar has not been examined. He cannot recollect the date of his visit to the house of accused persons with Gangadhar. To a suggestion put to him that he was not a Panchayat member in 1990, he denied. It is the specific evidence of P.W. 5 that at the time of incident he was the Pradhan of that area and during his tenure none complained to him against the accused persons regarding their misbehaviour or torture upon Smriti. If P.W. 5 was the Pradhan of local G.P., why P.W. 20 and Gangadhar suddenly went there and at whose call has not been disclosed. There is also absence of earlier statement under Section 161 Cr.P.C. on his behalf that the dispute arose over payment of dowry or that the accused persons tortured upon the victim. So, the evidence of P.W. 20 does not inspire confidence.

18. Mr. Safiullah on referring the case of Ashok Kumar v. State of Rajasthan reported in MANU/SC/0372/1990 : 1990CriLJ2276 , contended that, in dowry death motive is inherent and what is required by the; Courts is to examine as to who translated it into action as motive for it is not individual but of family. Referring to the evidence of P.Ws. 10 and 23 (first I.O.) and Exts. 4, 9 & 20 he further contended that after

reaching Burdwan from Benaras on the following date of incident, P.W. 10 went to Pandua P.S. for getting information whether any case was started over the incident of his sister, but O.C., Pandua P.S. threatened him intimating that a registered letter was received by the P.S. against them and thereafter on 26.07.1990 O.C. reluctantly accepted the written complaint. Though a copy of letter addressed by P.W. 10 to S.D.O., Burdwan Sadar requesting for permission to shift the victim from Burdwan to BHU Hospital, Varanasi for better treatment, indicating thereby presence of P.W. 10 at Burdwan, was received by the P.S. on 06.10.1990, P.W. 23 intentionally dropped the letter dated 13.09.1990 (Ext. 9) requesting P.W. 10 for production of documents on 06.10.1990 itself to cause unnecessary delay. The said letter, however, was replied vide Ext. 10. Within a span of about three months excepting arrest of the parents-in-law and grandmother-in-law and recording statements of P.W. 10, P.W. 20 and some unimportant witnesses P.W. 23 did nothing nor he took any step for getting the dying declaration of the victim who was at Burdwan Hospital for about one month 12 days, recorded, for which the investigation was made over to Detective Department and P.W. 23 was declared hostile by the prosecution due to his above conduct demonstrating hostile attitude. As regards P.W. 24, Mr. Safiullah submitted, after taking up investigation on 27.12.1990 he first visited the house of the accused to examine accused Suhhasish the reason for which is obscure and examined a number of important witnesses after lapse of a considerable period without any explanation for such delayed examination indicating thereby his conduct as suspicious, and as such much importance should not be given upon the omissions in recording the statements of witnesses faithfully, in support of which he relied upon the cases of Ashok Kumar (supra), Amrik Singh v. State of Punjab reported in MANU/SC/0217/1998 (S.C.) and Alamgir v. State (Delhi) reported in MANU/SC/0072/2003 : 2003 SCC (Cri) 165. Amrik Singh case (supra) is distinguishable where it was observed that merely because witnesses have not specifically stated in their statements recorded by police under Section 161 Cr.P.C. as to which blow was given by which accused, their evidence cannot be discarded. Alamgir case (supra) is also distinguishable as there a relevant fact was not mentioned in the statement under Section 161 but stated before Court by a witness and it was held that omission on the part of the police officials would not take away nature and character of the evidence and it would not be a ground for rejecting the evidence of P.W. on that aspect if his evidence is otherwise creditworthy and acceptable.

19. Indubitably, defective investigation is not fatal to prosecution where ocular testimony is found credible and cogent. At the same time, it is also well-settled that benefit of a defective investigation cannot go to the prosecution, as was held in the case of Chandrakant Laxman v. State of Maharashtra reported in MANU/SC/0093/1973 : 1974CriLJ309 . Statements to police are meant to be brief and omission amounts to contradiction when it is in respect of a vital point, but omission to minor details cannot be utilized as contradiction. Merely because P.W. 24 after taking up investigation first visited the house of the accused which is the P.O. and examined some witnesses at a delayed stage it will not justify to make a provision abortive. So, even if the above contention of Mr. Safiullah is considered in part and some lenient view is taken in respect of P.Ws. 10 & 20 only as they were examined by the first I.O. (P.W. 23) who was declared hostile, it hardly makes any difference since according to the evidence of P.W. 10, the first dispute arose over the demand of winter garments for his sister and her husband, second one is dissatisfaction over the issue of diamond ring on account of the diamond being of small size, third one is also dissatisfaction due to birth of a female child, as deposed by P.W. 13, and fourth dispute is over the demand of a gold button fitted with diamond, none of which has been reflected in the FIR. Regarding first dispute there is no corroborative evidence. As regards second dispute though it is not a demand but a matter of dissatisfaction,

the evidence is contradictory to each other, as discussed in paragraph 17 above. Regarding third dispute, it is a case of dissatisfaction, in respect of which P.Ws. 11, 12 & 14 are silent. As regards fourth dispute which arose after birth of the female child i.e. two years back from the time of death of the victim as the said child, as revealed from the bed-head ticket, was aged about two years at the time of her death, it has been negated in the said paragraph 17. That apart, in the absence of any earlier statement under Section 161 Cr.P.C. on the part of P.Ws. 11 to 14, as disclosed from the evidence of P.W. 24, their evidence to that extent, as pointed out in paragraph 17 being contradiction due to omission on vital points may be excluded from consideration.

20. Mr. Basu, on referring the case of Sunil Bajaj v. State of M.P. reported in MANU/SC/0631/2001 : 2001CriLJ4700 , submitted that P.Ws. 1 & 7 never heard about any misbehaviour of the accused persons towards the victim and P.Ws. 17 to 19 expressed their ignorance as to how the accused persons behaved with the victim thereby necessarily suggesting that had there been any misbehaviour to or torture upon the victim it can be expected that they being neighbours, would have known it, but none of them came forward to support the prosecution story, which appears to be appreciable.

21. Mr. Basu, on referring to the evidence of P.W. 24 contended that though he took up further investigation of the case on 27.12.1990, he examined and recorded statements of P.Ws. 11 to 16 on different dates at a belated stage ranging from 43 days to 514 months after and so no reliance should be placed upon their evidence. The belated examination of witnesses by police is not fatal if explanation offered is cogent, but if no explanation is given, the evidence of those witnesses become unreliable, as was held in the case of Balakrushna v. State of Orissa reported in MANU/SC/0075/1971 : 1971CriLJ670 . Similar is the decision in Awadhesh v. State of M.P. reported in 1989 C Cr. LR (SC) 100, where it was held that examination of witnesses by the police long after the occurrence should be discarded. Here, no explanation for belated examination of those witnesses having been offered by the prosecution, it creates a situation warranting the Court not to place much reliance upon the testimony of those witnesses.

22. In regard to fourth ingredient above, the incident, as stated earlier, took place on 16. 07. 1990 at about 6.30 hrs. and the victim died at B.H.U. Hospital, Benaras on 24.10.1990 at about 6.05 p.m.

23. There were as many as seven dying declarations, out of which the first two were recorded (Exts. 11 & 13) and the balance oral, stated to have made on different dates and time, such as before P.W. 10 on 17.10.1990 at about 4.30 p.m. at Burdwan Medical College & Hospital, before P.W. 16 (who being a family friend came to B.H.U. Hospital with P.W. 10 from Benaras) on 17.07.1990, before P.W. 1, 3 at the said hospital at noontime on the date of incident, before mother P.W. 14 on or about 18.07.1990 and lastly before P.W. 15 at B.H.U. Hospital, Benaras. In relation to dowry death, the circumstances showing the existence of cruelty or harassment to the deceased are not restricted to a particular instance but normally refer to a course of conduct. Such conduct may be spread over a period of time. If the cruelty or harassment or demand for dowry is shown to have persisted, it shall be deemed to be 'soon before death' if any other intervening circumstance showing the non-existence of such treatment is not brought on record, before such alleged treatment and the date of death. Proximate and live link between the effect of cruelty based on dowry demand and the consequential death is required to be proved by the prosecution. The demand of dowry, cruelty or harassment based upon such demand and the date of death should not be too remote in time which, under the

circumstances, be treated as having become stale enough. The expression 'soon before' is a relative term which is required to be considered under specific circumstances of each case and no strait-jacket formula can be laid down by fixing any time limit. The expression is pregnant with the idea of proximity test. The term 'soon before' is not synonymous with the term 'immediately before'. It contemplates the reasonable time to be understood and determined under the peculiar circumstances of each case, as was held in the case of Kans Raj reported in MANU/SC/0296/2000 : 2000CriLJ2993 . Similar is more or less the holding in the case of Kamesh Panjiyar v. State of Bihar reported in 2005 SCC (Cri) 511. In the present case, Ext. 11 is a statement of the victim Smriti recorded by P.W. 23 (first I.O.) under Section 161 Cr.P.C. on 18.08.1990 at Burdwan Medical College & Hospital which runs as follows: "I myself set fire. My grandmother-in-law set fire on my back after pouring kerosene oil. Off and on there was quarrel. I am not in a position to speak further." Ext. 13 is another dying declaration recorded by Mr. M.M. Bhattacharya, Id. Executive Magistrate, Burdwan on 17.07.1990 at about 12.55 hrs. at the said hospital which is reproduced hereunder: "My grandmother 'Buri', whose name I cannot say, used to torture upon me. She used to give me trouble over the issue of food; often she used to abet me to commit suicide. Yesterday i.e. on 16.07.1990 while I was cooking in the morning at my in-law's house wearing a synthetic sari and my daughter Tumpa, aged about two years, was by my side, the said "Buri", whom I used to call 'Thakuma' poured kerosene oil on me and such kerosene oil was sprinkled on my daughter. Before I could understand the situation the said Buri suddenly lighted a matchstick and threw on me. My husband was not at house at that time and as I heard he was at Debipur. There was a bucket of water in front of me, and as I was ablaze I poured the said water on my person. I raised a row. My daughter was also ablaze. The neighbours rushed to our house. Later I was removed to this hospital. I do not blame any person other than the said Buri. My husband loves me, he is innocent."

24. The evidence of P.W. 10 in substance is same as he deposed that on his query as to the reason for the injury, his sister reported that her grandmother-in-law viz. Bangabala poured kerosene oil on her back and set a burning stick on her person for which she as also her child sustained burn injuries. Similar is also the evidence of mother P.W. 14. The evidence of P.W. 13 is bit different as he stated that on her query, the victim informed that while she was feeding her baby she felt a cold sensation on her back. She found that she was ablaze, she got a smell of kerosene oil and found Annapurna and Bangabala standing nearby with matchstick in their hands. If the matchsticks were in the hands of Annapurna and Bangabala the story of her being ablaze is incompatible. Though P.Ws. 15 & 16 deposed to the same tune of P.Ws. 10 & 14, P.W. 15 added that the victim requested him that her parents-in-law, grandmother-in-law and husband should not be spared, while P.W. 16 stated that at the time of setting fire by grandmother-in-law, her parents-in-law and husband were present. Presence of mother-in-law, as deposed by P.W. 13 and presence of parents-in-law and husband as stated by P.W. 16 appear to be subsequent improvement which do not find place in the evidence of other witnesses. Similarly the request to P.W. 15 to see that parents-in-law, grandmother-in-law and husband are not spared is an uncorroborated testimony.

25. Mr. Safiullah on citing the case of Jogendra Nahak v. State of Orissa reported in MANU/SC/0441/1999 (SC) which stands for the proposition that Section 164 Cr.P.C. does not empower a Magistrate to record statement of witness on his request even though not asked for by investigating agency, in his usual fairness submitted that since the said Ext. 13 is the dying declaration, the above decision has no application here but under whose direction or at whose instance the said recording of dying declaration of the victim was done by the Id. Magistrate is obscure, and as such the

same may be excluded from consideration. Mr. Basu, on the other hand, contended that though the said Magistrate was a chargesheet witness summons could not be served upon him due to non-availability of his address, for which the defence prayed for issuing summons on him under Section 311 Cr.P.C. and on 13.12.2000 the above document which was forwarded by SDO., Burdwan vide letter dated 18.7.1990 to Inspector-in-charge, Burdwan PS, was marked exhibit on consent of the parties, and as such the question of excluding the above important document from consideration does not arise, and there appears to be enough force in such contention. The substance of the above document appears to be consistent with the evidence of P.Ws. 10, 14, 15 & 16 barring the portion of P.Ws. 15 & 16 as pointed out in the preceding paragraph. P.W. 10 also deposed about recording of statement of his sister by a Magistrate. If a dying declaration is found true, voluntary, conscious made with normal understanding and the maker was in fit physical condition and if it is free from any embellishment or distortion it can be acted upon. Accordingly, the aforesaid Ext. 13 which was recorded by the Id. Executive Magistrate and is corroborated in substance by the testimony of independent witnesses the same may be accepted. This is another important piece of evidence which strengthens the above finding relating to absence of cogent evidence regarding demand of dowry and cruelty or harassment upon the victim by the accused persons.

26. It is the evidence of P.W. 13 that during the visit of her sister to her father's house on the occasion of marriage ceremony of her youngest sister about two months before the incident, she refused to go back to her matrimonial house to avoid torture by the accused persons as she was threatened with dire consequences. There is no such evidence on behalf of either her father P.W. 12 or mother P.W. 14 that the victim refused to go back to her in-law's house. That apart, in absence of any earlier statement under Section 161 Cr.P.C. on her behalf in this regard, as is disclosed from the evidence of P.W. 24, the above evidence being a contradiction due to omission on vital point may be excluded from consideration. It is her further evidence that her sister came to her house with her child in a torn cloth and dirty dress a week before the incident for the last time, and on her query she came to learn that her husband tried to kill her by throttling and that she began to cry and refused to go back to her in-law's house. She stayed there for 5/6 days and thereafter when an employee of the accused persons came to bring her back, she refused to go and thereafter she was persuaded to return there. The evidence of P.W. 11 in this regard is that Smriti came to their house before seven days of the incident for the last time, wearing a sari with her baby in dirty garments and informed P.W. 13 that she was compelled to come there as the accused persons tortured her. After 3 days when an employee of the accused persons came to his house for taking her back, she did not agree to go back but ultimately she was persuaded to go back which does not appear to be in conformity with above evidence of P.W. 13. Here too, there is absence of earlier statement of P.W. 13 that the victim came to her house about 6/7 days prior to the incident with a torn cloth with her child dressed with dirty garments and reported that her husband tried to kill her by strangulation or throttling, or that she refused to go back to her matrimonial house with the employee of the accused persons. Similarly, there is no earlier statement on behalf of P.W. 11 that before 7 days of the incident Smriti came to his house wearing a torn and dirty cloth and informed that she had to come there on account of torture by the accused persons and after 3 days when an employee of the accused persons came to his house for taking her back, Smriti declined to go back. Thus the above evidence too being a contradiction due to omission cannot be taken into account. P.W. 14 deposed that when Smriti came to her house for the last time two months back of the incident on the occasion of marriage ceremony of her youngest daughter, on her query she came to learn that the accused persons did not behave well with her and tortured her both mentally and physically which is also absent in her earlier statement and accordingly the same

cannot be taken into consideration due to contradiction on account of omission on vital point.

27. Therefore, there is no cogent and reliable evidence-on-record to show that the victim was subjected to cruelty or harassment by the accused persons over the issue of demand for dowry soon before her death or at any time after her marriage. As the materials-on-record including the dying declaration head to suggest, cruelty or harassment was meted out to the victim by grandmother-in-law Bangabala, since deceased, who committed her murder by pouring kerosene oil followed by setting fire on her person and no other member of the family can be accused for the same.

28. In the premises, in the light of the above discussion, the prosecution cannot be said to have brought home the charge against the accused persons beyond all reasonable doubt, and as such all the accused persons are found not guilty.

29. Accordingly, the appeal be allowed on contest. The impugned order of conviction and sentence passed by the Id. Court below be set aside. The accused persons be acquitted of the charge under Sections 304B/34 & 498A/34IPC and they be set at liberty at once.

30. Alamats, if any, be destroyed after the period of appeal is over.

31. Let a copy of this judgment along with the LCR be sent down at once to the Id. Court below.

D.P. Sengupta, J.

I agree.

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