GAHC010003082021

In the Gauhati High Court

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

Crl. APPl. No. 6/2021

Md. Abul Kalam Sk.
S/O- Md. Moksed Ali
R/O- Vill.- Sadhu Bhasha Pt.-I
P.S. Gouripur
Dist.- Dhubri
Assam

.....…… Appellant

VERSUS

The State Of Assam And Anr.
Rep. by P.P.
Assam.
2:Md. Mokbul Hussain
S/O- Late Abdur Rahman
R/O- Vill.- Amervita Choto Barjani
P.S. And Dist.- Dhubri
Assam

.....…… **Respondents**

BEFORE
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Advocate for the Appellant : Mr. B.D. Konwar, (Sr. Advocate)

Advocate for the Respondent : Mr. M.P. Goswami,learned Addl. P.P.
Mr. A.T. Sarkar (respondent-2)

Date of Hearing : **08.12.2023**

Date of Judgment : **19.01.2024**

JUDGMENT & ORDER (CAV)

1. Heard Mr. B.D. Konwar, learned Senior Counsel for the petitioner assisted by Ms. V.V. Thanyu. Heard Mr. M.P. Goswami, learned Additional Public Prosecutor representing the State respondent no. 1 and Mr. A.T. Sarkar, learned counsel for the respondent no. 2/informant.

2. In appeal, the appellant has challenged the judgment and order dated 27.11.2020 passed in Sessions case No. 139/2017 by the learned Sessions Judge, Dhubri, whereby the learned Judge convicted Abdul Kalam Sk. (hereinafter referred to as the appellant or the accused) for the offence under Section 304(B) of the Indian Penal Code, 1860 (IPC for short) and sentenced him to undergo rigorous imprisonment for ten years. The period of custodial sentence is set off with the period of detention of the appellant during investigation as well as trial.

3. The genesis of the case was that the appellant was married to Minara Khatun on 05.02.2014 and their marriage was registered on the same day. Two months after their marriage the appellant and his family members subjected Minara Khatun (hereinafter also referred to as the deceased or the victim) to cruelty to meet their illegal demand of dowry. They also attempted to commit murder of the victim. A bichar (meeting) was also held and the victim continued with her marital life. However, on 29.07.2014 at about 09:00 p.m., the appellant and his family members relentlessly assaulted the victim and killed her as she failed to meet their illegal demand of dowry. The appellant at about 12:00 o'clock midnight informed Pinku Haque about the death of the victim. Mokbul Hussain (hereinafter the

informant) is the victim's and Pinku Haque's elder brother.

4. An FIR regarding this incident was lodged with the police at Athani police outpost and a GD Entry No. 419 dated 30.07.2014 was registered and the FIR was forwarded to the police station and registered as Gauripur P.S. Case No. 602/2014 under Section 120(B)/304(B) of the Indian Penal Code (IPC for short).

5. The Investigating Officer embarked upon the investigation. He went to the place of occurrence, prepared a sketch-map and recorded the statements of the witnesses. He also held inquest and thereafter, forwarded the body for autopsy. On conclusion of investigation, charge-sheet was laid against the present appellant, under Section 120(B)/304(B) IPC, whereas, the appellant's family members Abdul Salam, Moksed Ali, Monuara Bibi and Meherjan were not forwarded for trial. On appearance of the appellant, copies were furnished and this case was committed for trial.

6. At the commencement of trial, after hearing both sides, a formal charge under Sections 304(B)/302 IPC was framed and read over and explained to the appellant, who abjured his guilt and claimed innocence.

7. To connect the appellant to the crime, the prosecution adduced the evidence of 7(seven) witnesses including the Medical Officer (M.O in short) and the I.O and the Court also examined Abul Laice Choudhury as CW-1. The appellant cross-examined the witnesses to refute the charges. On the incriminating materials projected through the evidence by the prosecution, several questions were asked to the appellant, who mechanically denied the allegations in an evasive manner.

<u>Submissions</u>

8. The learned counsel for the appellant laid stress in his argument that this is not a case of dowry death. There is no evidence of cruelty. The related and interested witnesses have deposed that the victim, Minara Khatun was subjected to cruelty by her husband and her family members, but, there is no instance that the victim or any of her family members have lodged any FIR relating to the cruelty meted out to the victim. It is also submitted that it is mentioned in the FIR that the victim's marriage was solemnized with the appellant on 05.02.2014, but not a single witness testified that the marriage of the victim was solemnized on 05.02.2014. It has surfaced through the evidence that after two months of her marriage, the victim was subjected to cruelty and this timeframe cannot be considered as "soon before her death". If a village meeting was held as stated by the witnesses, not a single member present in the meeting was produced as a witness. It is submitted that major contradictions could be elicited through the cross examination of the informant, PW-4 vis-a-vis, the cross-examination of the I.O. The informant never mentioned before the I.O that the appellant demanded Rs. 1,00,000/- from his sister and this was affirmed by the I.O, PW-7.

9. It is contended that, for the first time the allegation of demand of dowry was made in the court and this casts a shadow of doubt over the veracity of the evidence. After the death of the victim, a false allegation was made against the appellant that he had demanded dowry and subjected the victim to cruelty. The prosecution has failed to prove beyond a reasonable doubt that the victim was subjected to cruelty 'soon before her death'. The FIR was written by another person Sri Saiful Islam and the scribe of the FIR was not produced by the prosecution to prove that the FIR was read over to the PW-4, who denied that he was privy to the contents of the FIR. As the prosecution failed to prove the foundational facts there can be no presumption under section 113(B) of the Indian Evidence Act, 1872 (the Evidence Act

for short). It is contended that the learned trial court heavily relied on the presumption under section 113(B) to bring the appellant to book.

10. It is further contented by the learned counsel for the appellant that the injuries are not indicative of smothering. The Medical Officer in a nonchallant manner stated that death was due to smothering. The injuries were minor injuries like abrasions over forehead, left infra orbital area, mandible wrist and lower leg. In case of smothering by any foreign substance like pillow or any other substance, injuries will be detected on the face of the victim and not on her leg, hand or forehead. The injury No. III, described under the heading "Thorax and heart" clearly depicts that the chambers of the heart were empty which indicates that the victim died of heart attack and not because of smothering. The opinion of the Medical Officer that death was due to asphyxia as a result of smothering is not acceptable.

11. Unlike the submission of the prosecution, the evidence of PW-6 cannot be relied upon, as PW-6 was not interrogated by the I.O during investigation and the learned counsel for the appellant relied on the decision of Hon'ble the Supreme Court in ***Ram Lakhan Singh*** **and others vs. State of Uttar Pradesh**, reported in ***AIR 1997 SCC 1936***. It is submitted by the learned Counsel for the appellant that the learned trial court erroneously held the appellant guilty of offence under section 304(B) IPC and he deserves to be acquitted in connection with this case.

12. Per contra the learned counsel for the respondent No. 2 laid stress in his argument that "*soon before her death*" is a relative term depending on the facts and circumstances of each case. In this case, the victim died within five months of marriage, and thus it can be held that the victim was subjected to cruelty "*soon before her death*". It is submitted that PW-4, 5 and 6 have mentioned that Rs. 1,00,000/- was demanded by the appellant and his family members and as the victim was unable to pay Rs. 1,00,000/-, she was subjected to cruelty by the appellant and his family members. This evidence of PW-4, 5 and 6 was not contradicted. Although the learned counsel for the appellant kept harping on the fact

that PW-4, 5 and 6 are related witnesses, their evidence that the victim was subjected to cruelty cannot be ignored. The evidence of PW-4 and PW-5 that the victim was subjected to cruelty was not rebutted by the I.O. The Medical Officer has proved the post-mortem report. It is evident that the victim was smothered. An act of smothering is always homicidal in nature because smothering can be caused only by another person. The M.O. categorically stated that death was *ex-facie* a result of smothering sustained by the deceased and it was a case of homicide. As suggested by the learned counsel for the appellant, this cannot be a case of heart attack only, as it was detected by the Medical Officer that the left chamber and right chamber of the heart were empty, when several injuries were detected on the victim's body. In cases of heart attack, usually no injuries are detected on the dead body. Here in this instant case, it is apparent that the victim sustained several injuries. There were bruises on her right hand and left hand as noticed by the Magistrate, who had conducted inquest. The Medical Officer detected abrasion on the forehead.

Abrasion on left infra orbital area,

abrasion on left angle of mandible,

abrasion on left wrist.

Bruise on left leg lower third horizontally placed, Reddish in colour.

13. The sizes of the injuries cannot be said to be negligible. Abrasion on forehead measuring 1 cm X 1 cm cannot be dismissed as negligible. The abrasion on left infra orbital area measuring 1.5 cm X 1 cm can neither be considered as negligible nor as a minor injury. The victim died in the accused person's house under unnatural circumstances. Earlier, on the same day, the victim was seen working and she appeared to be healthy as stated by the I.O, while quoting the statement of the witness Jabed Ali under section 161 Cr.P.C. (inadmissible).

14. It is contended by the learned counsel for the respondent No. 2 that the argument by

the learned counsel for the appellant that for offence under 304(B) IPC, the accused is not liable to discharge his burden under Section 106 of the Evidence Act to rebut the circumstantial evidence against him cannot be accepted. It is submitted that like a case under section 302 IPC, even in a case under section 304(B) IPC, the accused has to discharge his burden under Section 106 of the Indian Evidence Act and explain why the victim was found dead in his house with injuries which were homicidal and ante-mortem in nature. In a case of domestic violence, seeking for direct evidence and evidence of independent witnesses will lead to miscarriage of justice.

15. The learned Additional P.P. Mr. M.P. Goswami, laid stress in his argument that although PW-4, 5 and PW-6 are related witnesses, they cannot be branded as interested witnesses. Their evidence inspires confidence. The statement of the accused under Section 313 Cr.P.C was evasive and he mechanically denied his involvement in the crime. When, he was asked how his wife sustained the injuries detected by the Medical Officer or injuries which were visible, no explanation was offered by the accused. Report cannot be disputed at this juncture at the stage of appeal. The cross-examination of M.O. PW-3 clearly reveals that the medico legal report was not at all disputed by the defence counsel. At this juncture, it cannot be disputed that this case was not a case of homicidal death, when at the stage of trial, it was accepted that this was a case of homicidal death. The victim was found dead under mysterious circumstances in her house and she was sleeping with the appellant in the same room. None other than the appellant was responsible for the victim's death. The learned Addl. P.P. has relied on the decision of Hon'ble the Supreme Court in ***Mustafa Shahadal Sheikh versus State of Maharashtra on 14.09.2012 in Criminal Appeal No. 406/2008***.

16. The learned counsel for the respondent No. 2 and the learned Addl. P.P. has prayed to dismiss the appeal stating that the appeallant was dealt with leniently by the learned trial Court.

Decision of the Trial Court

17. The learned trial Court held that the deceased Minara Khatun died otherwise than under normal circumstances within 6 months of her marriage. She was married to the appellant on 05.02.2014 and the incident occurred within 6 months i.e. on 29.07.2014. It was held that the doctor's opinion clearly discloses that death was homicidal death and the victim was smothered. The internal organs were found congested. Left angle of mandible on the person of the deceased was tainted with abrasion with bluish colouration of lips and nail beds indicating central cyanosis. It was held by the learned trial Court that, although out of eight [8] witnesses examined by the prosecution, PW-4 and PW-5 are related to the deceased, as they are brothers of the deceased, the evidence of PW-4 and PW-5 that the victim was subjected to cruelty was not rebutted by the defence in any manner.

It was noted by the trial Court that PW-4 did not mention in his earlier statement that an amount of Rs. 1 lac was demanded from Minara. Despite this omission, the evidence of the witnesses that the victim was subjected to cruelty remained uncontradicted. It was held by trial Court that the evidence of PW-4, PW-5 and PW-6 clearly depicts that within the 6 months of their marriage, the victim was subjected to cruelty and then she was taken back to her parental home, but after a few days the appellant came to the victim's parental home with his father and settled the dispute amicably and took back the victim to her matrimonial home.

It was held that soon before her death the victim was subjected to cruelty by the appellant as the victim was unable to meet his illegal demand of dowry and within six [6] months of her marriage, the victim was smothered to death. The PW-2 categorically stated that the appellant was present at home and he was sleeping with the victim on the same bed. No explanation was

offered by the appellant as to why the victim who was sleeping on the same bed was found with injuries which resulted in her death. It was observed that mere denial of the appellant in his statement u/s 313 Cr.PC in a mechanical manner relating to his involvement in the crime cannot be treated as explanation discharging his burden. Onus has to be discharged by leading proper and cogent evidence. It was held by the learned trial Court that the prosecution was able to prove the case against the appellant beyond all reasonable doubt u/s 304B IPC but the appellant was acquitted from the charges u/s 302 IPC. On conjoint reading of Section 113B of the Evidence Act and Section 304B IPC, along with Section 114-Illustration-h of the Evidence Act, the appellant was held to be guilty of the offence u/s 304B IPC.

18. Now the question that falls for consideration is, whether the trial Court erred by convicting the appellant u/s 304B IPC?

19. To decide this case in its proper perspective, the evidence is reappraised.

Smothering

20. The learned counsel for the appellant emphasized through his argument that the medical evidence cannot be relied upon. The cause of death appears to be heart attack and not smothering as no injuries were sustained by the victim which were suggestive of smothering.

21. In the instant case, the Medical Officer Dr. N.M. Ahmed deposed as PW-3 that on 30.07.2014, while he was posted at Dhubri Civil Hospital, he performed post-mortem examination on the dead body of Minara Khatun, aged 19 years on police requisition and found the following:-

"Bluish colouration of lips and nail beds, indicating presence of central cyanosis. Rigor mortis present.

(1) Small abrasions over forehead, two in numbers. The sizes were 1 cm x 1 cm.

(2) Small abrasion over left intra orbital area. The size was 1.5 cm x 1 cm.

(3) Abrasion over left angle of mandible. Size was 1.5 cm x 1 cm.

(4) Abrasion over left wrist. Size was 2 cm x 1 cm, horizontally placed over dorsal aspect.

(5) Bruise over left leg, lower third horizontally placed. Reddish in colour. On internal examination, the internal organs were found congested."

According to him, the cause of death was asphyxia as a result of smothering sustained by the deceased and It was a case of homicide.

He proved the post mortem report as Exhibit-1. Exhibit-1(1) as his signature. The post mortem report was endorsed by Joint Director of Health Services, Dhubri as Exhibit-1(2).

22. Although the learned counsel for the appellant has disputed the post-mortem report at this stage, the cross-examination of the MO reveals that he was not cross-examined relating to the opinion of the homicidal death.

23. It has been argued by the learned counsel for the informant and by the learned Addl. PP that at this juncture the appellant cannot dispute the cause of death. It is apparent that death was caused by smothering as injuries were found on the mandible of the victim. Abrasions were found on her forehead and infra orbital area indicating smothering. The infra orbital area, the area of over left angle of mandible and the abrasions on the forehead clearly depicted that the victim sustained injuries on her face while she was smothered to death. It is hereby held that there is no dispute that death was homicidal in nature and the autopsy report marked as Ext.-1 clearly discloses that the victim died as a result of smothering and the death was ante mortem in nature.

Analysis

24. The independent witness in this case is PW-1 Sri Roham Ali and he deposed that the appellant was his neighbour. On the night of the incident, at about 12'O clock (midnight), the appellant's father Moksed Ali came to his house and informed him that after dinner, the deceased went to bed, but later

she was found to be dead. Then he (PW-1) went to the appellant's house and noticed that Minara Khatun had passed away. He also admitted in his cross-examination that the appellant was his neighbour.

25. The other independent witness Sri Jaher Ali deposed as PW-2 that the appellant is distantly related to him. Deceased Minara Khatun was the appellant's wife. On the night of the incident, at about 12'O clock, the appellant's father came to his house and informed him that Minara Khatun had passed away. He then went to the appellant's house and noticed that Minara Khatun was no more. He did not know how Minara Khatun passed away. He was cross-examined by the prosecution after he was declared a hostile witness. He denied that he had mentioned before the police in his initial statement that he saw the appellant quarrelling with the deceased and assaulting her. He denied that he stated before the police that he saw Minara Khatun working in the house during the day time and she appeared healthy, and he was surprised on learning about the death of the deceased and he informed the police that the appellant was responsible for her death as she was sleeping with the appellant on the same bed at the time of the incident. In his cross-examination he mentioned that he saw the victim in her house during the day time.

26. Sri Mohidhar Das was the IO who deposed as PW-7 and affirmed that the PW-2 stated u/s 161 Cr.PC that on the day of the incident, he saw Minara Khatun working in the house during the day time and she looked healthy, and he was surprised to learn about her death at night and the appellant was responsible for her death, as, at the time of the incident he was sleeping with the victim on the same bed.

27. The statement of this witnesses u/s 161 Cr.PC is however not taken into consideration while analyzing the evidence. The evidence of this hostile witness and the evidence of the other independent witness (PW-1) proves that on the night of the incident, the appellant's father went to their house at 12 O' Clock and informed them that Minara Khatun had passed away. PW-2 also admitted in his cross-

examination that he saw the victim during the day time.

28. The informant Sri Mokbul Hussain deposed as PW-4 that he lodged the FIR Ext.-2. He proved his signature on the FIR as Ext.-2(1). The marriage between his younger sister Minara Khatun and the appellant was solemnized about 7 months ago (from 02.11.2017). After a few days the appellant demanded dowry of Rs. 1 lac from his sister Minara Khatun. As they could not provide Rs. 1. lac, the appellant assaulted his sister. Then he brought back his sister to their house. After a few days the appellant again came to their house with his father and settled the matter amicably and took back his sister to her matrimonial home. On the day of the incident, his sister Minara Khatun called him over phone at about 9 PM. On the same night, at around 11 PM, the appellant informed him over phone that his sister Minara Khatun passed away. Then he went to the Gauripur police station to lodge an FIR, but the police asked him to go to Athani Police Outpost to lodge the FIR. Then he went to Athani Police Outpost and along with the police of Athani outpost, he went to the appellant's house. In the appellant's house he saw his sister's deadbody with injuries on her body.

This witness was cross-examined and the contradiction that could be elicited through the cross-examination of this witness vis-a-vis the cross-examination of the IO, PW-7 is that he did not state before the IO that the appellant demanded Rs. 1 lac from his sister Minara Khatun. This omission has been affirmed by PW-7 (IO).

In his cross-examination PW-4 also stated that he could not remember the date of the village meeting held with the appellant and his father.

29. The learned counsel for the appellant laid stress in his argument that the evidence of PW-4 was contradicted by the evidence of PW-7. PW-7 admitted that PW-4 never mentioned that the appellant demanded Rs. 1 lac. PW-4 also did not disclose about a village meeting before PW-7.

30. When an ingenious counsel places his argument, the grain has to be separated from the chaff. The

evidence of PW-4 clearly reveals that the appellant assaulted his sister Minara Khatun, but he was not cross-examined relating to the cruelty meted out to his sister, nor was the other witness, PW-5 cross-examined about the cruelty meted out to his sister. The evidence of the brothers, PW-4 and PW-5 that Minara Khatun was assaulted and subjected to cruelty was not rebutted or contradicted by the cross-examination of PW-4 and PW-5 vis-à-vis the cross-examination of the IO.

31. PW-5 is Pinku Hoque. He is the younger brother of PW-4 and the brother of the deceased Minara Khatun. He deposed that the victim was subjected to cruelty by her husband and so they brought back Minara Khatun to their house. The appellant also demanded money and he came to their house. As they did not have sufficient means, they could not provide money to the appellant. After a few days the appellant came to their house and took back their sister Minara Khatun to his house and thereafter the appellant committed murder of the deceased Minara Khatun. This witness was cross-examined in *extenso*. No contradiction could be elicited through the cross-examination of PW-5 as per Section 145 of the Evidence Act qua Section 162 of Cr.PC. It is thus held that the un-rebutted evidence of PW-5 clearly proves beyond a reasonable doubt that the victim was subjected to cruelty by the appellant within 6 months of her marriage to the appellant. The appellant also demanded money from the victim and the victim's family was unable to meet the illegal demand of dowry. The evidence of PW-4 was corroborated by the evidence of PW-5. PW-5 of course did not mention that the appellant demanded Rs. 1 lac, but the evidence of PW-4 and PW-5 that the appellant had demanded money remained uncontradicted and uncontroverted evidence. The evidence of PW-4 and PW-5 that the victim was subjected to cruelty by the appellant was not contradicted.

32. The learned counsel for the appellant has relied on the decision of the High Court of judicature at Bombay in ***Mangesh v. State of Maharashtra***, reported in ***(2022) SCC Online Bom 5095*** wherein it has been held that:-

"**23. …….. It is to be noted that if the demand of dowry and ill-treatment on that count was narrated**

by the deceased, then PW-1 without wasting time could have lodged the report. In my view, this would reflect on their conduct. Their conduct in the fact situation, appears to be contrary to the conduct of man of prudence placed in a similar situation.

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27. It is to be noted that the learned Sessions Judge has not properly considered the case of the prosecution vis-a-vis charge of the murder under Section 302 is concern. It is seen that in the entire judgment there is not even cursory observation about the charge of murder of deceased Shefali and the evidence adduced by the prosecution. In the teeth of the specific opinion as to the cause of death i.e. strangulation with postmortem drowning, the learned Judge ought to have amended and made charge under Section 302 as a principal charge against appellant and other accused. In that event circumstances relevant to the point of homicidal death brought on record would have been of some assistance to the case of prosecution. In this case, therefore the basic two ingredients of section 304B have not been made out namely; demand of dowry and the ill-treatment or harassment on that count. Therefore, in my view, the judgment and order passed by the learned Judge cannot be sustained. The appellant would be entitled to get benefit which has been extended to the accused nos. 2, 3 and 5 by the learned Sessions Judge. The appeal deserves to be allowed. Hence, following order:

ORDER

(i) The criminal appeal is allowed.

(ii) The judgment and order of conviction and sentence passed by the Sessions Judge, Gadchiroli dated 01.04.2021 passed in Sessions Case No. 87/2016 is set aside.

(iii) Appellant - Mangesh s/o Deorao Kannake (accused no. 1) is acquitted of the offence under Section 304-B of the Penal Code, 1860.

(iv) The appellant be set at liberty forthwith, if not required in any other crime. Fine amount, if any, deposited by the appellant be refunded to him."

33. This decision of the Bombay High Court is not applicable to this case because as held in my foregoing discussions, the evidence of PW-4 and PW-5 relating to the cruelty extended to the victim was not controverted or contradicted. The amount of Rs. 1 lac may not have been mentioned by PW-5 earlier, but both PW-4 and PW-5 have stated categorically that the victim was subjected to cruelty as her brothers were unable to pay the money demanded by the appellant. It is not mandated that the amount has to be mentioned to prove a case of cruelty and dowry death.

34. The learned counsel for the appellant further relied on the decision of Hon'ble the Supreme Court in ***Major Singh vs. State of Punjab***, reported in ***(2015) 5 SCC 201*** wherein it has been observed

that:-

> "**14. The prosecution has not examined any independent witness or the Panchayatdars to prove that there was demand of dowry and that the deceased was subjected to ill-treatment. Ordinarily, offences against married woman are being 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. But when PW3 has specifically stated that the demand of dowry by the accused was informed to the Panchayatdars and that Panchayat was taken to the village Badiala, the alleged ill-treatment or cruelty of Karamjit Kaur by her husband or relatives could have been proved by examination of the Panchayatdars. The fact that deceased was subjected to harassment or cruelty in connection with demand of dowry is not proved by the prosecution. It is also pertinent to note that both the courts below have acquitted all the accused for the offence punishable under Section 498A IPC."**

35. In this case at hand PW-4 and PW-5 have not mentioned about any village meeting in their evidence-in-chief. No instance of a village meeting was brought to the fore during the cross-examination of PW-4. Both PW-4 and PW-5 had not asserted in their evidence-in-chief that a village meeting was held. PW-4 stated that the appellant came with his father and took away the victim after the matter was amicably settled. There was not even a whisper of a village meeting in the evidence-in-chief of PW-4 and PW-5.

36. Sri Animul Hoque deposed as PW-6 about a village meeting. As the initial statement of this witness was not recorded by the IO, the evidence of PW-6 is not taken into account.

37. The learned counsel for respondent No. 2 relied on the decision of Hon'ble the Supreme Court in ***Preet Pal Singh v. State of Uttar Pradesh and Another***, reported in ***(2020) 8 SCC 645*** wherein it has been held and observed that:-

> "**42. From the evidence of the Prosecution witnesses, it transpires that the Appellant had spent money beyond his financial capacity, at the wedding of the victim and had even gifted an I-10 car. The hapless parents were hoping against hope that there would be an amicable settlement. Even as late as on 17.6.2010 the brother of the victim paid Rs.2,50,000/- to the Respondent No.2. The failure to lodge an FIR complaining of dowry and harassment before the death of the victim, is in our considered view, inconsequential. The parents and other family members of the victim obviously would not want to precipitate a complete breakdown of the marriage by lodging an FIR against the Respondent No.2 and his parents, while the victim was alive."**

38. Reverting back to this case it is held that the victim died within less than 6 months of her

marriage to the appellant. Between the short span of time the victim was subjected to cruelty by the appellant and the evidence of her brothers clearly depicted that she went back to her parental home along with her brothers and stayed there for a while and thereafter the appellant and his father brought her back to her matrimonial home. This was too short a period to speculate such dreadful ramifications. There was also an understanding between the parties and so the marital dispute was not brought to the public domain or publicized by an FIR. The decision of Hon'ble the Supreme Court in *Preet Pal Singh's* case *(supra)* is relevant to this instant case.

39. The learned counsel for the appellant laid stress in his argument that the scribe of the FIR was not produced as a witness. The contents of the FIR are not similar to the testimony of PW-4. In his FIR PW-4 did not mention that 1 lac was demanded by the appellant from his sister. The scribe of the FIR Sri Saiful Islam was indeed not produced to prove his note that the FIR was read over to PW-4 before PW-4 had affixed his signature on the FIR. PW-4 stated in his cross-examination that he was not privy to the contents of the FIR. This argument on behalf of the appellant can be safely brushed aside.

40. It was mentioned in the FIR that the victim was subjected to cruelty. The deposition of PW-4 was consistent to the contents of the FIR. It is true PW-4 did not mention that Rs. 1 lac was demanded by the appellant from his sister. This omission in the FIR does not thwart the clinching evidence against the appellant that the victim was subjected to cruelty and that the appellant demanded dowry. It would be apt to reiterate that the evidence of PW-4 and PW-5 clearly implicated that the victim was subjected to cruelty and the appellant demanded money and soon before her death the victim was subjected to cruelty by the appellant. The injury marks detected on the victim's body also speaks volumes. The evidence of PW-4 and PW-5 was also substantiated by the post mortem report of the victim. This Court cannot be oblivious of the ante mortem injuries sustained by the victim soon before her death. These injuries have been proved by PW-7 as well as CW-1. PW-4 and PW-5 have also mentioned about the injuries sustained by the victim.

41. The learned counsel for the appellant Mr. B.D. Konwar laid stress in his argument that the allegation of cruelty has not been proved. The prosecution failed to prove beyond a reasonable doubt that the victim was tortured soon before her death to meet the illegal demand of dowry made by the appellant. The FIR reveals that after two months of her marriage, the victim was subjected to cruelty. The PW-4 who lodged the FIR did not describe that soon before her death the victim was subjected to cruelty. Both PW-4 and PW-5 have made a bald statement that dowry was demanded and the victim was subjected to cruelty, but the evidence does not reflect when the victim was subjected to cruelty by the appellant to meet his illegal demand of dowry. In support of his argument, the learned counsel for the appellant relied on the decision of Hon'ble the Supreme Court in ***Satbir Singh and Another vs. State of Haryana,*** reported in ***(2021) 6 SCC 1*** wherein it has been observed that:-

"**15. Considering the significance of such a legislation, a strict interpretation would defeat the very object for which it was enacted. Therefore, it is safe to deduce that when the legislature used the words, "soon before" they did not mean "immediately before". Rather, they left its determination in the hands of the courts. The factum of cruelty or harassment differs from case to case. Even the spectrum of cruelty is quite varied, as it can range from physical, verbal or even emotional. This list is certainly not exhaustive. No straitjacket formulae can therefore be laid down by this Court to define what exactly the phrase "soon before" entails.**

16. The aforesaid position was emphasized by this Court, in the case of *Kans Raj v. State of Punjab*, (2000) 5 SCC 207, wherein the three Judge Bench held that:

"**15. … "Soon before" is a relative term which is required to be considered under specific circumstances of each case and no straitjacket formula can be laid down by fixing any time limit. … In relation to dowry deaths, 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. …. 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."**

(emphasis supplied)

A similar view was taken by this Court in *Rajinder Singh v. State of Punjab*, (2015) 6 SCC 477.

17. Therefore, Courts should use their discretion to determine if the period between the cruelty or harassment and the death of the victim would come within the term "soon before". What is pivotal to the

above determination, is the establishment of a "*proximate and live link*" between the cruelty and the consequential death of the victim.

18. When the prosecution shows 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*', a presumption of causation arises against the accused under Section 113B of the Evidence Act. Thereafter, the accused has to rebut this statutory presumption. Section 113B, Evidence Act reads as under:

"113B. 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 304B of the Indian Penal Code (45 of 1860).**"

42. Relying on the decision of *Satbir Singh (supra)* the learned counsel for the appellant emphasized through his argument that there was no proximate and live link between the alleged cruelty and the death of the victim. It was also argued that as the foundational facts have not been proved the appellant cannot be held guilty solely on presumption u/s 113B of the Evidence Act.

43. In *Satbir Singh (supra)* the conviction of the appellant u/s 304B IPC was upheld and "soon before" the death of the victim has been clearly described to be a relevant term.

44. In this case at hand, the victim was married to the appellant for less than 6 months and she died within 6 months of her marriage. There is clinching evidence that two months after her marriage she was subjected to cruelty by the appellant to meet his illegal demand of dowry. There is also evidence that the victim went back to her parental home and after an amicable settlement the victim returned to her matrimonial home and on the fateful day, the victim died as a result of smothering. This is indeed a live link stretching from the time of her marriage to her death. Two months after her marriage, the victim was subjected to cruelty and thereafter the victim took shelter in her parental home and she again went back to her matrimonial home. She was found with injuries around her face. Thus the prosecution could prove beyond reasonable doubt that the victim died "otherwise than under normal circumstances" within 6 months of her marriage, and soon before her death she was subjected to

cruelty and harassment by her husband-appellant in the proximate past. The appellant failed to discharge his burden without offering any explanation about the injuries sustained by the victim. Several injuries as discussed above were detected during the post-mortem examination of the deceased. Presumption u/s 113(B) of the Evidence Act operates against the appellant.

45. I would like to reiterate that the evidence of PW-4 and PW-5 about the cruelty extended to the victim has remained uncontradicted. Their evidence cannot be discarded solely because they are related to the victim. In this case the decision of Hon'ble the Supreme Court in ***Ram Chander and Others vs. State of Haryana***, reported in ***(2017) 2 SCC 321*** is relevant. It has been observed and held that:-

> "**53) In Namdeo Vs. State of Maharashtra, (2007) 14 SCC150, this Court further held:**
>
> "**38. ……. it is clear that a close relative cannot be characterised as an "interested" witness. He is a "natural" witness. His evidence, however, must be scrutinised carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the "sole" testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one."**
>
> **54) We follow and apply this well settled principle of law for rejecting the submissions of learned counsel for the appellants.**
>
> **55) In the light of aforementioned twelve reasons, we are of the view that Guddi (PW-9) was rightly held to be an eye-witness and the two Courts rightly relied upon her sworn testimony for sustaining the appellants' conviction."**

46. The learned Addl. PP has relied on the decision of Hon'ble the Supreme Court in *Mustafa Shahadal Shaikh (supra)* wherein it has been observed :-

> "**8) To attract the provisions of Section 304B, one of the main ingredients of the offence which is required to be established is that "soon before her death" she was subjected to cruelty or harassment "for, or in connection with the demand for dowry". The expression "soon before her death" used in Section 304B IPC and Section 113B of the Evidence Act is present with the idea of proximity test. In fact, learned counsel appearing for the appellant submitted that there is no proximity for the alleged demand of dowry and harassment. With regard to the said claim, we shall advert to the same while considering the evidence led in by the prosecution. Though the language used "soon before her death", no definite period has been enacted and the expression "soon before her death" has not been defined in both the enactments. Accordingly, the determination of the period which can come within the term "soon before her death" is to be determined by the courts, depending upon the facts and circumstances of each case. However, the said expression would normally imply that the**

interval should not be much between the concerned cruelty or harassment and the death in question. In other words, there must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the concerned death. 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. These principles have been reiterated in Kaliyaperumal vs. State of Tamil Nadu, AIR 2003 SC 3828 and Yashoda vs. State of Madhya Pradesh, (2004) 3 SCC 98.

13) Though learned counsel for the appellant contended that all the witnesses relied on by the prosecution are close relatives and no outsider has been examined to prove their case, we are of the view that in a case of this nature i.e. matrimonial death, we cannot expect outsiders to come and depose what had happened in the family of the deceased. We have already highlighted that the death occurred within a period of 7 months from the date of the marriage and she died at her matrimonial home. It has also come in evidence from the prosecution witnesses that on the date of the death, the appellant and his parents alone were in the house. In such circumstances, we reject the contention raised by the counsel for the appellant."

47. In the instant case it has already been held in my foregoing discussions that the appellant was married to the victim for 6 months and within less than 6 months of their marriage the victim died under unnatural circumstances. There is indeed a live and proximate link between the incidence of cruelty meted out to the victim and the death of the victim. It was not in the remote past when the victim was subjected to cruelty to meet the appellant's illegal demand of dowry. Thus presumption can be drawn u/s 113B of the Evidence Act that the appellant committed the offence of dowry death. The learned trial Court spelt out sound reasonings while deciding the case. The victim was last seen with the appellant. The prosecution could establish the case with circumstantial evidence as well as substantive evidence. The findings of the trial Court is not at all erroneous but sustainable. It is held that the appellant is guilty of offence of dowry death.

48. I record my concurrence to the findings of the learned trial Court. The judgment and order of conviction is upheld. However, the sentence u/s 304B is modified and scaled down to 7 years of Rigorous Imprisonment. The order of set off of the custodial sentence with the period of detention already undergone by the appellant during investigation and trial is upheld. The learned trial Court has also rightly passed an order by not recommending any compensation as the deceased has not been

survived by any Class-1 legal heir.

Send back the LCR.

JUDGE

Comparing Assistant