IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) No.167 of 2018

Arising Out of PS. Case No.-734 Year-2015 Thana- KANKARBAG District- Patna

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Samir Kumar Sinha S/o Sri Surendra Prasad, R/v- Pataura Lala, P.S.-Motihari, Distt- East Champaran at present Dariyapur, Block- Saran Railway Quarter, Chapra at present Ganga Complex, Flat No.406, Kankarbagh Main Road, P.S.-Kankarbagh, Distt- Patna.

... ... Appellant

Versus

The State of Bihar

... ... Respondent

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Acts/Sections/Rules:

- IPC - Section 304B
- CrPC - Sections 161, 164, 313
- Evidence Act, 1872 - Sections 32(1), 113B, 118, 134

Cases referred:

- Sher Singh @ Partapa Vs. State of Haryana reported in (2015) 3 SCC 724
- State of West Bengal Vs. Mir Mohammad Omar reported in (2000) 8 SCC 382
- Subramaniam versus State of Tamil Nadu reported in (2009) 14 SCC 415
- Ramesh Baburao Devaskar and Others versus the State of Maharashtra reported in (2007) 13 SCC 501
- Jang Singh and Others versus the State of Rajasthan reported in (2001) 9 SCC 704
- Sekaran versus the State of Tamil Nadu reported in (2024) 2 SCC 176
- P. Ramesh vs. State represented by Inspector of Police reported in (2019) 20 SCC 593
- Rudal Chaupal versus the State of Bihar reported in 2024 (2) BLJ 231 (HC)
- Malkiat Singh and Others versus State of Punjab reported in (1991) 4 SCC 341

Appeal - for setting aside the judgment and order of conviction under Section 304B of IPC

Informant has alleged that his daughter had been burnt by her husband (Appellant)

Held - There are sufficient materials on the records to believe that the appellant had tried to save his wife while she was burning and in the said attempt, he had suffered injuries. (Para 57)

Prosecution has not established at first instance that victim was subjected to harassment by her husband (the appellant) in connection with the demand of dowry and soon before the occurrence, she was tortured and harassed for dowry, therefore, in this case, the legal presumption requiring heavy burden of rebuttal by the defence would not arise. (Para 58)

Impugned judgment of conviction and order of sentence are set aside. (Para 59)

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... ... Appellant

Versus

The State of Bihar

... ... Respondent

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Appearance :

For the Appellant	:	Mr. Vijay Kumar Sinha, Advocate Mr. Satyendra Kumar Bhatnagar, Advocate Mr. Arvind Kumar Shrivastava, Advocate Mr. Santosh Kumar, Advocate Mr. Kumar Shivam Sinha, Advocate Mr. Krishna Murari Prasad, Advocate
For the State	:	Mr. Dilip Kumar Sinha, Addl.PP
For the Informant	:	Mr. Suresh Kumar, Advocate

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
and
HONOURABLE JUSTICE SMT. G. ANUPAMA CHAKRAVARTHY

ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date : 07-03-2024

Heard Mr. Vijay Kumar Sinha, learned counsel assisted by Mr. Satyendra Kumar Bhatnagar, learned counsel for the appellant, Mr. Dilip Kumar Sinha, learned Additional Public Prosecutor for the State and Mr. Suresh Kumar, learned counsel representing the informant.

2. This appeal has been preferred for setting aside the judgment dated 01.12.2017 and the order dated 12.12.2017 whereby and whereunder the learned Additional District and

Sessions Judge-IV-cum-Special Judge, NIA, Patna has convicted the appellant for an offence punishable under Section 304B of the Indian Penal Code (in short 'IPC') and sentenced him to undergo imprisonment for life, in Sessions Trial No. 371 of 2016 (CIS No. 459 of 2016, arising out of Kankarbagh P.S. Case No. 734 of 2015).

Prosecution case

3. The prosecution case is based on the *fardbeyan* of one Haresh Kumar Srivastava (PW-4) who is the father of the victim. In his *fardbeyan* recorded by the Sub-Inspector (SI) of Police K.K. Singh of Agamkuan Police Station on 27.10.2015 at 8:00 am, the informant has alleged that his daughter Namrata had been burnt by her husband Samir Kumar Sinha in Flat No. 406 of Ganga Complex within Kankarbagh Police Station by pouring kerosene oil on her body and setting her at fire by matches. Her daughter had been injured, she was brought to the hospital by the neighbours for treatment and he was informed by them. His daughter died in course of treatment on 27.10.2015. The *fardbeyan* was recorded by the informant in the Apollo Burn Hospital, Kumhrar, Kankarbagh, Patna. The informant further alleged that the reason for the said occurrence is that one and half year ago, her daughter was married with the appellant in accordance with Hindu

Rites and Customs and in the said marriage, he had spent about Rs. Ten Lakhs but after marriage, a demand of Rs. Two Lakhs and a motorcycle was being made which could not be met by his daughter. The informant claimed that his daughter was repeatedly telling him about this and yesterday on 26.10.2015 at about 4:00 pm (evening), his daughter had called for the money and said that if money would not be made available then she would be killed. The informant claimed that he told his daughter that he would come on 27.10.2015 and will convince him. According to the informant, the occurrence took place because the money and the articles could not be made available.

4. It appears from the records that on 27.10.2015, the Station House Officer (S.H.O.), Agamkuan Police Station forwarded the *fardbeyan* to S.H.O. Kankarbagh Police Station as the place of occurrence was situated within the jurisdiction of Kankarbagh Police Station. On the basis of said *fardbeyan,* a First Information Report (in short 'FIR') was registered by Kankarbagh Police Station as Kankarbagh P.S. Case No. 734 of 2015 dated 28.10.2015 under Section 304B IPC. The formal FIR would show that the information was received in Kankarbagh Police Station on 28.10.2015 at 18:45 hours, the FIR was registered simultaneously and the investigation of the case was handed over to one Vijay

Kumar Mishra, S.I. of Police. The FIR was, however, received in the court of learned Judicial Magistrate, Patna on 31.10.2015.

5. After investigation, police submitted charge-sheet against the sole accused under Section 304B IPC. Cognizance was taken by the learned Magistrate *vide* order dated 06.04.2016. Since the offence alleged was a sessions triable offence, the records were committed to the court of Sessions *vide* order dated 27.04.2016. Accordingly, the records were received in the court of learned Sessions Judge, Patna for disposal. In this case, the charge under Section 304B IPC was framed against the sole accused on 17.09.2016. He pleaded not guilty and claimed to be tried.

6. To bring home the charges, the prosecution examined as many as eight witnesses who are as under:-

PW-1 Vimlesh Kumar (uncle of the deceased), PW-2 Kirti Prasad Verma (a relative of the deceased being co-brother of her father), PW-3 Nitish Kumar Singh (an acquaintance of her father for the last 10-12 years), PW-4 Haresh Kumar Srivastava (the informant), PW-5 Khushi Kumari (child witness, who is said to be working as maid in the house of the deceased and claims to be an eyewitness), Dr. Ramanand Chaudhary (PW-6, the Doctor who conducted the autopsy on the dead body of the deceased), Navin Kumar Singh (PW-7), the S.I. of Police-cum-Officer-in-charge of

Kankarbagh Police Station, who had taken charge of investigation from Vijay Kumar Mishra (PW-8) and had submitted the charge-sheet *vide* Charge-sheet No. 104 of 2016 marked as Exhibit '5'.

7. On behalf of the prosecution, some documentary evidences were also brought on the record. Exhibit '1', '1/1' and Exhibit '1/2' are the signatures of Vimlesh Kumar, Haresh Kumar Shrivastava and Vijay Kumar Mishra respectively, protest-cum-complaint petition (Exhibit '2'), signature of Khushi Kumari on her statement under Section 164 Code of Criminal Procedure (hereinafter referred to as the 'Cr.P.C') (Exhibit '3'), the postmortem report (Exhibit '4'), Charge-sheet No. 104 of 2016 (Exhibit '5'), Inquest Report (Exhibit '6') and the statement of Khushi Kumari under Section 164 Cr.P.C. marked as Exhibit '7' with objection. We find from the records that Exhibit '7' was marked by the learned trial court *vide* order dated 16.06.2017 after considering the objections taken on behalf of the defence. The learned trial court while allowing Section 164 Cr.P.C. statement put mark as Exhibit '7' with objection observed in its order dated 16.06.2017 that so far as the admissibility as evidence in the instant case is concerned, it may be taken up at the time of final adjudication.

8. On behalf of the defence, as many as seven witnesses were examined and the defence brought on record certain documents such as the discharge slip, history sheet and payment bill dated 09.01.2016 respectively which were marked as ‘X’, ‘X/1’ and ‘X/2’ for identification. Signatures of the Doctor has been brought as Exhibit ‘A’ and Exhibit ‘A/1’, the documents of Apollo Burn Hospital of the treatment of the accused-appellant is Exhibit ‘B’ to ‘B/15’, discharge slip dated 07.01.2016 has been marked as Exhibit ‘C’. The certified copy of the petition of Succession Case No. 15 of 2016 and certified copy of its order sheet are Exhibit ‘D’ to ‘D/1’ respectively. Mithilesh kumar (DW-1) is the owner of Flat No. 406 in Ganga Complex who had rented out his flat to this appellant. Nirmala Devi (DW-2) is the erstwhile owner of the house in which this appellant was residing with his parents for about two years. Santosh Kumar Singh (DW-3) is son of DW-2. Renu Devi (DW-4) is the sister of the appellant. Rinki Devi (DW-5) is also sister of the appellant. Sanjeev Kumar Sinha (DW-6) is the elder brother of the appellant and Dr. Sanjay Kumar (DW-7) is said to be an employee of Apollo Burn Hospital, who has proved Exhibit ‘B’ to ‘B/15’ and Exhibit ‘C’.

Findings of the Trial Court

9. The learned trial court has upon appreciation of the evidences available on the record found that PW-4, who is the informant of the case, has supported his *fardbeyan* (Exhibit '1/3'). He has stated that on 26.10.2015 at about 4-5 pm, he received a phone call of his daughter Namrata who said that her husband is quarreling for money and if the same would not be paid, she might be killed. The learned trial court held that the version of the informant (PW-4) is supported by PW-2 and PW-3, therefore, this is a fact spoken by the deceased and it refers to the circumstance which has a connection with the transaction which ended up in her death. The learned trial court, therefore, held that this statement would fall within the purview of Section 32(1) of the Evidence Act, 1872 (hereafter referred to as the "Act of 1872'). The learned trial court supported its views by the judgment of the Hon'ble Supreme Court in the case of **Rattan Singh Vs. the State of Himachal Pradesh** reported in **(1997) 4 SCC 161** and **Sharad Birdhichand Sarda Vs. State of Maharashtra** reported in **(1984) 4 SCC 116**. The judgment in the case of **Kans Raj Vs. State of Punjab and Others** reported in **(2000) 5 SCC 207** has also been relied upon.

10. Learned trial court has further recorded that Khushi Kumari (PW-5) has stated specifically that on the date of occurrence, the appellant had beaten the victim/deceased. PW-5 claimed that she woke up due to heat then she found that *didi* (victim girl) was burning in the room and *bhaiyaji* (accused) was talking on phone, then she opened the gate and raised *hulla,* on which people came and when *bhaiyaji* saw the men, he started putting off the flame. Subsequently, she was taken to the hospital by Ambulance. The learned trial court found that this witness has stated specifically that she put blanket on the body of *didi* to put off the flame and the blanket was given to the guard by *bhaiyaji* to throw it away. PW-5 has also stated that her statement was recorded in the court on 25.02.2016, she identified her signature over the same (Exhibit '3'). In her cross-examination, she had disclosed that she called Samir Kumar as *bhaiyaji* and she was residing with them for her studies. The learned trial court found that PW-5 has narrated about the quarrels between the informant and the unfortunate girl. According to the trial court, PW-5 had corroborated her statement under Section 164 Cr.P.C. (Exhibit '7'). She has been taken as the first witness who had seen the occurrence and it has been found that she had also disclosed that

Namrata (deceased) was assaulted by her husband Samir Kumar Sinha before her death for dowry.

11. The learned trial court has discussed the evidence of the I.O. (PW-7) and the I.O. (PW-8). It is PW-8 who had got the *fardbeyan* of Haresh Kumar Srivastava (PW-4) from Agamkuan Police Station and on the basis of the same, the case was registered. PW-8 has disclosed about the statements made by the defence witnesses, namely, Ram Charitra Das and Mithilesh Kumar but the learned trial court has refused to look into the evidence of Ram Charitra Das and Mithilesh Kumar saying that they are not charge-sheet witnesses and as such, use of their statements is not permissible and cannot be looked into. Having examined the materials on the record, the learned trial court recorded the finding of guilt, convicted the accused and awarded the sentence as noted hereinabove.

Submissions on behalf of the Appellant

12. Learned counsel for the appellant has assailed the findings of the learned trial court on several grounds. It is submitted that the learned trial court has grossly erred in attaching much evidentiary value to the statement of the informant (PW-4) that he received a phone call of his daughter Namrata on 26.10.2015 at about 4-5 pm. It is submitted that the I.O. had not

verified the telephone call and no material was placed before the learned trial court to show that Namrata had made a telephonic call to her father on 26.10.2015 at about 4-5 pm.

13. Learned counsel further submits that the learned trial court has completely erred in saying that the words spoken by the deceased have reference to the circumstances which has connection with the transaction which ended up in her death and, therefore, it would fall within the purview of Section 32(1) of Act of 1872. It is submitted that even if it is assumed for a moment that the words spoken by the deceased have reference to the circumstances, in absence of the complete chain having been established with respect to the circumstantial evidence, it cannot be irresistibly concluded that the death of Namrata was homicide. Learned counsel submits that although the judgment of the Hon'ble Supreme Court in the case of **Sharad Birdhichand Sarda** (supra) was placed before the learned trial court, the learned trial court could not appreciate that the proximity test under Section 32(1) of the Act of 1872 is applicable to both homicide and suicide.

14. Attention of this Court has been drawn towards paragraph '198' of the judgment of the Hon'ble Supreme Court in the case of **Sharad Birdhichand Sarda** (Supra). Learned counsel

for the appellant further submits that on perusal of the statement under Section 313 Cr.P.C., it may be noticed that the learned trial court had not put to the accused each material fact which was intended to be used against him and no chance of explaining it was given to him. In this regard, the observations of the Hon'ble Supreme Court in paragraph '25' of the judgment in the case of **Hate Singh Bhagat Singh Vs. State of Madhya Bharat** reported in **AIR 1953 SC 468** has been placed before this Court.

15. Learned counsel submits that there are few facts which would be evident from the records which were exhibited before the trial court. It is pointed out that the inquest report (Exhibit '6', page '51' of the paperbook) was prepared by the Sub-Inspector of Police, Agamkuan Police Station (not examined) at Apollo Burn Hospital, Kumhrar in presence of PW-1 and PW-4. PW-1 is one of the two signatories on Exhibit '6'. He has proved his signature as Exhibit '2'. Learned counsel submits that in the inquest report, there is a column which requires an information as regards the circumstances which may give rise to a suspicion of an illegal act "वे परिस्थितियाँ : यदि कोई जिससे किसी कृटकर्म का सन्देह उत्पन्न हो।" In front of the said column, a cut mark (X) has been given which shows that at the time of preparation of the inquest report,

Police was not told about any suspicion against her husband with respect to the death of Namrata.

16. It is further submitted that if this Exhibit '6' is read with the evidence of PW-4, it would be noticed that PW-4 performed last rites of his daughter at Patna on 27.10.2015 itself and he left for Muzaffarpur from where he came back after three days. This would be a relevant fact for the reason that though the *fardbeyan* of the informant is said to have been recorded by the S.I. Kankarbagh Police Station on 27.10.2015 itself but it reached Kankarbagh Police Station, which is situated at a distance of two kilometers only on the next date i.e. 28.10.2015 at 18:45 pm, thus, it took about thirty five hours in reaching Kankarbagh Police Station which is at a distance of two kilometers. Not only that, the FIR reached the court of learned Judicial Magistrate at Patna on 31.10.2015 i.e. after about three days. The delay has not been explained by PW-7 or PW-8 in course of trial. It is submitted that in fact, the FIR has been registered only as an after-thought and by antedating. PW-4 has admitted that he was working as Personal Assistant to a Member of Parliament. According to learned counsel for the appellant, the FIR was registered only after three days when PW-4 returned from Muzaffarpur, that is the reason even as

the FIR was antedated but it could reach the court of learned Judicial Magistrate only on 31.10.2015.

17. Learned counsel further submits that in this case much reliance has been placed upon the evidence of Khushi Kumari (PW-5), who is a child witness aged about nine years at the time of occurrence. The prosecution case is that Khushi Kumari was living in the same flat with the deceased and the appellant and on the date of occurrence, she was there. She has stated that on the said date also, there was a quarrel between Namrata and the appellant and the appellant had beaten her whereafter, Namrata had asked for water and PW-5 provided her the same whereafter, she had talked to her parents and went to sleep. PW-5 was also asked by the appellant to go to sleep and she had gone to sleep. PW-5 claims that she got awaken when she felt hot and at this stage, she found that Narmata was burning in her room and the appellant was talking on his mobile phone. PW-5 claims that she had opened the door, went down and raised a *hulla* whereupon some persons came and at this stage when the appellant found that some persons were coming, he started putting off the flames. PW-5 has stated that Police had come in the hospital and had enquired from her. Learned counsel submits that PW-4 has also stated in his evidence that PW-5 was present in the

hospital with the deceased but the fact is that PW-5 was not examined by the I.O. (PW-8) on 27.10.2015. PW-8 has stated in his evidence that he had recorded the statement of the maid Khushi Kumari and had taken her to the court for recording her statement under Section 164 Cr.P.C. The 164 Cr.P.C. statement of Khushi Kumari has been marked as Exhibit '7' (with objection) from which it would appear that the said statement was recorded only on 25th February, 2016 i.e. after a period of about four months. PW-8 has stated in paragraph '12' of his deposition that Khushi Kumari had told him that Namrata had set herself at fire. It is submitted that Khushi Kumari (PW-5) was not produced before the I.O. immediately in course of investigation, she was tutored for about 2-3 months and then she was brought before the Police to make a statement. Khushi Kumari has herself stated in paragraph '8' of her cross-examination that her father had brought her to make a statement before the Police and at the instance of her father, she was making the statement. She has also stated that after 2-3 months, she had come to make a statement.

18. Learned counsel submits that on perusal of Exhibit '7', which is the statement of PW-5 under Section 164 Cr.P.C. as well as the testimony of PW-5 in the trial court, it would appear that despite the fact that PW-5 happens to be a child witness, the

learned Magistrate did not conduct a preliminary examination to determine competency of the child witness. Referring to a recent judgment of the Hon'ble Division Bench of this Court in the case of **Rudal Chaupal Vs. State of Bihar** reported in **2024 (2) BLJ 231**, learned counsel submits that in the said case, the Hon'ble Division Bench of this Court has discussed the requirements of the preliminary test as pointed out by the Hon'ble Supreme Court in the case of **Pradeep Vs. State of Haryana** reported in **2023 SCC Online SC 777** and **P. Ramesh Vs. State represented by Inspector of Police** reported in **(2019) 20 SCC 593**. Learned counsel submits that it has been held by the Hon'ble Supreme Court that before recording evidence of a child, it is the duty of the judicial officer to ask preliminary questions to him/her with a view to ascertain whether the child can understand the questions put to him/her and is in a position to give rational answers. The competency of a child witness has to be ascertained by questioning him/her to find out the capability to understand the occurrence witnessed and to speak the truth before the court.

19. Learned counsel submits that while recording the statement of PW-5 under Section 164 Cr.P.C., the learned Magistrate has only recorded at the top that after putting some questions from the witness, he believed that she was able to

understand the nature of questions and answer it. What questions were put to the child witness to examine her competence to understand the occurrence witnessed by her and to speak the truth before the court have not been mentioned by the learned Magistrate, moreover, the learned Judicial Officer, who recorded the statement under Section 164 Cr.P.C., has not been examined in course of trial, therefore, the defence could not get an opportunity to test the veracity of the manner in which statements recorded by the learned Judicial Officer with regard to the questions put to the child witness to understand her capability to speak the truth. This, according to learned counsel for the appellant, has prejudiced the case of the appellant. It is pointed out that in course of trial, even though this witness was aged about ten years only, the learned trial court did not ascertain the competence of PW-5 by questioning her to find out her capability to understand the occurrence witnessed and to speak the truth. In such circumstance, it is submitted that the evidence of PW-5 cannot be relied upon and the same is liable to be excluded.

20. Learned counsel further submits that from the evidence of the prosecution witnesses and the defence witnesses available on the record, it would appear that all the witnesses have stated that initially everything was fine. PW-4 has stated in his

examination-in-chief that after marriage Namrata went with her husband to *sasural* and she was fine there for about a week. After one month of her marriage, she had shifted to the Railway quarter of her in-laws situated at Naya Tola, Muzaffarpur. She was transferred to Pakur in course of her service with the Syndicate Bank, thereafter she was transferred to Patna where Namrata was living with her husband in Ganga Apartment at Kankarbagh. Learned counsel submits that even though PW-4 has stated that there was a demand of Rs. Two Lakhs and a motorcycle, from his own statements it would appear that both Namrata and the appellant were living happily. When Namrata was working at Muzaffarpur, this appellant had taken an accommodation on rent and had been doing his duty from Muzaffarpur to Chhapra keeping the residence at Muzaffarpur to facilitate working of Namrata.

21. It is submitted that the defence evidences are there to show that in attempt to save Namrata, the appellant had also burnt himself to the extent of twenty five percent and he was admitted in the same hospital from where after his discharge, he was arrested by PW-8. On these grounds, the appellant submits that the judgment of the learned trial court is liable to be set aside as the prosecution has not been able to show the circumstances such as to reach to only conclusion that it is a case of homicide.

Submissions on behalf of the State and the informant

22. Learned Additional Public Prosecutor for the State as well as learned counsel for the informant have jointly opposed this appeal. Learned Additional Public Prosecutor submits that it is a case under Section 304B IPC and as such, the burden of proof would lie upon the appellant to show his innocence. Learned counsel submits that the presence of Khushi Kumari (PW-5) has been admitted by the defence and one of the defence witnesses, who is sister of the appellant, has stated that the appellant had brought kerosene oil from her house in the month of August, 2015. It is also submitted that the medical evidences brought on the record in form of *post mortem* report coupled with the evidence of Dr. Ramanand Choudhary (PW-6) corroborates the cause of death.

23. It is further submitted that so far as the delay in sending the FIR is concerned, it is the fault of the Police, therefore, for the fault of Police in sending the FIR after three days of delay, the prosecution case would not fall. Learned counsel have jointly supported the judgment of the learned trial court.

Consideration

24. Having heard learned counsel for the appellant, learned Additional Public Prosecutor for the State and learned counsel for the informant, we find that it is a case in which the

appellant has been charged for an offence punishable under Section 304B IPC. Learned Additional Public Prosecutor for the State has pointed out that as per Section 113B of the Indian Evidence Act, 1872 (hereinafter referred to as the 'Act of 1872'), there would be a presumption as to dowry death and such presumption of law would be mandatory in nature. We would, therefore, first examine Section 113B of the Act of 1872 in conjunction with Section 304B IPC. Section 113B of the Act of 1872 and Section 304B IPC were inserted into the statute book by the Dowry Prohibition (Amendment) Act, 1986 (Act 43 of 1986) with effect from 01.05.1986. Both the provisions are quoted hereunder for a ready reference:-

> "[a][**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 had 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 purposes of this section, "dowry death" shall have the same meaning as in section 304B of the Indian Penal Code.] (45 of 1860).
>
> [**a**] Inserted by Dowry Prohibition (Amendment) Act (43 of 1986), S. 12 (19-11-86)."
>
> [a][**304B. Dowry death.**

> (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.
>
> **Explanation.** - For the purposes of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961.
>
> (2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.]
>
> [**a**] Inserted by Dowry Prohibition (Amendment) Act (43 of 1986), S. 10 (19-11-1986).”

25. On a bare reading of the aforementioned provisions, it would appear that whenever a question would arise as to whether a person has committed dowry death of a woman, at first instance, it is to be ‘shown’ that soon before her death, such woman had been subjected by such person to cruelty, or harassment in connection with any demand for dowry. Once, it is ‘shown’ the legal presumption would arise and the Court shall presume that such person had caused the dowry death defined under Section 304B IPC. In catena of decisions, the Hon’ble Supreme Court has held that the presumption of Section 113B will

arise if the prosecution is able to establish circumstances set out under Section 304B IPC.

26. In the case of **Sher Singh @ Partapa Vs. State of Haryana** reported in **(2015) 3 SCC 724**, the Hon'ble Supreme Court had occasion to consider the true meaning and import of words "soon" and "deemed" occurring under Section 113B of the Act of 1872. The Hon'ble Supreme Court had also occasion to consider as to what would be the standard of proof to be applied to prosecution in proving the ingredients of Section 304B IPC and the standard of proof to be applied to accused to rebut the deemed presumption of guilt which arises once the prosecution has proved the ingredients of Section 304B IPC.

27. Upon consideration of the earlier judgments of the Hon'ble Supreme Court in the case of **State of West Bengal Vs. Mir Mohammad Omar** reported in **(2000) 8 SCC 382** and **Subramaniam versus State of Tamil Nadu** reported in **(2009) 14 SCC 415**, their Lordships held in paragraph '16' as under:-

> "**16.** As is already noted above, Section 113-B of the Evidence Act and Section 304-B IPC were introduced into their respective statutes simultaneously and, therefore, it must ordinarily be assumed that Parliament intentionally used the word "deemed" in Section 304-B to distinguish this provision from the others. In actuality, however, it is well-nigh impossible to give a sensible and legally

acceptable meaning to these provisions, unless the word "shown" is used as synonymous to "prove" and the word "presume" as freely interchangeable with the word "deemed". In the realm of civil and fiscal law, it is not difficult to import the ordinary meaning of the word "deem" to denote a set of circumstances which call to be construed contrary to what they actually are. In criminal legislation, however, it is unpalatable to adopt this approach by rote. We have the high authority of the Constitution Bench of this Court both in State of Travancore-Cochin v. Shanmugha Vilas Cashewnut Factory[8] and State of T.N. v. Arooran Sugars Ltd.[9], requiring the Court to ascertain the purpose behind the statutory fiction brought about by the use of the word "deemed" so as to give full effect to the legislation and carry it to its logical conclusion. We may add that it is generally posited that there are rebuttable as well as irrebuttable presumptions, the latter oftentimes assuming an artificiality as actuality by means of a deeming provision. It is abhorrent to criminal jurisprudence to adjudicate a person guilty of an offence even though he had neither intention to commit it nor active participation in its commission. It is after deep cogitation that we consider it imperative to construe the word "shown" in Section 304-B IPC as to, in fact, connote "prove". In other words, it is for the prosecution to prove that a "dowry death" has occurred, namely,

(*i*) that the death of a woman has been caused in abnormal circumstances by her having been burned or having been bodily injured,

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8. AIR 1953 SC 333
9. (1997) 1 SCC 326

(*ii*) within seven years of her marriage,

(*iii*) and that she was subjected to cruelty or harassment by her husband or any relative of her husband,

(*iv*) in connection with any demand for dowry, and

(*v*) that the cruelty or harassment meted out to her continued to have a causal connection or a live link with the demand of dowry.

We are aware that the word "soon" finds place in Section 304-B; but we would prefer to interpret its use not in terms of days or months or years, but as necessarily indicating that the demand for dowry should not be stale or an aberration of the past, but should be the continuing cause for the death under Section 304-B or the suicide under Section 306 IPC. Once the presence of these concomitants is established or shown or proved by the prosecution, even by preponderance of possibility, the initial presumption of innocence is replaced by an assumption of guilt of the accused, thereupon transferring the heavy burden of proof upon him and requiring him to produce evidence dislodging his guilt, beyond reasonable doubt. It seems to us that what Parliament intended by using the word "deemed" was that only preponderance of evidence would be insufficient to discharge the husband or his family members of their guilt. This interpretation provides the accused a chance of proving their innocence. This is also the postulation of Section 101 of the Evidence Act. The purpose of Section 113-B of the Evidence Act and Section 304-B IPC, in our opinion, is to counter what is commonly encountered —the lack or the absence of evidence in the case of suicide or death of a woman within seven years of marriage. If the word "shown" has to be given its

> ordinary meaning then it would only require the prosecution to merely present its evidence in court, not necessarily through oral deposition, and thereupon make the accused lead detailed evidence to be followed by that of the prosecution. This procedure is unknown to common law systems, and beyond the contemplation of CrPC."

28. In the aforementioned background of the legal position, we are required to consider as to whether the prosecution in this case has been able to prove the essential ingredients which have been highlighted by the Hon'ble Supreme Court in paragraph '16' of the judgment in the case of **Sher Singh** (Supra).

29. In this case, so far as condition no. (i) and (ii) are concerned, this Court can safely record that it is a case of death of a woman caused in abnormal circumstances by burning. It is also a case of death of a woman within seven years of her marriage. This would bring us to a question as to whether the prosecution has been able to prove even by way of preponderance of possibility that the conditions contained in clause (iii), (iv) and (v) are present so that the initial presumption of innocence of the appellant is replaced by an assumption of guilt of the accused, thereby transferring the heavy burden of proof upon him, requiring him to produce evidence dislodging his guilt beyond reasonable doubt.

30. We have noticed the submission of learned counsel for the appellant. It has been shown to us that the inquest report (Exhibit '6') was prepared on 27.10.2015 at 08:30 A.M. (morning) at Apolo Burn Hospital, Kumharar, Kankarbagh by one K.K. Singh, SI of Police, Aghamkuan Police Station (not examined). Column '6' of the inquest report requires an information as to the circumstances, if any, had raised a suspicion of foul act (वे परिस्थितियाँ : यदि कोई जिससे किसी कृटकर्म का सन्देह उत्पन्न हो ।) . In front of column no. '6' only a cross (x) mark has been made meaning thereby that at the time of preparation of the inquest report by SI K.K. Singh, nothing has been recorded suspecting a foul act/play by this appellant. In column no. '8' of the inquest report, an information is to be furnished with regard to opinion of the witnesses regarding the cause of death. In front of column no. '8' also, the only information furnished is that due to setting at fire after sprinkling kerosene oil, death has occurred in course of treatment. Thus, the inquest report (Exhibit '6') does not indicate any suspicion raised by the informant or inquest witness (PW-1) against the appellant.

31. I.O. (PW-8) had not seized any article from the place of occurrence and no photograph of the said place was taken. This further makes doubtful as to whether PW-8 ever visited the place

of occurrence. Examination-in-chief of PW-4 indicates that the marriage between the victim and the appellant had been solemnised in accordance with Hindu Rites and Customs. In his *fardbeyan*, PW-4 has stated that he had spent Rs.10 lakhs in marriage but there is no allegation that there was any demand of dowry at the time of marriage. In his examination-in-chief also PW-4 has not alleged demand of dowry at the time of marriage. He has stated in paragraph '1' of his examination-in-chief that he had married his daughter in accordance with Hindu Rites and customs as per his capacity and after marriage, his daughter had gone to her *Sasural* with her husband and stayed well thereafter for few days.

32. Although, in his *fardbeyan*, he has not stated that one week after going to her *sasural,* her husband, mother-in-law and father-in-law had started torturing her to bring Rs.2 lakhs and a motorcycle but in examination-in-chief, PW-4 has come out with a statement that after living well for few days, one week thereafter, she was being tortured by her husband, mother-in-law and father-in-law to bring Rs.2 lakhs and one motorcycle which was being informed by his daughter on phone. Mother-in-law and father-in-law were not chargesheeted in this case. PW-4 has further stated that one month after her marriage, his daughter had shifted to the Railway quarters at Muzaffarpur Naya Tola with her husband,

mother-in-law and father-in-law but the accused persons kept on demanding Rs.2 lakhs and one motorcycle.

33. This Court finds that the statement of PW-4 in this regard do not inspire confidence if it is looked into with his subsequent statement. According to PW-4, Namrata (deceased) was transferred to Pakur in the Syndicate Bank and from there, she was transferred to Patna where she had been living with her husband. In his cross-examination, this witness has stated that after marriage, Namrata worked in Bhagwanpur branch and was living in Naya Tola Muzaffarpur, Railway quarters. It shows that Namrata (deceased) was self-dependent, she was working with the bank since prior to her marriage and was working while living in her *sasural.* PW-4 has stated that during holidays and festivals, she had been visiting his house also. It shows that Namrata was living a life of her choice. There is no complaint that the family of the appellant had been torturing her to part with her earnings from salary. She was freely visiting the house of her father during holidays and festivals, there was no restriction on her. PW-4 has also stated that when Namrata was transferred from Bhagwanpur to Pakur, she had stayed in hotel for two months in Pakur and during this period, she had gone for training to Kolkata also whereafter she was transferred to Patna. PW-4 has stated that

during these two months' period, her husband was visiting her at Pakur. There is no allegation that at Pakur, this appellant had been indulging in quarrel or demand of dowry. It has also come in evidence that there was a talk of marriage of younger sister of Namrata (deceased) and people from the bridegroom side were coming to see her. On this occasion also, the appellant had accompanied Namrata (deceased) to Muzaffarpur. Both of them reached Muzaffarpur on 24.10.2015 and returned on 25.10.2015. The statement of PW-4 that he received a phone call from Namrata on 26.10.2015 at about 4:00 P.M. and she told him that she may be killed if the demand is not met, remained unverified by the I.O.

34. This further shows that the appellant and his wife (deceased) may have any other kind of disputes but at least there was no issue of demand of dowry. Why and how Namrata died may remain a mystery but to this Court, it appears that there is no evidence to show even by preponderance of possibility that there was any demand of dowry and Namrata was subjected to cruelty or harassment by her husband in connection with any demand for dowry soon before her death. The *post mortem* report (Exhibit '4') and evidence of the Doctor (PW-7) nowhere shows any mark of violence on the person of the deceased. This Court would, therefore, come to a conclusion that in this case, the prosecution is

not able to prove by preponderance of possibility that soon before the occurrence, Namrata had been treated with cruelty connected with dowry demand.

Delay in Lodging, Registration and Sending the FIR

35. The informant has been examined in this case as PW-4. In his testimony, PW-4 has stated that police had recorded his *fardbeyan* in the Hospital itself on 27.10.2015 but the fardebyan was not read over to him and he had put his signature on the same without reading it. In his cross-examination, he has stated that he had reached Apolo Burn Hospital on 26.10.2015 at 11:00 P.M (night). The *post mortem* of the dead body was conducted in Nalanda Medical College and Hospital on 27.10.2015 and on the same day after receiving her dead body, he cremated the dead body at Gulbighat and proceeded for Muzaffarpur in the evening itself. He has further stated in his cross-examination that he came back Patna after three days. In his *fardbeyan* (Exhibit '1/3'), the informant (PW-4) has stated that his daughter Namrata has been killed by pouring kerosene oil on her and he was informed by the neighbours about the occurrence but in course of trial, he disclosed that on 26.10.2015 at about 09:00 P.M., he got a phone call from one Gautam who is resident of Ganga Complex and he told him that his daughter has been burnt. Gautam has not been examined

by police and he has not come in course of trial. The *fardbeyan* of the informant was recorded only on the next date i.e. on 27.10.2015 at 08:00 A.M., thus, there is at least delay of nine hours in recording of the *fardbeyan* of the informant. It is evident from his statement that on 28.10.2015, his further statement was not recorded by Vijay Kumar Mishra (PW-8) SI of Police, Kankarbagh. Fardebyan recorded by K.K. Singh, SI of Agamkuan Police Station was received in Kankarbagh Police Station on 28.10.2015 at 18:45 Hours (evening) and it was registered simultaneously. PW-8 has stated in his examination-in-chief that after taking over the investigation, he recorded the statement of PW-4, PW-1, PW-2 and PW-3 who were present but because of night hours, he could not visit the place of occurrence that day and he went there on 29.10.2015, he conducted the inspection of the place of occurrence on the identification of the informant (PW-4) on 29.10.2015 but PW-4 has stated that he was not at the place of occurrence at the time of inspection.

36. The evidence of PW-4 and PW-8 are contradicting each other on material particulars. PW-4 states that he left for Muzaffarpur after cremation of the dead body on 27.10.2015 itself and came back after three days, therefore, the statement of PW-8 that he recorded further statement of the informant and other

witnesses after registration of the FIR but could not visit that day for verification of place of occurrence and visited the said place on 29.10.2015 cannot be believed. The informant was not present at Patna on 28.10.2015. He came back after three days meaning thereby that he reached Patna on 30.10.2015/31.10.2015. The records of the learned trial court would show that the first order has been recorded on 31.10.2015 which reads as under:-

> "31.10.2015 – Received F.I.R. of Kankarbagh P.S. Case No. 734/15 under Section 304 (B) I.P.C. against accused Samir Kumar Sinha.
>
> Seen. Put up this case after Final Form received.
>
> (Dictated)
>
> J.M. 1st Class, Patna"

37. This Court, therefore, finds from the records that there were not only a substantial delay in recording the *fardbeyan*, the said *fardbeyan* reached to the Kankarbagh Police Station after about 35 hours and the FIR was registered on 28.10.2015 at 16:45 hours but it reached to court of learned Judicial Magistrate after three days on 31.10.2015, thus, there is inordinate delay in lodging of the FIR.

38. We find that the I.O. (PW-8) has not at all offered any explanation for the delay in sending the FIR. It is not the case of the prosecution that there was any intervening holidays or for any reason beyond control of the I.O. the FIR could not be sent to

the learned Magistrate within the statutory period of 24 hours. In the case of **Ramesh Baburao Devaskar and Others versus the State of Maharashtra** reported in (**2007) 13 SCC 501,** the Hon'ble Supreme Court has observed as under:-

> "**20.** The Code of Criminal Procedure provides for certain internal and external checks; one of them being the receipt of a copy of the first information report by the Magistrate concerned. It is not in dispute that in a grave case of this nature, the copy of the first information report was received by the Magistrate four days later. No explanation has been offered therefor. Section 157 of the Code of Criminal Procedure mandates that the first information report should be sent to the nearest Magistrate within a period of 24 hours. It has not been disputed that the occurrence took place near the district headquarters. There cannot be any reason whatsoever as to why the first information report was sent after four days. (See *Jagdish Murav* v. *State of U.P.*[3]*)*"

39. In the case of **Jang Singh and Others versus the State of Rajasthan** reported in **(2001) 9 SCC 704,** their Lordships observed thus:-

> "….Then again, this FIR was lodged on 26-7-1975, and it reached the Magistrate on 29-7-1975, and no explanation is forthcoming as to why there has been such delay in sending the FIR to the Magistrate. That apart, intrinsically the materials brought out in the cross-examination of PW 1, persuade us to hold that the said PW 1, by no stretch of imagination, can be held to be a truthful witness on whose testimony conviction of so many accused persons can be based. ..."

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3. (2006) 12 SCC 626 : (2007) 2 SCC (Cri) 234 : (2006) 8 Scale 433

40. In the facts of the present case, having found that the inordinate delay of three days in sending the FIR to the court of learned Judicial Magistrate, Patna shall prove fatal to the prosecution.

41. Recently, in the case of **Sekaran versus the State of Tamil Nadu** reported in **(2024) 2 SCC 176,** the Hon'ble Supreme Court has taken note of the contention that there has been no satisfactory explanation for the belated registration of the FIR, however, it has been held that the same by itself and without anything more ought not to weigh in the minds of the courts in all cases as fatal for the prosecution. A realistic and pragmatic approach has to be adopted, keeping in mind the peculiarities of each particular case, to assess whether unexplained delay in lodging the FIR is an after-thought to give a coloured version of the incident, which is sufficient to corrode the credibility of the prosecution version. In this case, we find that it is not only the delay in lodging of the FIR, even the subsequent events such as delay of 35 hours in registration of the FIR and then unexplained delay of three days in sending the FIR to the court of learned Judicial Magistrate are such that they are sufficient to tarnish the credibility of the prosecution version and it creates a doubt as the prosecution case is a result of an after-thought.

42. It further transpires from the records that the I.O. (PW-8) had not examined any of the doctors or staffs of the hospital.

43. This Court finds that in this case at a much belated stage after four months from the date of lodging of the FIR, Khushi Kumari (PW-5) has been introduced saying that she was serving as Maid and is an eye-witness. PW-4 had not disclosed about presence of PW-5 in his *fardbeyan.* She has stated that on the said night of 26.10.2015, Namrata (deceased) was tortured by this appellant and there was a dispute over money. PW-5 has deposed as a witness of circumstances just before the occurrence and the circumstances after the occurrence. She had not seen the appellant setting the deceased at fire. She has stated in her examination-in-chief that on the said night, the appellant had given hand and fist blow (लप्पड़–थप्पड़) to the deceased. Khushi Kumari (PW-5) is a child witness. She was only '9' years old at the time of occurrence. She claims that *didi* had brought her for studies but she was not admitted in any school. In the *fardbeyan* (Exhibit '1/3'), PW-4 has not stated about the presence of PW-5 in the flat (PO) but later on PW-4 has stated in his evidence that Khushi Kumari (PW-5) was a maid and she was present there, she was also present in the hospital when he reached hospital on

26.10.2015 (night). PW-4 in his statement before the police or in course of trial did not say that Khushi Kumari (PW-5) had narrated him about the occurrence which had taken place on 26.10.2015 but later on, after four months, Khushi Kumari (PW-5) was produced in the police station and her statement was recorded. Though PW-4 took name of PW-5 in his further statement still it took four months in bringing her before the I.O. (PW-8). She was taken to the court of learned Magistrate on 25.02.2016 where her statement under Section 164 Cr.P.C. (Exhibit '7' with objection) has been recorded.

44. Learned Magistrate who recorded her statement under Section 164 CrPC has simply recorded that "after putting some questions from the witnesses, I believe that she is able to understand the nature of questions and answer it." We are unable to accept that learned Magistrate has conducted a true preliminary examination to determine the competency of a child witness. In the case of **P. Ramesh vs. State represented by Inspector of Police** reported in **(2019) 20 SCC 593,** the Hon'ble Supreme Court has observed as under:-

"**13.** Section 118[3] of the Evidence Act, 1872 deals

3. "**118.** ***Who may testify***.—All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.
Explanation.—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them."

with the competence of a person to testify before the court. Section 4[4] of the Oaths Act, 1969 requires all witnesses to take oath or affirmation, with an exception for child witnesses under the age of twelve years. Therefore, if the court is satisfied that the child witness below the age of twelve years is a competent witness, such a witness can be examined without oath or affirmation. The rule was stated in *Dattu Ramrao Sakhare* v. *State of Maharashtra*[5], where this Court, in relation to child witnesses, held thus : (SCC p. 343, para 5)

"*5*. … A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored."

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4. ["**4.** ***Oaths or affirmations to be made by witnesses, interpreter and jurors***.—(1) Oaths or affirmations shall be made by the following persons, namely:
(*a*) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any court or person having by law or consent of parties authority to examine such persons or to receive evidence;
(*b*) interpreters of questions put to, and evidence given by, witnesses; and
(*c*) jurors:

Provided that where the witness is a child under twelve years of age, and the court or person having authority to examine such witness is of opinion that, though the witness understands the duty of speaking the truth, he does not understand the nature of an oath or affirmation, the foregoing provisions of this section and the provisions of Section 5 shall not apply to such witness; but in any such case the absence of an oath or affirmation shall not render inadmissible any evidence given by such witness nor affect the obligation of the witness to state the truth.(2) Nothing in this section shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person, unless he is examined as a witness for the defence, or necessary to administer to the official interpreter of any court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties."]

5. (1997) 5 SCC 341 : 1997 SCC (Cri) 685.

14. A child has to be a competent witness first, only then is her/his statement admissible. The rule was laid down in a decision of the US Supreme Court in *Wheeler* v. *United States*[6], wherein it was held thus : (SCC OnLine US SC para 5)

"*5*. … While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. *This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial Judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath*. As many of these matters cannot be photographed into the record the decision of the trial Judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous."

(emphasis supplied)

15. In *Ratansinh Dalsukhbhai Nayak* v. *State of Gujarat*[7], this Court held thus : (SCC pp. 67-68, para 7)

"*7. … The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which*

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6. 1895 SCC OnLine US SC 220 : 40 L Ed 244 : 159 US 523 (1895).

7. (2004) 1 SCC 64 : 2004 SCC (Cri) 7. Subsequently, relied upon in *Nivrutti Pandurang Kokate* v. *State of Maharashtra*, (2008) 12 SCC 565 : (2009) 1 SCC (Cri) 454

will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

(emphasis supplied)

16. In order to determine the competency of a child witness, the Judge has to form her or his opinion. The Judge is at liberty to test the capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (*i*) understand questions put as a witness; and (*ii*) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto.[8] A child becomes incompetent only in case the court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner.[9] If the child understands the questions put to her/him and gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined."

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8. *Ratansinh Dalsukhbhai Nayak* v. *State of Gujarat*, (2004) 1 SCC 64 : 2004 SCC (Cri) 7
9. Sarkar, *Law of Evidence*, 19th Edn., Vol. 2, Lexis Nexis, p. 2678 citing *Director of Public Prosecutions* v. *M*, 1998 QB 913 : (1998) 2 WLR 604 : (1997) 2 All ER 749 (QBD)

45. In a recent judgment, the Hon'ble Division Bench of this Court in the case of **Rudal Chaupal versus the State of Bihar** reported in **2024 (2) BLJ 231 (HC)** held that before recording evidence of a child, it is the duty of a Judicial Officer to ask preliminary questions from him/her with a view to ascertain whether the child can understand the questions put to him/her and is in a position to give rational answers. The Magistrate must be satisfied that the child is able to understand the questions and respond to that and understands the importance of speaking the truth.

46. We find that not only the learned Magistrate who recorded the statement of PW-5 under Section 164 CrPC has not been examined in course of trial, the learned trial court has before recording the evidence of PW-5 has not at all conducted the preliminary examination. It remains a mystery as to why PW-5 who was present in hospital on 26.10.2015/27.10.2015 did not disclose the occurrence which had taken place inside the flat in the said evening to PW-4 or to the S.I. of Police K.K. Singh who recorded the *fardbeyan* of PW-4 and why she has been introduced as a witness after four months. It is also to be seen with the evidence of PW-8 who has stated in paragraph '3' that he had recorded the statement of Khushi Kumari (PW-5) under Section

161 Cr.P.C. and she had stated before him that Namrata had set herself at fire (paragraph '12' of his cross-examination).

47. A perusal of the evidence of PW-5 further shows that she had accompanied the deceased and the appellant to Muzaffarpur. She has stated that in train, there was no quarrel between the two and they had gone to the residence by auto after boarding down from the train. This witness states that after reaching the house of the deceased, she had left for her own house alone. She has stated that at Muzaffarpur, there was a quarrel between the appellant and the deceased but she has not stated in her entire deposition that she had ever heard about the demand of Rs.2 lakhs and a motorcycle by the appellant. What is important in the evidence of PW-5 is that according to her, this appellant had left Muzaffarpur on the same day after quarrel and she had left for her house where she stayed with her parents for two days. If PW-5 stayed for two days with her parents from 25.10.2015, her presence in the flat on 26.10.2015 becomes doubtful. She has herself stated in para '8' of her cross-examination that for her statement, she was brought before police by her parents after 2-3 months. This only strengthens the views of this Court that PW-5 is not an eye-witness of any of the circumstances leading to the occurrence of 26.10.2015, she was not present at the place of

occurrence and she has been introduced in this case as a witness after tutoring. Section 134 of the Act of 1872 has categorised the oral testimony of the witnesses in three categories, they are:- (i) wholly reliable, (ii) wholly unreliable and (iii) neither wholly reliable nor wholly unreliable. Her evidence would come in the category of a wholly unreliable witness as envisaged under Section 134 of the Act of 1872. It is well-settled that it is the quality of the evidence that matters not the quantity.

48. We are of the considered opinion that PW-5 is a tutored child witness who has been introduced at a much belated stage and her presence seems to be highly doubtful.

49. So far as other witnesses such as Vimlesh Kumar (PW-1), Kirti Prasad Verma (PW-2) and Nitish Kumar Singh (PW-3) are concerned, they are not the witnesses to the circumstances showing the cause of death of the daughter of the informant. These witnesses are related to the informant (PW-4). One thing is common in the statement of all of them that the marriage was solemnised between the parties without any dispute or differences at the time of marriage. None of them have stated that there was any demand of dowry at the time of marriage. In fact, it is not even the case of PW-4 in his *fardbeyan* that at the time of marriage, appellant had made any demand. PW-1 has stated that Namrata

had gone to her *sasural* after marriage but after one month, her *sasural* people started torturing her for a sum of Rs.2 lakhs and a motorcycle which is not believable because Namrata was an employee of the Syndicate Bank from before her marriage and it is difficult to understand that if no demand was made at the time of marriage then why the appellant would indulge in torturing his wife for a demand of Rs.2 lakhs and one motorcycle. PW-1 has stated to the extent that after marriage, Namrata had gone to her *sasural* happily and for about one month, she had been living in her *sasural* and used to attend her work at Muzaffarpur from the village of the appellant. This further shows that Namrata was getting full cooperation from her *sasural* and she was allowed to visit Muzaffarpur from her *sasural* for attending her work. PW-1 had his residence at a distance of two kilometers only from the house of Namrata at Muzaffarpur. He is the uncle of Namrata but he does not say that at any stage, Namrata had made a complaint to him regarding demand of dowry or torture in connection thereof.

50. PW-2 is the co-brother of PW-4 on whose intervention, the marriage was arranged. He has also stated in his examination-in-chief that the disturbances started after a month or so and he was told about the demand of Rs.2 lakhs and a motorcycle by PW-4. This witness has also not stated that Namrata

had ever disclosed to him about the demand and the torture being meted out to her due to non-fulfillment of the demand.

51. Nitish Kumar (PW-3) has also not stated that at any stage, Namrata had told her about the demand of dowry and torture in connection thereof.

52. In this case, the doctor who conducted the autopsy on the dead body has been examined as PW-6, he found the following injuries on the body of the deceased:-

> "(i) Scalp hair signed Kirosene oil like smell perceived in their odour Dermoepidermal burn wound with redness and blacken skin at several places seen over face, neck, both upper limbs, front and back of trunk, buttock, both lower limbs, genetalia except sole of feets.
> (ii) On Dissection - Both lungs were congested. Right heart chamber was full and left empty. The stomach contain khichari about 100 ml. The abdominal viscera was congested. Uterus was non pregnant. The urinary bladder was empty. The brain and its meninges was congested.
> Opinion- The above noted burn injuries were ante-mortem in nature. Death resulted from burn injuries and its complication caused by flame of fire. The time since death was within 4 to 12 hours. From the time of Post-Mortem examination.
> The above said Post-Mortem report in my pen and bearing my signature marked as Exhibit-4."

53. In his cross-examination, he has stated that except the fingers of the legs, the whole body of the deceased was found burnt. Such injuries may be caused if a person is burnt in standing condition. The body was burnt from all the four sides. PW-6 has stated that he cannot say whether such kind of injuries may be

found in case of a suicide. He has stated in paragraph '3' of his cross-examination that if a person pours kerosene oil on the whole body then the fire would engulf the entire body. He had found 100 ml of *khichadi* in the stomach. It is evident from the evidence of PW-6 that Namrata was not set at fire while sleeping. Had the kerosene oil been poured over her in sleeping condition or she would have resisted at the time of being subjected to the burning, the doctor must have found some other anti-mortem injuries but in this case, no other anti-mortem injuries have been found on the body of the deceased. The *post mortem* report coupled with the pattern of cross-examination of the prosecution witnesses would suggest that on return from her parents place at Muzaffarpur, Namrata was not happy, though she had taken some food but in some disturbed condition, she took the drastic step. There is no mark of struggle on her body and by the time, the appellant came to rescue her, she was badly burnt. In order to save, the appellant was also burnt. She was taken to hospital by the appellant. The appellant was admitted in the Apollo Burn Hospital itself and the prosecution witnesses have admitted that the appellant was also treated in the same hospital. The I.O. in his deposition has stated that in their respective statements which have been recorded by him one Ram Charitra Das who is the guard in the building and

Mithilesh Kumar Singh, a resident of Flat No. 401 in the said apartment had stated that both the appellant and his wife were living happily there and there was no quarrel between them. It is not known why the I.O. did not make Ram Charitra Das and Mithilesh Kumar Singh a chargesheet witness in this case, however, the evidence of the I.O. in this regard remains unchallenged.

54. The learned trial court has taken a view that because Ram Charitra Das and Mithilesh Kumar are not named as witnesses in the chargesheet, therefore, using their statement would not be permissible and the same cannot be looked into in the trial. Reliance in this regard has been placed on the judgment of the Hon'ble Apex Court in the case of **Malkiat Singh and Others versus State of Punjab** reported in **(1991) 4 SCC 341.** On going through the judgment in case of **Malkiat Singh** (supra), we do not find any law laid down by the Hon'ble Supreme Court saying that the statement of the I.O. (PW-8) as regards the statements made by Ram Charitrar Das and Mithlesh Kumar cannot be looked into. If the I.O. did not mention in the chargesheet the name of those two persons who were investigated and had made statement in course of investigation before the I.O., it is only because the I.O. did not want those two witnesses who

were not supporting the prosecution case to depose against the interest of the prosecution. In his cross-examination, however, the I.O. (PW-8) has categorically stated that these two witnesses had stated that both the wife and husband were living happily and the appellant had taken her to Apollo Burn Hospital by Ambulance. These two witnesses about whom the I.O. (PW-8) has stated are the witnesses to the circumstances immediately after the occurrence and there is no reason as to why the statement of PW-8 in this regard shall be discarded.

55. In the present case, we find that the defence examined as many as seven witnesses. DW-1, Mithilesh Kumar is the flat owner of Flat no. 406 in which the appellant was residing with the deceased. He has stated that the flat was given to the appellant on rent in September, 2015. According to this witness, both the husband and wife were maintaining good relationship. This appellant used to go to his work in Railway Factory, Marhaura at 08:30 in the morning and Namrata was going on her job at 09:00 am. Both of them were working and they used to come in the evening. On 26.10.2015, this appellant was seen putting off the fire and he was shouting. He has stated that the people from the flats came there and in attempt to save Namrata, this appellant had also suffered burnt injuries. In his cross-

examination, he has stated that at the time of occurrence, he was in Ganga Complex itself and on *hulla*, he had reached to the place of occurrence. He had seen the appellant trying to put off the fire, Namrata was in standing condition. The another witness is Nirmala Devi (DW-2) who has stated that this appellant was a tenant in her Govind Chak situated house where he had stayed for two years approximately. She has also stated about good relationship between the husband and wife. Santosh Kumar Singh (DW-3) is a colleague of the appellant who has stated that he was working in the Railway factory with the appellant and he has stated that the appellant was maintaining good relationship with his wife. Renu Devi (DW-4) and Rinki Devi (DW-5) are the two sisters of the appellant. Both of them have stated that there was good relationship between husband and wife. DW-5 has stated that two days prior to the occurrence, both of them had gone to Muzaffarpur where there had some dispute and father of Namrata had been demanding a sum of Rs.50,000/- for the purpose of marriage of his younger daughter because of which Namrata was disturbed and she committed suicide.

56. The learned trial court has not given any credence to the statements of the defence witnesses and has not considered the

medical documents which were marked as Exhibit ‘A Series’ and Exhibit ‘B Series’.

57. In this regard, we find from the oral testimony of PW-1 and PW-8 that they have stated that this appellant was also admitted in the same hospital. PW-8 has stated in paragraph ‘7’ of his deposition that this appellant was admitted in the hospital and he was injured. PW-8 had recorded the statement of the appellant in the hospital, he had obtained the discharge slip of the appellant which was enclosed by him with the case diary and the same was marked as ‘X’ for identification. We are, therefore, of the view that there are sufficient materials on the records to believe that the appellant had tried to save his wife Namrata while she was burning and in the said attempt, he had suffered injuries. The learned trial court had no reason to disbelieve it.

58. In the light of the discussions held hereinabove, we are of the view that the learned trial court has erred in holding that the appellant is guilty of the offence punishable under Section 304 B IPC. We are of the view that the prosecution has not established at first instance that Namrata was subjected to harassment by her husband (the appellant) in connection with the demand of dowry and soon before the occurrence, she was tortured and harassed for

dowry, therefore, in this case, the legal presumption requiring heavy burden of rebuttal by the defence would not arise.

59. In result, the impugned judgment of conviction and order of sentence are set aside. The appeal is allowed giving benefit of doubt to the appellant. The appellant is on bail. He is discharged from the liability of his bail bonds.

(Rajeev Ranjan Prasad, J)

(G. Anupama Chakravarthy, J)

Rishi/Siddharth-

AFR/NAFR	AFR
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