

CASE NO.:
Appeal (crl.) 1161 of 2003

PETITIONER:
Baljeet Singh & Anr.

RESPONDENT:
State of Haryana

DATE OF JUDGMENT: 24/02/2004

BENCH:
N.Santosh Hegde & B.P.Singh.

JUDGMENT:
JUDGMENT

SANTOSH HEGDE, J.

The appellant herein and three others were charged for offences punishable under Sections 304-B, 306, 498-A and 201 of the IPC before the Addl. Sessions Judge, Sonapat who after trial came to the conclusion that the prosecution has failed to establish its case against A-1 Sukhbir and A-4 Krishna and acquitted them of the said charges, while it came to the conclusion that A-2 Baljeet, who is the appellant before us, was guilty of offences punishable under Section 304-B IPC as also Section 498-A IPC. The said court found A-3 Ganga Dutt guilty of offence punishable under Section 201 of IPC. The trial court sentenced the first appellant herein for the offence punishable under Section 304-B IPC to undergo 7 years RI and to pay a fine of Rs.500/- while it sentenced him to undergo 2 years RI for an offence punishable under Section 498-A IPC. It convicted the second appellant for an offence punishable under Section 201 IPC and sentenced him to undergo 2 years RI. The sentences imposed on the first appellant Baljeet Singh were directed to run concurrently. Being aggrieved by the said conviction and sentence, the said convicted accused preferred an appeal before the High Court of Punjab & Haryana at Chandigarh which by its impugned judgment confirmed the said conviction and sentence and dismissed the appeal.

It is against the said judgment of the High Court the two appellants filed the above criminal appeal. During the pendency of this appeal, A-3 Ganga Dutt died, hence, his appeal abated and the present appeal is confined to first appellant only.

Brief facts necessary for the disposal of this appeal are as follows:

It is the case of the prosecution as stated by PW-4 Baldeva in his complaint lodged on 14.2.1987 as also in his evidence before the court that his daughter Darshana was married to the appellant herein about 5 years before the filing of the said complaint and he had spent about Rs. 30,000/- in the said marriage. He also alleged that he had given clothes and utensils, apart from ornaments. It is stated by this witness that about one and half months after the marriage, Darshana told her mother that her in-laws were not happy with the dowry given, therefore, they were always taunting her in this regard. PW-4 also alleged that Darshana's father-in-law and other members of her family including her husband used to beat her. The further case of the complainant is that a year after her marriage, the appellant herein demanded a scooter

and about 4 months prior to the filing of the complaint, the appellant had demanded Rs.10,000/- for securing employment for his brother, but PW-4 could not fulfil these demands. It is further stated that about 2 weeks after Darshana went to her marital home, a cousin of Darshana, by name, Dilbagh (PW-7) had gone to the village of the appellant to enquire about the welfare of Darshana and he came to know that Darshana had died as a result of taking pills of insecticide. This witness had also come to know that the accused persons had disposed of Darshana's body without informing her parents and other members of the family. The written complaint in question was filed before the Superintendent of Police which was transferred for investigation to the jurisdictional Police on 14.2.1987. In the said written complaint date of death of Darshana was given as 6.2.1987. On completion of the investigation, charge sheet for offences punishable under Sections 498-A, 306 and 201 IPC was filed against four accused persons before the Addl. Sessions Judge, Sonapat. At the time of framing of charges, the court also included Section 304-B as an additional charge against the accused persons. After the trial, A-1, Sukhbir, the younger brother of the appellant and A-4 Krishna, sister of the appellant were acquitted of the charges while the appellant and his father were convicted as stated above and their appeal having been dismissed by the High Court, they approached this Court by way of above criminal appeal. After the death of the second appellant, the present appeal is confined to the appellant Baljeet only.

Shri Sushil Kumar, learned senior counsel appearing for the appellant contended that both the courts below seriously erred in drawing a presumption under Section 113B of the Evidence Act and shifting the onus of proof on the accused without the prosecution having proved the basic requirement under the said section. He also contended that the evidence led on behalf of the prosecution to establish either the demand of dowry or harassment meted out to deceased Darshana cannot be accepted at all because it is an afterthought of PW-4 to harass the family of the appellant after his daughter Darshana committed suicide. Learned counsel pointed out that though the death of Darshana took place on 6.2.1987 and her parents and relatives were present at the cremation, no complaint was immediately filed but a well drafted complaint making false allegations against the appellant was made by PW-4 on 14.2.1987. He also contended that the courts below erred in relying upon such a belated complaint. He further contended that the prosecution has failed to establish that Darshana's death had occurred within 7 years of her marriage and the evidence led by the prosecution to establish demand of dowry and harassment have all emanated from interested sources, hence, the courts below erred in convicting the appellant and his father. Ms. Avneet Toor, learned counsel appearing for the respondent, however, contended that the courts below were justified in drawing a presumption against the accused because the appellants had failed to establish their case that the marriage of Darshana had taken place 11 years before her death. Learned counsel also contended that it is clear from the evidence of PW-4 and other prosecution witnesses that the appellant and his father were constantly nagging Darshana for not bring sufficient dowry, therefore, the courts below were justified in coming to the conclusion that the prosecution has established its case against the appellant and his deceased father.

A perusal of the judgment of the two courts below clearly shows that they have heavily relied upon the

presumption available under Section 113-B of the Evidence Act. This is done by shifting the onus of proving the date of marriage on the accused. Therefore, we will first consider the argument addressed on behalf of the parties in regard to the availability of presumption under Section 113-B of the Evidence Act.

Section 304-B of the IPC which defines "Dowry death" reads thus:-

"Dowry death \026 (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 \026 For the purpose of this sub-section "dowry" shall have the same meaning as in section 2 of the Dowry prohibition Act, 1961 (28 of 1961).

(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."

A perusal of this section clearly shows that if a married woman dies otherwise than under normal circumstances within 7 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 in connection with demand for dowry, such death shall be called "dowry death" and such husband or relative shall be deemed to have caused the death. The conditions precedent for establishing an offence under this Section are as follows: (a) that a married woman had died otherwise than under normal circumstances; (b) such death was within 7 years of her marriage; (c) and the prosecution has established that there was cruelty and harassment in connection with demand for dowry soon before her death.

Section 113-B permits a presumption to be drawn against the accused in regard to dowry death provided the prosecution establishes that soon before her death the woman was subjected to cruelty or harassment.

The explanation to said section says the word "dowry death" shall have the same meaning as in Section 304-B of the IPC which means such death should be otherwise than in normal circumstances and within 7 years of marriage. On a conjoint reading of these sections, it is clear that for drawing a presumption under Section 113-B of the Evidence Act firstly there should be a death of a woman otherwise than in normal circumstances, within 7 years of marriage and the prosecution having shown that soon before her death she was subjected to cruelty or harassment in connection with any demand for dowry by persons accused of having committed the offence. Unless and until these preliminary facts are established by the prosecution, it is not open to the courts to draw a presumption against the accused invoking Section 113-B of the Evidence Act. We are supported in this view of ours by a judgment of a three-Judge Bench of this Court in the case of Ramesh Kumar vs. State of Chhattisgarh (2001 (9) SCC 618) wherein this Court held thus:

"Before the presumption may be raised, the foundation thereof must exist. A bare reading of Section 113-A shows that to attract applicability of Section 113-A, it must be shown that (i) the woman has committed suicide, (ii) such suicide has been committed within a period of seven years from the date of her marriage, (iii) the husband or his relatives, who are charged had subjected her to cruelty. On existence and availability of the above said circumstances, the court may presume that such suicide had been abetted by her husband or by such relatives of her husband. Parliament has chosen to sound a note of caution. Firstly, the presumption is not mandatory; it is only permissive as the employment of expression "may presume" suggests. Secondly, the existence and availability of the abovesaid three circumstances shall not, like a formula, enable the presumption being drawn; before the presumption may be drawn the court shall have to have regard to "all the other circumstances of the case". A consideration of all the other circumstances of the case may strengthen the presumption or may dictate the conscience of the court to abstain from drawing the presumption. The expression "the other circumstances of the case" used in Section 113-A suggests the need to reach a cause-and-effect relationship between the cruelty and the suicide for the purpose of raising a presumption. Last but not the least, the presumption is not an irrebuttable one. In spite of a presumption having been raised the evidence adduced in defence or the facts and circumstances otherwise available on record may destroy the presumption. The phrase "may presume" used in Section 113-A is defined in Section 4 of the Evidence Act, which says "Whenever it is provided by this Act that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it."

The above case, of course, deals with Section 113-A of the Evidence Act. However, the principle laid down therein squarely applies to cases involving Section 113-B of the said Act also in so far as they relate to the proof of facts enumerated in the section before a presumption is drawn.

From the above, it is clear that certain conditions precedent by way of proved facts should be brought on record before the courts can draw a presumption under Sections 113-A or 113-B of the Evidence Act.

We will now examine whether the prosecution in this case has discharged its initial burden so as to attract the presumption under Section 113-B of the Evidence Act and whether the courts below have correctly applied that law to the facts of this case.

The trial court in the course of its judgment while dealing with the presumption available under Section 113-A and 113-B held thus :

"In this case, now in view of new statutory provisions, onus also lies on the accused to rebut the presumption which may be raised under Section 113-A of the Indian Evidence Act or under Section 113-B of the Indian Evidence Act."

A reading of this part of the judgment clearly shows that the trial court proceeded as if a presumption is available against the accused merely because an allegation of death within 7 years of the marriage was made, without even the prosecution having proved the required preliminary fact. Having so erroneously shifted the onus the court then proceeded to hold that the accused had not discharged the said onus, hence, convicted the accused primarily based on the presumption under Section 113-B of the Evidence Act.

The High Court also put the onus of proving the date of marriage on the accused by stating that since a specific plea was taken by the accused persons that the marriage had taken place 11 years prior to the death of Darshana, there was an obligation cast upon the accused to prove this aspect of their assertion and since they had not proved this fact, it held that the trial court rightly drew an adverse presumption against the accused persons.

Having noticed the requirement of law both under Section 304-B of the IPC as also under Section 113-B of the Evidence Act, we are of the considered opinion that both the courts below erred in drawing an adverse presumption against the accused by shifting the onus on them to prove the date of marriage, which, in our opinion, is not the requirement of law. On the contrary, the law requires the prosecution to establish first by cogent evidence that the death in the case occurred within 7 years of the marriage. Therefore, we will have to consider whether the prosecution has established the factum of Darshana having died within 5 years of her marriage as contended by PW-4. A perusal of his evidence shows that according to him marriage of Darshana was solemnized in the year 1982 but he was not aware which Sambat it was. He says it was the month of Jaistha but was not sure whether it was Sambat 2035. He specifically states that a Bahi entry was made by his nephew Satbir in regard to the date of marriage and expenses incurred in connection therewith, but this document was not produced in the court. Existence of such a document is established not only from the evidence of PW-4 but also from the evidence of the Investigating Officer PW-10 who says that he was made known of the existence of such a document but he did not either seize the said document or verify the date of marriage from the said document. He also states that he made an inquiry about the year of marriage of Darshana and nobody was able to tell the date but year of marriage was told to him. He goes further to state that he did not record the statement of those persons who told him about the year of marriage. Therefore, it is clear that the prosecution has failed to produce the available evidence regarding the date of Darshana's marriage thereby failed to discharge its initial onus of proof. The defence in this case has unequivocally challenged the correctness of the date of marriage, as stated by the prosecution. It even examined defence witnesses in this regard. Be that as it may the question whether the defence has been able to establish its version of the date of marriage is immaterial because in the first instance it was for the prosecution to establish this fact which for reasons stated above, it has failed to do. Both the courts below, thus, have clearly erred in shifting the onus of proving the date of marriage on the defence and drawing a presumption against it. This is evident from the finding of the trial court which is as follows : "Accused Baljeet in this case has not been able to rebut the mandatory presumption under Section 113-B of the Indian Evidence Act thus prosecution has been able to prove him the guilt". This finding which is concurred to by the High Court, in our opinion, is wholly erroneous and

unsustainable in law.

We will now consider whether the prosecution has established its case de hors the presumption available under the Evidence Act. In this process, we should bear in mind the fact that the complaint in question was filed nearly 8 days after the incident and a perusal of the said complaint shows that it was a well thought, deliberated and typed document which even mentions the sections relating to the offences of which the accused persons were said to be guilty. Though PW-4 has denied that this was a document prepared after consultation and on the advice of outsiders, we must note that he admittedly is an illiterate and, in our opinion, this denial is wholly false. The narration of facts in the complaint enumerates even the ingredients of the offence under the Indian Penal Code and the sections under which the offences fall. This undoubtedly goes to show that this is a document which has come into existence after lots of deliberation and consultation. In this context, the admission of the informant that he had gone to the court where the report to be lodged was prepared, is significant.

In the above background, we will now consider the evidence led by the prosecution. Though PW-4 says that he had no knowledge of the death of Darshana and her cremation was done without informing him and his family, from the material on record, it could be seen that this statement of PW-4 is not true. It has come in evidence that a sketch was prepared showing the place where Darshana's body was kept before the funeral. This sketch admittedly was prepared on instructions of PW-4. This sketch indicates that firstly Darshana's body was kept on the first floor of the house and later brought down and kept in the courtyard on a cot. PW-4 could not have acquired such knowledge so as to give it to the maker of the sketch if he was not present before Darshana's funeral. Therefore, we think that this part of the evidence of PW-4 that the accused did not inform Darshana's family about her death before her funeral cannot be believed. The prosecution has then relied on the evidence of PWs.4 to 7 to establish their case of the demand for dowry and harassment meted out to Darshana. We should bear in mind that all these witnesses are close relatives of Darshana being her mother and uncles and their evidence will have to be considered for whatever it is worth in the background of the findings we have given in regard to the evidence of PW-4. PW-5 the mother of the deceased in her examination-in-chief repeats whatever her husband has stated in his evidence which we have already considered and not found it safe to rely on. In her cross-examination she stated that after the death of Rohtas, who was her only brother, Darshana used to be depressed. She further states that she was also depressed because she had no children. This indicates that there is a possibility of Darshana having committed suicide in a state of depression.

PW-6 is an uncle of Darshana who also speaks about the harassment allegedly meted out by the appellant and his family to Darshana but these facts are not mentioned to the I.O. in his statement under Section 161 (See Ex.DA). He states that they came to know of the death of Darshana from one Balwan who had told about the death of Darshana to a cousin of Darshana, by name Dilbagh, who in turn had informed the other members of the family about the death of Darshana. Curiously none of the witnesses who came to know of the incident from Balwan are able to give either the correct address, the particulars of the caste and occupation of Balwan which gives us an impression that this Balwan is an imaginary person. In these circumstances, bearing in mind

the falsity we have found in the evidence of PW-4, we do not consider it safe to place reliance on such oral evidence led by the prosecution to establish the fact that the appellant or his family used to harass Darshana. There is one other aspect of the case to be borne in mind to consider the role played by the appellant in the alleged harassment of Darshana. It has come in evidence that the appellant was not residing in the village with his wife but was employed in Jagadhari in Ambala District and was only visiting the village now and then. This fact has been noticed by the trial court but it rejected the same by observing that if the appellant was not present when Darshana died the evidence under section 304-B is not effected by the factum of appellant being away from his house at the time of death, forgetting the fact that the argument of the defence was not merely the absence of the appellant at the time of death of Darshana but also the possibility of appellant's involvement in the alleged harassment, since most of the time he was away from the village. That apart, we notice that the courts below have not founded the guilt of the appellant on the oral evidence produced by the prosecution but the same is based primarily on a presumption drawn under Section 113-B of the Evidence Act which we have held to be impermissible in law in view of the prosecution's failure to prove the basic facts which was a condition precedent to the drawing of such a presumption.

For the reasons stated above, this appeal succeeds. The conviction and sentence imposed on the appellants by the courts below are set aside. If the appellants are in custody, they shall be released forthwith.

The appeal is allowed.