CASE NO.:
Appeal (crl.) 69 of 2007

PETITIONER:
Virendra Kumar

RESPONDENT:
State of U.P

DATE OF JUDGMENT: 16/01/2007

BENCH:
Dr. ARIJIT PASAYAT & S.H. KAPADIA

JUDGMENT:
J U D G M E N T
(Arising out of SLP (Crl.) No.435 OF 2006)

Dr. ARIJIT PASAYAT, J.

Leave granted.

Challenge in this appeal is to the judgment rendered by a Division Bench of the Allahabad High Court allowing the appeal filed by the appellant in part by setting aside his conviction for offence punishable under Section 302 of the Indian Penal Code, 1860 (in short the 'IPC') and instead convicting him for offence punishable under Section 306 IPC. He was sentenced to undergo imprisonment for ten years. Appellant and another accused, namely, Jai Narain faced trial for alleged commission of offence punishable under Section 302 IPC. During pendency of the appeal before the High Court aforesaid Jai Narain died and, therefore, the appeal stood abated so far as he is concerned.

Background facts in a nutshell are as follows:

The informant Sheo Karan (PW-1)'s niece Smt. Pushpa (hereinafter referred to as 'deceased') was married to the appellant Virendra Kumar, son of Jai Narain in village Chirli, Police Station Ghatampur. Immediately after the marriage Virendra Kumar,, his brother Suresh Kumar used to humiliate Smt. Pushpa and her other family members for bringing inadequate dowry and for being of a dark complexion. They even publicly abused the informant in village Chirli and threatened to end their relations with Smt. Pushpa, the deceased. This public humiliation was witnessed by Sahdev Singh (PW-3) and Prahlad Singh (PW-5), residents of Rajepur and Suresh, Bhanu Pratap Dixit (PW-4) and many others of village Chirli, About one and a half month prior to the fateful event Anil Kumar brought Smt. Pushpa to her Sasural in village Chirli. On 7.10.1982 at about 7 A.M. on information being sent by Bhanu Pratap Dixit (PW-4), the informant Sheo Karan (PW-2) reached village Chirli where he found the dead body of Smt. Pushpa. Four fingers of her right hand were burnt and on her hands and legs there were some marks of injuries. There was also a deep mark of hanging on the neck which showed that Smt. Pushpa had been beaten and thereafter done to death. Although the appellant Virendra Kumar was present in the village, from the morning of the

fateful day (7.10.1982) he was absent. Hence it was inferred by the informant that appellant in conspiracy with his elder brother Suresh had murdered Smt. Pushpa after taking help of some accomplices. The report to this effect was lodged by Sheo Karan Shukla on 7.10.1982 at police out post Sarh, police station Ghatampur, District Kanpur.
However, prior to this report, on 7.10.1982 at about 10 A.M., the co-accused Jai Narain gave an information at the police chauki Sarh of police station Ghatampur that in the night intervening 6-7 October, 1982, the deceased Smt. Pushpa placed her dhoti in an iron ring on the roof and thereafter she tied her own neck with the same and committed suicide and her body was still hanging from the ring on that roof with the Sari. On getting this information, the first investigating officer SI Ajab Singh (P.W.-8) reached the house of Jai Narain. He found the dead body hanging from a ring in the 'Dhanni' in the western Verandah by means of a Dhoti, which was tied on the neck. The body was taken down and inquest was performed on it by SI Ajab Singh. The opinion of the inquest witnesses was taken and also the body was sent along with the concerned papers for post mortem through Constables Kailash Chandra and Radhey Shyam. The injuries on the dead body were indicated in the inquest. The place where the body was found hanging was inspected by SI Ajab Singh (P.W.-8) who also prepared site plan. He recorded the statement of Jai Singh and his wife. As it had become late, the investigating officer returned to the police station. Thereafter the investigation was conducted by SSI Jogendra Singh (P.W.-9). As Smt. Pushpa had tied the knot with the Dhoti that she was wearing, hence it was not taken into possession, but it was sent along with the body of the deceased for post mortem.

Dr. R.K. Gupta (PW-6), Medical Officer, ESI Dispensary Kanpur conducted post mortem on the body of Smt. Pushpa on 8.10.1992 at 12.45 p.m. at the E.S.I. Dispensary in Kanpur.

SI Jogendra Singh (P.W.9) was handed over the investigation of this case by order of the Superintendent of Police, Kanpur Dehat dated 11.10.1982 on an application by Sheo Karan of the same date, and he commenced the investigation on 15.10.1982. After that effort was made to trace the accused persons, but they could not be arrested. As some of the witnesses were absent on that date, their statements could not be recorded and the police of Chauki Sarh was directed to produce the witnesses at the police station. On 3.11.1982 SI Jogendra Singh recorded the statements of Sheo Karan, Sahdeo, Deshraj Singh and Bhagwan Deen at the police station under Section 161 of the Code of Criminal Procedure, 1973 (in short the 'Cr. P.C'). On 24.11.1982 he recorded the statement of Prahlad and others. As he could not find the accused in spite of search, hence he obtained order under Sections 82 and 83 Cr.P.C. for attachment of their property on 27.11.1982. On 17.12.1982 appellant Virendra Kumar surrendered in Court. After completion of investigation. S. I. Jogendra Singh submitted the charge sheet.
The trial court found that on the basis of circumstances highlighted, the prosecution has established the accusations and therefore held the accused persons guilty and sentenced each to undergo imprisonment for life. As noted above the two accused persons preferred appeal before the Allahabad High Court which partially allowed the appeal. The High Court noted that though there was no specific charge in terms of Section 306 IPC, the ingredients of the said provision were

clearly made out and the appellant had abetted commission of suicide by the deceased. Though a stand was taken by the appellant before the High Court that since he had only been charged under Section 302 IPC, he could not be convicted under Section 306 IPC, the High Court did not find any substance in view of several decisions of this Court. We shall deal with the decisions referred to, by the High Court, infra.

In support of the appeal learned counsel for the appellant submitted that the High Court acted in terms of presumption available in law under Section 113A of the Indian Evidence Act, 1872 (in short the 'Evidence Act'). In the instant case, the offence was committed on 7.10.1982 when the provision i.e. Section 113A was not in the statute book. In fact, the statement under Section 313 Cr.P.C. was recorded on 2.11.1983. Reference is also made to a decision of this Court in Shamnsaheb M. Multtani v. State of Karnataka (2001(2) SCC 577) to contend that in the absence of specific charge under Section 306 IPC, the appellant could not have been convicted in terms of that provision. Learned counsel for the respondent-State on the other hand submitted that in the instant case the prosecution did not rely on the presumption available under Section 113A of the Evidence Act and the materials on record clearly established commission of the offence by the appellant, even without resort to Section 113A of the Evidence Act. It is further submitted that the controversy now raised is settled by a three-judge Bench of this Court in Dalbir Singh v. State of U.P. [2004(5) SCC 334].

Though learned counsel for the appellant submitted that the evidence was even otherwise insufficient to fasten the guilt on the appellant and on a bare perusal of the judgment of the trial court and the High Court, it is clear that the materials brought on record clearly formed a complete chain of circumstances which unerringly pointed out at the accused-appellant being the author of the crime. Therefore there is no infirmity in the analysis done by the trial court and the High Court in analyzing the evidence.

The residual question relates to the applicability of Section 113A of the Evidence Act and the question as to whether in the absence of the specific charge under Section 306 IPC, the appellant could be convicted though he was only charged in terms of Section 302 IPC.

So far as the question as to the effect of no charge having been framed under Section 306 is concerned the effect of Section 222(2) and Section 464 of Cr. P.C. cannot be lost sight of. In Dalbir Singh's case (supra) it was inter alia noted as follows:

"Here the Court proceeded to examine the question that if the accused has been charged under Section 302 IPC and the said charge is not established by evidence, would it be possible to convict him under Section 306 IPC having regard to Section 222 Cr.P.C. Sub-section (1) of Section 222 lays down that when a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it. Sub-section (2) of the same Section lays down that when a

person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it. Section 222 Cr.P.C. is in the nature of a general provision which empowers the Court to convict for a minor offence even though charge has been framed for a major offence. Illustrations (a) and (b) to the said Section also make the position clear. However, there is a separate chapter in the Code of Criminal Procedure, namely Chapter XXXV which deals with Irregular Proceedings and their effect. This chapter enumerates various kinds of irregularities which have the effect of either vitiating or not vitiating the proceedings. Section 464 of the Cr.P.C. deals with the effect of omission to frame, or absence of, or error in, charge. Sub-section (1) of this Section provides that no finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby. This clearly shows that any error, omission or irregularity in the charge including any misjoinder of charges shall not result in invalidating the conviction or order of a competent Court unless the appellate or revisional Court comes to the conclusion that a failure of justice has in fact been occasioned thereby. In Lakhjit Singh (supra) though Section 464 Cr.P.C. has not been specifically referred to but the Court altered the conviction from 302 to 306 IPC having regard to the principles underlying in the said Section. In Sangaraboina Sreenu (supra) the Court completely ignored to consider the provisions of Section 464 Cr.P.C. and keeping in view Section 222 Cr.P.C. alone, the conviction of the appellant therein under Section 306 IPC was set aside.

17. There arc a catena of decisions of this Court on the same lines and it is not necessary to burden this judgment by making reference to each one of them. Therefore, in view of Section 464 Cr.P.C., it is possible for the appellate or revisional Court to convict an accused for an offence for which no charge was framed unless the Court is of the opinion that a failure of justice would in fact occasion. In order to judge whether a failure of justice has been occasioned, it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself. We are, therefore, of the opinion that Sangarabonia Sreenu (supra) was not correctly decided as it purports to lay down as a principle of law that where the accused is

charged under Section 302 IPC, he cannot be convicted for the offence under Section 306 IPC."

It is to be noted that in view of apparent conflict in the views expressed by two Judge Bench decisions in Sangaraboina Sreenu v. State of A.P. (1997(5) SCC 348) and Lakhjit Singh and Another v. State of Punjab (1994 Supp(1) SCC 173) the matter was referred to a three Judge Bench in Dalbir Singh's case (supra)

There is no dispute that the circumstances are relatable to Section 306 IPC which were clearly put to the appellant during his examination under Section 313 of Cr.P.C.

Particular reference may be made to question Nos. 4,7,8,9,16 and 22 in the examination under Section 313 of the Cr.P.C. and the answers given by the appellant. The incriminating materials relating to torture, harassment and demand of dowry were specifically brought to the notice of the appellant during such examination.

In support of his stand, the appellant pleaded that deceased had committed suicide and for this purpose one witness DW1 was examined. It was specifically stated by him that the appellant's father had asked him to inform PW2 that the deceased had committed suicide and accordingly he had informed PW2. Even in the absence of a presumption in terms of Section 113- A of the Evidence Act it is to be noted that the prosecution version was specific to the extent that the deceased was being taunted by the appellant for not bringing adequate dowry and/or being of dark complexion. The humiliation and harassment meted out was described by the deceased when she had gone to her maternal uncle's house. The evidence of PW-1 i.e. neighbour of the accused-appellant is also significant. It is clearly stated that the appellant used to beat his wife i.e. deceased and on the night of occurrence, when he was sitting on his roof-top he had heard cries of the deceased being beaten, went to the house of the appellant and he was turned away by the appellant who said that it was their internal affair and he should mind his own work. To similar effect was the evidence of PW4- another neighbour.

The doctor who conducted the autopsy i.e. PW6, had noted many major injuries in different parts of body including one mark on the neck. Therefore, as rightly contended by learned counsel for the respondent-State, even without reference to Section 113A of the Evidence Act the prosecution version has been established.

Above being the position there is no merit in this appeal which is accordingly dismissed.