

HARJIT SINGH
v.
STATE OF PUNJAB

DECEMBER 8, 2005

[S.B. SINHA AND P.P. NAOLEKAR, JJ.]

Penal Code, 1860:

Section 304-B—Death of wife—Caused by poisoning—Allegation of demand of dowry and cruelty—Prosecution of husband, mother-in-law and brother-in-law—Acquittal of brother-in-law and conviction of the rest of the accused by trial Court—Further acquittal of mother-in-law on the ground that the deceased might have committed suicide being unable to tolerate the insult meted out to her father, when he had come to visit her—On appeal, held: In the facts of the case prosecution failed to prove that the deceased was subjected to cruelty or harassment in connection with demand of dowry soon before her death—Hence presumption under Section 304-B IPC or under Section 113-B of Evidence Act cannot be invoked—Appellant acquitted—Evidence Act, 1872—Section 113-B.

Section 304-B and 306—Prosecution u/s. 304 B—Failure to frame charge u/s. 306—Acquittal u/s. 304 B—Permissibility to convict u/s. 306—Held: An accused is not liable to be convicted wherever, the prosecution fails to establish case u/s. 304-B—In the present case, since case of suicide by the deceased not made out, accused cannot be convicted u/s. 306—The ingredients of Section 304-B and Section 306 are different—Code of Criminal Procedure, 1973—Section 215.

Practice and Procedure—Plea for conviction u/s. 306 IPC where case u/s. 304-B IPC not established—Plea raised for the first time before Supreme Court—Permissibility of—Held: Such plea cannot be permitted to be raised for the first time before the Supreme Court, unless the materials on record establish the said charge.

Appellant-accused along with his mother and brother, was prosecuted for having killed his wife by poisoning. It was alleged that after the marriage

A of the younger brother of the appellant, the accused started taunting and harassing the deceased for having brought less dowry. In order to fulfill the demand, PW-2-father of the deceased had paid a sum of Rs. 3,000/- and Rs. 1,000/- on two occasions. The deceased had informed her brother that PW-2 would kill her at the time of her delivery as she was in family way. She was
B taken by PW-2 to his place, where she delivered her baby. However, the baby died. Thereafter, she went back to her matrimonial house. One day prior to the occurrence. PW-2 had gone to visit the deceased and found her hale and hearty. Next day, on receiving the message of death of the deceased, PW-2 went to her house and there he made complaint to the police. Chemical
C Examiner in his report opined that poison was found in the viscera of the deceased. Brother of the deceased was not examined. PW-2 in his statement regarding nature and purpose of demand of the amount above mentioned had contradicted his earlier statement before D.O.R.G. Mother of the deceased-PW-3 categorically admitted that she had no grievance against her son-in-law, not did she ever make any complaint. Trial Court convicted the appellant and his mother u/s.304-B IPC. Brother of the appellant was acquitted. In
D appeal, High Court acquitted the mother of the appellant finding that appellant's mother did not accept any dowry; and that the deceased might have consumed poison to finish herself on the ground that when PW-2 had come to see her, one day prior to the occurrence, he might have been insulted or felt hurt that his daughter was not happy. Hence the present appeal.
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Allowing the appeal, the Court

F HELD: 1.1. A legal fiction has been created in Section 304-B IPC to the effect that in the event it is established that soon before the death, the deceased was subjected to cruelty or harassment by her husband or any of his relative, for or in connection with any demand of dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death. [636-D]

G 1.2. From a conjoint reading of Section 304-B IPC and Section 113-B of the Evidence Act, it will be apparent that a presumption arising thereunder will operate if the prosecution is able to establish the circumstances as set out in Section 304-B IPC. The ingredients of Section 304-B IPC are: (1) that the death of the woman caused by any burns or bodily injury or in some circumstances which is not normal; (2) Such death occurs within 7 years
H from the date of her marriage (3) That the victim was subjected to cruelty or

harassment by her husband or any relative of her husband; (4) Such cruelty or harassment should be for or in connection with demand of dowry; and (5) is established that such cruelty and harassment was made soon before her death. [636-G-H; 637-A, B] A

1.3. In the facts and circumstances of the present case, the presumption arising either under Section 304-B IPC or Section 113-B of the Evidence Act could not be invoked against the Appellant. The prosecution, therefore, must be held to have failed to establish any case against the appellant herein. There is no evidence on records to show that the deceased was subjected to any cruelty or harassment between the dates she went to her matrimonial home after delivery of the child and her death. [638-H; 639-D] B C

Satvir Singh and Ors. v. State of Punjab and Anr., [2001] 8 SCC 633; *Hira Lal and Ors. v. State (Govt. of NCT) Delhi*, [2003] 8 SCC 80; *Kaliya Perumal and Anr. v. State of Tamil Nadu*, [2004] 9 SCC 157; *Kamesh Panjiyar alias Kamlesh Panjiyar v. State of Bihar*, [2005] 2 SCC 388 and *State of A.P. v. Raj Gopal Asawa and Anr.*, [2004] 4 SCC 470, relied on. D

2.1. Omission to frame charges under Section 306 IPC in terms of Section 215 Cr.P.C. may or may not result in failure of justice, or prejudice the accused. It cannot be said that in all cases, an accused may be held guilty of commission of an offence under Section 306 IPC wherever the prosecution fails to establish the charge against him under Section 304-B thereof. Moreover, ordinarily such a plea should not be allowed to be raised for the first time before this court unless the materials on record are such which would establish the said charge against the accused. [639-B-D] E

2.2. Before invoking the provisions of Section 306 IPC, it is necessary to establish that : (i) the deceased committed suicide, and (ii) she had been subjected to cruelty within the meaning of Section 498A IPC. Only in the event those facts are established, a presumption in terms of Section 113B of Evidence Act could be raised. In the instant case, the prosecution has not been able to prove that the deceased was subjected to cruelty within the meaning of Section 498A IPC. No case that the deceased committed suicide was also made out. [639-E, F] F G

2.3. The ingredients of Section 306 and Section 304-B are different and distinct. In any event, no evidence has been brought on record to show that there has been any act of omission or commission on the part of the H

A accused, before the death of the deceased to demonstrate that the appellant was responsible for the same. High Court, for the first time, in its judgment on a hypothesis observed that when her father came to see her, he must have been insulted or felt hurt as she might have been subjected to harassment. No evidence whatsoever has been brought to the notice of the Court to enable
B to sustain the said finding. [640-H; 641-A, B]

K. Prema S. Rao and Anr. v. Yadla Srinivasa Rao and Ors., [2003] 1 SCC 217, distinguished.

C CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 756 of 1999.

From the Judgment and Order dated 15.12.1998 of the Punjab and Haryana High Court in Crl.A. No. 66-SB of 1998.

D Siddhartha Dave, Sudhir Walia and Mahinder Singh Dahiya for the Appellant.

Kuldip Singh, R.K. Pandey and Arun K. Sinha for the Respondent.

The Judgment of the Court was delivered by

E **S.B. SINHA** : Jasbir Kaur, a young woman, in her prime age of 22-23 years, died on 26.7.1988. She died of poisoning. The poison is said to be aluminum phosphide which is a common pesticide. She was married with the appellant on 05.10.1986 in a village known as Maur Khurd. Her matrimonial home was at Bhatinda, which is at a distance of 40 k.m. from Maur Khurd.

F She delivered a male child at her parents house i.e. at Maur Khurd on 23.4.1988. The child, however, died on 25.4.1988. The mother of the deceased P.W.-3 (Mukhtiar Kaur) disclosed the said fact to her after about 20 days. The deceased came back to her matrimonial home soon thereafter. A day prior to the date of occurrence i.e. on 25.07.1988, her father Gurlal Singh (P.W.-2) came to see her at Bhatinda and found her to be hale and hearty. He received the

G information of her death on 26.07.1988 at about 1.00 PM at Maur Khurd. He took a bus and reached Bhatinda at about 2.00 PM. He allegedly found the appellant, his mother and brother sitting there. They allegedly slipped away from the house one by one. He sent for his other relatives and after they came he left the house for going to the Police Station. He on his way met the

H Inspector of Police at the bus stand at about 11.00 PM. His statement was

recorded at the bus station.

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The mother of the appellant at the relevant time was said to be residing with her husband at Ferozpur which is situated at a distance of 132 Km.

The defence of accused was that they were not present at the time of death of the deceased. According to the appellant, he was at his work place till 12.30 PM while according to his brother Jaspal Singh, he at the relevant time was at Ludhiana undergoing training. The defence of mother Mohinder Kaur was that she at the relevant time had been at Ferozpur.

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The inquest of the dead body was held at about 11.45 PM on 26.07.1988 and the post mortem was held on 27.7.1988. P.W.1 (Dr. Balbir Singh) who conducted the post mortem could not ascertain the cause of death. The viscera of the deceased was preserved and later on sent for chemical examination. The chemical examiner submitted his report on 15.11.1988 opining that aluminum phosphide was found therein.

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On the basis of the statements made by Gurlal Singh (P.W.-2) before the Investigating Officer Dharam Singh (P.W.7), a case under Section 304-B of the Indian Penal Code was registered against the appellant, his brother Jaspal Singh and mother Mohinder Kaur on the allegation that after solemnization of marriage of Sarabjit Singh, the younger brother of the appellant, the accused started taunting and harassing Jasbir Kaur for bringing less dowry as the wife of Sarabjit Singh had brought Refrigerator, Television and Cooler. Allegedly, to fulfil the said demand of the accused, the complainant paid a sum of Rs.3,000 around Diwali on one occasion and Rs.1,000/- on two other occasions within two months therefrom. It was further alleged that in the month of March, 1988, when Gurlal Singh went to the house of in-laws to bring her to her house as she was in the family way, the accused refused to send her with him. It was further alleged that Raghbir Singh, the brother of the deceased came to Bhatinda when he was informed by his sister that his father should take her away to Maur Khurd otherwise the accused would kill her at the time of delivery. The appellant was arrested on 05.08.1988.

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The learned Addl. District and Sessions Judge convicted the appellant herein as also his mother for commission of offence under Section 304-B of the Indian Penal Code and they were sentenced to undergo rigorous imprisonment for seven years. The learned Judge, however, recorded a judgment of acquittal so far as Jaspal Singh is concerned. The learned Addl.

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A District and Sessions Judge in his judgment relying upon or on the basis of the evidence of the prosecution witnesses arrived at a finding that the dowry was paid to the appellant and his mother Mohinder Kaur and, thus, they were guilty of the commission of offence.

B The High Court, on the other hand, did not discuss the merit of the matter so far as the appellant is concerned but concentrated on the role played by his mother Mohinder Kaur and came to the finding that she did not accept any dowry. Curiously enough, the High Court propounded a theory which was not the prosecution case that the deceased must have consumed poison to finish herself allegedly on the ground that when P.W.-
C 2 (Gurlal Singh) came to see her on 25.7.1988, he must have been insulted or hurt that his daughter is not happy in the house of her in-laws.

We would proceed on the basis that in this case the prosecution has established the case of payment of dowry to the extent of Rs.5,000/-. The question, however, would remain as to whether the demand of dowry was
D soon before the deceased was treated cruelly or harassed by the appellant. The brother of the deceased was not examined. It was, therefore, not proved that any apprehension was expressed by the deceased that she would be killed during delivery of the child. The fact remains that she delivered the child at her parents place. It is also accepted that she at the time of delivery
E had developed certain complications as a result of which she had to be shifted to a nursing home. There exists a dispute as who took her to the nursing home, the husband or her father. But the fact remains that the delivery of the child was premature, and the child expired within two days of its birth.

F At this juncture, we may notice the deposition of the prosecution witnesses.

P.W.-1 (Dr. Balbir Singh) opined that the death was due to taking of poison. A contusion was also found on the dead body. The said witness, however, explained the presence thereof stating "Contusion in question on
G the right side of the neck which are faintly appears could be due to the irritation in the mouth and neck as a result of irritation."

H P.W.-2 (Gurlal Singh), father of the deceased, merely stated "My daughter had died due to non-payment of dowry to the satisfaction of accused, by me." He did not say that any other demand was made or his daughter was subjected to any other form of cruelty or harassment. In cross-examination,

he contended that he had stated before the Investigating Officer that the accused persons started taunting his daughter for not bringing Refrigerator, Cooler and Television but such a statement was not found to have been made before the Investigating Officer. He even did not make any statement before the police that the accused persons either in unison or individually demanded dowry.

His statement was also recorded by a Magistrate holding the post of D.O.R.G. It stands accepted that he did not make any statement before him in regard to the demand of or taking of Rs.3,000/- by Harjit Singh for purchase of Refrigerator, Cooler and Television although he made such a statement in court. It appears from the records that he also made a statement before the D.O.R.G. to the effect that his daughter and son-in-law collected Rs.3,000/- for purchasing a stereo and two months thereafter, his daughter took Rs.1,000/- for installation of hand-pump. He, thus, in a way contradicted himself as regard nature and purpose of demand. This belies the genesis of the prosecution case. Although Sarabjeet Singh's marriage and bringing of luxury items by his wife were said to be the ground for demand of dowry, as we have noticed hereinbefore, he contended that he paid Rs.3,000/- and Rs.1,000/- on two occasions as dowry within two months thereafter i.e. between October and December, 1987 whereas according to the defence, Sarabjeet Singh was married on 24.01.1988. Curiously enough, P.W.3 (Mukhtiar Kaur) categorically admitted that she had no grievance as against her son-in-law, nor did she ever make any complaint.

P.W.-4 (Ajaib Singh) is the brother of the complainant whose evidence is not material for our purpose. P.W.7 (Dharam Singh) is the Investigating Officer.

Concededly, there is no evidence on records to show that the deceased was subjected to any cruelty or harassment between April, 1988 and the date of her death. In the light of the above-mentioned evidence, the question which arises for consideration is as to whether a case under Section 304-B of the Indian Penal Code can be said to have been made out.

Section 304-B of the Indian Penal Code reads as under:-

"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

A 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.

B Explanation.- 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).

C (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.”

D A legal fiction has been created in the said provision to the effect that in the event it is established that soon before the death, the deceased was subjected to cruelty or harassment by her husband or any of his relative; for or in connection with any demand of dowry, such death shall be called “dowry death”, and such husband or relative shall be deemed to have caused her death. The Parliament has also inserted Section 113 B of the Indian Evidence Act by Act No.43 of 1986 with effect from 1.5.1986 which reads as under :-

E “113.B- *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.

F *Explanation.*- For the purposes of this section, “dowry death”, shall have the same meaning as in section 304-B of the Indian Penal Code (45 of 1860).”

G From a conjoint reading of Section 304-B of the Indian Penal Code and Section 113-B of the Indian Evidence Act, it will be apparent that a presumption arising thereunder will operate if the prosecution is able to establish the circumstances as set out in Section 304-B of the Indian Penal Code.

The ingredients of the aforementioned provisions are :

H (1) That the death of the woman caused by any burns or bodily injury

or in some circumstances which is not normal; (2) Such death occurs within 7 years from the date of her marriage (3) That the victim was subjected to cruelty or harassment by her husband or any relative of her husband; (4) Such cruelty or harassment should be for or in connection with demand of dowry; and (5) is established that such cruelty and harassment was made soon before her death.

In the case of unnatural death of a married woman as in a case of this nature, the husband could be prosecuted under Section 302, Section 304-B and Section 306 of the Indian Penal Code. The distinction as regards commission of an offence under one or the other provisions as mentioned hereinbefore came up for consideration before a Division Bench of this Court in *Satvir Singh & Ors. v. State of Punjab and Anr.*, [2001] 8 SCC 633, wherein it was held :

“Thus, there are three occasions related to dowry. One is before the marriage, second is at the time of marriage and the third is “at any time” after the marriage. The third occasion may appear to be an unending period. But the crucial words are “in connection with the marriage of the said parties”. This means that giving or agreeing to give any property or valuable security on any of the above three stages should have been in connection with the marriage of the parties. There can be many other instances for payment of money or giving property as between the spouses. For example, some customary payments in connection with birth of a child or other ceremonies are prevalent in different societies. Such payments are not enveloped within the ambit of “dowry”. Hence the dowry mentioned in Section 304-B should be any property or valuable security given or agreed to be given in connection with the marriage.

It is not enough that harassment or cruelty was caused to the woman with a demand for dowry at some time, if Section 304-B is to be invoked. But it should have happened “soon before her death.” The said phrase, no doubt, is an elastic expression and can refer to a period either immediately before her death or within a few days or even a few weeks before it. But the proximity to her death is the pivot indicated by that expression. The legislative object in providing such a radius of time by employing the words “soon before her death” is to emphasise the idea that her death should, in all probabilities, have been the aftermath of such cruelty or harassment. In other words,

A there should be a perceptible nexus between her death and the dowry-related harassment or cruelty inflicted on her. If the interval elapsed between the infliction of such harassment or cruelty and her death is vide the court would be in a position to gauge that in all probabilities the harassment or cruelty would not have been the immediate cause of her death. It is hence for the court to decide, on the facts and circumstances of each case, whether the said interval in that particular case was sufficient to snuff its cord from the concept “soon before her death”.

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Yet again in *Hira Lal and Ors. v. State (Govt. of NCT) Delhi*, [2003] 8 SCC 80, this Court observed that “The expression “soon before her death” used in the substantive Section 304-B IPC and Section 113-B of the Evidence Act is present with the idea of proximity test. No definite period has been indicated and the expression “soon before” is not defined. A reference to the expression “soon before” used in Section 114 Illustration (a) of the Evidence Act is relevant. It lays down that a court may presume that a man who is in the possession of goods “soon after the theft, is either the thief or has received the goods knowing them to be stolen, unless he can account for their possession”. The determination of the period which can come within the term “soon before” is left to be determined by the courts, depending upon facts and circumstances of each case. Suffice, however, to indicate that the expression “soon before” would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. There must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the death concerned. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence.”

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The same opinion was expressed by the same learned Judge in *Kaliya Perumal and Anr. v. State of Tamil Nadu*, [2004] 9 SCC 157 Para 4 and *Kamesh Panjiyar alias Kamlesh Panjiyar v. State of Bihar*, [2005] 2 SCC 388, Para 10 See also *State of A.P. v. Raj Gopal Asawa and Anr.*, [2004] 4 SCC 470, Paras 10 and 11.

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In the aforementioned situation, the presumption arising either under Section 304-B of the Indian Penal Code or Section 113-B of the Indian Evidence Act could not be invoked against the Appellant. The prosecution, therefore, must be held to have failed to establish any case against the Appellant herein.

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Faced up with this situation, the learned counsel appearing on behalf of the State relies upon a Judgment of this Court in *K. Prema S. Rao and Anr. v. Yadla Srinivasa Rao and Ors.*, [2003] 1 SCC 217, wherein an observation was made in the peculiar facts and circumstances of that case that even if the accused is not found guilty for commission of an offence under Section 304 and 304-B of the Indian Penal Code, he can still be convicted under Section 306 IPC thereof.

Omission to frame charges under Section 306 in terms of Section 215 of the Code of Criminal Procedure may or may not result in failure of justice, or prejudice the accused.

It cannot, therefore, be said that in all cases, an accused may be held guilty of commission of an offence under Section 306 of the Indian Penal Code wherever the prosecution fails to establish the charge against him under Section 304-B thereof. Moreover, ordinarily such a plea should not be allowed to be raised for the first time before the court unless the materials on record are such which would establish the said charge against the accused.

Before invoking the provisions of Section 306 IPC, it is necessary to establish that : (i) the deceased committed suicide, and (ii) she had been subjected to cruelty within the meaning of Section 498A IPC.

Only in the event those facts are established, a presumption in terms of Section 113A of the Indian Evidence Act could be raised. In the instant case, the prosecution has not been able to prove that the deceased was subjected to cruelty within the meaning of Section 498A IPC. No case that the deceased committed suicide was also made out.

In *K. Prema S. Rao*, (supra), it was found as of fact :

“Both the courts below have found the husband guilty of cruel treatment of his wife and as a result the wife committed suicide within seven years of their marriage. On such evidence the presumption which arises under Section 113-A of the Evidence Act is that the husband abetted the suicide. The word “cruelty” as mentioned in the Explanation below Section 113-A of the Evidence Act has been given the same meaning as contained in the Explanation below Section 498-A IPC. On the facts found, “the wilful” conduct of the husband in forcing the deceased to part with her land which she had received in

A marriage as "*stridhana*" and for that purpose concealing her postal mail was so cruel that she was driven to commit suicide. A case of conviction and sentence of Accused 1 under Section 306 IPC has thus clearly been made out even though his acquittal for commission of the offence of "dowry death" punishable under Section 304-B IPC is not found liable to be disturbed."

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In *Satvir Singh*, (supra), it was observed :

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"Learned Senior Counsel submitted that since the word "cruelty" employed therein is a virtual importation of that word from Section 498-A IPC, the offence envisaged in Section 306 IPC is capable of enveloping all cases of suicide within its ambit, including dowry-related suicide. According to him, the second limb of the Explanation to Section 498-A which defines the word "cruelty" is sufficient to clarify the position. That limb reads thus:

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"For the purposes of this section, 'cruelty' means

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(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."

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At the first blush we thought that there was force in the said contention but on a deeper analysis we found that the contention is unacceptable. Section 306 IPC when read with Section 113-A of the Evidence Act has only enabled the court to punish a husband or his relative who subjected a woman to cruelty (as envisaged in Section 498-A IPC) if such woman committed suicide within 7 years of her marriage. It is immaterial for Section 306 IPC whether the cruelty or harassment was caused "soon before her death" or earlier. If it was caused "soon before her death" the special provision in Section 304-B IPC would be invocable, otherwise resort can be made to Section 306 IPC."

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H The ingredients of Section 306 and Section 304-B are different and distinct. In any event, no evidence has been brought on record to show that there has been any act of omission or commission on the part of the accused,

before the death of the deceased to demonstrate that the appellant was responsible for the same. We have noticed hereinbefore that the High Court, for the first time, in its judgment on a hypothesis observed that when her father came to see her, he must have been insulted or felt hurt as she might have been subjected to harassment. Unfortunately, no evidence whatsoever has been brought to our notice to enable us to sustain the said finding and in that view of the matter we are unable to accept the submissions of the learned counsel appearing for the Respondent State.

For the reasons aforementioned, we are of the opinion that the impugned judgment of the High Court cannot be sustained which is set aside accordingly.

The appeal is allowed. The Appellant is on bail. He is discharged from his bail bonds.

K.K.T.

Appeal allowed.