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BIMLA DEVI AND ANR.

V.

STATE OF JAMMU AND KASHMIR

Criminal Appeal No. 22 of 2002

B

MAY 5, 2009

**(DR. ARIJIT PASAYAT AND DR. MUKUNDKAM
SHARMA, JJ.)**

Ranbir Penal Code:

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Sections 306 and 498-A – Conviction by the Trial Court – Upheld by the High Court but sentence reduced – Correctness of – Held: In the examination under s.313 no question was asked relating to demand of dowry and abetment of suicide – Hence conviction set aside.

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Sangaraboina Sreenu v. State of A.P. 1997 (5) SCC 348; Lokendra Singh v. State of M.P. 1999 SCC (Criminal) 371; Shamnsaheb M. Multtani v. State of Karnataka 2001 (2) SCC 577 and Lakhjit Singh v. State of Punjab 1994 Supp (1) SCC 173 – referred to.

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CRIMINALAPPELLATE JURISDICTION : Criminal Appeal No. 22 of 2002

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From the Judgement and Order dated 25.08.2000 of the Hon'ble High Court of Jammu & Kashmir in Criminal First Appeal No. 7 of 1992

K.T.S. Tulsi, Sushil Kumar Jain, Puneet Jain, for the Appellant.

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The Judgement of the Court was delivered by

DR. ARIJIT PASAYAT, J.

1. Challenge in this appeal is to the judgment of a learned Single Judge of the Jammu and Kashmir High Court upholding the conviction of the appellant for offence punishable under

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Sections 306 and 498-A of the Ranbir Penal Code (in short the 'RPC') while reducing the sentence so far as the offence relating to Section 306 is concerned. The custodial sentence and fine of Rs.500/- was confirmed. Learned Sessions Judge, Kathua had found the appellant guilty as afore-noted and had sentenced the appellant to undergo RI for 7½ years and 2 years respectively and fine with default stipulation. Appellant No.1 is the mother of appellant No.2. The present appellant and one Jatinder Kumar, brother of appellant No.2 faced trial for alleged commission of offence referred to above.

2. Prosecution version in a nutshell is as follows:

On 29.5.1990 Suman Lata (hereinafter referred to as the deceased) was brought to district Hospital Kathua. She had sustained burn injuries. Police came to know about this occurrence. An Assistant Sub-Inspector Amar Chand Padha reached there. Statement of the deceased was recorded. On the basis of the statement so given First Information Report came to be lodged. This was under Section 498-A of RPC. The victim was taken to a Government Hospital at Jammu. Another statement of the victim came to be recorded. This was recorded at Jammu on 29.5.1990. This was also recorded by a Police Officer. Later, on sixth day, i.e. 3.6.1990 another statement came to be recorded. This statement was recorded by Gulam Naib Tehsildar Digiana. The victim died on 6.6.1990. This is thus a case where one statement of the deceased came to be recorded on 29.5.1990. This was recorded by a police officer in the District Hospital, Kathua. Another statement came to be recorded after she was admitted in the SMGS Hospital. This statement was again recorded on 29.5.1990. This was again by a police officer. Another statement came to be recorded by Gulam Nabi, Executive Magistrate on 3.6.1990. The trial Court on the basis of the first statement which was recorded in the District Hospital, Kathua and after referring to oral as also documentary evidence convicted two of the accused persons.

There were in fact several statements recorded of the

A deceased. They gave entirely different scenario. The trial Court noticed that at the stage of framing charge the question was as to which of the different versions was to be preferred. The Court was required to appreciate whether it was a case of murder or abetment to suicide. The trial Court by order dated 1.11.1998 framed charge under Section 302 read with Section 34 RPC. As the trial Court itself noted in its judgment, in case the earlier statement of the deceased was believed the other two statements cannot be ignored because their evidentiary value could be appreciated and, therefore, the proper charge was under Section 302 read with Section 34 RPC.

C Sixteen witnesses were examined to further the prosecution version. As the accused pleaded innocence they also examined 11 witnesses. The trial Court proceeded on the premises that from the beginning two versions of the deceased were there; one relating to suicide and the other relating to murder. Even though the charge was framed under Section 302 read with Section 34 RPC the trial Court felt that the appropriate conviction would be under Sections 306 and 498-A of RPC. The conclusions were questioned before the High Court. By the impugned judgment the High Court held that whatever be the charge framed the question is appreciation of evidence and accordingly upheld the conviction.

F 3. In support of the appeal, learned counsel for the appellant submitted that the ingredients of Sections 306 498-A are absent and in any event no question was put under Section 313 of the Code of Criminal Procedure, 1973 (in short the 'Code') relating to these offences.

G 4. The respondent-State on the other hand supported the judgment. So far as the ingredients are concerned, in *Sangaraboina Sreenu v. State of A.P.* (1997 (5) SCC 348) it was noted as follows:

H "2. This appeal must succeed for the simple reason that having acquitted the appellant of the charge under Section 302 IPC — which was the only charge framed against him

— the High Court could not have convicted him of the offence under Section 306 IPC. It is true that Section 222 CrPC entitles a court to convict a person of an offence which is minor in comparison to the one for which he is tried but Section 306 IPC cannot be said to be a minor offence in relation to an offence under Section 302 IPC within the meaning of Section 222 CrPC for the two offences are of distinct and different categories. While the basic constituent of an offence under Section 302 IPC is homicidal death, those of Section 306 IPC are suicidal death and abetment thereof.”

5. Similarly, in *Lokendra Singh v. State of M.P.* (1999 SCC (Criminal) 371) it was observed as follows:

“3. Law is well settled that in respect of a charge once framed, there can only be an order of conviction or acquittal. Therefore, notwithstanding the fact that the trial court did not record a formal finding in respect of the charge under Section 306 IPC, the appellant stood acquitted thereof. This apart, the trial court having convicted the appellant of the charge under Section 302 IPC could not have convicted him of the alternative charge (under Section 306 IPC). Such acquittal could be converted into conviction by the High Court only in an appeal preferred by the State. Admittedly, no such appeal was filed. Of course, by exercising its suo motu revisional power under Section 401 CrPC, the High Court could also have set aside the acquittal under Section 306 IPC but this question is now purely academic for the High Court did not exercise such power and, even if it had, it could not have converted the finding of acquittal recorded in favour of the appellant to one of conviction in view of the express bar of sub-section (3) of Section 401 CrPC. We reach the same conclusion through a different route.

6. In *Shamnsaheb M. Multtani v. State of Karnataka* (2001 (2) SCC 577) in paras 16 to 19 it was noted as follows:

- A "16. What is meant by "a minor offence" for the purpose of Section 222 of the Code? Although the said expression is not defined in the Code it can be discerned from the context that the test of minor offence is not merely that the prescribed punishment is less than the major offence. The
- B two illustrations provided in the section would bring the above point home well. Only if the two offences are cognate offences, wherein the main ingredients are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis-à-vis the other offence.
- C 17. The composition of the offence under Section 304-B IPC is vastly different from the formation of the offence of murder under Section 302 IPC and hence the former cannot be regarded as minor offence vis-à-vis the latter. However, the position would be different when the charge
- D also contains the offence under Section 498-A IPC (husband or relative of husband of a women subjecting her to cruelty). As the word "cruelty" is explained as including, inter alia,
- E "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".
- F 18. So when a person is charged with an offence under Sections 302 and 498-A IPC on the allegation that he caused the death of a bride after subjecting her to harassment with a demand for dowry, within a period of 7
- G years of marriage, a situation may arise, as in this case, that the offence of murder is not established as against the accused. Nonetheless, all other ingredients necessary for the offence under Section 304-B IPC would stand established. Can the accused be convicted in such a case for the offence under Section 304-B IPC without the said
- H offence forming part of the charge?

19. A two-Judge Bench of this Court (K. Jayachandra Reddy and G.N. Ray, JJ.) has held in *Lakhjit Singh v. State of Punjab* that if a prosecution failed to establish the offence under Section 302 IPC, which alone was included in the charge, but if the offence under Section 306 IPC was made out in the evidence it is permissible for the court to convict the accused of the latter offence.”

7. The earliest judgment on the point is *Lakhjit Singh v. State of Punjab* (1994 Supp (1) SCC 173) which was not referred to in Sangaraboina's case (supra) and Lokendra Singh's case (supra)

8. The position has been explained in *Shamnsaheb M. Multtani's case* (supra).

9. It was noted that in Jammu and Kashmir there is no provision similar to Section 304-B IPC.

10. In *Shamnsaheb M. Multtani's case* (supra) it was noted as follows:

“29. At this stage, we may note the difference in the legal position between the said offence and Section 306 IPC which was merely an offence of abetment of suicide earlier. The section remained in the statute-book without any practical use till 1983. But by the introduction of Section 113-A in the Evidence Act the said offence under Section 306 IPC has acquired wider dimensions and has become a serious marriage-related offence. Section 113-A of the Evidence Act says that under certain conditions, almost similar to the conditions for dowry death the court *may presume* having regard to the circumstances of the case, that such suicide has been abetted by her husband etc. When the law says that the court may presume the fact, it is discretionary on the part of the court either to regard such fact as proved or not to do so, which depends upon all the other circumstances of the case. As there is no

A compulsion on the court to act on the presumption the accused can persuade the court against drawing a presumption adverse to him.

B 30. But the peculiar situation in respect of an offence under
C Section 304-B IPC, as discernible from the distinction pointed out above in respect of the offence under Section 306 IPC is this: Under the former the court has a statutory compulsion, merely on the establishment of two factual positions enumerated above, to presume that the accused has committed dowry death. If any accused wants to escape from the said catch the burden is on him to disprove it. If he fails to rebut the presumption the court is bound to act on it.

D 31. Now take the case of an accused who was called upon to defend only a charge under Section 302 IPC. The burden of proof never shifts onto him. It ever remains on the prosecution which has to prove the charge beyond all reasonable doubt. The said traditional legal concept remains unchanged even now. In such a case the accused
E can wait till the prosecution evidence is over and then to show that the prosecution has failed to make out the said offence against him. No compulsory presumption would go to the assistance of the prosecution in such a situation. If that be so, when an accused has no notice of the offence
F under Section 304-B IPC, as he was defending a charge under Section 302 IPC alone, would it not lead to a grave miscarriage of justice when he is alternatively convicted under Section 304-B IPC and sentenced to the serious punishment prescribed thereunder, which mandates a
G minimum sentence of imprisonment for seven years.

H 32. The serious consequence which may ensue to the accused in such a situation can be limned through an illustration: If a bride was murdered within seven years of her marriage and there was evidence to show that either

on the previous day or a couple of days earlier she was subjected to harassment by her husband with demand for dowry, such husband would be guilty of the offence on the language of Section 304-B IPC read with Section 113-B of the Evidence Act. But if the murder of his wife was actually committed either by a dacoit or by a militant in a terrorist act the husband can lead evidence to show that he had no hand in her death at all. If he succeeds in discharging the burden of proof he is not liable to be convicted under Section 304-B IPC. But if the husband is charged only under Section 302 IPC he has no burden to prove that his wife was murdered like that as he can have his traditional defence that the prosecution has failed to prove the charge of murder against him and claim an order of acquittal.

33. The above illustration would amplify the gravity of the consequence befalling an accused if he was only asked to defend a charge under Section 302 IPC and was alternatively convicted under Section 304-B IPC without any notice to him, because he is deprived of the opportunity to disprove the burden cast on him by law.

34. In such a situation, if the trial court finds that the prosecution has failed to make out the case under Section 302 IPC, but the offence under Section 304-B IPC has been made out, the court has to call upon the accused to enter on his defence in respect of the said offence. Without affording such an opportunity to the accused, a conviction under Section 304-B IPC would lead to real and serious miscarriage of justice. Even if no such count was included in the charge, when the court affords him an opportunity to discharge his burden by putting him to notice regarding the prima facie view of the court that he is liable to be convicted under Section 304-B IPC, unless he succeeds in disproving the presumption, it is possible for the court to enter upon a conviction of the said offence in the event of his failure to disprove the presumption."

- A 11. In the said case the matter was remanded. But in the present case no useful purpose would be served in remanding matter since it is more than 20 years old and the appellant has served part of the custodial sentence. Apart from that in the present case, in the examination under Section 313 of the Code
- B no question was put up relating to demand of dowry and abetment of suicide. That being so, the appeal deserves to be allowed which we direct. The conviction stands set aside. The bail bonds executed to give effect to the order of bail dated 9.1.2001 shall stand discharged.
- C 12. Appeal is allowed.

G.N.

Appeal allowed.