

Nilakantha Pati Vs. State of Orissa

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Court : Orissa

Decided On : Jun-24-1994

Reported in : 1995CriLJ2472

Judge : B.N. Dash, J.

Acts : [Dowry Prohibition Act, 1961](#) - Sections 2, 3 and 4; [Evidence Act, 1872](#) - Sections 4, 32, 32(1) and 113A; [Indian Penal Code \(IPC\), 1860](#) - Sections 306 and 498A

Appeal No. : Criminal Appeal No. 122 of 1990

Appellant : Nilakantha Pati

Respondent : State of Orissa

Advocate for Def. : G.K. Mohanty, Standing Counsel, ;P.K. Mishra, ;N.C. Pati, ;A.K. Nanda and ;B. Sahu, Advs.

Advocate for Pet/Ap. : S.M. Patnaik, ;P.K. Chowdhury, ;S. Mohanty and ;B.K. Sahu, Advs.

Disposition : Appeal allowed

Judgement :

B.N. Dash, J.

1. The accused-appellant has been convicted under Section 306 and 498A of the Penal Code, 1860 (in short, 'IPC') and also under S 3 of the [Dowry Prohibition Act, 1961](#) (for short, 'the Act') and sentenced respectively to undergo rigorous imprisonment for three years, one year and three months with a direction that the sentences shall run concurrently.

2. Admittedly, the accused, a lecturer in Sadasiba Sanskrit Mahabidyalaya situated at Puri married the deceased Saila, the daughter of Ananta Mishra (P. W. 3) and niece of Basudeb Mishra (P.W. 2) and Ganadeb Mishra (P.W. 1) in the month of April, 1982 according to Hindu custom. Out of the three brothers, the eldest is Ananta who was staying in his native village Naraharipur being an agriculturist and the middle and youngest are Basudeb and Ganadeb who being respectively a business man and an advocate of the legal Bar were slaying separately at Dolemandep Sahi in Puri town. Shortly stated, the prosecution case is that in the marriage negotiation Kishore Chandra Mohapatra (P.W. 18), a colleague of the accused being a lecturer in the same college acted as mediator. At the time of the marriage there was a demand of Rs. 10,000/- as dowry, besides furniture and ornaments by the groom's party which were all given and after the marriage the accused and the deceased resided in a rented house located at Panchu Chaura (Kundhaibenta Sahi), Puri town belonging to one Basudeb Mishra of Nayagarh. The conjugal life became gradually unhappy because the accused tortured the deceased and subjected her to cruelty in different ways on account of insufficient dowry given at the time of the marriage. It is also alleged that the accused in his desire to purchase the house in which he was living on rent sent the deceased to her father and other relatives to collect Rs. 78,000/- and when the attempts of the deceased proved abortive the torture and cruelty that were being meted out to her became more intensive and as a result thereof on 11-12-1986 between 8 and 11 a.m. the deceased committed suicide by hanging inside her bed-room.

3. Basudeb Mishra having come to know about the death of the deceased went to Puri town Police Station and lodged the first information report (Ext. 4). On the basis of the said report, P.S. Case No. 428 of 1986 corresponding to G.R. Case No. 1887 of 1986 was registered by drawing up the formal, FIR (Ext. 4/2). The police

visited the spot, held inquest over the dead body of the deceased as per Ext. 7 and sent the dead body for postmortem examination through a constable (P.W. 15). Since the accused had some injuries in his person he was also sent for medical examination on 11-12-1986. Requisition was also sent to the Scientific Officer, District Forensic Science Laboratory, Puri (P.W. 12) who inspected the spot. The wearing apparels and ornaments of the deceased and three broken railings of a window in the bedroom were seized as per the seizure list, Ext. 5. Subsequently, an Inspector of Police attached to H.A. and D.D. Cuttack being directed by the Deputy Inspector General of Police, Orissa took charge of the investigation and after completion of investigation he submitted charge-sheet against the accused on 28-5-1987. After committal of the case the accused stood charged not only for the offences under which he was convicted but also under Section 4 of the Act.

4. The accused, while admitting the factum of marriage and the death of the deceased by suicide, disputed not only the demand of dowry at the time of the marriage but also the allegation that he had sent the deceased to her father and other relatives to collect a sum of Rs, 70,000/- such less for purchase of the house in which they were living on rent. He also specifically denied having tortured the deceased in any form whatsoever or having subjected her to cruelty. According to him, the deceased failed to adjust after the marriage, being of unadjustable character. The other family members of the accused were purely vegetarian and even onion and garlic were not allowed to be used for the purpose of cooking, whereas the deceased was very fond of non-vegetarian diet. Otherwise stated, it was out of sheer disgust the deceased committed suicide. In support of such defence, the accused has examined his own brother Utakantha Charan Pati (D.W. 1)

as witness.

5. In order to prove its case, the prosecution examined as many as 17 witnesses of whom P.Ws. 1, 2, 3, 10, 12 and 15 have already been introduced. The remaining witnesses are P.W. 9 Prafulla Swain, a co-villager of P.W. 3 who had allegedly carried the deceased and P.W. 3 in a bullock cart to the house of the

accused a couple of days after the Kumar Purnima of the year 1986 when the accused allegedly did not allow the deceased to enter into his house for her not collecting the required money; P.Ws. 5 and 6 are two neighbours of the accused who did not support the prosecution case of torture and cruelty; P.W. 7 Bhagaban Dash and P.W. 9 Dr. Abhaya Kumar Mishra are the 'Sadhus' (co-brother-in-laws) who have deposed about cruelty and torture that were being allegedly meted out to the deceased by the accused; P.W. 8 is a witness to the seizure; P.W. 11 is the brother of the deceased who has also deposed about the torture and cruelty on the deceased by the accused; P.Ws. 13 and 14 are the two medical officers who respectively conducted the postmortem examination on the dead body of the deceased and examined the accused and P.Ws. 16 and 17 are the police officers who took same part of other in the investigation of the case.

6. On a consideration of the relevant evidence on record, the learned Second Addl. Sessions Judge, Puri came to hold that there was no demand of dowry by the accused or any of his relatives and as such, he acquitted the accused of the charge u/S. 4 of the Act. He, however, came to hold that at the time of the marriage a sum of Rs. 10,000/- was given to the accused as dowry which he had accepted as consideration for the marriage. He also came to hold that the accused tortured the deceased in various ways and physically assaulted her for which the deceased committed suicide. With these findings, he convicted the accused and sentenced him, as stated above. Being aggrieved by such conviction and sentence, the appeal has been filed.

7. Mr. D. M. Patnaik, the learned counsel for the appellant contends that the findings of the learned Second Addl. Sessions Judge resulting in the conviction of the accused is based on improper appreciation of the evidence on record. According to the learned counsel, such findings are speculative and since speculation is foreign to the criminal jurisprudence the findings are liable to be set aside and consequently the accused is entitled to an acquittal. The learned Standing Counsel for the State, on the other hand, submits that the findings of the learned Addl. Sessions Judge is based on proper appreciation of the evidence on record and therefore, the same cannot be said to be speculative. These rival contentions require re-appraisal of the evidence on record to find out if the findings

of the learned Addl. Sessions Judge are liable to be accepted or the same are liable to be disturbed being speculative.

8. Section 3 of the Act as it stood at the time of the marriage in question in 1982 provides penalty for giving or taking dowry and prescribes punishment for any person who gives or takes or abates the giving or taking of dowry. Section 2 defines 'dowry':-

'to mean any property or valuable security given or agreed to be given either directly or indirectly -

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person;

At or before or after the marriage was consideration for the marriage of the said parties, but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.'

Explanation 1 to the said section declares that any presents were at the time of a marriage to either party to the marriage in the form of cash, ornaments, clothes or other articles, shall not be deemed to be dowry within the meaning, of this section, unless they are made as consideration for the marriage of the male parties.

9. Keeping the above legal provisions in the background, it has to be found out whether it has been proved beyond reasonable doubt that dowry within the meaning of the Act had been received by the accused. According to the prosecution, at the time of the settlement of the marriages cash of Rs. 10,000/- was paid to the accused as consideration for the marriage. Although the father of the deceased namely, Ananta (P.W.3) is expected to know about the alleged payment of Rs. 10,000/- as dowry, he has not deposed anything about such payment and according to P.Ws. 1 and 2, since their brother was not financially sound being an agriculturist, the said payment was made by them. In order to prove the payment of Rs. 10,000/- as dowry, reliance was placed on the evidence of Bamadev Mishra (P.W. 1) and Basudev Mishra (P. W. 2) which was believed by

the learned Addl. Sessions Judge to record his finding regarding receipt of such dowry by the accused. It is not to be examined whether such finding is based on proper appreciation of the evidence on record.

10. Bamadev Mishra (P.W. 1), as stated earlier, is an advocate of the local Bar and his evidence is that prior to the marriage there was demand of Rs. 10,000/- as dowry by the accused and as per such demand the entire amount was paid to the accused in his drawing room. His evidence also shows that his brother Basudev (P.W. 2) handed over the money to him and he personally gave the money to the accused. Basudev Mishra (P.W. 2) had deposed about payment of Rs. 12,000/- as dowry. According to him, his brother (P.W. 1) gave Rs. 10,000/- to the accused, but when there was dissatisfaction about the quantum of money paid, he voluntarily gave Rs. 2,000/- to the accused towards dowry. All these according to the witness, took place in the office room of P.W. 1 not only in presence of the mediator Kishore Chandra Mohapatra but also in presence of N.B. Dowla, the then visiting Professor of Jagannath Sanskrit University (not examined). His evidence is also to the following effect:-

'...I did not give Rs. 10,000/- to P.W. 1 who gave it to the accused. P.W. 1 gave Rs. 18,000/- on my request, but out of his own income. I paid only Rs. 2000/- out of my income, to both the brothers paid Rs. 12,000/- at one time and at one place. I paid Rs. 2000/- without the knowledges of P.W. 1. I have not told to P.W. 1 as yet or to any other persons that I have paid Rs. 2000/- to the accused, but I have told to the Police when I was examined.'

While appreciating the evidence of these two witnesses, it is necessary to note the evidence of Kishore Chandra Mohapatra (P.W. 10) who has asserted himself to be a colleague being a lecturer in the same Sadasiva Sanskrit College, Puri. According to him, he acted as a mediator in the marriage as per request of Basudev Mishra (P.W. 2). His evidence in chief-examination is that when he was present in the house of P.W. 1 the marriage proposal between the accused and the deceased was finalised and at the time of such finalisation a sum of Rs. 10,000/- was settled to on paid to the accused, but he did not see the actual payment. However, during his cross-examination, he stated as under:-

'...The accused is very much sober, simple in his character. He is very much a pious and religious man. Basudev Mishra, P.W. 2 initiated a proposal of saila with the accused. Before the marriage, P.W. 2 has told me that they are prepared to pay Rs. 10,000/- to Rs. 12,000/- as a dowry. There was specific demand from the side of the accused. When I told them that the guardians of saila were prepared to give Rs. 10,000/- to Rs. 12,000/- ready cash as a dowry. The father of the accused told that if they are willing to pay the amount they could accept it for the expenses of the marriage. The marriage was settled up between the father of the accused and the guardians of saila, specially P.W. 2'

From all these evidence of P.Ws. 1, 2 and 10 the correctness of the finding of the learned Addl. Sessions Judge regarding receipt of Rs. 10,000/- as dowry by the accused has to be judged.

11. Mr. Patnaik for the appellant argues with vehemence that since the evidence is not clear as to the Courts from which the cash of Rs 10,000/-allegedly paid was brought and as the evidence is discrepant as to the exact amount of money allegedly paid, the finding of the Learned Addl. Sessions Judge that Rs. 10,000/- had been paid to the accused is liable to be disturbed particularly when the FIR (Ext. 4) is silent regarding payment of such cash. It is also argued by him that even if receipt of Rs. 18,000/- by or on behalf of the accused is believed, then also it cannot be held that the receipt of such money was towards dowry within the meaning of the Act in view of the evidence of P.W. 10, the mediator and as such, the conviction under Section 3 of the Act is not sustainable.

12. First information report is not an encyclopaedia of all the events in detail to be relied upon by the prosecution at the time of trial. Even if a particular event is not stated in the FIR, for such omission the said event cannot always be disbelieved and the happening of such event or otherwise is liable to be considered along with the other facts and circumstances of the case. In the FIR (Ext. 4), the informant had clearly stated that at one time of the marriage he had given necessary dowry and had treated the groom's party with all respect, when payment of dowry for the marriage had been indicated in the FIR the omission to mention about the payment of exact amount of money as dowry cannot be a good ground to reject

the assertion of the prosecution that a sum of Rs. 10,000/- has been paid to the accused. As already pointed out above, Basudev Mishra (P.W.2) has clearly deposed that a sum of Rs. 18,000/- was given by P.W. 1 i.e. Basudev Mishra out of his own income. This evidence of Basudev Mishra cannot be said to be inconsistent with the evidence of Bamadev Mishra because from his evidence that his brother Basudev handed over the money to him and not personally gave the money to the accused it cannot be definitely said that the money given to him belonged to his brother Basudev. That being so, from the evidence of Basudev it can very well be said that the money allegedly paid actually belonged to Basudev and as such, the submission made on behalf of the appellant that the evidence is not clear as to the source from which the money allegedly paid to the accused was brought is not acceptable. It is, however significant to note that the evidence of Bamadev and Basudev as regards the exact amount paid to the accused is highly discrepant; the former having deposed that Rs. 10,000/- was paid and the latter having vouched that Rs. 12,000/- was paid. Ofcourse, Basudev has asserted that he paid Rs. 2,000/- to the accused when there was dissatisfaction about the quantum of money paid and that such payment of Rs. 2,000/- was not known to his brother Bamadev, but each other under the normal circumstances, cannot be believed particularly when it is seen from the evidence of Basudev, he quoted above, that both the brothers paid Rs. 12,000/- at one time and at one place. It may be urged, as was urged before us, that the payment of Rs. 2,000/- might have been made during the temporary absence of Bamadev. Possibility of payment of Rs. 2,000/- in the same manner cannot be altogether ruled out but when it is asserted by P.W. 2 that both the payments at the time of finalisation of the marriage were made at one place and time, the possibility of Bamadev not knowing about the payment of Rs. 2,000/- by Basudev becomes very remote. Further it becomes clear from the evidence of the mediator (P.W. 10), as quoted earlier, that there was no demand for dowry by the accused or his father. If there was no demand of dowry as deposed to by P.W. 10, it can hardly be said that there was dissatisfaction when Rs. 10,000/- was paid, as stated by Basudev (P.W. 2). In that view of the matter, the question of payment of Rs. 2,000/- by Basudev is not believable. Be that as it may, it is seen from the evidence of the mediator (P.W. 10) that Bamadev and Basudev volunteered to pay Rs. 10,000/- to the

accused. Although he has claimed that he was not present when the actual payment was allegedly made, it has to be normally taken that such amount had been paid to the accused because the marriage was solemnised. So, the evidence of the mediator lends assurance to the evidence of Basudev and Bamadev that atleast Rs. 10,000/- was paid to the accused. That being so, the finding of the learned Addl. Sessions Judge that at the time of settlement of the marriage the accused received Rs. 10,000/- from Bamadev and Basudev cannot be disturbed.

13. The next important point for adjudication is whether the receipt of Rs. 10,000/- by the accused was towards dowry because Section 3 of the Act provides penalty for giving or taking dowry. According to the definition of the term 'dowry' quoted earlier, receipt of cash by one party to the marriage from the other party to the marriage cannot be called as dowry unless it is proved that such receipt was made as consideration for the marriage. Ofcourse, Namadev and Basudev have asserted that the payment of money was made on the demand of the accused. But the evidence of the mediator (P.W. 10) is otherwise. It appears that the recording of evidence of P.W. 10 as quoted earlier has not been properly made. If the said evidence is read as a whole it seems that the word 'no' has been omitted after the words 'there was' and before the words 'specific demand from the side of the accused' appearing in the 6th line from the top one instead of a full-stop, a comma should have been used after the statement 'there was specific demand from the side of the accused' because the sentence following has remained incomplete. After such addition and correction, the contences 'there was specific demand from the side of the accused. When I told them that the guardians of sails were prepared to give Rs. 10,000/- to Rs. 12,000/- ready cash as a dowry' should be read as 'there was no specific demand from the side of the accused, when I told them that the guardians of saila were prepared to give Rs. 10,000/- to Rs. 12,000/- ready cash as a dowry'. The evidence of the witness to the effect that 'the father of the accused told that if they are willing to pay the amount they would accept it for the expenses of the marriage' clearly signifies that there was no demand from the side of the accused or his father in his presence. The accused merely accepted Rs. 10,000/- when the said amount was voluntarily offered by Bamadev and Basudev. It is, thus, seen that the evidence of Bamadev and Basudev runs quite counter to the evidence of the mediator (P.W. 18) as to the demand of certain

cash as dowry. In view of such contradiction, it was the duty of the prosecution to examine Sri M. B. Doula, the then visiting Professor of Jagannath Sanskrit University who, according to Basudev, was also present when the alleged demand and payment were made, but he has not been examined and no explanation whatsoever has been offered for his non-examination. In face of his non-examination, when the mediator (P.W. 10) has stated that there was no demand from the side of the accused, it is not possible to place reliance merely on the evidence of Bamadev and Basudev to hold that Rs. 18,000/- had been paid to the accused as consideration for his marriage with the deceased. That being so, the finding of the learned Addl. Sessions Judge that there was receipt of cash of Rs. 10,000/- by the accused towards dowry cannot be sustained in law and consequently the conviction of the appellant under Section 3 of the Act is liable to be set aside.

14. It is then to be found out whether the conviction under Section 498A, IPC is sustainable. The said section deals with husband or relative of husband of a woman Subjecting her to cruelty and it provides punishment for them if they subject such woman to cruelty. In the explanation to the section, the meaning of 'cruelty' has been given in clauses (a) and (b). Admittedly, we are not concerned with clause (b). According to clause (a), 'cruelty' means any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman. In order to prove that the accused was subjecting the deceased to cruelty, reliance has been placed mainly on the evidence of P.Ws. 3, 4, 7, 9 and II. Before dealing with their evidence it is necessary to state that there is no direct evidence, oral or documentary, to show that the accused was subjecting the deceased to cruelty within the meaning of the section. The uncles of the deceased (P.Ws. 1 and 2) have not stated about any particular incident from which it can be said that the accused was subjecting the deceased to cruelty. Her uncle Bamadev has merely stated that the deceased was not happy with the accused after the marriage and they did not pull on well with each other. The other uncle Basudev has also deposed likewise and his further evidence is that the deceased was complaining of the illtreatment on her by the accused before his wife who was reporting the same to him. The wife of Basudev having not been examined, such

evidence is of no assistance to the prosecution. To state broadly, prosecution has disclosed two incidents in order to prove this aspect of the case; the first being of 'Kumar Purnima' day immediately preceding the occurrence and the second being that which took place in the morning of the date in question prior to the suicide of the deceased.

15. The incident relating to 'Kumar Purnima' day has been deposed to by P.Ws. 3, 4 and 7. P.W. 3 is the father of the deceased and his evidence is that on the said day the deceased came to his house in the village and cried and on his asking she showed her body where there were marks of injuries. She told him to his query that she had been assaulted by the accused on the ground that she had not taken sufficient dowry at the time of the marriage. While so saying she asked him to pay same money so that they would purchase the house otherwise she would be further assaulted by the accused. He consoled her saying that the matter would be looked into after his discussion with his brothers at Puri. His further evidence is that the deceased remained with him for a period of 6 to 7 days and thereafter when he brought the deceased to the house of the accused in a cart belonging to Tudu swain who is also known as Prafulla (P.W. 4) the latter did not allow them to enter into the house when the deceased replied to his query saying that she had not brought money. His evidence also shows that after being refused entry into the house they went to the house of Bhagaban Dash (P. W. 7), his another son-in-law situated in Puri town who narrated the entire incident to him. His another son-in-law Dr. Abhaya Prasad Mishra (P.W. 9) who was staying in a rented house in front of the District Headquarter's Hospital, Puri was sent for and thereafter both the said co-sons-in-law took the deceased to the house of the accused and left her there. It is pertinent to note from the evidence of the I.B. (P. W. 17) that during his examination at the time of investigation this witness had not stated the above facts before him. It is further admitted by Ananta (P.W. 3) that after his arrival at Puri he had no talk with his brother Basudev regarding payment of any money in accordance with the assurance allegedly given by him to the deceased. The defence has admitted that the deceased had gone out of his house on the 'Kumar Purnima' day and remained absent for 5-6 days but according to it the accused was suffering from typhoid and was bed ridden at the time of her departure and so he took exception to her absence when she was brought to his house again.

16. P.W. 4 in the cartman belonging to the village of P.W. 3 and his evidence is that he drove the cart carrying the deceased and P.W. 3 from his village to the house of the accused and when they reached near the house of the accused the latter came and asked the deceased whether she had brought money from her father and when the deceased replied that her father had come to talk to him in that regard he abused them in filthy language and did not allow them to go inside his house. His further evidence is that when entry into the house was refused they all went to the house of Bhagaban Dash (P.W. 1) and after sometime the said Bhagaban Dash and Dr. Abhaya Prasad Mishra, the son-in-law of P.W. 3 took the deceased to the house of the accused and left them.

17. P.W. 7, as stated earlier, is another son-in-law of P.W. 3 and his evidence is that about 2-3 months prior to her death the deceased had been brought by P.W. 3 to the house of the accused in a bullock cart but the accused did not allow her to go inside his house. Thereafter, P.W. 3 came to his house with the deceased and after sometime he himself and his co-brother-in law Dr. Abhaya Prasad Mishra (P.W. 9) took the deceased to the house of the accused and left her there. It is significant to note that this witness has not stated that either the deceased or her father (P.W. 3) disclosed before him that P.W. 3 had injuries on her person on account of any assault or that on their arrival near the house of the accused the latter abused them and did not allow entry into his house when he came to know from the deceased that money had not been brought by her.

18. It is highly significant to note that although P.Ws. 3, 4 and 7 have asserted that after being refused entry into the house of the accused while the deceased was there in the house of P.W. 7 along with her father and the cartman, P.W. 9 came there being sent for and thereafter P.Ws. 7 and 9 took the deceased to the house of the accused and left her there, the evidence of P.W. 9 is silent on that score. On the other hand, his evidence shows that he had been transferred to Anandapur from Puri 5-6 days after the Kumar Purnima when, according to the evidence of P.Ws. 3, 4 and 7, the deceased had been allegedly taken by him along with P.W. 7 to the house of the accused and left her there.

19. From the above narration of the evidence of P.Ws. 3, 4 and 7, it becomes clear that on the Kumar Purnima day the deceased had gone to the house of her father (P.W. 3) and when she was brought back to the house of the accused by her father, the accused took exception to her absence and did not allow her to enter into his house. But from such evidence it cannot be concluded with certainty that either the deceased had been assulted by the accused for want of sufficient dowry, as deposed to by P.W. 3 or was refused entry into the house of the accused when she disclosed having not brought the money, because P.W. 3 had not stated such facts at the time of investigation and his evidence to that effect has not been corroborated either by P.W. 7 or by P.W. 9 (his co-sons-in-law). That being so, the first incident relating to Kumar Purnima day cannot be believed.

20. As regards the second incident that allegedly took place in the morning of the date of the occurrence prior to the death of the deceased, reliance has been placed on the evidence of P.Ws. 7 and 11 to prove the same. P.W. 11 is the brother of the deceased and was a student of SD.S. College, Puri. His evidence is that on the date of the occurrence at about 8-30 to 9-00 a.m. when he went to the house of the accused his sister, the deceased, started crying at his sight and on his asking she told that the accused had assaulted her mercilessly because his younger brother Badal told him something for which the accused became enraged. When he asked Badal about the reason for such torture he did not listen to him and rather gave evasive reply. At that time the accused having abused and asked him to go away from his house, while he was leaving the house the deceased requested him to come once again saying that she would go to their house with him. As per such request of his sister, when he again went to the house of the accused at 11 a.m. and pushed the calling bell, there was no response from inside. He asked Indumati Rath (P.W. 5) and on his enquiry she gave out that about half an hour before she had heard the cry of the deceased. At the cost of repetition it may be stated here that P.W. 5 has not supported the prosecution case. It is further found from the evidence of P.W. 11 that after hearing as such from P.W. 6 when he pushed the calling bell again the accused without opening the entrance door told him to come half an hour after. But sometime thereafter he came and opened the door. When he asked the accused about his sister he directed him to go to the other room and on his going to that room he found the

door to have been bolted from inside. On pushing the window which got opened he found that his sister had committed suicide by hanging. Thereafter, he broke open the wooden railings of the window and through the opening of that window thus created he went inside the room being followed by the accused and then both of them brought down the dead body of the deceased from hanging position and made the same lie down on the floor. Water was given in her mouth but it did not enter inside. A doctor was called who declared the deceased to be already dead. It is of course found from the evidence of the I.O. (P. W. 17) that during investigation this witness had not stated before him that when he came to the house of the accused and pushed the calling bell for the second time the accused came and remaining inside his house told him to come after one hour. This omission being trifling in nature does not materially affect the trustworthiness of the evidence of this witness particularly when his assertion that in the morning of the date of the occurrence he had been to the house of the accused cannot be doubted as it has been elicited from him that at the material time he was staying in the house of his uncle in Puri town to prosecute his study in the college.

21. P.W. 7, as stated earlier, is another sister's husband of P.W. 11 and his evidence is that in the morning of the date of occurrence at about 9 to 9-30 a.m. while he was taking his meal to go to the State Bank of India, Puri Branch where he was working as a deputy head cashier, P.W. 11 requested him to go to the house of the accused saying that the accused and the deceased were quarrelling with each other. He assured P.W. 11 to go to the house of the accused after 4 p.m. after finishing his office work but when P.W. 11 insisted on his going there he refused to go there immediately because according to him the quarrel between the accused and the deceased was a routine affair. From such evidence of P.W. 7, it cannot be said that he was a witness to any torture on the deceased by the accused on the date of the occurrence. All that his evidence indicates is that the accused and the deceased were frequently quarrelling with each other. His evidence corroborates the evidence of P.W. 11 to the effect that he had been to the house of the accused in the morning of the date of occurrence when the deceased complained about the physical torture on her by the accused.

22. At this stage, it is necessary to refer to the medical evidence PW 13 is the medical officer who conducted the postmortem examination on the dead body of the deceased on 12-12-1986 at 12-30 pm and his postmortem report in Ext. 9. His evidence is that he noticed three external injuries on the person of the deceased, besides the ligature mark around her neck and those injuries are :-

(1) One oblique lacerated injury, 1/2' x 1/4' x bone deep, on the left parietal region 3' above the left eye brow;

(2) One haematoma, 1' x 1', in the front and middle of the forehead; and

(3) Multiple abrasions of different shapes and sizes over a region of 3' x 2' in the middle of the back.

23. P.W. 14 is another medical officer who examined the accused on 11-12-1986 and found, as per his injury report (Ext, 10), the following injuries on his person :-

(1) Lacerated wound, 1/3' x 1/4', on the face 1/2' below the right eye;

(2) Lacerated wound, 1/4' x 1/4' x 1/4', on the lateral aspect of left thigh;

(3) Lacerated wound, 1/4' x 1/4' x 1/4', on the lateral aspect of the left thigh;

(4) Lacerated wound, 1/4' x 1/4' x 1/4', on the lateral aspect of the left thigh; and

(5) Lacerated wound, 1/4' x 1/4' x 1/4', on the lateral aspect of the left thigh.

According to the Doctor, the injuries were simple in nature. Injury Nos. 2 to 5 might have been caused by tooth-bite. Accordingly to the defence, the accused came by the aforesaid injuries when he went inside the bed room, where the suicide took place, through the window by coming in contact with the pointed wooden splinters of those broken railings sticking to the window frame. Neither the injury report nor the evidence of the Doctor shows that the injury Nos 2 to 5 were convex and concave in nature although the Doctor has himself admitted that in case of tooth-bite the injuries will be convex and concave in nature. In view of such position, the defence plea that the accused came by the injuries by coming in contact with the broken railings sticking to the window frame cannot be ruled out.

24. Coming to the injuries on the frontal and parietal region of the head of the deceased and also in her back, it has to be prima facie taken that she received those injuries as a result of the, assaults by the accused particularly when the Doctor conducting the postmortem examination has clearly opined those injuries to be antemortem in nature and the defence has no case of its own as to the cause of the injuries. Mr. Patnaik for the appellant invites my attention to the inquest report ('Ex. 7) where there is no mention about the injuries on the forehead and in the back of the deceased and submits that the postmortem report being inconsistent with the inquest report, the same should not be acted upon Both the inquest report and the postmortem report are substantive evidence and for such inconsistency the postmortem report cannot be ignored. In such event, other evidence and circumstances have to be looked into to find out the credibility to be attached to the postmortem report. It is there in the evidence of P.W. 11, the brother of the deceased that the deceased had put on a blouse to cover the upper part of her body and in view of such evidence which has gone unchallenged it is quite likely that the police officer conducting the inquest on the dead body of the deceased might not have noticed the injuries on her back by removing the blouse so far as the haematoma on the frontal part of the head is concerned, the I.O. should have noticed the same inasmuch as its size was 1' x 1' but, for his mistake in omitting to note that injury in the inquest report, the postmortem report cannot be ignored indicating presence of such an injury. At this stage the evidence of the sole defence witness who is the brother of the accused may also be usefully noted. His evidence is to this effect :-

'Four to five days before my Bhauja committed suicide my brother was absent as he had been to Gopalpur in official duty. On the day of the occurrence at about 7 a.m. my brother returned from Gopalpur. Soon after the arrival of my brother, my Bhauja complained before him against me. She insisted my brother that I should be beaten, My brother did not agree to best me and went to take his bath

XXX XXX XXX

When my Bhauja insisted my brother to beat me and when my brother did not beat me there was a quarrel between my brother and Bhauja.'

This evidence also indirectly suggests that the accused might have assaulted the deceased prior to her committing suicide. This circumstance coupled with the presence of the aforesaid three injuries on the frontal and left parietal region of the head of the deceased and in her back and the evidence of P.W. 11 indicating that the deceased complained before him that she had been assaulted mercilessly by the accused on something being stated by Badal to him and that the deceased cried while stating so indicate that prior to her going inside the bed room for committing suicide the deceased had been assaulted by the accused.

25. The learned Standing Counsel for the State has invited my attention to the evidence of Bhagaban Dash (P.W. 7) who has stated that to his knowledge the accused and his wife were quarrelling with each other frequently and also the evidence of P.W. 9 where he has stated that in many occasions the deceased had complained before him that she was being assaulted by the accused and has submitted on the basis of such evidence that barring the two specific incidents of Kumarpurnima day and of the morning preceding the occurrence, there is material to show that the accused was frequently assaulting the deceased. P.W. 7 has not specifically deposed whether his knowledge about the quarrels was direct or derivative. The aforesaid evidence of P.Ws. 7 and 9 have no reference to any year. The same also do not indicate the reason for the assault and the nature of the assault. The same also have no proximate relation to the actual occurrence, namely, the suicidal death of Saila. The statements of the deceased before P.Ws. 7 and 9, in the facts and circumstances of the case, are not admissible u/S. 32(1) of the Indian Evidence Act. The learned Standing Counsel for the State has contended that Section 32(1) may be extended beyond the immediate cause resulting in the death and the statements of the deceased are admissible in view of the decision of the Supreme Court in *Sharad Birdhi Chand Sarda v. State of Maharashtra* : 1984 CriLJ1738 .

26. In the case of *Sharad (supra) Fazal Ali, J.* on a review of the authorities, laid down the following proposition :-

(i) Section 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is homicide, or a suicide,

provided the statement relates to the cause of death, or exhibits circumstances leading to the death. In this respect, as indicated above, the Indian Evidence Act, in view of the peculiar conditions of our society and the diverse nature and character of our people, has thought it necessary to widen the sphere of Section 32 to avoid injustice.

(ii) The test of proximity cannot be too literally construed and practically reduced to a out-and-dried formula of universal application so as to be confined in a strait-jacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it answers a final of the story, the statement regarding each step directly connected with the end of the drama would be admissible, because the entire statement would have to be read as an organic whole and not term from the context. Sometimes statements relevant to or furnishing on immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes place within a very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under Section 32.

(iii) The second part of Clause (1) of Section 32 is yet another exception to the rule that in criminal law the evidence of a person who was not being subjected to or given an opportunity of being cross-examined by the accused would be valueless because the place of cross-examination is taken by the solemnity and sanctity of oath for the simple reason that a person on the verge of death is not likely to make a false statement unless there is strong evidence to show that the statement was secured either by prompting or tutoring.

(iv) It may be important to note that Section 32 does not speak of homicide alone but includes suicide also, hence all the circumstances which may be relevant to prove a case of homicide would be equally relevant to prove a case of suicide

(v) Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a Tell-tale story, the said statement would clearly fall within the four corners

of Section 32 and, therefore, admissible. The distance of time alone in such cases would not make the statement irrelevant.

Sabyasachi Mukherjee, J. while concurring with the view of Fazal Ali, J. sounded a note of caution. He has observed as under (para 214):

I would, however, like to state that this approach should be taken with a great deal of caution and care and though I respectfully agree with Fazal Ali, J. that the test of proximity cannot and should not be too literally construed and be reduced practically to a cut-and-dried formula of universal application, it must be emphasised that whenever it is extended beyond the immediate, it should be the exception and must be done with very great caution and care. As a general proposition, it cannot be laid down for all purposes that for instance where a death takes place within a short time of marriage and the distance of time is not spread over three or four months, the statement would be admissible under Section 32 of the Evidence Act. This is always not so and cannot be so. In very exceptional circumstances like the circumstances in the present case such statements may be admissible and that too not for proving the positive fact but so an indication of a negative fact namely raising some doubt about the guilt of the accused as in this case.'

27. The above decision has no application to the facts of the present case. There are no exceptional circumstances like those in Sharad's case (1984 Cri LJ 1738) (SC) (supra). In the instant case, it is not known how long prior to her death the deceased made those statements before the witnesses. The statements are quite vague and do not specify the acts of omissions and commissions. The element of continuity is lacking. It is not a case where the statements are directly connected with or related to her death or reveal as a toll-tale story or that the death was logical culmination of a continuous drama long in process and is, as it were, a finale of the story. It is a case where a few cryptic, vague and general statements were made and when it is not ascertainable so to when these statements prior to the death of the deceased were made they cannot be said to be directly connected or related to her death. In my opinion, therefore, the statements of the deceased disclosed in the evidence of P.Ws. 7 and 9 are not relevant and admissible under

Section 32 of the Evidence Act.

28. Even it is assumed that the alleged statements are admissible under Section 32 of the Evidence Act, the same are quite insufficient to prove cruelty within the meaning of Section 498A of the I.P.C. The physical and mental torture that allegedly took place on the Kumarpurnima day and shortly thereafter has not been believed by this Court. It has of course been found that the prosecution has been able to prove beyond reasonable doubt that in the morning of the date of the alleged occurrence prior to her death, the deceased had been assaulted by the accused. But regard being had to the nature and location of the injuries it can scarcely be said that the wilful conduct of the accused i.e. in assaulting the deceased was of such a nature as was likely to drive the deceased to commit suicide or to cause grave injury or danger to her life limb or health (whether mental or physical). It follows, therefore, that the conviction of the appellant under Section 498A, I.P.C. cannot also be sustained in law.

29. Coming to the conviction u/s. 306, I.P.C. it is seen that the learned Addl. Sessions Judge has convicted the accused thereunder by applying the presumption available u/s. 113A of the Evidence Act after holding that cruelty on the deceased by the accused has been amply proved. U/S. 113A when a question is raised whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the Court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband. Explanation to the Section says that cruelty shall have the same meaning as in Section 498A, I.P.C. The presumption available to be raised under the Section is rebuttable and such presumption can be raised where it is proved that the wife committed suicide within a period of seven years from the date of her marriage and that her husband and such relative of her husband had subjected her to cruelty. In this case, admittedly, the suicide of the deceased took place within seven years from the date of her marriage with the accused. But, in view of my aforesaid discussion cruelty had not been meted out to the deceased either by the

accused or any of his relative, within the meaning of Section 498A, I.P.C. That being so, the aforesaid legal presumption is not available to the prosecution. The Court in having recourse to the legal presumption must be circumspect. It is evident that the Parliament was extremely careful in drafting the provisions of the said Section i.e. Section 113A. Had it been the intention of the legislature that the court should in all cases jump upon a conclusion as a rule that there has been abetment of suicide simply because suicide has been committed by the woman within seven years of marriage and she has been subjected to cruelty, the Parliament would not have used such flexible expression as 'the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband....' The expression used is 'may presume' and not that rigid as 'shall presume'. In view of Section 4 of the Evidence Act, the import of the expression 'may presume' is that the Court may either regard the fact in question as proved, unless and until it is disproved, or may call for proof of it. In Section 113A of the Evidence Act, the Parliament in its wisdom did not leave it at that by using the expression 'may presume' alone, but has supplemented the same by using the further expression 'having regard to all the other circumstances of the case' which casts a positive responsibility on the court to take into consideration all the other circumstances of the case also, namely the circumstances which may be there besides the two basic circumstances mentioned in the section itself which are suicide within seven years of marriage and proof of cruelty, in deciding whether the presumption of abetment of suicide should be drawn in a particular case from the proof of cruelty which itself is, separately punishable under Section 498A, I.P.C. It is found in the evidence of P.Ws, 8 and 9 that the accused and the deceased were of different temperaments for which they were not pulling on well with each other. The accused had been born and brought up in an orthodox Bramhin family with a very conservative outlook whereas the deceased was born and brought up in middle class Bramhin family without having orthodox outlook. The accused was a complete vegetarian and was not even allowing onion and garlic to be used while cooking whereas the deceased was fond of non-vegetarian diets. From all these facts it can be legitimately inferred that the deceased was unable to adjust herself in the family of the accused. So, after a mild beating by the accused for some domestic quarrel in

the morning in question, the possibility of the deceased putting an end to her life out of disgust being possessed of a temperament diametrically opposite to that of the accused cannot be altogether ruled out. The finding of the learned Additional Sessions Judge as to cruelty having been negatived and the aforesaid circumstances having not been taken into consideration, the conviction of the accused under Section 306, I.P.C. is also not sustainable. i

30. In the result, the appeal is allowed in full, the conviction of the appellant under Section 306 and 498A, I.P.C. and under Section 3 of the Act and the sentences passed thereunder are hereby set aside and the appellant is acquitted. The bail bond filed by him stands cancelled.

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