IN THE HIGH COURT OF JUDICATURE AT PATNA
DEATH REFERENCE No.1 of 2019

Arising Out of PS. Case No.-47 Year-2007 Thana- MANJHAGARH District- Gopalganj

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The State of Bihar

... ... Petitioner

Versus

Nasruddin Mian @ Lalu @ Nasiruddin Ahmad Son of Late Maqsood Alam @ Wakil Ahmad Resident of Village- Haradiyan, P.S.- Thawe, District- Gopalganj (Bihar.).

... ... Respondent

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with

CRIMINAL APPEAL (DB) No. 425 of 2019

Arising Out of PS. Case No.-47 Year-2007 Thana- MANJHAGARH District- Gopalganj

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Nasruddin Mian @ Lalu @ Nasiruddin Ahmad Son of Late Maqsood Alam @ Wakil Ahmad Resident of Village- Haradiyan, P.S.- Thawe, District- Gopalganj (Bihar.).

... ... Appellant

Versus

The State of Bihar

... ... Respondent

==========

with

CRIMINAL APPEAL (DB) No. 499 of 2019

Arising Out of PS. Case No.-47 Year-2007 Thana- MANJHAGARH District- Gopalganj

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Salamu Nesha @ Salamun Nesa Wife of Masiruddin Ahmad Resident of Village - Hardiya, P.S.- Thawe, Distt - Gopalganj.

... ... Appellant

Versus

The State of Bihar

... ... Respondent

Appearance :
(In DEATH REFERENCE No. 1 of 2019)
For the Petitioner : Mr.
For the Respondent : Ms.Anukriti Jaipuriyar, Amicus Curiae
(In CRIMINAL APPEAL (DB) No. 425 of 2019)
For the Appellant : Mr. Ajay Kumar Thakur, Advocate
Mr.Anuj Kumar, Advocate
For the Respondent : Dr.Mayanand Jha, APP
(In CRIMINAL APPEAL (DB) No. 499 of 2019)
For the Appellant : Mr. Ajay Kumar Thakur, Advocate
Mr.Shafiur Rahman, Advocate
For the Respondent : Mr.Dilip Kumar Sinha, APP

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
and
HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH)

Date: - 21-06-2021

The appellants in these appeals challenge the common judgment of conviction dated 26.03.2019 and order of sentence dated 29.03.2019 passed by the learned Sessions Judge, Gopalganj in Sessions Trial No. 122 of 2008. By the aforesaid judgment dated 26.03.2019, the appellants have been convicted for the offences punishable under Sections 498-A, 304-B, 302 and 201/34 of the Indian Penal Code (for short 'IPC'). Consequent upon conviction, vide aforesaid order dated 29.03.2019, the appellants have been sentenced to undergo Rigorous Imprisonment (for short 'R.I.') for seven years along with a fine of Rs.25,000/- each for the offence punishable under Section 201/34 of the IPC and in default of payment of fine to undergo further imprisonment for a period of six months each and R.I. for three years along with a fine of Rs.25,000/- each for the offence punishable under Section 498-A of the IPC and in default of payment of fine to undergo further imprisonment for a period of six months each. The appellant Salamu Nesha @ Salamun Nesha (Cr.Appeal (DB) No. 499 of 2019) has been further sentenced to undergo R.I. for life along with a fine of Rs.50,000/- for the offence punishable under Section 302 of the IPC and in default of payment of fine to undergo further

imprisonment for a period of one year. The appellant Nasruddin Mian @ Lalu @ Nasiruddin Ahmad (Cr.Appeal (DB) No. 425 of 2019) has further been sentenced to undergo death for the offence punishable under Section 302 of the IPC with a fine of Rs.50,000/-. It has been directed by the Trial Court that all the sentences shall run concurrently. The Trial Court has held that since the appellants have been convicted for the offence punishable under Section 302 of the IPC, no separate sentence is being prescribed for the offence punishable under Section 304-B of the IPC.

2. After passing the impugned judgment and order, the Trial Court made a reference under Section 366 of the Code of Criminal Procedure (for short 'Cr.P.C') for confirmation of death sentence awarded to the convict Nasruddin Mian @ Lalu @ Nasiruddin Ahmad, which has been registered as Death Reference No.1 of 2019.

3. The respective appeals preferred by the appellants and the reference made by the trial Court have been heard together and are being disposed of by a common judgment.

4. The sessions trial in which the impugned judgment and order were passed relates to the First information Report (for short 'FIR') that had been registered at 12:30 PM on 21.03.2007 in Manjhagarh (Thawe) Police Station under Section 154 of the Cr.P.C

in respect of an incident that had occurred on 17.03.2007 at village Haradiyan, P.S.- Thawe, District- Gopalganj situated at a distance of 9 kilometers from the police station.

5. The FIR was registered on the basis of duly signed typed report of one Abdul Jabbar, father of the deceased Sanjeeda Khatoon. In his report submitted to the S.H.O. of Thawe Police Station, he has stated that his daughter Sanjeeda Khatoon, aged 23 years, was married to Nasruddin Mian @ Lalu @ Nasiruddin Ahmad on 10.08.2003. Though he gave clothes and ornaments as gift at the time of marriage as per his capacity, the accused persons made a demand for motorcycle. However, on assurance of providing motorcycle after some time, the b*idagari* of his daughter was performed. He alleged that Nasruddin Ahmad along with his *Deyadin* (sister-in-law) Salamu Nesha and his father Maqsood Alam subjected the deceased to cruelty for a Hero Honda Motorcycle as dowry. He states that in the evening of 20.03.2007, he came to know that the aforesaid accused persons have killed his daughter on 17.03.2007 by administering poison in her food because of non-fulfillment of demand of motorcycle and buried her body without informing him or his family members.

6. On receipt of the aforesaid report, the S.H.O., Thawe Police Station Ashutosh Kumar forwarded it to the S.H.O. of

Manjhagarh Police Station for instituting a case pursuant to which Bipin Kumar Thakur, S.H.O. of Manjhagarh Police Station (not examined) registered Manjhagarh (Thawe) P.S. Case No. 47 of 2007 on 21.03.2007 at 12:30 PM under Sections 304-B and 201/34 of the IPC against the appellants and father-in-law of the deceased, namely, Maqsood Alam and handed over the investigation to Ashutosh Kumar, S.H.O., Thawe.

7. It would be evident from the record that in the present case the Investigating Officer (for short "I.O.") submitted charge-sheet no. 92 of 2007 dated 20.11.2007 only against the accused Nasruddin under Sections 498-A, 306 and 201/34 of the IPC and kept the investigation open against the other two accused persons.

8. Subsequently, on 30.11.2007, though the I.O. submitted supplementary charge-sheet no.94 of 2007 against the accused Salamu Nesha under Sections 498-A, 306 and 201/34 of the IPC, the accused Maqsood Alam having been found innocent during investigation was not sent up for trial.

9. Upon receipt of the police report, the learned Chief Judicial Magistrate, Gopalganj took cognizance of the offences vide order dated 15.01.2008 and, after complying with the provisions prescribed under Section 207 of the Cr.P.C, he committed the case

of the accused Nasruddin Ahmad and Salamu Nesha for trial to the Court of Session.

10. It would further be evident from the record that after commitment of the case, originally charge was framed against the two sent up accused vide order dated 22.08.2008 under Sections 498-A, 306 and 201/34 of the IPC to which they pleaded not guilty. Thereafter, the prosecution witnesses were examined between 24.10.2008 and 29.07.2016 and, vide order dated 01.09.2016, the prosecution evidence was closed.

11. After closure of the prosecution evidence, statements of the appellants were recorded under Section 313 of the Cr.P.C on the same day, i.e. on 01.09.2016 in which they pleaded their innocence and asserted that they have been falsely implicated in this case.

12. Thereafter, the sole defence witness Sahjad Gulrej (D.W.1) was examined, cross-examined and discharged on 11.01.2017. Vide order dated 24.01.2017, the defence evidence was closed and the case was fixed for argument.

13. It was at this stage that the informant of the case filed an application under Section 216 of the Cr.P.C on 09.03.2017 for addition of charge under Sections 304-B and 302 of the IPC to the original charge framed against the accused persons earlier on

22.08.2008. A reply to the application filed under Section 216 of the Cr.P.C was filed on behalf of the accused persons on 18.03.2017.

14. After hearing the parties on the application filed under Section 216 of the Cr.P.C, the Trial Court passed its order on 08.05.2017 whereby it altered the charge to Sections 304-B, 302 and 201/34 of the IPC in place of original charge under Sections 498-A, 306 and 201/34 of the IPC and fixed the case on 23.05.2017 for explaining the altered charge to the accused persons.

15. Vide order dated 08.05.2017, the Trial Court held that the accused persons would be at liberty to cross-examine the witnesses after alteration of charge in terms of Section 217 of the Cr.P.C.

16. The aforesaid order dated 08.05.2017 passed by the Trial Court reads as under: -

> "IN THE COURT OF ADDL. SESSIONS JUDGE V, GOPALGANJ, BIHAR
>
> Sessions Trial No.122 of 2008
>
> ORDER
>
> 08-05-2017
>
> Today case record is fixed for order on the petition filed on behalf of the prosecution, dated 09.03.2017, u/s 216 Cr.P.C to alter the charge and its rejoinder of dated 18.03.2017.
>
> Heard both parties and perused the record. On perusal of record, it transpires that in the instant case,

previously the charge was framed u/s 498(A)/306/201/34 of I.P.C; against the accused persons who are facing trial for the alleged offences. Further on perusal of the petition, filed on behalf of the prosecution u/s 216 Cr.P.C, it transpires that the death of victim was caused due to administering poison in her meal at her bridle home by accused persons, which is also evident from viscera report, and it is also evident that prior to death, the victim was subjected to cruelty for the demand of Hero Honda motorcycle and due to non fulfillment of such dowry, she was subjected to cruelty soon before her death and she was died due to administering poison in her meal. Further the ld. Lawyer for the prosecution has also given his emphasis on Sec. 113 B of the Indian Evidence Act, which deals with the presumption as to dowry death.

Contrary to this, the ld. Lawyer for the defense has voluntarily denied the factum of dowry death of victim caused by accused persons by administering poison in her meal and also denied the factum of demand of dowry and subjected to cruelty soon before her death.

Heard both the parties and perused the case record. On perusal of the same, it transpires that the death of victim was caused due to poisoning which is an admitted fact; vide Ext. 2, i.e the P.M. report and Ext. 5, i.e the viscera report. Further on bare perusal of F.I.R, it transpires that the accused persons were demanding motorcycle and due to that the victim was subjected to cruelty and she was administering poison in her meal soon before her death. Considering the fact and circumstances of the case, in my considered view, the

instant case comes under the purview of Sec. 304B read with Sec. 302 and Sec. 201 of the I.P.C and hence the petition filed on behalf of the prosecution u/s 216 Cr.P.C of dated 9.3.2017 is hereby allowed to alter the charges u/s 304B/302/201/34 I.P.C in place of Sec. 498A/306/201/34 I.P.C.

Dated 23.05.2017 is fixed for charge. Accused persons are directed to remain present physically on the date fixed for framing of altered charges.

Further the accused persons will have liberty to cross examine witnesses after alteration of charge u/s 217 Cr.P.C.

(dictated)
Addl. Sessions Judge V"

17. In view of the order dated 08.05.2017, the Trial Court explained the altered charge under Sections 302, 304-B and 201/34 of the IPC to the accused persons to which they pleaded not guilty.

18. Further, on 23.05.2017, an application was filed on behalf of the defence that since charge has been altered after closure of the prosecution evidence, it is expedient that the witnesses examined on behalf of the prosecution be recalled. The said application of the defence was allowed vide order dated 23.05.2017 itself and the office was directed to issue summons to all the prosecution witnesses.

19. Pursuant to the summons issued vide order dated 23.05.2017, the prosecution produced Md. Mustafa (P.W.1), Md.

Habib (P.W.3), Abdul Jabbar (P.W.4) and Jamda Khatoon (P.W.5) for further cross-examination.

20. After production of the aforesaid four witnesses on recall, an application was filed on behalf of the prosecution to close the prosecution evidence, which was allowed by the Trial Court vide order dated 6/7.08.2017.

21. The record reveals that after closure of the prosecution evidence pursuant to alteration of charge, the statements of the accused persons were once again recorded under Section 313 of the Cr.P.C on 21.08.2017 wherein they pleaded their innocence.

22. However, the prosecution filed another application on 03.07.2018 stating therein that the statements of the accused persons recorded under Section 313 of the Cr.P.C on 21.08.2017 are not as per the evidence led on behalf of the prosecution. Hence, a request was made to record their statements once again under Section 313 of the Cr.P.C for the purpose of enabling them to explain the circumstances appearing in evidence against them.

23. The Trial Court, vide order dated 19.07.2018 allowed the aforesaid application dated 03.07.2018 filed on behalf of the prosecution and adjourned the case to 30.07.2018 for recording fresh statements of the appellants under Section 313 of the Cr.P.C.

24. It would further appear from the record that on 30.07.2018 the statements of the accused persons were recorded for the fourth time in the trial under Section 313 of the Cr.P.C. The appellants once again pleaded their innocence.

25. Having discussed the manner in which the trial proceeded before the court below, let me look at the evidence recorded during trial.

26. The prosecution examined, in all, 12 witnesses in order to prove the charge against the accused persons. They are Md. Mustafa (P.W.1), Md. Majummil Hussain (P.W.2), Md. Habib (P.W.3), Abdul Jabbar (P.W.4), Jamda Khatoon (P.W.5), Saukat Ali (P.W.6), Dr.Jamsedh Ahmad (P.W.7), Ashutosh Kumar (P.W.8), Md. Ayub (P.W.9), Ramakant Giri (P.W.10) and Pawan Kumar Singh (P.W.11). It would be pertinent to note here that the evidence of Pawan Kumar Singh (P.W.11) was recorded on two different dates, i.e. on 05.07.2013 and 29.07.2016 and while recording his evidence on 29.07.2016, the Trial Court treated him as P.W.12.

27. The prosecution has also proved the following documents during trial: -

(i)	Signature of informant on typed report	Exhibit-1
(ii)	Post-mortem report	Exhibit-2
(iii)	Signature of I.O. on the forwarding note of the typed report the informant	Exhibit-3
(iv)	Pagination on FIR by Bipin Kumar	Exhibit-3/1

	Thakur, S.H.O. Manjhagarh	
(v)	Signature of the informant on the typed report	Exbihit-3/2
(vi)	Signature of Bipin Kumar Thakur at the bottom of the formal FIR	Exhibit-4
(vii)	Viscera Report	Exhibit-5
(viii)	Typed report	Exhibit-6
(ix)	Protest Petition	Exhibit-7
(x)	Signature of the I.O. on inquest report	Exhibit-8

28. On behalf of the defence, one Sahjad Gulrej, nephew of accused Salamu Nesha was examined during trial on 11.01.2017.

29. **Md. Mustafa (P.W.1)** states in his deposition that the daughter of Abdul Jabbar, namely, Sanjeeda Khatoon was married to Nasruddin five years ago. He states that the occurrence took place about one and a half years ago. At that time, he was at Purnea. He came to know through his co-villagers that Sanjeeda was being subjected to cruelty in her *sasural* for demand of dowry. Her husband and his relatives killed her by administering poison in the food and buried her body. The family members of the deceased complained to the police where after the police exhumed her body and sent it for post-mortem examination.

30. In cross-examination, Md. Mustafa states that whatever he has stated is based on information he received from other people. He states that Sanjeeda was blessed with two children out of the wedlock. She died three and a half years after her marriage. He admits that he had never visited the *sasural* of

Sanjeeda. He further admits that the financial condition of her father is very weak. He also admits that prior to the marriage of Sanjeeda, Nasruddin was already married. When his attention was drawn to his statement made under Section 161 of the Cr.P.C before the police, he admits that he had stated that Sanjeeda was first taken to Gopalganj Sadar Hospital for treatment and when her condition deteriorated, she was taken to Gorakhpur for better treatment, but on way she died. He also admits that he had stated before the police that after Sanjeeda died, her husband and in-laws brought her body to Haradiyan from Gorakhpur and buried it in *Qabristan* after *Janaza* prayer.

31. **Md. Majummil Hussain (P.W.2)** states in his deposition that Sanjeeda was married to Nasruddin about five years ago. She was not happy in her *sasural*. Her husband and in-laws used to demand motorcycle. He came to know about her death from others on 20.03.2007. He was told that her husband, father-in-law and sister-in-law killed her by administering poison in the food. Since the information of her death was received after three days, he could not participate in her *Janaza*.

32. In cross-examination, he states that he is not aware as to whether Sanjeeda was provided treatment at Gopalganj prior to her death. He admits that he had never met Sanjeeda after she was

married to Nasruddin. He also admits that Sanjeeda was having two children, one daughter (six months old) and one son (two years old). He admits that since the financial condition of the informant was not good, he had married his daughter to the son of his *khalera* brother (*mausera bhai*), who was already married from before. He admits that Sanjeeda's parents had not disclosed anything to him. He states that he does not remember as to who told him about the death of Sanjeeda.

33. **Md. Habib (P.W.3)** states in his deposition that he came to know from others about the death of Sanjeeda. He states that he was told that her death was caused by her husband, father-in-law and sister-in-law by administering poison in her food.

34. In cross-examination, he states that Md. Sattar is his *samdhi*. He admits that he was not present at the time of marriage of Sanjeeda. He further admits that after the marriage of Sanjeeda, he never met her. He states that father of Nasruddin, Md. Saddique and Md. Jabbar are *khalera* brothers (*mausera bhai*). He admits that he could not participate in the burial rituals of Sanjeeda. He states that when the body of the deceased was exhumed, he was present at the *Qabristan*.

35. In further cross-examination, after recall due to alteration of charge, he states that he does not know the reason as

to why Sanjeeda was killed by administering poison. He further admits that he has no personal knowledge about poisoning the victim to death and he came to know about it from his co-villagers. He also admits that he had never seen the accused persons subjecting her to cruelty.

36. **Abdul Jabbar (P.W.4)** states in his deposition that he is the informant of the case. On 20.03.2007, he got information that his daughter has been killed by administering poison. On such information, he went to the *sasural* of his daughter along with his brother Abdul Sattar (not examined). On reaching Haradiyan, he came to know that his daughter was killed by Nasruddin, Maqsood Alam and Salamu Nesha three days ago by administering poison and her body was buried on the same day without informing him. He further states that the husband and father-in-law of the deceased always used to demand motorcycle. He states that his daughter was married on 10.08.2003. He proved his signature on the typed report submitted to the police, which was marked as Exhibit-1. He states that the police had exhumed the body of his daughter from *Qabristan* and sent it for post-mortem examination.

37. In cross-examination, he admits that the accused persons are his old relatives. He states that his cousin (*mamera bhai*) Ekramul Haque (not examined) was the mediator in the

marriage. He admits that he knew that his son-in-law was already married earlier. He admits that his daughter and son-in-law always used to visit his house and he also used to visit their house quite frequently. He admits that his wife and another daughter had also visited the matrimonial home of Sanjeeda when mother of Nasruddin had died. He admits that his son-in-law runs a readymade garment shop at Gopalganj where he frequently used to visit. He states that he came to know about the death of his daughter from his cousin Ekramul Haque, whose house is situated at a distance of 50 yards from the house of Nasruddin. He states that when he reached Haradiyan, both the children of his deceased daughter were playing with their grandfather on a cot. He denies the defence suggestion that he had been informed about the death of his daughter and he along with his wife and daughter had participated in her burial rites. He was shown a photograph and was asked to identify the persons present therein to which he replied that he is unable to identify them. Immediately thereafter, he says that the photograph does not contain picture of his wife and daughter. He denies the defence suggestion that he has lodged the case because the accused persons failed to pay him Rs.5,00,000/- and transfer a piece of plot demanded by him after the death of his daughter.

38. On recall, after alteration of charge, in further cross-examination, he states that he has four daughters and had knowingly married one of his daughters to Nasruddin, who was already married from before, as he had no money. He states that at the time of marriage, he had promised to give motorcycle after some time. He admits that he had visited the matrimonial home of his daughter about ten days prior to her death. He further admits that after the marriage of his daughter and before her death no panchayati had taken place. He also admits that before the death of the deceased he had not lodged any complaint to the police or before the court. He denies the defence suggestion that after the death of his daughter he along with other family members had gone to Haradiyan and participated in her burial rites and three days thereafter lodged the case in order to extract money from the accused persons. He also denies the defence suggestion that the demand of dowry was never made by the accused persons.

39. **Jamda Khatoon (P.W.5)** states in her deposition that her daughter Sanjeeda Khatoon was married to Nasruddin on 10.08.2003. At the time of marriage, Nasruddin and his father had demanded Hero Honda motorcycle. As the demand was not fulfilled, after persuasion, *bidagri* of her daughter was performed and she was taken to her *sasural*. In her *sasural*, she was being

subjected to cruelty for demand of dowry. Later on, they killed her daughter by administering poison in her food and even without informing about her death, her body was buried. After few days of her death when information was received, her husband and his younger brother Abdul Sattar went to her *sasural* and brought her both children, who now live at her home.

40. In cross-examination, she states that her daughter frequently used to come to her maternal home from *sasural,* but mostly she used to live in her *sasural* after marriage. She states that Sanjeeda was in her *maike* when her first child was born. She states that since her son-in-law was having extra marital relationship with his sister-in-law Salamu Nesha, her daughter was not happy in her *sasural*. In this regard, her daughter had told her earlier. She further states that she came to know after three days of her death that she consumed poison. She expressed her ignorance about any medical treatment given to Sanjeeda before her death. She admits that *maike* of her mother-in-law is in Haradiyan. She also admits that the grandfather of Nasruddin is agnate of her mother-in-law. She was shown a photograph, but she expressed her inability to identify the pictures therein. She denies the defence suggestion that she had information about death of her daughter and had participated in her

burial rituals and deliberately refused to identify the persons in the photo, which was taken on that occasion.

41. In her cross-examination, on recall, she states that once she had visited the *sasural* of Sanjeeda after three months of her marriage. She admits that Sanjeeda did not make any complain to her at that time.

42. **Saukat Ali (P.W.6)** is an advocate clerk. He states that the formal FIR was drawn in the writing of the then S.H.O. Bipin Kumar Thakur. He identifies his writing and signature on the formal FIR, which was marked as Exhibit- 3/1.

43. In cross-examination, he states that the formal FIR was not drawn in his presence.

44. **Dr.Jamsedh Ahmad (P.W.7)** was posted at Sadar Hospital, Gopalganj on 21.03.2007 as Civil Assistant Surgeon. He held the post-mortem examination on the body of the deceased at 4:45 PM on 21.03.2007 and found that the whole body was decomposed and foul smell was emanating from it. He proved the post-mortem report, which has been marked as Exhibit-2. A perusal of the post-mortem report would indicate that the opinion regarding cause of death was reserved pending forensic examination of viscera.

45. **Ashutosh Kumar (P.W.8)** states in his deposition that on 21.03.2007 he was posted as S.H.O. of Thawe Police Station. On that day, he received a typed report containing signature of Abdul Jabbar, which was forwarded by him to the S.H.O. of Manjhagarh Police Station for institution of FIR. He identified his writing on the typed report, which was marked as Exhibit-3. He proved the pagination done on the FIR by the S.H.O. Manjhagarh, Bipin Kumar Thakur and signature of the informant on the typed report, which were marked as Exhibits- 3/1 and 3/2 respectively. He also proved the signature of the S.H.O. Manjhagarh Police Station on the formal FIR, which was marked as Exhibit-4. He states that he inspected the place of occurrence and recorded the subsequent statement of the informant and witnesses, namely, Md. Muzammil Hussain, Md. Mustafa, Jayda Khatoon, Md. Habib and Alamgir Ahmad. He exhumed the body of the deceased Sanjeeda at Haradiyan from Qabristan in presence of the B.D.O. and witnesses and prepared the inquest report. He sent the body of the deceased Sanjeeda for post-mortem examination to the Sadar Hospital, Gopalganj. He sent the viscera to the Forensic Science Laboratory, Muzaffarpur through Constable Jitendra Tiwary (not examined) after obtaining orders from the court of the Chief Judicial Magistrate, Gopalganj. He submitted the charge-

sheet against Nasruddin and kept the investigation open against other accused persons. Subsequently, he submitted the supplementary charge-sheet against Salamu Nesha. He states that since the allegation against the accused Maqsood Alam was not found true, he was not sent up for trial.

46. In cross-examination, the I.O. admits that on 21.03.2007 when he took up investigation, he recorded the statement of the witnesses at the place of occurrence itself, He admits that the mother of the deceased in her statement made under Section 161 of the Cr.P.C stated that Sanjeeda Khatoon was unwell and she died on way while being taken to Gorakhpur for treatment.

47. The I.O. further admits that Alamgir Ahmad stated before him that on 15.03.2007 all on a sudden Sanjeeda became sick. She was taken for treatment to Gopalganj Sadar Hospital on a Bolero vehicle and from there she was taken to Gorakhpur for better treatment but, she died on way. He further admits that in his statement made under Section 161 of the Cr.P.C, Md. Naushad stated that the deceased died during treatment. He admits that Md. Naushad also stated that during treatment and burial rituals family member of the deceased were present.

48. The I.O. admits that he did not investigate the case on the point of treatment provided to the deceased before her death, as

disclosed to him by the witnesses. He admits that he did not investigate on the point as to whether the parents and family members of the deceased were present or not at the time of her burial. He also admits that the place of occurrence is a joint house of Moed Mian and Ishad Mian, but he did not record the statement of the owners of the house. He admits that in the inquest report there is no mention of any injury on the body of the deceased. He denies the defence suggestion that he had conducted a faulty investigation.

49. **Md. Ayub (P.W.9)** was posted as a technician in the Forensic Science Laboratory, Muzaffarpur. He states that viscera of the deceased was examined by Dr. U.K. Sinha. He also states that he had assisted him in the examination. He proved signature of Dr. U.K. Sinha on the viscera report, which was marked as Exhibit-5. A perusal of Exhibit-5 would show that Aluminium Phosphide was detected in the fluid, which is commercially known as Celphos and is used as grain preservative and is highly poisonous.

50. In cross-examination, he admits that Dr. U.K. Sinha had examined the viscera at his own level. He admits that he does not know about the method of examination of viscera adopted by him. He also admits that Dr. U.K. Sinha had not stated anything to him regarding the method adopted for examination of viscera. He

states that Aluminium Phosphide remains in the body till the body is not composed.

51. **Ramakant Giri (P.W.10)**, a private typist in the Civil Court, Gopalganj states in his deposition that he had typed the report as instructed by the informant Abdul Jabbar, which has been marked as Exhibit-6.

52. In cross-examination, he admits that he has no knowledge about the veracity of the contents of the typed report submitted to the police by Abdul Jabbar.

53. **Pawan Kumar Singh (P.W.11)** was examined twice in this case, firstly, on 05.07.2013 and, secondly, on 29.07.2016, when he was treated by the Trial Court as P.W.12. He is an advocate clerk, who has proved the protest petition filed by the informant, which has been marked as Exhibit-7 and the inquest report, which has been marked as Exhibit-8.

54. In cross-examination, he admits that the inquest report was not prepared before him and he has no knowledge of the case.

55. After examination of the aforesaid witnesses, the prosecution evidence was closed and the statements of the accused persons were recorded under Section 313 of the Cr.P.C in the manner indicated above. Thereafter, the defence examined its sole

witness Sahjad Gulrej, resident of village Saudali, P.S. Barauti, District Gopalganj on 11.01.2017.

56. **Sahjad Gulrej (D.W.1)** states in his deposition that Salamu Nesha is his aunt (*bua*). On 17.03.2017, he was at his house. After receiving information, he took his *bua* on motorcycle to Sadar Hospital, Gopalganj. At Gopalganj Sadar Hospital, his uncle (*fufa*) Sk. Masruddin, his younger brother Nasruddin, father-in-law of Nasruddin and his family members were present from before. The wife of Nasruddin, who was ailing, was being provided treatment in the hospital. Subsequently, she was referred to Gorakhpur from Gopalganj Sadar Hospital for better treatment. He states that he himself, Nasruddin and Nasruddin's father-in-law took Sanjeeda to Gorakhpur in a vehicle, but on way she died. Thereafter, her body was brought to Haradiyan and in presence of the family members and relatives, burial rituals were performed. He states that the photograph of the deceased was taken at the time of burial rituals in which the mother and sister of the deceased can be seen. He states that till that time, there was no grievance and with their consent rituals were performed, but after 3-4 days of the burial of the deceased, the FIR was instituted. He produced the photograph and its negative, which were marked as Exhibits-B and B/1 respectively with objection. He proved the signature of his *fufa*

on the typed application submitted by him to the Superintendent of Police, Gopalganj regarding the actual facts of the case, which was marked as Exhibit-A. He also proved the hospital registration receipt of the deceased Sanjeeda issued by the Gopalganj Sadar Hospital, which was marked as Exhibit-C.

57. In cross-examination, he states that when he reached the hospital, Sanjeeda was in her senses. She was being administered fluid. At about 5:00 PM, Sanjeeda was referred from Gopalganj Sadar Hospital to Gorakhpur. They proceeded to Gorakhpur for better treatment in a vehicle. He could not disclose the name of the doctor, who treated Sanjeeda or the name of the owner of the vehicle in which Sanjeeda was being taken from Gopalganj to Gorakhpur. He admits that the photograph and negative are undated and unsigned. He states that the photograph was taken on 18.03.2007 at 4:00 PM. He states that in the photograph on the right and left side of the body of the deceased her mother and sister respectively can be seen. He denies the suggestion made by the prosecution that the photograph presented by him in the court was a result of technological trick. He denies the suggestion that in the Gopalganj Sadar Hospital, mother and father of the deceased were not present. He also denies the

prosecution suggestion that Sanjeeda did not die due to illness and her death was caused due to poisoning.

58. After the defence evidence was closed and the arguments made on behalf of the parties were heard, the Trial Court vide impugned judgment and order convicted and sentenced the accused persons in the manner noted above.

59. Assailing the impugned judgment of conviction and order of sentence, Mr. Ajay Kumar Thakur, learned counsel appearing for the appellants submitted that in the report submitted by the informant no date, month or year of the alleged demand of Hero Honda Motorcycle has been given. He submitted that the informant has also not stated any date, month or year of the alleged cruelty by the accused persons in his report. He contended that there is no allegation that soon before her death or within a reasonable proximity of death either there was any demand from the deceased for dowry or she was subjected to any kind of cruelty for non-fulfillment of such demand.

60. Referring to the deposition of the witnesses, he submitted that P.Ws. 1, 2 and 3 are hearsay witnesses. Their evidence is completely vague. Similarly, P.W.4, the father of the victim has also not stated a word in his evidence about torture to the deceased by any of the accused. He has not stated that his

daughter ever told him when he visited her *sasural* or when she visited *naihar* about alleged demand of dowry.

61. Mr. Thakur further contended that P.W.5 has made vague allegation of demand and torture in her examination-in-chief. However, she did not state that soon before death the victim was subjected to cruelty for non-fulfillment of demand of dowry. He contended that P.W.5 has introduced a new story in her evidence that her son-in-law had illicit relationship with his sister-in-law Salamu Nesha. He contended that none of the prosecution witnesses is eye-witness to the alleged demand of motorcycle made from the deceased. He argued that the falsity of the prosecution case would be evident from the deposition of P.W.1, who had stated before the police that when the deceased became critically ill on 20.3.2007 she was taken to Sadar Hospital Gopalganj where she was treated and from there she was taken to Gorakhpur for better treatment and she died on way and her body was buried as per Muslim custom and rituals.

62. Referring to the deposition of the I.O. (P.W.8), Mr. Thakur submitted that in his deposition the I.O. has admitted that the mother of the deceased had stated in her statement that the deceased was ill and she died while being taken to Gorakhpur for treatment. He also admitted that he had recorded the statement of

Alamgir Ahmad and Naushad, who had stated that the victim died due to ailment during treatment.

63. He further contended that the I.O. has admitted in his deposition that the house in which the appellants and the deceased were living together was a joint house of two families, but he has not recorded the statement of other persons residing in the said house.

64. He contended that the evidence of other witnesses would not be admissible as far as the altered charges are concerned simply because they were not produced by the prosecution for further cross-examination after alteration of charge. He submitted that the Trial Court has failed to appreciate the evidence on record in correct perspective and has reached to an erroneous conclusion while convicting and sentencing the accused persons.

65. He submitted that in the present case, the prosecution has failed to establish that the death of the deceased was homicidal. According to him, if the evidence of the witnesses examined on behalf of the prosecution is considered, it would reveal that the evidence is inconsistent with the theory of homicidal death.

66. He contended that in case of circumstantial evidence, motive plays a crucial role and the prosecution has truly failed to prove the case as to motive.

67. Lastly, Mr. Thakur submitted that when two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the benefit of doubt should be given to the accused.

68. Ms. Anukriti Jaipuriyar, learned advocate appointed as amicus curiae in Death Reference No.1 of 2019 submitted that P.Ws. 1 to 3 are hearsay witnesses, P.Ws. 4 and 5 are parents of the deceased, P.Ws.6, 10 to 12 are formal witnesses, P.W.7 is the medical officer, who conducted post-mortem examination and reserved his opinion subject to viscera report, P.W.8 investigated the case and P.W.9 is a technician, who has proved the expert report submitted by Dr. U.K. Sinha. She contended that Ekramul Haque, who informed the Informant about the death of the deceased, was not examined. Similarly, Alamgir Ahmad and Naushad, whose statements were recorded by the I.O. during investigation and, who stated that the deceased died during treatment of her ailment, which supports the case of the defence have not been examined during trial. She contended that there is no evidence on record to show that the deceased was subjected to cruelty for non-fulfillment of demand of dowry or there was any illicit relationship between appellants Nasruddin Mian @ Lalu @ Nasiruddin Ahmad and Salamu Nesha. She contended that the evidence on record would

suggest that the deceased and her husband were happily married since 10.08.2003 having two children – one daughter and one son. The evidence would further suggest that they had cordial relationship.

69. Learned amicus curiae submitted that the evidence of the I.O. is very important in the case as he has admitted that the deceased's mother told him that the deceased died on way while she was being taken for treatment to Gorakhpur. She contended that there is complete lack of legal evidence on the basis of which the Trial Court could have recorded the finding of guilt against the appellants.

70. Learned amicus curiae submitted that while passing the impugned judgment, the Trial Court has completely ignored the evidence adduced by the sole defence witness. His evidence regarding treatment provided to the deceased at Sadar Hospital, Gopalganj has not been challenged by the prosecution. The registration receipt issued by the hospital in the name of the deceased clearly shows that her husband and his relatives tried their best to save her life. She contended that the deposition of D.W.1, if read together with the deposition of the prosecution witnesses, would clearly suggest that the accused persons had neither caused

homicidal death of the deceased nor had abated her to commit suicide.

71. On the other hand, Mr. Dilip Kumar Sinha, learned Additional Public Prosecutor appearing for the State submitted that the prosecution has led cogent evidence in support of its case and the Trial Court has correctly appreciated the facts and the law involved in the case. He contended that the witnesses examined during trial are truthful. The parents of the deceased (P.Ws.4 and 5) have clearly stated in their evidence that their daughter Sanjeeda Khatoon was married to Nasruddin Mian @ Lalu @ Nasiruddin Ahmad on 10.08.2003 and at the time of *bidagari,* her husband and father-in-law demanded a motorcycle. He contended that P.W.5 has specifically stated in her evidence that her daughter had made complaint that she was being subjected to cruelty due to non-fulfillment of demand of motorcycle. He contended that there is no illegality in the alteration of charge and all the relevant witnesses were recalled by the court for further cross-examination after the charge was altered. According to him, no prejudice has been caused to the defence due to non-production of some of the witnesses after the original charge was substituted by new charge under Sections 304-B and 302 of the IPC. He further contended that the Trial Court has taken compassionate view against accused Salamu Nesha

in a gruesome case of murder in which she was actively involved and has awarded her minimum sentence, i.e. life imprisonment. He further contended that the accused Nasruddin Mian @ Lalu @ Nasiruddin Ahmad being husband of the deceased has rightly been awarded death sentence in view of the materials on record.

72. Mr. Sinha, learned Additional Public Prosecutor further submitted that there is no doubt that the appellant Nasruddin being the husband of the deceased and the appellant Salamu Nesha being sister-in-law of the deceased were staying under the same roof and the viscera report suggests that the deceased died due to poisoning. He submitted that Section 106 of the Evidence Act would directly operate against them. He contended that since the appellants were the persons living together with the deceased, they had the special knowledge under what circumstance she died and it was for them to explain as to how Aluminium Phosphide was detected in the viscera of the deceased sent for chemical examination.

73. I have given my anxious consideration to the rival submissions and have carefully perused the evidence on record.

74. Before we enter on a consideration of the submissions made by the learned counsel for the parties and the learned *amicus curiae*, it is apposite to refer to the reasons, which

weighed with the Trial Court to convict the appellants. They read as under :-

> *"42. Under the facts and circumstances and on giving emphasis on the entire scenario of the case from beginning to end is completely gone against the accused persons and it falsified the defence of the accused persons and no innocence attracted on the part of the accused persons rather a serious conspiracy and determination and mala fide intention is clearly established against both the accused leading to commit brutal murder of Indian legal wedded wife due to non-fulfillment of desire like asking a motorcycle in dowry demand. It also gives a clear cut impact against the accused persons that they are so cruel or 'बहसी दरिन्दा' that he could not spare own beloved wife, who has promised with her while 'Nikah' was commenced that he will maintain his legal wedded wife properly and look-after her carefully without any complain and torture. He has promised to lead happy conjugal life and an Indian girl left her parental home keeping lot of believe and faith upon a stranger to create 'अपना सुनहरा संसार' and enter into the matrimonial tie under the commencement of ritual of 'Nikah' in presence of 'अल्लाहताला' in the name of Prophet Mohammad and both made promise to save their life each-other, but in this case, the accused-husband forgotten the promise whatever promised while 'Nikah' took place*

and he started committing torture to her beloved wife. Not only this, the Deyadin, who ought to have to save life of a lady, who has come leaving her parental home at the instance of the fact that another lady residing at her in-laws' house will save her being a lady, but what happened her a lady being Deyadin residing at her in-laws' house, she failed to protect her, she involved actively with the accused-husband of the deceased and made up a conspiracy and made a mental set-up to kill her and both of the accused made up a plan to kill her and as such, the deceased was killed by administering poison in daily meal. Thereafter, the circumstances itself reflects that both the accused are not at all innocent rather, the attitude and behavior which is very remarkable human being goes completely against a person and the overt-act and attitude committed against legal wedded wife itself established and proved the commission of crime of committing brutal murder of Indian legal wedded wife by administering poison due to non-fulfillment of dowry-demand and the entire episode flashes light over the 'बहसीपन एवं दरिंदगी' of both the accused and they could not spare an Indian legal wedded wife only because the father of the deceased was not capable to fulfill the desire of the accused and at the same time, 'ये कहा जाना अतिशयोक्ति नहीं होगा कि अभियुक्त इतने बहसी-दरिंदा है कि एक ब्याहता-स्त्री के हँसते-खेलते जीवन को एक मोटरसाइकल से भी कम आँका और अपनी चाहत पूरी के लिए उसकी जीवनलीला ही समाप्त कर दी। ऐसे बहसी-दरिंदा पर किसी तरह की

सहानुभूति दिखाना, खुद को ईश्वर के बंदे न समझना होगा।' The act and overt-act committed by the husband-accused and Deyadin-accused, who has given strength clear-cut towards commission of murder of a innocent Indian legal wedded wife due to non-fulfillment of demand of dowry even for a motorcycle, goes against pious and God-fearing persons. Hence, both the accused completely and seriously failed to establish their innocence and accordingly, they are found clear-cut guilty for commission of committing murder of the deceased due to non-fulfillment of dowry-demand.

43. Having considered the facts and circumstances of the case as well as discussion made above, the case U/S 306 I.P.C. is not at all attracted and established from any corner rather a clear cut case of dowry-death U/Ss. 498A, 304B, 201 I.P.C. is made out beyond the shadow of all reasonable doubts.

44. It is pertinent to note that earlier the charge was framed U/S 498A, 306, 201/34 I.P.C. Later on, after completion of trial, this fact came into the notice of the court that the deceased legal wedded wife was committed murder due to administering poison in her meal and on the basis of protest petition and another petition, the prosecution made approach to court to amend the charge by way of addition and further, the charge was framed against both of the accused U/S 498A, 304B, 302, 201/34 I.P.C. vide order sheet dated 23.05.2017. The prosecution has further approached the court,

enlightening the fact that the deceased was not died to her natural death then the court, to dispense with justice, not the alive father rather extend justice to the deceased and particularly ordered to dig the grave of deceased and extract the corpse and accordingly, the corpse of deceased was extracted and postmortem was done and it was found from P.M. Report and Viscera-report (Exhibit-2 and Exhibit-5) as such the death was caused due to poison. Ultimately, the real truth itself came out that the deceased was committed murder by administering poison in her meal. Inquest-report (Exhibit-8), P.M. Report (Exhibit-2) and Viscera-report (Exhibit-5) are available on record which are well proved by oral witness adduced on behalf of prosecution.

45. Under the facts and circumstances as well as giving emphasis on the relevant documents brought on the record on behalf of prosecution like, Inquest-report, examination of Viscera of FSL and other material as discussed above, earlier the document filed and marked on behalf of defence do not give any impact over the same as the same is not at all relevant to disbelieve the case of the prosecution. Since the case is very serious and come under the purview of 'rarest of rare' as it came to notice to the court of justice that the inference is very well drawn towards pathetic story of the deceased on being derived the conclusion as discussed above. Hence, it is crystal clear that the case in hand is

related to corpse of the deceased Sanjeeda Khatoon "cried under the graveyard to seek dispense of justice from the court of justice."

46. Having considered the facts and circumstances as well as giving anxious consideration and on careful microscopic studies of the oral evidence and the material available on record and considering the argument of the ld. counsel for the defence and prosecution, I find much force in the submission of the prosecution towards establishing the allegation leveled against both the accused leading to committing murder of deceased due to non-fulfillment of demand of dowry and with a view to save their skin to screen the evidence, deceased was hurriedly and hastily buried without giving acknowledgement to any one and even the parents of the deceased were completely deprived to see the face of their beloved daughter.

47. Hence, the prosecution has completely proved the charges U/Ss. 498A/304B/302/201/34 of the I.P.C. against the accused no.1 Nasruddin Mian @ Lallu and accused no.2 Salamu Nesha beyond the shadow of all reasonable doubts. Accordingly, the bail bonds of both the accused is being cancelled and both of them are taken into judicial custody to be appeared on 29-03-2019 for hearing on the point of sentence."

75. Be it noted that while writing a judgment, a Judge is required to keep certain basic rules in mind. The supreme require-

ment of a judgment is reason, which is the rational to the conclusion. Reasoning is the mental process through which a Judge reaches to his conclusion. All conclusions should be supported by reasons duly recorded. The finding of fact should be based on legal testimony and should be based on legal grounds. Neither the finding of fact nor the decision should be based upon wild suspicion, hypothetical presumption, surmises and conjectures. Further, while commenting on the conduct of the parties, a Judge is required to be careful to use sober and restrained language. He should avoid use of disparaging and derogatory remarks against any person whose case may be under consideration before him.

76. A Court while writing judgment has a onerous task of being dispassionate in assessing the evidence. Indulging in trial and error in arriving at a decision making tends to cloud the cognitive space with the attendant cognitive biases. The clouded mind then tends to fit in the causal chain to the prototypes based on biologically and socially evolved capacities; social pressures, individual motivations and emotions. In making decision a judge is required to avoid the intuitive/reflexive outcome based on the causal chain of events available and focus on deliberative aspect of decision making otherwise the judge would tend to draw illusory correlation between the chain of events and the reflexive outcome. The decision

making requires a certain level of motivation and cognitive capacity of a judge. A well trained mind of a judge along with self realization of the available biases occupying his cognitive space would help a judge avoid the pit falls of heuristic and avoid distorted thinking leading to a more balanced and rational outcome.

77. In ***Rathinam vs. State of T.N***., since reported in ***(2011) 11 SCC 140***, the Supreme Court has highlighted the importance of dispassionate assessment of the evidence and a greater caution on the Court which must resist the tendency to look beyond the fact in the following paragraphs:-

> *"23. We must, however, understand that a particularly foul crime imposes a greater caution on the court which must resist the tendency to look beyond the file, and the insinuation that the rich are always the aggressors and the poor always the victims, is too broad and conjectural a supposition. It has been emphasised repeatedly by this Court that a dispassionate assessment of the evidence must be made and that the Court must not be swayed by the horror of the crime or the character of the accused and that the judgment must not be clouded by the facts of the case. In Kashmira Singh v. State of M.P. [AIR 1952 SC 159 : 1952 Cri LJ 839] it was observed as under: (AIR p. 160, para 2)*
>
> > *"2. The murder was a particularly cruel and revolting one and for that reason it*

will be necessary to examine the evidence with more than ordinary care lest the shocking nature of the crime induce an instinctive reaction against a dispassionate judicial scrutiny of the facts and law."

24. Likewise in Ashish Batham v. State of M.P. [(2002) 7 SCC 317 : 2002 SCC (Cri) 1718] it was observed thus: (SCC p. 327, para 8)

"8. Realities or truth apart, the fundamental and basic presumption in the administration of criminal law and justice delivery system is the innocence of the alleged accused and till the charges are proved beyond reasonable doubt on the basis of clear, cogent, credible or unimpeachable evidence, the question of indicting or punishing an accused does not arise, merely carried away by the heinous nature of the crime or the gruesome manner in which it was found to have been committed. Mere suspicion, however strong or probable it may be is no effective substitute for the legal proof required to substantiate the charge of commission of a crime and graver the charge is, greater should be the standard of proof required. Courts dealing with criminal cases at least should constantly remember that there is a long mental distance between 'may be true' and 'must be true'

and this basic and golden rule only helps to maintain the vital distinction between 'conjectures' and 'sure conclusions' to be arrived at on the touchstone of a dispassionate judicial scrutiny based upon a complete and comprehensive appreciation of all features of the case as well as quality and credibility of the evidence brought on record."

78. The judgment under consideration is an example of how not to write a judgment. It has repeatedly been emphasized by the Supreme Court that the Courts and Judges must make a dispassionate assessment of evidence and that the Courts and Judges should not be swayed by the horror of crime and the character of the person. The judgment should be made by a Judge uninfluenced by his own imagined norms of the functioning of the society.

79. The Trial Court ought to have avoided the sweeping and disparaging remarks made in para 42 of its judgment regarding the conduct of the appellants.

80. I fail to see as to how the Trial Court held in para 44 of its judgment that the charge was framed against the appellants under Section 498-A of the IPC after the informant filed an application for addition to the original charge. The order dated 08.05.2017 passed by the Trial Court, which has been extracted

hereinabove, would clearly show that the original charge under Sections 498-A, 306 and 201/34 of the IPC was altered to Sections 304-B, 302 and 201/34 of the IPC. The trial court did not allow the prayer of the informant regarding addition of Sections 304-B and 302 of the IPC to the original charge already framed against them meaning thereby that due to alteration of the original charge vide order dated 08.05.2017, the charge under Sections 498-A and 306 became non-existent.

81. As a matter of fact, for all practical purposes, after alteration of the charge, the appellants were being tried only for the offences punishable under Sections 304-B, 302 and 201/34 of the IPC.

82. Surprisingly, in para 43 of the judgment, the Trial Court held that the case under Section 306 of the IPC is not made out. After alteration of charge, since there was no charge under Section 306 of the IPC, there was no occasion for the Trial Court to have recorded such finding in respect of Section 306 of the IPC.

83. Evidently, while passing the impugned judgment, the Trial Court had misconceived that the appellants were also being tried for the original charge framed under Sections 498-A and 306 of the IPC.

84. While saying so, I am mindful of the judgment of the Supreme Court in ***Shanti Vs. State of Haryana*****,** since reported in ***(1991) 1 SCC 371***, wherein it has been held that Sections 304-B and 498-A of the IPC are not mutually exclusive. They deal with two distinct offences. A person charged and acquitted under Section 304-B of the IPC can be convicted under Section 498-A of the IPC without charge being framed, if such a case is made out. But from the point of view of practice and procedure and to avoid technical defects, it is necessary in such cases to frame charges under both the sections and if the case is established against the accused, they can be convicted under both the Sections but no separate sentence need be awarded under Section 498-A in view of the substantive sentence being awarded for the major offence under Section 304-B.

85. However, in the present case, the Trial Court has not only convicted and sentenced the appellants for the offence punishable under Section 498-A of the IPC under which effectively they were not charged, but also convicted and sentenced them for the offence punishable under Section 304-B of the IPC.

86. Now coming to the issue of recall of witnesses after alteration of charge, it is necessary to refer to Sections 216 and 217 of the Cr.P.C :-

"216. Court may alter charge.—*(1) Any Court may alter or add to any charge at any time before judgment is pronounced.*

(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.

217. Recall of witnesses when charge altered.—*Whenever a charge is altered or added to by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed—*

(a) to recall or re-summon, and examine with reference to such alteration or addition, any witness who may have been examined, unless the Court, for reasons to be recorded in writing, considers that the prosecutor or the accused, as the case may be, desires to recall or re-examine such witness for the purpose of vexation or delay or for defeating the ends of justice;

(b) also to call any further witness whom the Court may think to be material."

87. Sub-section (3) of Section 216 of the Cr.P.C provides that if the alteration or addition to a charge does not cause prejudice to the accused in his defence or the prosecutor in the conduct of the case, the Court may proceed with the trial as if the additional or altered charge is the original charge. Sub-section (4) thereof contemplates a suggestion where alteration or addition of charge will prejudice the accused and empowers the Court to either direct a new trial or adjourn the trial for such period as may be necessary to delay the prejudice likely to be caused to the accused. It is the duty on the part of the Court to see that no prejudice is caused to the accused and he is allowed to have a fair trial.

88. Section 217 of the Cr.P.C deals with recall of witnesses in case of alteration of charge. It allows the prosecutor and the accused to recall, re-summon and examine any witness who

may have been examined with reference to alteration or addition of charge. The court is, however, required to ensure that calling of witnesses is only for meeting the ends of justice and not to vitiate the purpose of trial or delay the proceeding.

89. The provisions prescribed under Sections 216 and 217 of the Cr.P.C require the court to ensure that no prejudice is caused to the accused in the event of addition or alteration of charge and he is provided with a fair trial.

90. In ***CBI v. Karimullah Osan Khan*****,** since reported in ***(2014) 11 SCC 538***, the Supreme Court dealt with a case where an application was filed under Section 216 of the Cr.P.C during the course of trial for addition of charge against the appellant under various provisions of the IPC, Explosive Substances Act and the Terrorists and Disruptive Activities (Prevention) Act, 1987. The Supreme Court held as under: -

> ***"17.*** *Section 216 CrPC gives considerable power to the trial court, that is, even after the completion of evidence, arguments heard and the judgment reserved, it can alter and add to any charge, subject to the conditions mentioned therein. The expressions "at any time" and before the "judgment is pronounced" would indicate that the power is very wide and can be exercised, in appropriate cases, in the interest of justice, but at the same time, the courts*

should also see that its orders would not cause any prejudice to the accused."

91. In ***R. Rachaiah Vs. Home Secy., Bangalore*****,** since reported in ***(2016) 12 SCC 172***, in which charge sheet was filed by the police after investigation under Sections 306 and 365 read with Section 34 of the IPC against the accused persons, the trial proceeded on the basis of the charge. In all, 27 witnesses were examined on behalf of the prosecution. When P.W.26 was examined, an application was filed by the prosecution under Section 216 of the Cr.P.C for framing of additional charge under Section 302 of the IPC. The objections raised by the accused persons were rejected and the Trial Court framed alternative charge under Section 302 of the IPC read with Section 34 of the IPC. The Trial Court convicted the accused persons under Section 302 read with Section 34 of the IPC and also under Section 364 read with 34 of the IPC meaning thereby that the appellants were not convicted of the original charge framed either under Section 306 or Section 365 of the IPC. They were convicted in respect of alternative charge under Section 302 of the IPC. Further, the other offence for which they were charged was under Section 365 of the IPC, but the conviction was recorded under Section 364 IPC on the ground that even when the charge framed was under Section 365 of the IPC,

the evidence produced by the prosecution shows existence of all ingredients of Section 364 of the IPC. The appellants filed appeal before the High Court against the said conviction taking a plea to the effect that there could not have been any conviction under Section 302 of the IPC. It was also pleaded that the alternative charge under Section 302 of the IPC was wrongly framed without following the procedure under Sections 216 and 217 of the Cr.P.C. Therefore, the entire trial under Section 302 of the IPC stood vitiated. It was also argued that there could not have been any conviction under Section 302 of the IPC in absence of any specific charge under this Section. The High Court dismissed the appeal.

92. The accused persons moved before the Supreme Court. The Supreme Court while referring to Sections 216 and 217 of the Cr.P.C held as under: -

> "***10.*** *The bare reading of Section 216 reveals that though it is permissible for any court to alter or add to any charge at any time before judgment is pronounced, certain safeguards, looking into the interest of the accused person who is charged with the additional charge or with the alteration of the additional charge, are also provided specifically under sub-sections (3) and (4) of Section 216 of the Code. Sub-section (3), in no uncertain term, stipulates that with the alteration or addition to a charge if any prejudice is going to be caused to the accused in his defence or the prosecutor*

in the conduct of the case, ***the Court has to proceed with the trial as if it altered or added the original charge by terming the additional or alternative charge as original charge****. The clear message is that it is to be treated as charge made for the first time and trial has to proceed from that stage. This position becomes further clear from the bare reading of sub-section (4) of Section 216 of the Code which empowers the Court, in such a situation, to either direct a new trial or adjourn the trial for such period as may be necessary. A new trial is insisted if the charge is altogether different and distinct.*

11. *Even if the charge may be of same species, the provision for adjourning the trial is made to give sufficient opportunity to the accused to prepare and defend himself. It is, in the same process, Section 217 of the Code provides that whenever a charge is altered or added by the court after the commencement of the trial, the prosecutor as well as the accused shall be allowed to recall or re summon or examine any witnesses who have already been examined with reference to such alteration or addition. In such circumstances, the court is to even allow any further witness which the court thinks to be material in regard to the altered or additional charge.*

12. *When we apply the aforesaid principles to the facts of this case, the outcome becomes obvious….”*

(emphasis mine)

93. In ***R. Rachaiah*** (Supra), the Supreme Court further held as under: -

> *"**14.** In a case like this, with the framing of alternative charge on 30-9-2006, testimony of those witnesses recorded prior to that date could even be taken into consideration. It hardly needs to be demonstrated that the provisions of Sections 216 and 217 are mandatory in nature as they not only sub serve the requirement of principles of natural justice but guarantee an important right which is given to the accused persons to defend themselves appropriately by giving them full opportunity. Cross-examination of the witnesses, in the process, is an important facet of this right. Credibility of any witness can be established only after the said witness is put to cross-examination by the accused person.*
>
> ***15.** In the instant case, there is no cross-examination of these witnesses insofar as charge under Section 302 IPC is concerned. The trial, therefore, stands vitiated and there could not have been any conviction under Section 302 IPC.*
>
> ***16.** Though, in the given case, it would be doubtful as to whether the appellants can now be convicted under Section 306 IPC as we, prima facie, find that the charge under Section 302 was in substitution of the earlier charge under Section 306 as both the charges cannot stand together. (See Sangaraboina Sreenu v. State of A.P. [Sangaraboina Sreenu v. State of A.P., (1997) 5 SCC)"*

94. In the instant case, though the original charge under Sections 498-A and 306 of the IPC was substituted by much graver offences under Sections 302 and 304-B of the IPC, the prosecution produced only P.Ws. 1, 3, 4 and 5 before the court for further cross-examination in spite of the fact that a prayer was made on behalf of the appellants before the Trial Court to recall all the witnesses examined earlier after the alteration of charge and the same was allowed. Surprisingly, after examining the aforesaid four witnesses, the prosecution filed a petition that it did not want to recall other witnesses and the Trial Court closed the prosecution evidence.

95. Now, the question would arise as to whether withholdment of P.W.2 and P.Ws.6 to 12 after the charge was altered has caused any prejudice to the appellants.

96. In the facts and circumstances of the case, the mandate of the provisions prescribed under Sections 216 and 217 of the Cr.P.C and the law laid down by the Supreme Court in ***CBI v. Karimullah Osan Khan*** (Supra) and ***R. Rachaiah*** (Supra), I have no hesitation in concluding that since the altered charge was for graver offences under Sections 302 and 304-B of the IPC, the withholdment of the aforesaid witnesses from further cross-examination has certainly caused prejudice to the accused persons.

They have been deprived from cross-examining those witnesses in respect of the substituted charge. I am also of the opinion that their deposition cannot form basis for arriving at the conclusion of guilt for the offences punishable under Sections 304-B and 302 of the IPC.

97. Leaving apart the aforesaid legal position, this Court would like to appreciate the entire material including the prosecution evidence, as has been brought on record to see as to whether the charge brought against the appellants was proved before the Trial Court beyond doubt.

98. We have seen that the appellants have been charged by the Trial Court for the offences punishable under Sections 302 and 304-B of the IPC separately. The charge under Section 304-B of the IPC is not an alternative charge to Section 302 of the IPC.

99. Insofar as the conviction of the appellants under Section 302 of the Indian Penal Code is concerned, it would appear from the record that there is complete lack of direct evidence of murder of the deceased. The conviction of the appellants is purely based on circumstantial evidence. The circumstantial evidence is direct evidence of a fact from which a person may reasonably infer the existence or non-existence of another fact. A person’s guilt of a charged crime may be proved by circumstantial evidence if that

evidence, while not directly establishing guilt, gives rise to an inference of guilt beyond a reasonable doubt. Thus, the circumstantial evidence is evidence of circumstances which can be relied upon not as proving a fact directly, but instead as pointing to its existence. In every case based on circumstantial evidence, the question that needs to be determined is whether the circumstances relied upon by the prosecution are proved by reliable and cogent evidence and whether all the links in the chain of circumstance are complete so as to rule out the possibility of innocence of the accused.

100. Undoubtedly, the conviction can be based solely on circumstantial evidence, but it should be tested on the touchstone of the law relating to proof beyond reasonable doubt.

101. The law relating to conviction on the basis of circumstantial evidence has been delineated by the Supreme Court in ***Sharad Birdhichand Sarda vs. State of Maharashtra*** since reported in ***(1984) 4 SCC 116*** in paras 153 and 154 as under:-

> *"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:*
> *(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.*
> *It may be noted here that this Court indicated that the circumstances concerned "must or should" and not*

"may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 1783] where the observations were made:

"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

102. In ***C. Chenga Reddy and Others Vs. State of Andhra Pradesh,*** since reported in ***(1996) 10 SCC 193***, the Supreme Court

while dealing with a case based on circumstantial evidence in para 21 held as under: -

> *"21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In the present case the courts below have overlooked these settled principles and allowed suspicion to take the place of proof besides relying upon some inadmissible evidence."*

103. After referring to a catena of cases based on circumstantial evidence in ***Shivu and Others Vs. Registrar General, High Court of Karnataka and Another,*** since reported in ***2007 (4) SCC 713***, the Supreme Court held in para 12 as under: -

> *"12. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See Hukam Singh v. State of Rajasthan [(1977) 2 SCC 99 : 1977 SCC (Cri) 250 : AIR 1977 SC 1063] , Eradu v. State of Hyderabad [AIR 1956*

SC 316 : 1956 Cri LJ 559] , Earabhadrappa v. State of Karnataka [(1983) 2 SCC 330 : 1983 SCC (Cri) 447 : AIR 1983 SC 446] , State of U.P. v. Sukhbasi [1985 Supp SCC 79 : 1985 SCC (Cri) 387 : AIR 1985 SC 1224] , Balwinder Singh v. State of Punjab [(1987) 1 SCC 1 : 1987 SCC (Cri) 27 : AIR 1987 SC 350] and Ashok Kumar Chatterjeev. State of M.P. [1989 Supp (1) SCC 560 : 1989 SCC (Cri) 566 : AIR 1989 SC 1890]) The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram v. State of Punjab [AIR 1954 SC 621 : 1954 Cri LJ 1645] it was laid down that where the case depends upon the conclusion drawn from circumstances, the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt.

104. In ***Padala Veera Reddy Vs. State of Andhra Pradesh and Others,*** since reported in ***1989 Supp (2) SCC 706***, the Supreme Court laid down that in a case of circumstantial evidence, the evidence must satisfy the following tests:-

"(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

105. In the light of these guiding principles, we should now consider the circumstances of the present case.

106. The appellant Nasruddin was married to the deceased on 10.08.2003. Though, there is allegation of demand of a motorcycle at the time of marriage and also subsequent to the marriage against the appellant Nasruddin and his father, there is no cogent evidence on behalf of the prosecution in this regard. It is an admitted case of the prosecution that out of the marriage, the deceased was blessed with two children. They had cordial relationship would also become evident from the evidence of PW-4 and PW-5, who are father and mother respectively of the deceased. Both of them have admitted in their evidence that the deceased along with her husband (appellant Nasruddin) used to visit her maternal home frequently. The father of the deceased (PW-4) has admitted in his evi-

dence that he also used to frequently visit the matrimonial home of his deceased daughter and the readymade garment shop of his son-in-law at Gopalganj. He has admitted to the extent that even ten days prior to the death of his daughter, he has visited her matrimonial home. Both the parents have admitted that the deceased had never lodged any complaint to the police or before the court regarding subjecting her to cruelty for non-fulfillment of demand of motorcycle.

107. The evidence on record would indicate that the deceased fell sick on 17.03.2017 and was taken to Gopalganj Sadar Hospital and when her condition deteriorated, she was referred to Gorakhpur for better treatment. The husband of the deceased and other family members took steps to take her to Gorakhpur, but she died while being taken to Gorakhpur. These facts would be evident from the deposition of PW-1 and the I.O. of the case. The I.O. has admitted in cross-examination that the mother of the deceased (PW-5), Alamgir Ahmad (not examined) and Md. Naushad (not examined) stated before him in their statement recorded under Section 161 of the CrPC that the deceased was unwell and was treated at Gopalganj and while being taken to Gorakhpur for better treatment she died. The sole defence witness has supported the aforesaid assertion made by PW-1. In this regard, DW-1 has proved the

hospital registration receipt of the deceased issued by Gopalganj Sadar Hospital. The hospital registration receipt supports the case of the defence that on the fateful day, she was treated in Gopalganj Sadar Hospital. The hospital registration receipt produced and exhibited on behalf of the defence has not been disputed by the prosecution in cross-examination. These facts would clearly establish the conduct of the accused persons which would relevant under Section 8 of the Indian Evidence Act. The evidence on record shows that the accused persons tried their best to save the life of the deceased when she was ailing.

108. The Medical Officer (PW-7), who conducted the postmortem examination after the body was exhumed from the *Qabristan*, reserved his opinion subject to viscera report. He only stated about foul smell emanating from the decomposed body of the deceased. There are no marks on the body, which would suggest violence and struggle. The FIR was registered *inter alia* under Section 306 of the IPC. After completion of investigation also, the police submitted charge sheet under Sections 498-A, 306 and 201/34 of the IPC. Initially, the charge was also framed under the aforesaid provisions under which the police had submitted charge-sheet against the appellants. All the prosecution witnesses were examined during trial on the basis of aforesaid charge. However, after

all the witnesses were examined during trial, the charge was altered to Sections 302, 304-B and 201/34 of the IPC by the Trial Court and, thereafter, only PWs 1, 3, 4 and 5 were recalled for further cross-examination.

109. Thus, right from the beginning till the conclusion of investigation, the investigating agency did not find any material in support of homicidal death of the deceased. It was only after all the witnesses were examined during trial, the Trial Court altered the charge.

110. Thus, the issue is as to whether there was any material to support the prosecution case that the death of the deceased was homicidal.

111. The prosecution has argued that since the viscera report exhibited by PW-9, a forensic lab technician, confirms that the fluid contained Aluminium Phosphide, it was a case of murder and not of suicide. The prosecution has also argued that since the deceased died in her matrimonial home within the four walls of a house, it was for the accused persons to establish that the death was not homicidal in view of Section 106 of the Indian Evidence Act.

112. Section 106 of the Indian Evidence Act embodies the rule that when any fact is especially within the knowledge of any person, the burden of proving that, is upon him.

113. Apparently, Section 106 of the Evidence Act, therefore, requires understanding the burden of proof. The burden of proof as envisaged under Section 101 of the Indian Evidence Act requires the person to prove the existence of fact which he had asserted. Section 106 is an exception to the general rule so laid down under Section 101 of the Indian Evidence Act.

114. The burden to prove the guilt of the accused is always on the prosecution and the burden never shifts. Section 106 does not relieve the prosecution of its initial burden. On the contrary, it is designed to meet certain exceptional cases on which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are especially within the knowledge of the accused or which he could prove without any difficulty or inconvenience.

115. In ***Sawal Das vs. State of Bihar*** since reported in ***1974 (4) SCC 193***, the Supreme Court explained the principle underlying Section 106 of the Indian Evidence Act as under: -

> *"10. Neither an application of Section 103 nor of 106 of the Evidence Act could, however, absolve the prosecution from the duty of discharging its general or primary burden of proving the prosecution case beyond reasonable doubt. It is only when the prosecution has led evidence which, if believed, will sustain a conviction, or, which makes out a prima facie case,*

that the question arises of considering facts of which the burden of proof may lie upon the accused."

116. In ***Subramanian vs. State of Tamil Nadu*** since reported in ***2009 (14) SCC 415***, the Supreme Court had occasion to consider a case of the husband and wife remaining within the four walls of the house and death of the wife took place. In para 23 of the judgment, the Supreme Court observed as under: -

"23. So far as the circumstance that they had been living together is concerned, indisputably, the entirety of the situation should be taken into consideration. Ordinarily when the husband and wife remained within the four walls of a house and a death by homicide takes place it will be for the husband to explain the circumstances in which she might have died. However, we cannot lose sight of the fact that although the same may be considered to be a strong circumstance but that by alone in absence of any evidence of violence on the deceased cannot be held to be conclusive. It may be difficult to arrive at a conclusion that the husband and husband alone was responsible therefor."

117. Thus, it is well settled that Section 106 of the Indian Evidence Act does not directly operate against either a husband or wife staying in the same room.

118. Section 106 of the Indian Evidence Act does not absolve the prosecution from discharging its general and primary burden of proving the case beyond reasonable doubt. It is only when

the prosecution has led evidence which, if believed, will sustain a conviction, or, which makes out a *prima facie* case, that the question would arise of considering facts of which the burden of proof may lie upon the accused.

119. In the present case, the prosecution has even failed to prove beyond reasonable doubt that the death was homicidal.

120. Moreover, the I.O. has admitted in his evidence that the deceased was living in a joint house belonging to two agnates namely, Mohit Mian and Ishad Mian. He has stated that he has not recorded statements of the family members of the agnates of the accused persons. Hence, it is not a case where the appellants and the deceased alone were living within the four walls of the house and death of the wife took place rather several persons of two families were living together in that house and the I.O. admittedly did not record statement of anyone during investigation.

121. Furthermore, even mother of the deceased (PW-5) admitted in cross-examination that she had come to know that the deceased had consumed poison after three days of her death. There is complete derth of evidence to prove the prosecution case that the appellants were responsible for the felonious administration of poison which caused death.

122. In view of the discussions made above, I am of the opinion that in the present case, the prosecution has failed to prove the fact that the consumption of poison by the deceased was a fact within the special knowledge of the appellants and, therefore, the principle underlying under Section 106 of the Indian Evidence Act would not apply.

123. Since it is a case of circumstantial evidence, proof of motive would be an important corroborative piece of evidence. If motive is indicated and proved, it would strengthen the probability of the commission of the offence. The motive relied on by the prosecution is ill-treatment by the appellants meted out to the deceased for non-fulfillment of demand of motorcycle and the illicit relationship between the appellant Nasruddin and Salamu Nesha. However, the evidence on record does not show any proof that the deceased was ever subjected to cruelty for demand of dowry or there was illicit relationship between the appellants.

124. I am of the considered view that the prosecution has utterly failed to prove the motive beyond doubt. Thus, an important thing to complete the chain of circumstances is totally absent in the present case.

125. The medical evidence and the forensic evidence, as discussed above, do not prove beyond reasonable doubt that it was

a case of homicidal death. I am of the considered view that in the absence of legally admissible evidence, the trial court has convicted the appellants under Section 302 of the IPC merely on moral ground, as the wife of the appellant Nasruddin had died in her matrimonial home.

126. In so far as the conviction of the appellant under Section 304-B of the IPC is concerned, it would be pertinent to analyze the law on dowry death. Section 304-B of the IPC, which defines and provides the punishment for dowry death, reads as under: -

> *"**304-B. 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 **soon before her death** she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.*
>
> *Explanation— For the purpose of this sub-section, "dowry" shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).*
>
> *(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be*

less than seven years but which may extend to imprisonment for life." (emphasis mine)

127. A perusal of Section 304-B of the IPC clearly demonstrates that if a married woman dies otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband in connection with any demand for dowry, such death shall be called dowry death, and such husband or relative would be deemed to have caused her death.

128. In ***Major Singh Vs. State of Punjab***, since reported in ***(2015) 5 SCC 201***, a three-Judge Bench explained the condition precedent for sustaining the conviction under Section 304-B of the IPC in para 10 as under :-

"10. To sustain the conviction under Section 304-B IPC, the following essential ingredients are to be established:

(i) the death of a woman should be caused by burns or bodily injury or otherwise than under a 'normal circumstance';

(ii) such a death should have occurred within seven years of her marriage;

(iii) she must have been subjected to cruelty or harassment by her husband or any relative of her husband;

(iv) such cruelty or harassment should be for or in connection with demand of dowry; and

(v) such cruelty or harassment is shown to have been meted out to the woman soon before her death."

129. Section 113-B of the Evidence Act provides for presumption as to dowry death. It reads as under: -

*"**113B. 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 has 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.*

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

130. As per the definition of dowry death in Section 304-B of the IPC and the presumption provided under Section 113-B of the Evidence Act, one of the essential ingredients amongst others is that the woman concerned must have been subjected to cruelty or harassment "soon before" her death in connection with the demand of dowry.

131. In ***Bakshish Ram v. State of Punjab*****,** since reported in ***(2013) 4 SCC 131***, while interpreting the provisions prescribed under Section 113-B of the Evidence Act and Section 304-B of the IPC, the Supreme Court observed as under: -

> ***"19.*** *As discussed above, a perusal of Section 113-B of the Evidence Act and Section 304-B IPC shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. In other words, the prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of "death occurring otherwise than in normal circumstances". The prosecution is obliged to show that soon before the occurrence, there was cruelty or harassment and only in that case presumption operates. As observed earlier, 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. In the case on hand, admittedly, the prosecution heavily relied on the only evidence of Sibo (PW 2), the mother of the deceased which, according to us, is a hearsay, in any event, a very general and vague statement which is not sufficient to attract the above provisions. In such circumstances, as argued by the learned counsel for the appellants, accidental death cannot be ruled out.*
>
> ***20.*** *Another relevant aspect to be noted is that it was Appellant 1, husband of the deceased who took the*

deceased to the hospital and it was he who informed the police as well as parents of the deceased. It is also brought to our notice that he did not make any attempt to run away from the place of occurrence."

132. In ***M. Srinivasulu Vs. State of A.P.*****,** since reported in ***(2007) 12 SCC 443,*** the Supreme Court observed as under: -

"*The presumption shall be raised only on proof of the following essentials:*

(1) The question before the court must be whether the accused has committed the dowry death of a woman. (This means that the presumption can be raised only if the accused is being tried for the offence under Section 304-B IPC.)

(2) The woman was subjected to cruelty or harassment by her husband or his relatives.

(3) Such cruelty or harassment was for, or in connection with any demand for dowry.

(4) Such cruelty or harassment was soon before her death."

133. Recently, a three-judge Bench of the Supreme Court in ***Satbir Singh Vs. State of Haryana***, since reported in ***2021 SCC OnLine SC 404,*** while interpreting the phrase "soon before" used in Section 304-B of the IPC observed : *"Being a criminal statute, generally it is to be interpreted strictly. However, where strict interpretation leads to absurdity or goes against the spirit of legislation, the courts may in appropriate cases place reliance*

upon the genuine import of the words, taken in their usual sense to resolve such ambiguities."

134. In ***Satbir Singh*** (Supra), the Supreme Court further observed: "*Considering the significance of such a legislation, a strict interpretation would defeat the very object for which it was enacted. Therefore, it is safe to deduce that when the legislature used the words, "soon before" they did not mean "immediately before". Rather, they left its determination in the hands of the courts.*"

135. The Supreme Court further observed: "*What is pivotal to the above determination, is the establishment of a "proximate and live link" between the cruelty and the consequential death of the victim*."

136. The Supreme Court ruled that when the prosecution establishes such proximate and live link presumption of causation arises against the accused under Section 113-B of the Evidence Act.

137. Coming back to the evidence in the present case, we have seen that though it is alleged in the FIR that a Hero Honda motorcycle was demanded by the accused Nasruddin and his father at the time of marriage and after persuasion *bidagari* of the daughter of the informant could be possible. It is also alleged that

in the *sasural,* the husband, sister-in-law and the father-in-law used to torture her for motorcycle. However, no date, month or year of alleged demand or alleged torture after the marriage has been given. There is no allegation that soon before her death or within a reasonable proximity of death either there was any demand from the deceased for dowry or the deceased was subjected to any kind of cruelty for non-fulfillment of such demand. During trial also, no witness has come forward to say that soon before death the victim was subjected to any kind of cruelty due to non-fulfillment of demand of dowry.

138. P.Ws. 4 and 5, being the father and mother respectively of the deceased, are the main witnesses, whose evidence would be relevant to determine as to whether the prosecution has been able to prove its case beyond reasonable doubt.

139. P.W.4, the father of the victim has vaguely stated in his deposition that the husband and father-in-law of the deceased always used to demand motorcycle. He states that the marriage of his daughter had taken place on 10.08.2003. The death of his daughter had taken place on 17.03.2007. There is nothing in his evidence from which it can be said that soon before death or in close proximity of death, the victim was subjected to cruelty for

non-fulfillment of demand of motorcycle. He has admitted in his cross-examination that he always used to visit the matrimonial home of his daughter and his daughter along with her husband also used to visit her maternal home frequently. He also admits that before death of the deceased, no complaint was ever lodged with the police or before the court. He admits that he had visited the matrimonial home of his daughter about ten days before her death and even during that time no complain was made to him.

140. Similarly, P.W.5, mother of the deceased has admitted that her daughter frequently used to come to her maternal home from *sasural*. She has made a vague allegation that in *sasural* her daughter was being subjected to cruelty for demand of motorcycle. She also has not stated a word to even remotely suggest that soon before her death or within a reasonable proximity of her death any demand of dowry was made from her daughter or she was subjected to cruelty for non-fulfillment of such demand. She has introduced a new story in her deposition that her daughter was not happy in her *sasural* as her husband was having extra marital relationship with his sister-in-law. Save and except this uncorroborated testimony of P.W.5, there is no cogent evidence to support the story. There is also no cogent evidence to support even the vague allegation of demand of motorcycle. No prior complaint

in this regard was ever made by the deceased or her parents.

141. On the contrary, the evidence on record suggests that the informant and father-in-law of the deceased are cousins. The families were known to each other since long. The deceased and her husband had cordial relationship and they were blessed with two children. The Trial Court completely erred in ignoring that the prosecution failed to present any material to rule out the possibility of a suicidal death so as to bring it within the purview of the death occurring otherwise than in normal circumstances as required under Section 304-B of the IPC. The Trial Court completely ignored the evidence of I.O. wherein he admitted that Alamgir Ahmad and Md. Naushad stated before him in their respective statements that the deceased was taken to hospital for treatment and she died while being taken to Gorakhpur by the husband and his relatives for treatment. It ignored the admission of the I.O. that Md. Naushad had stated that the family members of the victim had participated in the burial rituals. It also brushed aside the photograph exhibited on behalf of the defence showing presence of P.W.5 and her another daughter on the date of burial of the victim.

142. The Trial Court erred in ignoring the admission of the I.O. that the mother of the deceased had stated in her statement

under Section 161 of the Cr.P.C that the deceased died while being taken to Gorakhpur for better treatment.

143. The Trial Court also erred in ignoring that since the prosecution failed to establish the fact that “soon before” the occurrence of or in close proximity of death, the victim was subjected to cruelty or harassment in connection with demand of dowry, the presumption under Section 113-B of the Evidence Act would not operate. It also erred in ignoring the fact that the prosecution failed to establish any reliable evidence of subsisting demand. Thus, in the absence of the fulfillment of the essential ingredients of Section 304-B of the IPC, the conviction of the appellants under Section 304-B of the IPC cannot be upheld.

144. In so far as the conviction of the appellants under Section 201/34 of the IPC is concerned, the law is well settled that a charge under Section 201 of the IPC can be maintained in case the prosecution is able to establish that an offence had been committed, the person charged with the offence had knowledge or the reason to believe that the offence had been committed, the said person has caused disappearance of evidence and such act of disappearance has been done with the intention to screening the offender from legal punishment. Mere suspicion is not sufficient to bring home the charge under Section 201 of the IPC.

145. In ***Hanuman and Ors. vs. State of Rajasthan*** since reported in ***1994 SCC Supp (2) 39***, the Supreme Court held that mere fact that the deceased allegedly died an unnatural death could not be sufficient to bring home the charge under Section 201 of the IPC, unless the prosecution was able to establish that the accused person knew or had reason to believe that an offence had been committed, causing the evidence of the commission of the offence to disappear, he cannot be convicted.

146. In the instant case, there is no such evidence against the appellants. On the contrary, the evidence is that when the deceased was found unwell, she was taken to Sadar Hospital, Gopalganj for treatment. She was administered fluid and was provided treatment at Sadar Hospital. When her condition deteriorated, while she was being taken to Gorakhpur in a vehicle for better treatment, she died.

147. Further, the evidence on record makes it clear that the body of the deceased was not disposed of hurriedly. It was brought back to the matrimonial home of the deceased and the burial took place as per Muslim rites in the *Qabristan*. There is also evidence that the family members of the deceased were present at the time of burial. They had no suspicion at that time of commission of any offence. When a photograph taken at the time of burial of the de-

ceased containing the pictures of mother and sister of the deceased was shown to PWs 4 and 5 by the defence witness, they tried to give evasive reply.

148. Furthermore, the prosecution did not even examine any neighbour of the appellants to substantiate the allegation of hurried disposal of the body. On the contrary, the prosecution with-held witnesses like, Ekramul Haque, Md. Naushad and Alamgir Ahmad, whose statements were recorded by the I.O. during investigation under Section 161 Cr.P.C.

149. Thus, in the facts and circumstances of the case, I am of the view that the trial court was not justified in convicting the appellants under Section 201/34 of the IPC.

150. In view of the foregoing discussions, I am persuaded to conclude that the impugned judgment and order cannot be legally sustained. Consequently, the impugned judgment of conviction dated 26.03.2019 and order of sentence dated 29.03.2019 are, hereby, set aside. The appellants, namely, Nasruddin Mian @ Lalu @ Nasiruddin Ahmad and Salamu Nesha @ Salamun Nesa are directed to release forthwith, if they are not required in any other case.

151. These appeals stand allowed.

152. The reference made by the trial court under Section 366 of the Cr.P.C is rejected.

153. Before parting with the reference and the appeals, I would once again record my appreciation for the able assistance rendered by the learned *amicus curiae*.

154. The Patna High Court, Legal Services Committee is, hereby, directed to pay Rs.7,500/- (rupees seven thousand five hundred) to Ms. Anukriti Jaipuriar, learned *amicus curiae* in Death Reference No.1 of 2019.

(Ashwani Kumar Singh, J)

Arvind Srivastava,J.: I agree.

(Arvind Srivastava, J)

Pradeep

AFR/NAFR	AFR
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