CASE NO.:
Appeal (crl.) 907 of 1998

PETITIONER:
SHAMNSAHEB M.MULTTANI

Vs.

RESPONDENT:
STATE OF KARNATAKA

DATE OF JUDGMENT: 24/01/2001

BENCH:
B.M.Agarwal, K.T.Thomas

JUDGMENT:

L.....I.....T.....T.....T.....T.....T.....T..J

J U D G M E N T THOMAS, J. A bride in her incipient twenties was whacked to death at her nuptial home. After gagging her mouth the assailants treated her for some time as a football by kicking her incessantly and thereafter as a hockey puck by lambasting her with truncheons until she died of bilateral tension haemothorax. Her husband and his brother and father were indicted for her murder. But when all the material witnesses turned hostile to the prosecution the trial court, being foreclosed against all options, acquitted them. Undeterred by the said acquittal the State of Karnataka made a venture by filing an appeal before the High Court of Karnataka. A Division Bench of the High Court, looking at the factual matrix of the case, lamented O Tempora O Mores as the learned judges said by way of prologue that it is virtually a matter of shame that in this day and date, indiscriminate attacks and abnormally high degree of violence are directed against married women in certain quarters and that the law is doing little to curb this type of utterly obnoxious and anti-social activities. Learned Judges after reaching a cul de sac, swerved over to a different offence i.e. dowry death and convicted one of them (the husband) under section 304B of the Indian penal Code and awarded the maximum sentence of life imprisonment prescribed thereunder on him besides Section 498A IPC. However, the High court found helpless to bring the other two accused to the dragnet of any offence.

Thus, for the appellant (husband of the deceased) this appeal became one of right under Section 379 of the Code of Criminal Procedure (for short the Code) and under Section 2 of Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970.

During the course of arguments a question of law cropped up as the appellant was not charged under Section

304B, IPC. The question raised is this: Whether an accused who was charged under Section 302 IPC could be convicted alternatively under Section 304-B IPC, without the said offence being specifically put in the charge. The answer appeared, at the first blush, ingenuous particularly in the light of Section 221 of the Code. But as we proceeded further we noticed that the question has intricate dimensions, more so when this Court held divergent views on two occasions though not on the identical point. This case was, however, referred to be heard by a larger Bench and thus it came up before a bench of three judges.

To assist us in this matter we appointed Sri Uday Umesh Lalit, advocate as amicus curiae. He with his meritorious efforts helped us considerably in the task. We are beholden to him for the assistance rendered to us.

Before we proceed to the question of law it is necessary to delineate the synopsis of the case. The bride was Tanima, whose marriage with the appellant was solemnized only a few months prior to her tragic end. It appears that Tanimas father had died much earlier. A certain amount, not much, was given to the bridegroom at the time of the marriage, though the expenses of the wedding were borne by the brides people. After marriage Tanima lived in the house of her husband for a couple of months. But when she paid her first visit to her natal home she reported to her mother and brothers that she was being subjected to pressures and harassment by her husband and by the other two accused for wangling a further amount of Rupees twenty thousand from her people. She complained to her brother that she was threatened that if the amount was not brought she would be asked to leave the nuptial home once and for all.

On completion of her furlough at her parental house the appellant went to take her back. Then her brother (PW1-Mahaboobsab Ammarngi) gave a sum of rupees five thousand to the appellant and pleaded with him to be satisfied with it. Though with displeasure, as the amount was insufficient, appellant collected it and allowed Tanima to escort him to his house. A few days later Tanima conveyed to her mother that she was again persecuted for not making up the whole amount demanded. Once again appellant brought her back to her parental home after subjecting her to physical assaults. PW1-Mahboobsab Ammarngi, on being told that the assaults were meant for meeting the demand for dowry, pleaded with the appellant to desist from torturing his young sister. After some haggling PW1 was able to pay a sum of rupees two thousand more. At that time also appellant, though not fully satisfied with the pelf given, took her back to his house.

Within two months thereafter Tanima was killed. On hearing the news on 17.10.1992 PW1 along with some of his close relatives set out to the house of the appellant. On the way they met the appellant. When they tried to confront him with what they heard he skirted the subject and slipped away. When they reached the house of the appellant they saw the mangled dead body of Tanima.

Dr. Tawaraj (PW7) conducted the autopsy on the dead body of Tanima. Though externally there were only a few abrasions and contusions the inside was found very badly mauled. The rib on the right side was fractured, both the

lungs were collapsed, the thorasic cavity contained 200 ml. of blood. The peritoneum was soaked in blood, liver and spleen were massively lacerated and ruptured at three places. Though prosecution examined PW3 and PW4 who were neighbours to say that they saw the three accused inflicting incessant assaults on Tanima and PW6 was examined to say that appellant made an extra-judicial confession to him, they all turned hostile and did not speak as prosecution expected. The remaining evidence was not sufficient to establish that all or any of the accused had inflicted the injuries on Tanima. Consequently, prosecution failed to prove that the accused caused the death of the deceased. The trial court did not make any other endeavour and hence found the accused not guilty and acquitted them.

Learned Judges of the High Court found that there is no evidence against A-2 Meerasaheb Karim Saheb and A-3 Mahaboom Meerasaheb. However, in the case of A-1 (appellant) the Division Bench was in confusion as it found that prosecution proved beyond all reasonable doubt that it was appellant who killed Tanima. The relevant portion of paragraph 14 of the judgment of the Division Bench delivered by Saldana, J, is extracted below: We hold that there is sufficient direct and circumstantial evidence in this case to prove beyond all reasonable doubt that A-1 was responsible for tying deceased Tanima and assaulting her with the metal rod as also brutally and mercilessly kicking her in the course of this assault all of which resulted in her death. The nature of the incident and the fact that she succumbed to the cruelty would clearly bring this case within the ambit of Section 304 IPC.

But the operative portion of the judgment reads thus: The appeal partially succeeds. The order of acquittal passed in favour of original accused Nos.2 and 3 stands confirmed. As far as the original accused No.1 is concerned, the order of acquittal passed in his favour by the Trial Court is set aside. A-1 stands convicted of the offence punishable under Section 498-A IPC and is sentenced to RI for 3 years. He is also convicted of the offence punishable under Section 304-B IPC and is sentenced to RI for life, substantive sentence to run concurrently.

Initially we thought that there might have been some typographical or other errors in the above first extracted portion of the judgment produced before us but we found the said portion remaining the same even in the judgment sent up by the High Court along with the records. We may take it that learned Judges did not intend to speak what is seen recorded in the paragraph 14 of the judgment (extracted above) and that the High Court only proposed to convict the appellant under Sections 304-B and 498-A IPC. But even on that aspect Saldana, J, made an observation which is, unfortunately, not true to facts. That observation is this: Coming to the charge under Section 304-B IPC, this section was incorporated in the year 1986 by the legislature for the purpose of dealing with instances of dowry death. Counsel for both sides submitted that no charge was framed against the accused for the offence under Section 304-B IPC. We perused the original charge framed by the Sessions Court and noticed that there was no such count included in the charge at all. If so, we may say, euphemistically, that learned Judges committed a serious error in assuming that Section 304-B IPC was included in the charge framed against the appellant.

Be that as it may. The question raised before us is whether in a case where prosecution failed to prove the charge under Section 302 IPC, but on the facts the ingredients of section 304-B have winched to the fore, can the court convict him of that offence in the absence of the said offence being included in the charge.

Sections 221 and 222 of the Code are the two provisions dealing with the power of a criminal court to convict the accused of an offence which is not included in the charge. The primary condition for application of section 221 of the Code is that the court should have felt doubt, at the time of framing the charge, as to which of the several acts (which may be proved) will constitute the offence on account of the nature of the acts or series of acts alleged against the accused. In such a case the section permits to convict the accused of the offence of which he is shown to have committed though he was not charged with it. But in the nature of the acts alleged by the prosecution in this case there was absolutely no scope for any doubt regarding the offence under Section 302 IPC, at least at the time of framing the charge.

Section 222(1) of the Code deals with a case when a person is charged with an offence consisting of several particulars. The Section permits the court to convict the accused of the minor offence, though he was not charged with it. Sub-section (2) deals with a similar, but slightly different, situation. When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he is not charged with it.

What is meant by a minor offence for the purpose of Section 222 of the Code? Although the said expression is not defined in the Code it can be discerned from the context that the test of minor offence is not merely that the prescribed punishment is less than the major offence. The two illustrations provided in the section would bring the above point home well. Only if the two offences are cognate offences, wherein the main ingredients are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis-Ã -vis the other offence.

The composition of the offence under Section 304-B IPC is vastly different from the formation of the offence of murder under Section 302 IPC and hence the former cannot be regarded as minor offence vis-Ã -vis the latter. However, the position would be different when the charge also contains the offence under Section 498-A IPC (Husband or relative of husband of a women subjecting her to cruelty). As the word cruelty is explained as including, inter alia, harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

So when a person is charged with an offence under Sections 302 and 498-A IPC on the allegation that he caused the death of a bride after subjecting her to harassment with a demand for dowry, within a period of 7 years of marriage, a situation may arise, as in this case, that the offence of murder is not established as against the accused.

Nonetheless all other ingredients necessary for the offence under Section 304-B IPC would stand established. Can the accused be convicted in such a case for the offence under Section 304-B IPC without the said offence forming part of the charge?

A two Judge Bench of this Court (K. Jayachandra Reddy and G.N. Ray, JJ) has held in Lakhjit Singh and anr. vs. State of Punjab {1994 Supple. (1) SCC 173} that if a prosecution failed to establish the offence under Section 302 IPC, which alone was included in the charge, but if the offence under Section 306 IPC was made out in the evidence it is permissible for the court to convict the accused of the latter offence.

But without reference to the above decision, another two Judge Bench of this Court (M.K. Mukherjee and S.P. Kurdukar, JJ) has held in Sangaraboina Sreenu vs. State of A.P. {1997 (5) SCC 348} that it is impermissible to do so. The rationale advanced by the Bench for the above position is this: It is true that Section 222 CrP.C. entitles a court to convict a person of an offence which is minor in comparison to the one for which he is tried but Section 306 IPC cannot be said to be a minor offence in relation to an offence under Section 302 IPC within the meaning of Section 222 Cr.P.C. for the two offences are of distinct and different categories. While the basic constituent of an offence under Section 302 IPC is homicidal death, those of Section 306 IPC are suicidal death and abetment thereof.

The crux of the matter is this: Would there be occasion for a failure of justice by adopting such a course as to convict an accused of the offence under Section 304B IPC when all the ingredients necessary for the said offence have come out in evidence, although he was not charged with the said offence? In this context a reference to Section 464(1) of the Code is apposite: No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby. (emphasis supplied)

In other words, a conviction would be valid even if there is any omission or irregularity in the charge, provided it did not occasion a failure of justice.

We often hear about failure of justice and quite often the submission in a criminal court is accentuated with the said expression. Perhaps it is too pliable or facile an expression which could be fitted in any situation of a case. The expression failure of justice would appear, sometimes, as an etymological chameleon (The simile is borrowed from Lord Diplock in Town Investments Ltd. vs. Department of the Environment {1977(1) All England Report 813}. The criminal court, particularly the superior court should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage.

One of the cardinal principles of natural justice is that no man should be condemned without being heard, (Audi alterum partem). But the law reports are replete with

instances of courts hesitating to approve the contention that failure of justice had occasioned merely because a person was not heard on a particular aspect. However, if the aspect is of such a nature that non-explanation of it has contributed to penalising an individual, the court should say that since he was not given the opportunity to explain that aspect there was failure of justice on account of non-compliance with the principle of natural justice.

We have now to examine whether, on the evidence now on record the appellant can be convicted under Section 304-B IPC without the same being included as a count in the charge framed. Section 304-B has been brought on the statute book on 9-11-1986 as a package along with Section 113-B of the Evidence Act. Section 304-B(1) IPC reads thus: 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.

In the Explanation to the Section it is said that the word dowry shall be understood as defined in the Dowry Prohibition Act, 1961.

The postulates needed to establish the said offence are: (1) Death of a wife should have occurred otherwise than under normal circumstances within seven years of her marriage; (2) soon before her death she should have been subjected to cruelty or harassment by the accused in connection with any demand for dowry. Now reading section 113B of the Evidence Act, as a part of the said offence, the position is this: If the prosecution succeeds in showing that soon before her death she was subjected by him to cruelty or harassment for or in connection with any demand for dowry and that her death had occurred (within seven years of her marriage) otherwise than under normal circumstances the court shall presume that such person had caused dowry death.

Under Section 4 of the Evidence Act whenever it is directed by this Act that the Court shall presume the fact it shall regard such fact as proved unless and until it is disproved. So the court has no option but to presume that the accused had caused dowry death unless the accused disproves it. It is a statutory compulsion on the court. However it is open to the accused to adduce such evidence for disproving the said compulsory presumption, as the burden is unmistakably on him to do so. He can discharge such burden either by eliciting answers through cross-examination of the witnesses of the prosecution or by adducing evidence on the defence side or by both.

At this stage, we may note the difference in the legal position between the said offence and section 306 IPC which was merely an offence of abetment of suicide earlier. The section remained in the statute book without any practical use till 1983. But by the introduction of Section 113A in the Evidence Act the said offence under Section 306 IPC has acquired wider dimensions and has become a serious marriage-related offence. Section 113A of the Evidence Act says that under certain conditions, almost similar to the conditions

for dowry death the court may presume having regard to the circumstances of the case, that such suicide has been abetted by her husband etc. When the law says that the court may presume the fact, it is discretionary on the part of the court either to regard such fact as proved or not to do so, which depends upon all the other circumstances of the case. As there is no compulsion on the court to act on the presumption the accused can persuade the court against drawing a presumption adverse to him.

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

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

The serious consequence which may ensue to the accused in such a situation can be limned through an illustration:- If a bride was murdered within seven years of her marriage and there was evidence to show that either on the previous day or a couple of days earlier she was subjected to harassment by her husband with demand for dowry, such husband would be guilty of the offence on the language of Section 304-B IPC read with Section 113-B of the Evidence Act. But if the murder of his wife was actually committed either by a decoit or by a militant in a terrorist act the husband can lead evidence to show that he had no hand in her death at all. If he succeeds in discharging the burden of proof he is not liable to be convicted under Section 304B, IPC. But if the husband is charged only under Section 302 IPC he has no burden to prove that his wife was murdered like that as he can have his traditional defence that the prosecution has failed to prove the charge of murder against him and claim an order of acquittal. The above illustration would amplify the gravity of the consequence befalling an accused if he was only asked to defend a charge under Section 302 IPC and was alternatively convicted under Section 304B IPC without any notice to him, because he is deprived of the opportunity to disprove the burden cast on him by law.

In such a situation, if the trial court finds that the

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

As the appellant was convicted by the High Court under Section 304-B IPC, without such opportunity being granted to him, we deem it necessary in the interest of justice to afford him that opportunity. The case in the trial court should proceed against the appellant (not against the other two accused whose acquittal remains unchallenged now) from the stage of defence evidence. He is put to notice that unless he disproves the presumption, he is liable to be convicted under section 304-B IPC. To facilitate the trial court to dispose of the case afresh against the appellant in the manner indicated above, we set aside the conviction and sentence passed on him by the High Court and remand the case to the trial court.