A.F.R.

Neutral Citation No. - 2024:AHC:104978-DB

Court No. - 67

1. **Case :- CRIMINAL APPEAL No. - 1667 of 2021**
   Appellant :- Rammilan Bunkar
   Respondent :- State of U.P.
   Counsel for Appellant :- Shiv Babu Dubey,S.P.S. Chauhan,Sukhendra Singh
   Counsel for Respondent :- G.A.

AND

2. **Case :- JAIL APPEAL No. - 338 of 2018**
   Appellant :- Prem Chandra
   Respondent :- State of U.P.
   Counsel for Appellant :- From Jail, ,Mohd Aamir A.C.
   Counsel for Respondent :- A.G.A.

AND

3. **Case :- CRIMINAL APPEAL No. - 5193 of 2023**
   Appellant :- Meena Srivastava
   Respondent :- State of U.P.
   Counsel for Appellant :- Atharva Dixit,Dharmendra Kumar Singh
   Counsel for Respondent :- G.A.

AND

4. **Case :- CRIMINAL APPEAL No. - 5671 of 2023**
   Appellant :- Amit Srivastava @ Ashu
   Respondent :- State of U.P.
   Counsel for Appellant :- Vinod Kumar Yadav
   Counsel for Respondent :- G.A.,Arun Kumar Srivastava

AND

5. **Case :- CRIMINAL APPEAL No. - 5071 of 2018**
   Appellant :- Shiv Kumar
   Respondent :- State of U.P.
   Counsel for Appellant :- Dr. Arun Srivastav
   Counsel for Respondent :- G.A.

AND

6. **Case :- CRIMINAL APPEAL No. - 5069 of 2018**
   Appellant :- Jamuna Devi And Anr.
   Respondent :- State of U.P.
   Counsel for Appellant :- Dr. Arun Srivastav
   Counsel for Respondent :- G.A.

Hon'ble Rahul Chaturvedi,J.
Hon'ble Mohd. Azhar Husain Idrisi,J.

(Delivered by Hon'ble Rahul Chaturvedi,J.)

[1]. Heard learned counsels named above appearing for respective appellants as well as learned Additional Government Advocate for the State of U.P. Perused the record.

[2]. Since all the appeals suffer from same legal vice and flaw, therefore, all the appeals after being clubbed together and for the sake of brevity and convenience, are being decided by a common judgment.

[3]. The moot legal questions to be adjudicated, in these appeals are; (i) as to whether the trial courts are justified in framing the charge u/s 498A, 304B I.P.C. & Section 3/4 of Dowry Prohibition Act with alternative charge u/s 302 I.P.C. simplicitor or 302/34 I.P.C.; (ii) as to whether the trial courts are justified while exonerating the accused-appellants from the primary charges of Sections 498A, 304B I.P.C. & Section 3/4 of Dowry Prohibition Act, but convicting them u/s 302/34 I.P.C. taking recourse of Section 106 of the Evidence Act?

As above is a pure legal issue, which deserves strict judicial scrutiny by this Court about the alleged addition of Section 302 I.P.C., in addition to pre-existing sections about dowry death and dowry related inhuman treatment. This exercise is being carried out by the learned Trial Judges as a mater of routine and in a most mechanical fashion, making the entire episode more grim and serious, without having any supporting documents or allegations. Adjudicating of instant legal proposition would have far-reaching implications upon all the pending trials before concerned Sessions

Courts of the State, as we are now inclined to decide the aforesaid moot point at this threshold stage.

At this juncture, we may like to clarify that while deciding this bunch of Appeals, we are focussing our attention to above legal theorem only without touching the factual merit of the case. It is open for the trial court to decide entire spectrum of the cases after having proper evaluation of the evidence on its own.

[4]. Before entering into the legal arena, we find it necessary to give a bare skeleton facts of each case for better appreciation of every appeal at hand and the controversy involved in it, *viz* :

FACTUAL MATRIX OF RESPECTIVE APPEALS :

[5]. CRIMINAL APPEAL NO.1667 of 2021
(Rammilan Bunkar vs. State of U.P.)

(i) Appellant *Rammilan Bunkar* is facing incarceration since 09.02.2021 pursuant to judgment and order passed by the learned Additional Session Judge (F.T.C.), Lalitpur while deciding S.T. No.37 of 2017 (State vs. Rammilan Bunkar and 2 others), arising out of Case Crime No.113 of 2016, Police Station-Narahat, District Lalitpur. The appellant Rammilan Bunkar and 2 others were put to trial u/s 498A, 304B I.P.C. and Section ¾ D.P. Act with alternative charge u/s 302/34 I.P.C., but the learned Trial Judge have exonerated the accused-appellant from the charge u/s 304B I.P.C., but have convicted u/s 302 I.P.C. for life imprisonment with fine of Rs.10,000/-; u/s 498A I.P.C. for two years simple imprisonment with fine of Rs.3000/- and u/s 4 of D.P. Act for one year rigorous imprisonment and a fine of Rs.3000/- with default clause. In addition to this, remaining co-accused persons Lal Singh and Har Govind

were also exonerated and acquitted from the charges u/s 498A, 304B, 302 I.P.C. & Section 4 D.P. Act.

(ii). As per prosecution case the informant Aunda s/o Pathola has given a written tehrir on 18.3.2016 that her daughter Anita @ Poonam (aged about 22 years) got married with Rammilan Bunkar about three years back. The marriage was solemnized as per their standards, but her in-laws were dissatisfied with the dowry given and they were demanding a motorcycle and sofa-set by way of additional dowry and on this score she was subjected to constant torture and ill-treatment. On 17.3.2016 around 03.00 in the day, they have taken away the deceased and Rammilan Bunkar, Lal Singh and Har Govind poured kerosene oil upon her and set her ablaze. On this, F.I.R. was registered u/s 498A, 304B I.P.C. & 3/4 of D.P. Act on 18.03.2016. Postmortem of the deceased was conducted on 18.3.2016, which reveals that she died on account of asphyxia and shock as a result of ante mortem burn injuries.

(iii) Being cognizable offence, the matter was remitted to the court of session and on 20.04.2017 charges were framed against the appellant u/s 498A, 304B I.P.C. and Section 3/4 of D.P. Act and alternative charge u/s 302/34 I.P.C. The prosecution has produced as many as five prosecution witnesses to prove its case along with certain documents.

(iv) Learned counsel for appellant has drawn attention of the Court to the testimony of P.W.-2 Manbai @ Manbhu (mother of the deceased) in which she stated that since her daughter was not carrying pregnancy despite of the treatment provided by her husband, she became introvert, sombre and hopeless. For this reason and on

this account she has committed suicide by pouring kerosene oil upon her.

(v) The trial court in so many words has clearly indicated that the relevant postulates of Section 304B I.P.C. are completely missing in the present case and the prosecution has miserably failed to establish them, thus, no case u/s 304B I.P.C. or Section 4 of D.P. Act is made out, BUT in a most casual way the trial court has convicted the accused-appellant with alternative charge u/s 302 I.P.C. While adjudicating upon Issue No.5, the learned Trial Judge have taken the help and recourse of Section 106 of Evidence Act mentioning that her in-laws were not present over the site and the burden is upon the husband to explain the circumstances in which she died unnaturally. Since accused-appellant was unable to discharge his burden, as such, it would be presumed that the offence is committed by him and accordingly he was convicted for the offence u/s 302, 498A I.P.C.

(vi) As mentioned above, in the last paragraph of the judgment, in a most casual and capricious way without taking into account that the provisions of Section 302 I.P.C. are totally different and distinct and conviction cannot be recorded in a superficial way but the same has been done by the impugned order. This is the moot question to be adjudicated upon by this Court.

[6]. <u>CRIMINAL APPEAL NO.5193 OF 2023 **(Meena Srivastava vs. State of U.P.)** **&** CRIMINAL APPEAL No.5671 OF 2023 **(Amit Srivastava @ Ashu vs. State of U.P.)**</u>

(i) Appellants *Meena Srivastava and Amit Srivastava @ Ashu* are under incarceration pursuant to impugned judgment and order of conviction dated 24.9.2023 passed by the learned Additional Session

Judge, Court No.9, Varanasi. Both the appellants have filed their separate appeals challenging a common judgment and order dated 24.9.2023, whereby the learned Trial Judge has convicted the appellants in S.T. No.410 of 2018 (State vs. Amit Srivastava and another), arising out of Case Crime No.621 of 2018, u/s 498A, 316, 302 I.P.C., Police Station Shivpur, District Varanasi and awarded sentence u/s 302 I.P.C. for life imprisonment along with fine of Rs.10,000/- each; u/s 316 I.P.C. for seven years rigorous imprisonment along with fine of Rs.5,000/- each; u/s 498A I.P.C. for one year rigorous imprisonment along with fine of Rs.1000/- to each of the appellants.

(ii). As per the version of F.I.R., the informant Ramendra Kumar Srivastava has lodged the F.I.R. No.621 of 2018 on 20.9.2018 at Police Station Shivpur, District Varanasi, that his daughter Sakshi Srivastava was married to one Amit Srivastava @ Ashu, a year back, with a lot of fanfare and after giving sufficient amount of dowry and gifts. From the day one of marriage, the husband Amit Srivastava and mother-in-law Meena Srivastava used to taunt Sakshi for bringing scanty dowry. During her lifetime, Sakshi stated that her husband and mother-in-law were demanding Rs.3 lacs as additional dowry. The informant has shown his inability to meet out the demand of additional dowry. Her daughter was carrying pregnancy of seven months. On 19.10.2018 the informant got a call from his son-in-law, that the condition of her daughter Sakshi is not up to the mark and slowly deteriorating. She was got admitted in Ansh Neuro Hospital at I.C.U. and in the morning she was declared dead. Her body as well as head was having number of visible injuries.

(iii) In this case initially the F.I.R. was registered u/s 498A, 304B I.P.C. & Section 3/4 of D.P. Act at Police Station Shivpur, District Varanasi and after the investigation the police have submitted charge sheet under same sections. Being cognizable offence, the case was committed to the court of session and the learned Session Judge on 4.6.2019 has framed charge u/s 498A, 304B I.P.C. with alternative charge u/s 302 I.P.C. and Section 4 of D.P. Act, which were denied by the accused-appellants and insisted to be tried.

(iv) Perusal of the impugned judgment indicates that eventually the appellants were convicted for the offence u/s 498A, 316, 302 I.P.C. The interesting feature of the case is that the learned Sessions Judge have exonerated the accused-appellants u/s 304B I.P.C. and Section 4 of D.P. Act, but convicted u/s 498A, 316, 302 I.P.C. From the paragraphs 46, 47 and 48 of the judgment it is evident that the learned Sessions Judge has taken the help of Section 106 of the Evidence Act and arrived to the convenient conclusion, that this was under the special knowledge which is in possession of the accused-appellants as the deceased died at her marital place. How and under what circumstances the injuries were inflicted upon the deceased, its burden lies upon the accused-appellants and since they have not discharged their burden, therefore, taking the recourse of Section 106 of the Evidence Act, they have been convicted u/s 302 I.P.C. and awarded sentence for life.

[7]. JAIL APPEAL NO.338 OF 2018
(Prem Chand vs. State of U.P.)

(i) In this appeal the appellant *Prem Chandra* is in jail pursuant to impugned judgment and order dated 29.3.2017 passed by the Additional Session Judge, Court No.5, Banda in S.T. No.173 of 2012

(Prem Chandra and 2 others vs. State of U.P.), arsing out of Case Crime no.499 of 2012, Police Station Kotwali Nagar, District Banda. Though the accused have faced the trial u/s 498A, 304B I.P.C. & Section 4 of D.P. Act with alternative charge u/s 302 I.P.C., BUT the learned Trial Judge while deciding aforesaid session trial have convicted the appellant Prem Chandra with alternative charge u/s 302 I.P.C. only, awarding sentence for life with a fine of Rs.10,000/-, exonerating him from the charges u/s 498A I.P.C. and ¾ of D.P. Act.

(ii) As per prosecution case, Shyam Babu has given a written tehrir (Ext. Ka-1) that his handicapped daughter Sangita got married with accused-appellant Prem Chandra on 5.11.2011, though she was educated girl, completed her Masters. This marriage was solemnized with a lot of fanfare and sufficient dowry/gifts were given by the informant to her daughter. It is further alleged that after the marriage, the girl was constant target of taunts and innuendoes from her husband and mother-in-law for being handicapped and scanty dowry. They demanded Rs.50,000/- more as additional dowry. On 23.8.2012 around 8.00 in the morning the informant received an information that his daughter died. After making inquiry, an information was gathered by them that the husband Prem Chandra by the small gas cylinder and some sharp edged weapon assaulted upon the her and thereafter fled away. In a precarious condition she was got admitted in the hospital where at 8.00 in the morning she died.

(iii) In paragraph-7 of the judgment it is mentioned that after hearing the parties the charges against Raj Bahadur, Prem Chandra and Surajkali were framed u/s 498A, 304B I.P.C. & 3/4 D.P. Act and also alternative charge u/s 302 I.P.C. However, the husband Prem Chandra too was acquitted from the charge u/s 498A I.P.C. & 3/4

D.P. Act and he was convicted u/s 302 I.P.C. and was awarded life sentence by the learned Additional Session Judge, Court No.5, Banda. The appellant is in jail since 29.3.2017 (date of judgment).

(iv) The Court has occasion to examine the impugned judgment. No doubt, the deceased died under unnatural circumstances at the residence of her husband. In paragraph 35 and 36 of the judgment, it is clearly mentioned that prosecution has miserably failed to establish the guilt of Section 498A, 304B I.P.C. & 3/4 D.P. Act against co-accused Raj Bahadur and Surajkali, but without attributing any cogent reason abruptly and whimsically the learned Trial Judge have convicted the appellant Prem Chandra u/s 302 I.P.C. Since all accused persons were exonerated from the charge u/s 498A, 304B I.P.C. & 3/4 D.P. Act, therefore, presumption contained u/s 113 of the Evidence Act would not come to help of prosecution. If accused is being tried for the offence u/s 302 I.P.C., entire burden is upon the prosecution to establish the guilt of accused beyond reasonable doubt. In the entire judgment, there is no whisper that appellant Prem Chandra was an author of this unfortunate incident. However, Section 106 of the Evidence Act would come into play only after the prosecution establishes the case against the accused beyond the pale of reasonable doubt, then only the operation of Section 106 of Evidence Act starts operating against the accused.

[8]. CRIMINAL APPEAL NO.5071 OF 2018 **(Shiv Kumar vs. State of U.P.) &** CRIMINAL APPEAL NO.5069 OF 2018 **(Jamuna Devi and another vs. State of U.P.)**

(i) The appellants Shiv Kumar, Jamuna Devi and Shankar Lal are under incarceration pursuant to impugned judgment and order of conviction dated 09.08.2018 passed by the learned Additional District & Sessions Judge, Court No.3/Special Judge (DAA), Pilibhit.

The appellants have filed two separate appeals challenging a common judgment and order dated 09.08.2018, whereby the learned Trial Judge has convicted the appellants in S.T. No.219 of 2017 (State of U.P. vs. Shiv Kumar and others) and S.T. No.272 of 2017 (State of U.P. vs. Shankar Lal), arising out of Case Crime No.277 of 2017, u/s 498A, 304B, I.P.C. and 3/4 of D.P. Act, Police Station Gajraula, District Pilibhit awarding sentence u/s 304B I.P.C. for life imprisonment; u/s 302 I.P.C. for life imprisonment along with fine of Rs.10,000/- each and u/s 498A I.P.C. for three years rigorous imprisonment along with fine of Rs.3000/- to each of the appellants. Thus it is shocking that the learned Trial Judge have recorded conviction only to accused Shankar Lal (Husband) u/s 304B as well as 302 I.P.C. both and awarded u/s 304B I.P.C. for life sentence and u/s 302 I.P.C. for life sentence and fine of Rs.10,000/-, unmindful of the fact that both the sections operates in two different spheres, having two different sets of essential ingredients.

(ii). In this case too, initially the F.I.R. was registered u/s 498A, 304B I.P.C. & 3/4 D.P. Act against Shiv Kumar, Jamuna Devi and Rumla @ Urmila. Being cognizable offence the matter was committed to the court of session and the learned Trial Judge have framed the charge against the appellants u/s 498A, 304B I.P.C. & 4 D.P. Act with an alternative charge u/s 302 I.P.C.

(iii). As per prosecution case, the informant's daughter Vimla (22 years) got married with Shankar Lal in April, 2016 whereby the informant has given dowry and gifts as per his capacity, but the in-laws were not satisfied and on account of scanty dowry there was a bad breath between them. The deceased's sister-in-law (*nanad*) Rumla @ Urmila got married with the maternal brother of Vimla and this was the sole reason for further animosity. In the intervening night

of 15.6.2017 all the persons of in-laws throttled the neck of Vimla and wiped her off. Vimla was carrying the pregnancy of three months. Initially the F.I.R. was registered u/s 498A, 304B I.P.C. & 3/4 D.P. Act and the charge sheet was also submitted in same sections, but after committal of the case to the court of session, the learned Trial Judge have framed the charge against the appellants u/s 498A, 304B I.P.C. & 4 D.P. Act with an alternative charge u/s 302 I.P.C. on 26.10.2017, which were denied by the accused-appellants and insisted for trial.

(iv). To establish the case of prosecution, the prosecution has produced as many as six prosecution witnesses along with certain documents. After the trial, sister-in-law of the deceased Rumla @ Urmila was acquitted from the charge u/s 498A, 304B I.P.C. & 4 D.P. Act with an alternative charge u/s 302 I.P.C. BUT interesting feature of the case is that the learned Sessions Judge after thrashing the evidence have recorded the conviction of accused-appellants Shiv Kumar, Jamuna Devi and Shankar Lal u/s 498A, 304B I.P.C. & 4 D.P. Act with an alternative charge u/s 302 I.P.C. In this judgment learned Trial Judge has given *per se* absurd finding and conviction, so much so, on the same set of facts the Trial Judge have recorded conviction u/s 304B and 302 I.P.C. simultaneously against Shankar Lal, the husband and accordingly convicted the husband for life in both the offences.

This indeed a strange judgment whereby the learned Trial Judge who is a senior judicial officer of Sessions Judge rank, has failed to appreciate that the sphere of operation of both the sections of 302 I.P.C. and 304B I.P.C. are entirely different and distinct. Except that there is loss of life in both the cases, there is nothing common or overlapping with each other.

This Court feels pity about the legal understanding of the concerned Trial Judge who convicted the Husband Shankar Lal for both the offences u/s 302 as well as 304B I.P.C.

[9]. Thus, from the aforesaid it is clear that there is specific pattern in all the impugned judgments whereby almost all the F.I.Rs. have been registered u/s 498A, 304B I.P.C. & 3/4 D.P. Act, but the trial courts invariably in all the aforesaid cases have inserted Section 302 I.P.C. as an alternative charge. The peculiarity of all the appeals is that almost in all cases the learned Trial Judge has exonerated the accused-appellants from the charges u/s 498A, 304B I.P.C. & 3/4 D.P. Act, but taking recourse to Section 106 of Evidence Act all the respective appellants have been convicted for the alternate offence u/s 302 I.P.C. simplicitor or with the aid and help of Section 34 I.P.C.

[10]. It is argued by learned counsel for appellants that aforesaid legal fallacy is *dehors* of the settled principles of law in this regard that there is absolute big Zero to justify the addition of Section 302 I.P.C. for framing of the charge of "murder". It seems the learned Trial Judge have framed those charges in the faithful compliance of the Hon'ble Supreme Court's judgment in **Rajbir @ Raju and another vs. State of Haryana, decided in the year 2010**, which was later on explained in the year 2013 in yet another judgment of Hon'ble Apex Court in the case of **Jasvinder Saini vs. State (Government of NCT of Delhi), (2013) 7 SCC 256**.

LEGAL DISCUSSION :

[11]. From the aforesaid bunch of appeals, it is evident that there is common thread that in all the appeals the case was registered u/s 498A, 404B I.P.C. & 3/4 Dowry Prohibition Act, BUT the learned Sessions Judge while framing the charge have invariably added

Section 302 I.P.C. simplicitor or 302 read with Section 34 I.P.C. in all the appeals. Interesting feature of all the appeals is that the learned Sessions Judge have exonerated the appellants from the charges u/s 498A/304B I.P.C. & 3/4 D.P. Act, but at the tale of their respective judgments the learned Sessions Judges cursorily but in oddish way taking the aid of Section 106 of Evidence Act have convicted all the appellants for the offence u/s 302 I.P.C. This is the LCM of all the appeals.

[12]. After doing slight research work, it has come to our knowledge that this practice has started with a judgment pronounced by the Hon'ble Apex Court in the case of ***Rajbir alias Raju and another vs. State of Haryana, (2010) 15 SCC 116***, whereby the Hon'ble Apex Court, while relying upon its own judgments in the cases of *Satya Narayan Tiwari vs. State of U.P., 2010 (13) SCC 689* and *Sukhdev Singh vs. State of Punjab, 2010 (13) SCC 656*, pleased to pass the following directions to all the trial courts :

> ***"7. We further direct all the trial courts in India to ordinarily add Section 302 to the charge of Section 304-B, so that death sentences can be imposed in such heinous and barbaric crimes against women. Copy of this order be sent to the Registrars General/Registrars of all High Courts, who will circulate it to all trial courts."***

[13]. We have an occasion to peruse the judgment of **Rajbir @ Raju** *(supra)* running into only seven paragraphs. No doubt that now-a-days the crime against women is quite rampant and the Hon'ble Judges of the Supreme Court have shown their concern about increasing graph of crime against women, but it seems that, it was a more of an emotional cry by the Apex Court to frame alternatively charge an accused u/s 302 I.P.C. so that the offender may be hanged or death sentence could be imposed upon such an offender, unconcern by the fact that there is no evidence even for the namesake

to attract the essential ingredients of Section 302 I.P.C. which would justify the learned Trial Judge to frame an alternative charge u/s 302 I.P.C. Ignoring this vital legal fallacy, in order to obey the commands of the Hon'ble Supreme Court, a circular was issued pursuant to the aforesaid judgment, which is being scrupulously followed by the different trial courts in India since 2010 itself.

However, this proposition of law was later on explained by the Hon'ble Apex Court while pronouncing yet another judgment in ***Jasvinder Saini and others vs. State (Government of NCT of Delhi), (2013) 7 SCC 256.*** In this judgment while assessing the scope and ambit of Section 216 of Cr.P.C., it was held that, the courts have an unrestricted power to add or alter any charge whenever courts find that erroneous/defective charges have been framed which lately requires an addition or its dropping. Under Section 216 Cr.P.C. the scope and ambit of existing charges become necessary after commencement of the trial, but such change or alteration should be made before the pronouncement of the judgment.

In addition to this, if any alteration or addition is being made by the learned Trial Judge, it must primarily satisfy that there are sufficient material on record to justify the said addition or alteration of charge.

[14]. In the instant cases where there is *prima facie* allegation of dowry related harassment and unnatural demise of the bride within seven years of her marriage and the charges were accordingly framed, then addition of Section 302 I.P.C. mechanically without any supporting material is held to be unsustainable. In paragraphs 13, 14, 15 of ***Jasvinder Saini'***s case Hon'ble Apex Court have clarified the aforesaid paragraph-7 of Rajbir's judgment, which read thus :

"13. A reading of the order which the trial Court subsequently passed on 23rd February 2011 directing addition of a charge under Section 302 IPC makes it abundantly clear that the addition was not based on any error or omission whether inadvertent or otherwise in the matter of framing charges against the accused. Even the respondents did not plead that the omission of a charge under Section 302 IPC was on account of any inadvertent or other error or omission on the part of the trial Court. The order passed by the trial Court, on the contrary directed addition of the charge under Section 302 IPC entirely in obedience to the direction issued by this Court in Rajbir's case (supra). Such being the position when the order passed by the trial Court was challenged before the High Court the only question that fell for determination was whether the addition of a charge under Section 302 IPC was justified on the basis of the direction issued by this Court in Rajbir's case (supra). The High Court has no doubt adverted to that aspect and found itself to be duty bound to comply with the direction in the same measure as the trial Court. Having said so, it has gone a step further to suggest that the autopsy surgeon's report was prima facie evidence to show that the offence was homicidal in nature. The High Court has by doing so provided an additional reason to justify the framing of a charge under Section 302 IPC.

14. Be that as it may the common thread running through both the orders is that this Court had in Rajbir's case (supra) directed the addition of a charge under Section 302 IPC to every case in which the accused are charged with Section 304-B. That was not, in our opinion, the true purport of the order passed by this Court. The direction was not meant to be followed mechanically and without due regard to the nature of the evidence available in the case. All that this Court meant to say was that in a case where a charge alleging dowry death is framed, a charge under Section 302 can also be framed if the evidence otherwise permits. No other meaning could be deduced from the order of this Court.

15. It is common ground that a charge under Section 304B IPC is not a substitute for a charge of murder punishable under Section 302. As in the case of murder in every case under Section 304B also there is a death involved. The question whether it is murder punishable under Section 302 IPC or a dowry death punishable under Section 304B IPC depends upon the fact situation and the evidence in the case. If there is evidence whether direct or circumstantial to prima facie support a charge under Section 302 IPC the trial Court can and indeed ought to frame a charge of murder punishable under Section 302 IPC, which would then be the main charge and not an alternative charge as is erroneously assumed in some quarters. If the main charge of murder is not proved against the accused at the trial, the Court can look into the evidence to determine whether the alternative charge of dowry death punishable under Section 304B is established. The ingredients constituting the two offences are different, thereby

demanding appreciation of evidence from the perspective relevant to such ingredients. The trial Court in that view of the matter acted mechanically for it framed an additional charge under Section 302 IPC without adverting to the evidence adduced in the case and simply on the basis of the direction issued in Rajbir's case (supra). The High Court no doubt made a half hearted attempt to justify the framing of the charge independent of the directions in Rajbir's case (supra), but it would have been more appropriate to remit the matter back to the trial Court for fresh orders rather than lending support to it in the manner done by the High Court."

(Emphasised)

[15]. After reading the above relevant paragraph of the judgment in Jasvinder Saini's case (*supra*), the Hon'ble Apex Court clarified the legal proposition and the true import of Rajbir's case, that though in the cases of Dowry Death, is untimely and unnatural demise of the bride within seven years of her marriage. In such case, direction to add Section 302 I.P.C. against the accused who is already facing the charge u/s 304B I.P.C. is not a true import of the order passed in Rajbir's case (*supra*). Charges are framed relying upon the nature of evidence collected during investigation and not only in air or whimsical way. In fact, our lower courts are under the commands or in some mistake notion of law, they keep on adding Section 302 I.P.C. as an alternate charge without any cogent material to justify the same, which would bound to lead a disastrous result qua the accused-appellant. All that court wants to say that in a case where a charge alleging dowry death u/s 304B I.P.C. is framed, additional charge u/s 302 I.P.C. can also be framed, if the evidence otherwise permits; meaning thereby, during investigation if the angle of murder is also surfaced, then the learned Trial Judge would be well within his right to frame the charge u/s 302 I.P.C. as main charge. Charge u/s 304B I.P.C. cannot be substantiated for the charge of murder punishable u/s 302 I.P.C. It is true that in the case of murder and case of dowry deaths, death of a person is involved. The offender would be

prosecuted for the offence u/s 302 I.P.C. or 304B I.P.C., depends upon the fact, situation, circumstances and the material collected by the I.O. of that individual case.

[16]. If the evidence collected during investigation, direct or circumstantial, *prima facie* supports and justifies the addition of a charge u/s 302 I.P.C., then the learned Trial Judge can and indeed ought to have framed the charge of murder punishable u/s 302 I.P.C., then only it would be the main charge and not the alternative charge, as erroneously being assumed by the trial courts in State of Uttar Pradesh while framing the charge of Dowry Death. If the main charge of murder is not proved against the accused at the trial, the court then only switch over to look into evidence to determine whether the alternative charge of Dowry Death u/s 304B I.P.C. is established or not.

As mentioned above, the basic ingredients of both the offences operates in two difference spheres, demanding appreciation of evidence from the perspective relevant to such an individual offence. But as mentioned above, to frame the charge erroneously u/s 302 I.P.C. as alternative charge by the Trial Courts in State of U.P. is rampant and the learned Trial Courts are mechanically framing the charges, unmindful of the fact that there is no evidence even for namesake to justify the addition of Section 302 I.P.C. simply in faithful compliance of the judgment given in Rajbir's case (*supra)*. Though this erroneous interpretation of Section 216 Cr.P.C. has already been rectified and duly explained in yet another judgment of Jasvinder Saini's case (*supra*), but no Sessions Judge has paid any heed to the clarification/explanation.

[17]. It would not be a patch work, that if the court imbibing the same reasoning of *Jasvinder Saini's* case, directing the investigating to hold a wide spectrum of investigation in allegedly Dowry Death's cases. They are supposed to examine the death of a lady from every possible angle which includes her death on account of murdering her by her husband and in-laws punishable u/s 302 I.P.C., then also examine, as to whether she has committed suicide on account of instigation or abetment by her husband or in-laws punishable u/s 306 I.P.C. Not only this, the investigating agency would also ascertain by collecting material that she was subjected to inhuman behaviour or cruel treatment on account of scanty dowry by her husband and in-laws punishable u/s 304B I.P.C.

In such a substance, the investigating agency is not guided by F.I.R. alone, but they should also examine the murder case of a lady from every possible angle of the case and submit its report u/s 173(2) Cr.P.C. The trial Court then only after going through the material collected by the I.O. of the case, applying its own judicial mind should frame the charge against the offenders, and not guided by the so-called casual observations of Rajbir's case (*supra*) which was later on explained in Jasvinder Saini's case (*supra*).

[18]. In yet another judgment of ***Vijay Pal Singh and others vs. State of Uttarakhand, (2014) 15 SCC 163,*** the charges of offences punishable under Section 304B read with Section 34 of IPC, Section 302 read with Section 34 of IPC, Section 498A of IPC and Section 201 of IPC were framed against the appellants. The charges were read over and explained to the appellants, who pleaded not guilty and claimed to be tried. The relevant extract of the judgment is being spelled out hereunder :

> *"16. Since, the victim in the case is a married woman and the death being within seven years of marriage, apparently, the court has gone only on one tangent, to treat the same as a dowry death. No doubt, the death is in unnatural circumstances but if there are definite indications of the death being homicide, the first approach of the prosecution and the court should be to find out as to who caused that murder. Section 304B of IPC is not a substitute for Section 302 of IPC. The genesis of Section 304B of IPC introduced w.e.f. 19.11.1986 as per Act 43 of 1986 relates back to the 91st Report of the Law Commission of India. It is significant to note that the subject was taken up by the Law Commission suo motu.*
>
> ***18. However, it is generally seen that in cases where a married woman dies within seven years of marriage, otherwise than under normal circumstances, no inquiry is usually conducted to see whether there is evidence, direct or circumstantial, as to whether the offence falls under Section 302 of IPC. Sometimes, Section 302 of IPC is put as an alternate charge. In cases where there is evidence, direct or circumstantial, to show that the offence falls under Section 302 of IPC, the trial court should frame the charge under Section 302 of IPC even if the police has not expressed any opinion in that regard in the report under Section 173(2) of the Cr.PC. Section 304B of IPC can be put as an alternate charge if the trial court so feels. In the course of trial, if the court finds that there is no evidence, direct or circumstantial, and proof beyond reasonable doubt is not available to establish that the same is not homicide, in such a situation, if the ingredients under Section 304B of IPC are available, the trial court should proceed under the said provision."***

In the case of ***Jasvinder Saini'***s case the Hon'ble Apex Court has further clarified in paragraph-20, which reads thus :

> ***"20. Though in the instant case the accused were charged by the Sessions Court under Section 302 IPC as alternate charge, it is seen that the trial court has not made any serious attempt to make an inquiry in that regard. If there is evidence available on homicide in a case of dowry death, it is the duty of the investigating officer to investigate the case under Section 302 I.P.C. and the prosecution to proceed in that regard and the court to approach the case in the perspective. Merely because the victim is a married woman suffering an unnatural death within seven years of marriage and there is evidence that she was subjected to cruelty or harassment on account of demand for dowry, the prosecution and the court cannot close its eyes on the culpable homicide and refrain from punishing its author, if there is evidence in that regard, direct or circumstantial."***

[19]. From plain reading of aforesaid judgment, it clearly indicates that when a married woman dies within 7 years of marriage,

otherwise than normal circumstances, the F.I.Rs. are being lodged u/s 498A, 304B and other allied sections of I.P.C. There is no investigation or inquiry made by the police to see whether there is any evidence, direct or circumstantial, so as to justify whether the offence was within the realm of Section 302 I.P.C.? The Investigating Officer blindly and in the most mechanical fashion proceeded to investigate into the matter and filed his report u/s 173(2) Cr.P.C. only u/s 304B and other allied sections of I.P.C. It is the duty of I.O. of the case to investigate the matter from every angle of murder u/s 302 or 306 I.P.C. also and the prosecution to proceed in that regard and the court to approach the case in that perspective. Merely because the victim was a married woman, who has suffered unnatural death within seven years of her marriage and there is evidence that prior to her death she was subjected to cruelty and harassment on account of scanty dowry, the prosecution or the court, can not shut their eyes to examine the attending circumstances from the angle of culpable homicide or suicide. Meaning thereby, the I.O. of the case also required to hold a wide spectrum investigation to assess the entirety of facts, examining the case from every other possible angle and then assess the attending circumstances, so as to satisfy himself that case case in hand may also come within the purview of Section 302 or 306 or 304B I.P.C. If material indicates that essential features of Section 302 I.P.C. is also available, then the main charge would be u/s 302 I.P.C. and not alternative charge as popularly understood in some quarters.

The Investigating Officer never bothered to collect any evidence or examine the matter from the angle of murder of suicide so as to give even an indication that alleged incident might be a case of murder or suicide. No effort is made by the concerned I.O. to

collect evidence keeping in view the ingredients of Section 300 I.P.C., therefore, in most of the cases, we observe that Section 302 I.P.C. is put as an alternative charge at the stage of framing of the charge, unmindful of the fact that there is hardly any material to substantiate or justify the framing of charge of murder or culpable homicide. All the trial courts are obediently adhering to this practice since 2010 in the light of the judgment of Rajbir's case (supra) which has been clearly explained and clarified by Hon'ble Apex Court in its subsequent judgment of Jasvinder Saini (*supra*), but no effort has been made to circulate this judgment so as to put the record straight and clarify the legal position.

[20]. Now yet another aspect of the issue that if the main charge of murder is not proved against the accused at the trial, the court can look into the evidence to determine whether alternative charge of dowry punishable u/s 304B I.P.C. is established or not. During investigation the I.O. should be cautious enough to hold an in-depth investigation in the larger spectrum and collect the material as to whether the case falls within the ambit of Section 302 I.P.C. or secondarily it is a case of dowry death u/s 304B I.P.C. The legislation while promulgating the Act of 43 of 1986, the Statement of Object and Reasons while incorporating Section 304B I.P.C. reads thus :

> *"1. The Dowry Prohibition Act, 1961 was recently amended by the Dowry Prohibition (Amendment) Act, 1984 to give effect to certain recommendations of the Joint Committee of the Houses of Parliament to examine the question of the working of the Dowry Prohibition Act, 1961 and to make the provisions of the Act more stringent and effective. Although the Dowry Prohibition (Amendment) Act, 1984 was an improvement on the existing legislation, opinions have been expressed by representatives from women's voluntary organizations and others to the effect that the amendments made are still inadequate and the Act needs to be further amended.*

2. It is, therefore, proposed to further amend the Dowry Prohibition Act, 1961 to make provisions therein further stringent and effective. ...”

[21]. That is how Section 304-B I.P.C. was incorporated in the Penal Code which is more of a legal fiction having six essential and peculiar ingredients which are known to all, whereas Section 302 I.P.C. provides punishment for murder. However, it has been defined in Section 299/300 I.P.C. which speaks about culpable homicide and murder. Thus, the area of operation of both the Sections 299/300 I.P.C. is different and distinct, and its requirement to establish the case under law is clearly different. They do not overlap or intercept with each other, except with a common thread that in both the cases a person looses his life.

[22]. Section 299 I.P.C. defines ‘Culpable Homicide’ as whoever causes death by doing an act with intention of causing death or with intention of causing such bodily injury as is like to cause death or with the knowledge that he is likely by such act to cause death, commit the offence of culpable homicide.

Section 300 I.P.C. defines Muder-Except in the cases hereinafter expected, culpable homicide is murder, if the act by which death is done with the intention of causing death.

Thus ‘Culpable Homicide’ as defined in Section 299 I.P.C. is bigger Phylum of which Murder (Section 300), Culpable Homicide not amounting to murder (Section 304), causing death by negligence (Section 304A), Dowry Death (304B), Abetment of suicide (Section 306) of I.P.C. are distinct and different species of bigger that Phylum where there is common thread that a person looses his life or, in other words they are different shades with own distinctive and specialized features in it.

SCOPE AND AMBIT OF SECTION 302 IPC : 304B IPC :-

[23]. It has been argued by learned counsel for appellants while referring to the judgment of ***Shamnsaheb M. Multtani vs. State of Karnataka (2001) 2 SCC 577*** on the proposition that when a person is charged for an offence u/s 302, 498A I.P.C. on the allegation that he has caused the death of a bride after subjecting her to cruelty with a demand of dowry within seven years of her marriage, a situation may arise, as in this case, that the offence of murder is not established against the accused, nonetheless all the ingredients necessary for the offence u/s 304B I.P.C. would stand established. Can the accused be convicted in such a case for the offence u/s 304B I.P.C. without such offence forming the part of the charge? In other words, whether in a case where the prosecution has failed to prove the charge u/s 302 I.P.C., but on the facts the ingredients of Section 304B I.P.C. have winched to the fore, court can convict him of that offence in the absence of the said offence being included in the charge. This was a sole proposition of law which was determined by the Hon'ble Apex Court in the aforesaid judgment of *Shamnsaheb M. Multani* (*supra*).

[24]. Before dealing with the aforesaid proposition of law, it is relevant to spell out the meaning of a technical expression of 'cognate offense', 'inchoate offense' and 'lesser included offense'.

> ***Cognate offense :*** *A lesser offense that is related to the greater offense because it shares several of the elements of the greater offense and is of the same class or category. For example, shoplifting is a cognate offense of larceny because both crimes require the element of taking property with the intent to deprive the rightful owner of that property.*
>
> ***Inchoate offense.*** *A step toward the commission of another crime, the step in itself being serious enough to merit*

punishment. The three inchoate offenses are attempt, conspiracy and solicitation. The term is sometimes criticized. Also termed anticipatory offense; inchoate crime; preliminary crime.

Lesser included offense. *A crime that is composed of some, but not all, of the elements of a more serious crime and that is necessarily committed in carrying out the greater crime-battery is a lesser included offense of murder-For double-jeopardy purposes, a lesser included offense is considered the "same offense" as the greater offense, so that acquittal or conviction of either offense precludes a separate trial for the other. Also termed lesser offense; included offense; necessarily included offense; predicate offense; predicate act.*

The aforesaid technical terms are being used in explaining the scope and ambit of Sections 302 and 304B I.P.C. and their sphere of operation.

[25]. During course of argument, a pure question of law cropped up as the appellant was not charged u/s 304B IPC, the question raised is, "whether an accused, who is charged u/s 302 IPC, could be convicted alternatively u/s 304B I.P.C., 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 of Criminal Procedure. There were divergent opinions of different courts, and therefore, this issue was decided by the three Hon'ble Judges of the Supreme Court; Hon'ble K.T. Thomas, Hon'ble R.P. Sethi and Hon'ble B.M. Agarwal, JJJ. In this regard Sections 221 and 222 of the Code of Criminal Procedure has to be looked into as they deal with the power of criminal court to convict an accused for 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) of Section 222 Cr.P.C. 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.

[26]. Obvious question is as to what is meant by a 'minor offense' for the purpose of Section 222 of the Code? Although the said expression has not been 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. Only if the two offences are cognate offences, wherein the main ingredients are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis-à-vis the other offence.

[27]. As referred above many times, the composition of the offence under Section 304-B IPC is vastly different from the formation of the offence of murder under Section 302 IPC and hence the former cannot be regarded as minor offence vis-à-vis the latter. However, the

position would be different when the charge also contains the offence under Section 498-A IPC (husband or relative of husband of a women subjecting her to cruelty). So when a person is charged with an offence under Section 302 and 498A IPC on the allegation that he has caused the death of a bride after subjecting her to harassment with a demand for dowry, within 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? This question is the basic and moot issue involved in the entire controversy at hand.

[28]. At this juncture, learned counsel for appellants have drawn attention of the Court to the statutory provisions of Section 464(1) of Cr.P.C. The crux of the matter is that 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? Section 464(1) of Cr.P.C. reads thus :

> *"464. Effect of omission to frame, or absence of, or error in, charge.*
> *(1)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.*
>
> *(2)If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may -*

(a)in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge;

(b)in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit :Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction."

[29]. In this context the Hon'ble Apex Court's judgment in ***Shamnsaheb M. Milttani*** have great importance and relevance, whereby the Hon'ble Apex Court has held thus :

"22. 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.

24. 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.

25. 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.

27. 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".

28. 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.

30. 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.

31. Now take the case of an accused who was called upon to defend only a charge under Section 302 IPC. The burden of proof never shifts 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 underSection 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.

32. The serious consequence which may ensue to the accused in such a situation can be limned through an illustration: If a bride was murdered within seven years of her marriage and there was evidence to show that either on the previous day or a couple of days earlier she was subjected to harassment by her husband with demand for dowry, such husband would be guilty of the offence on the language of Section 304-B IPC read with Section 113-B of the Evidence Act. But if the murder of his wife was actually committed either by a 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.

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

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

[30]. In another judgment the Hon'ble Supreme Court has got an occasion to further amplify the ratio laid down in the judgment of *Shamnsaheb M. Milttani (supra),* in the case of ***Kamil vs. State of U.P., AIR 2019 SC 45.*** In this judgment yet another angle was added while elaborating the import of Section 212, 215 and 464 of the Code of Criminal Procedure relevant to this case, which are :

"17. The following principles relating to Sections 212, 215 and 464 of the Code, relevant to this case, become evident from the said enunciations:

(i) The object of framing a charge is to enable an accused to have a clear idea of what he is being tried for and of the essential facts that he has to meet. The charge must also contain the particulars of date, time, place and person against whom the offence was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(ii) The accused is entitled to know with certainty and accuracy, the exact nature of the charge against him, and unless he has such knowledge, his defence will be prejudiced. Where an accused is charged with having committed offence against one person but on

the evidence led, he is convicted for committing offence against another person, without a charge being framed in respect of it, the accused will be prejudiced, resulting in a failure of justice. But there will be no prejudice or failure of justice where there was an error in the charge and the accused was aware of the error. Such knowledge can be inferred from the defence, that is, if the defence of the accused showed that he was defending himself against the real and actual charge and not the erroneous charge.

(iii) In judging a question of prejudice, as of guilt, the courts must act with a broad vision and look to the substance and not to the technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly, and whether he was given a full and fair chance to defend himself."

[31]. Thus, the above judgment though is slightly on the different issue. In aforesaid case, the contention of the appellant was that the charge u/s 302 I.P.C. was not framed against him, therefore, the conviction of the appellants u/s 302 I.P.C. is not maintainable. The Hon'ble Apex Court dismissed that appeal on the ground that mere omission to frame the charge u/s 302 read with Section 34 I.P.C. would have no value in the eye of law till such time the accused appellant must establish the fact that this failure has occasioned in a "failure of justice" to him. In this appeal the High Court dismissed the appeal filed by the appellant affirming his conviction u/s 302 I.P.C. and for other offences and sentenced him for life imprisonment on the ground that after filing the charge sheet, the case was committed to the court of sessions. The Sessions Court has pointed out that the accused was charged with Section 302, 302/34, 323, 323/34 I.P.C., to which they have pleaded not guilty and insisted for the trial. The accused-appellant thus clearly understood that the charge has been framed against him u/s 302 read with Section 34 I.P.C. If really the appellant was under impression that no charge was framed against him u/s 302/34 I.P.C., the appellant would have raised his objection of his case for committal to the court of sessions.

[32]. The Hon'ble Apex Court got an opportunity to further explain the above mentioned moot question in yet another judgment of ***Vijay Pal Singh vs. State of Uttarakhand, (2015) 4 SCC (Cri) 595***, whereby the Hon'ble Supreme Court held that "*since the victim in the case is a married woman and the death being within seven years of marriage, apparently, the court has gone only on one tangent, to treat the same as a dowry death. No doubt, the death is in unnatural circumstances but if there are definite indications of the death being homicide, the first approach of the prosecution and the court should be to find out as to who caused that murder. Section 304B of IPC is not a substitute for Section 302 of IPC. The genesis of Section 304B of IPC introduced w.e.f. 19.11.1986 as per Act 43 of 1986 relates back to the 91st Report of the Law Commission of India. It is significant to note that the subject was taken up by the Law Commission suo motu.*

[33]. It is generally seen that in cases where a married woman dies within seven years of marriage, otherwise than under normal circumstances, no inquiry is usually conducted to see whether there is evidence, direct or circumstantial, as to whether the offence falls under Section 302 of IPC. Sometimes, Section 302 of IPC is put as an alternate charge. In cases, where there is evidence, direct or circumstantial, to show that the offence falls under Section 302 of IPC, the trial court must frame the charge under Section 302 of IPC as main charge relying upon the material collected by the I.O. during investigation though the police has not expressed any opinion in that regard in the report under Section 173(2) of the Cr.PC. Section 304B of IPC can be put as an alternate charge if the trial court so feels relying upon the material on record. In the course of trial, if the court finds that there is no evidence, direct or circumstantial, and proof

beyond reasonable doubt is not available to establish that the same is not homicide, in such a situation, if the ingredients under Section 304B of IPC are available, the trial court should proceed under the said provision.

[34]. A reading of Section 304-B of IPC and Section 113-B of Evidence Act together makes it clear that law authorises a presumption that the husband or any other relative of the husband has caused the death of a woman if she happens to die in circumstances not normal and that there was evidence to show that she was treated with cruelty or harassed before her death in connection with any demand for dowry. It, therefore, follows that the husband or the relative, as the case may be, need not be the actual or direct participant in the commission of the offence of death. The provisions contained in Section 304-B IPC and Section 113-B of the Evidence Act were incorporated on the anvil of the Dowry Prohibition (Amendment) Act, 1984, the main object of which is to curb the evil of dowry in the society and to make it severely punitive in nature and not to extricate husbands or their relatives from the clutches of Section 302 IPC if they directly cause death. This conceptual difference was not kept in view by the courts below. But that cannot bring any relief if the conviction is altered to Section 304 Part II. No prejudice is caused to the accused- appellants as they were originally charged for offence punishable under Section 302 IPC along with Section 304-B IPC.

This was the exact explanation by the Hon'ble Apex Court in the case of **Jasvinder Saini**'s case (supra).

APPLICABILITY OF SECTION 106 OF EVIDENCE ACT:-

[35]. Lastly while going through all the judgments mention above, this Court was literally flabbergasted to observe that in all these

judgments there is common thread that the trial courts invariably in all the cases have exonerated the accused persons from the charge u/s 304-B I.P.C. but with the aid and help of Section 106 of Evidence Act convicted the accused persons in a most casual and cursory fashion u/s 302 I.P.C. It seems that the trial courts are ignorant about the applicability of Section 106 of Evidence Act. To determine the scope and ambit of Section 106 of Evidence Act, it is desirable to reproduce the same as under :

> *"106-Burden of proving of fact "**especially**" within the knowledge :*
>
> *When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."*

[36]. Section 106 of Evidence Act states that when any fact is specially within the knowledge of any person the burden of proving that fact is upon him. In fact this is an exception to the general rule contained in Section 101, namely, that the burden is on the person who asserts a fact. The principle underlying Section 106 which is an exception to the general rule governing burden of proof applies only to such matters of defence which are supposed to be especially within the knowledge of the defendant. It cannot apply when the fact is such as to capable of being known also by a person other than the defendant. It is also the bounden duty of a party, personally knowing the whole circumstances of the case, to give evidence on his own behalf and to submit to cross-examination. His non-appearance as a witness would be the strongest possible circumstance going to discredit the truth of his case. Section 106 of Evidence Act should be confined to those cases where a fact is especially within the knowledge of any person. When the matter is within the knowledge of defendant, he has to prove the same.

[37]. Section 106 of the Evidence Act referred to above provides that when any fact is especially within the knowledge of any person, the burden of proving that fat is upon him. The word "especially" means facts that are pre-eminently or exceptionally within the knowledge of the accused. The ordinary rule that applies to the criminal trials that the onus lies on the prosecution to prove the guilt of the accused is not in any way modified by the rule of facts embodied in Section 106 of the Evidence Act. Section 106 of the Evidence Act is an exception to Section 101 of the Evidence Act. Section 101 which lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish the facts which are, "especially within the knowledge of the accused and which, he can prove without difficulty or inconvenience".

[38]. This aspect of the issue was elaborately discussed and explained in two landmark judgments of this Court as well as Hon'ble Supreme Court. In a recent judgment of ***Dr. (Smt.) Nupur Talwar vs. State of U.P. and another, 2017 10 ADJ 586*** the Division Bench of this Court while dealing with the scope of Section 106 of Evidence Act in paragraph 235 has held thus :

> *"235- Scope of Section 106 of the Indian Evidence Act was examined inconsiderable detail by the Apex Court in the case of Shambhu Nath Mehra versus State of Ajmer reported in AIR 1956 SC 404, wherein learned Judges spelt out the legal principle in paragraph 11 which read as under :*
>
> > *11."This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in 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 and which he could prove without difficulty or inconvenience. The word "especially" stresses that it means facts that are preeminently or exceptionally within his knowledge."

[39]. Vivian Bose, J. had observed that Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible or at any rate disproportionately difficult for the prosecution to establish the facts which are, especially within the knowledge of the accused and which, he can prove without difficulty or inconvenience.

[40]. The applicability of Section 106 of the Indian Evidence Act, 1872 has been lucidly explained by the Apex Court in paragraph 23 of its judgment rendered in the case of ***State of Rajasthan v. Kashi Ram, JT 2006(12)SCC 254,*** which runs as here under :

"23. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution."

[41]. Thus, after assessing the various judgment, this Court in aforesaid judgment of ***Dr. (Smt.) Nupur Talwar*** has observed that "when an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution. In view of Section 106 of the Evidence Act, there will be a corresponding burden on the inmates of the house to give cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its

case lies entirely upon the prosecution and there is no duty at all on the accused to offer.

[42]. In the case of **Trimukh Maroti Kirkan vs. State of Maharashtra, (2006) 10 SCC 681**, the Hon'ble Apex Court while considering a similar case of homicidal death in the confines of the house has got an opportunity to express the following observation :-

> *"**14.** If an offence takes place inside the privacy of a house and in such circumstances where the assailants have all the opportunity to plan and commit the offence at the time and in circumstances of their choice, it will be extremely difficult for the prosecution to lead evidence to establish the guilt of the accused if the strict principle of circumstantial evidence, as noticed above, is insisted upon by the Courts. A Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties. (See Stirland v. Director of Public Prosecution [1944] AC 315 : [1944] 2 All ER 13 (HL)]- quoted with approval by Arijit Pasayat, J. in State of Punjab vs. Karnail Singh (2003) 11 SCC 271: 2004 SCC (Cri)135].). The law does not enjoin a duty on the prosecution to lead evidence of such character which is almost impossible to be led or at any rate extremely difficult to be led. The duty on the prosecution is to lead such evidence which it is capable of leading, having regard to the facts and circumstances of the case. Here it is necessary to keep in mind Section 106 of the Evidence Act which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (b) appended to this section throws some light on the content and scope of this provision and it reads:*
>
> *"(b) A is charged with traveling on a railway without ticket. The burden of proving that he had a ticket is on him."*
>
> ***15.** Where an offence like murder is committed in secrecy inside a house, the initial burden to establish the case would undoubtedly be upon the prosecution, but the nature and amount of evidence to be led by it to establish the charge cannot be of the same degree as is required in other cases of circumstantial evidence. The burden would be of a comparatively lighter character. In view of Section 106 of the Evidence Act there will be a corresponding burden on the inmates of the house to give a cogent explanation as to how the crime was committed. The inmates of the house cannot get away by simply keeping quiet and offering no explanation on the supposed premise that the burden to establish its case lies entirely upon the prosecution and there is no duty at all on an accused to offer any explanation."*

> ***22.*** *Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime..."*

Thus, after illumined with the aforesaid decisions of the Hon'ble Apex Court, it is evident that the Court should apply Section 106 of the Evidence Act in any criminal trial with utmost care and caution. It cannot be said that it has got no application in criminal cases. The ordinary rule which applies to criminal trials in this country that the onus lies on the prosecution to prove the guilt of the accused is not in any way modified by the provisions contained in Section 106 of the Evidence Act.

Section 106 of the Evidence Act cannot be invoked to make up the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused. This section cannot be used to support a conviction unless the prosecution has discharged the onus by proving all the elements necessary to establish the offence. It does not absolve the prosecution from the duty of proving that a crime was committed even though it is a matter specifically within the knowledge of the accused and it does not throw the burden on the accused to show that no crime was committed. To infer the guilt of the accused from absence of reasonable explanation in a case where the other circumstances are not by themselves enough to call for his explanation is to relieve the prosecution of its legitimate burden. So, until a *prima facie* case is established by such evidence, the onus does not shift to the accused.

Section 106 of the Evidence Act obviously refers to cases where the guilt of the accused is established on the evidence produced by the prosecution unless the accused is able to prove some other facts especially within his knowledge, which would render the evidence of the prosecution nugatory. If in such a situation, the accused offers an explanation which may be reasonably true in the proved circumstances, the accused gets the benefit of reasonable doubt though he may not be able to prove beyond reasonable doubt the truth of the explanation. But, if the accused in such a case does not give any explanation at all or gives a false or unacceptable explanation, this by itself is a circumstance which may well turn the scale against him.

[43]. Yet another recent judgment of the Hon'ble Apex Court in ***Balvir Singh v. State of Uttarakhand in Ciminal Appeal No.301 of 2015 with Criminal Appeal No.2430 of 2014 decided on 06.10.2023,*** whereby the Hon'ble Apex Court has explained the import of Section 106 of Indian Evidence Act in the following way :

> "*41. Thus from the aforesaid decisions of this Court, it is evidence that the court should apply Section 106 f the Evidence Act in criminal cases with care and caution. It cannot be said that it has no application t criminal cases. The ordinary rule which applies to criminal trials in this country that the onus lies on the prosecution to prove the guilt of the accused is not in any way modified by the provisions contained in Section 106 of the Evidence Act.*
>
> *42. Section 106 cannot be invoked to make up the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused. This section cannot be used to support a conviction unless the prosecution has discharged the onus by proving all the elements necessary to establish the offence. It does not absolve the prosecution from the duty of proving that a crime was committed even though it is a matter specifically within the knowledge of the accused and it does not throw the burden of the accused to show that no crime was committed. To infer the guilt of the accused from absence of reasonable explanation in a case where the other circumstances are not by themselves enough to call for his explanation is to relieve the prosecution of its legitimate burden. So,*

until a prima facie case is established by such evidence, the onus does not shift to the accused.

43. Section 106 obviously refers to cases where the guilt of the accused is established on the evidence produced by the prosecution unless the accused is able to prove some other facts especially within his knowledge which would render the evidence of the prosecution nugatory. If in such a situation, the accused gives an explanation which may be reasonable true in the proved circumstances, the accused gets the benefit of reasonable doubt though he may not be able to prove beyond reasonable doubt the truth of the explanation. But if the accused in such a case does not give any explanation at all or gives a false or unacceptable explanation, this by itself is a circumstance which may well turn the scale against him. In the language of Prof. Glanville Williams :

"All that the shifting of the evidential burden does at the final stage of the case is to allow the jury (Court) to take into account the silence of the accused or the absence of satisfactory explanation appearing from his evidence."

[44]. Thus, as mentioned above, in all the cases at hand the respective trial courts while passing judgments impugned, though have exonerated the accused-appellants from the charge u/s 304B I.P.C., but after taking a convenient and mechanical recourse to Section 106 of Evidence Act, booked all the accused-appellants who are the husband of the deceased, for the offence u/s 302 I.P.C. We have already discussed the ratio laid down in **Balvir Singh's** case (supra), whereby the Hon'ble Apex Court has observed that *Section 106 of* Evidence Act *cannot be invoked to make up the inability of the prosecution to produce evidence of circumstances pointing to the guilt of the accused. This section cannot be used to support a conviction unless the prosecution has discharged the onus by proving all the elements necessary to establish the offence*.

Making a reference in one paragraph is not going to help the prosecution. To establish a case u/s 302 I.P.C., the prosecution has to establish its case by making a full-dressed trial producing various prosecution witnesses to establish the guilt of accused u/s 302 I.P.C.

beyond the pale of any suspicion or doubt. Section 106 of Evidence Act cannot be used mechanically or as a tool in the hand of prosecution to convict the accused without discharging duty on its part. This finding with regard to conviction u/s 302 I.P.C. is palpably and *prima facie* erroneous and devoid of merit, and thus cannot be sustained.

[45]. From the above discussion, as we have already mentioned that Section 302 I.P.C. cannot be added as an alternative charge as contemplated in **Jasvinder Saini's** case (supra), nor by taking a casual recourse to Section 106 of Evidence Act the accused-appellants could be condemned and convicted for the charge u/s 302 I.P.C., and therefore, on these score all the judgments impugned need to be scrapped and accordingly they are hereby quashed. Resultantly we hereby :

(i) Quash the Judgment and order dated 09.02.2021, impugned in Criminal Appeal No.1667 of 2021 (Rammilan Bunkar vs. State of U.P.), passed by the learned Additional Session Judge (F.T.C.), Lalitpur in S.T. No.37 of 2017 (State vs. Rammilan Bunkar and 2 others), convicting the appellant Rammilan Bunkar u/s 302 I.P.C. for life imprisonment with fine of Rs.10,000/-; u/s 498A I.P.C. for two years simple imprisonment with fine of Rs.3000/- and u/s 4 of D.P. Act for one year rigorous imprisonment and a fine of Rs.3000/- with default clause, but the appellant has been exonerated from the charge u/s 304B I.P.C.

(ii) Quash the Judgment and order of dated 24.9.2023, impugned in Criminal Appeal No.5193 of 2023 (Meena Srivastava vs. State of U.P.) and Criminal Appeal No.5671 of 2023 (Amit Srivastava @ Ashu vs. State of U.P.), which was passed by the

learned Additional Session Judge, Court No.9, Varanasi in S.T. No.410 of 2018 (State vs. Amit Srivastava and another), whereby the learned Trial Judge has exonerated the appellants u/s 304B I.P.C. & Section 4 of D.P. Act, but taking the recourse of Section 106 of Evidence Act booked them u/s 302 I.P.C. for life imprisonment along with fine of Rs.10,000/- each; u/s 316 I.P.C. for seven years rigorous imprisonment along with fine of Rs.5,000/- each; u/s 498A I.P.C. for one year rigorous imprisonment along with fine of Rs.1000/- to each of the appellants.

(iii) Quash the Judgment and order dated 29.3.2017, impugned in Jail Appeal No.338 of 2018 (Prem Chandra vs. State of U.P.), passed by the Additional Session Judge, Court No.5, Banda in S.T. No.173 of 2012 (Prem Chandra and 2 others vs. State of U.P.), whereby the learned Trial Judge while deciding aforesaid session trial have convicted the appellant Prem Chandra with alternative charge u/s 302 I.P.C. only, awarding sentence for life with a fine of Rs.10,000/-, exonerating him from the charges u/s 498A I.P.C. and ¾ of D.P. Act.

In paragraphs 35 and 36 of this judgment the learned Trial Judge have blindly and most mechanical fashion recorded finding that the prosecution has failed to establish the case against Raj Bahadur and Suraj Kali for the offence u/s 498A, 304B I.P.C. & Section ¾ of D.P. Act and exonerated from those charges, but in a most cursory fashion convicted the appellant Prem Chandra for the offence u/s 302 I.P.C. As mentioned above, to convict an accused u/s 302 I.P.C. a full dressed trial has to be taken place. This Court fails to appreciate the judgment and order dated 29.3.2017 passed by the learned Additional Sessions Judge, Court No.5, Banda, as he out of

blue has recorded the conviction of the appellant u/s 302 I.P.C. imposing sentence for life.

(iv) Quash the Judgment and order dated 09.08.2018, impugned in Criminal Appeal No.5071 of 2018 (Shiv Kumar vs. State of U.P.) and Criminal Appeal No.5069 of 2018 (Jamuna Devi and another vs. State of U.P.), passed by the learned Additional District & Sessions Judge, Court No.3/Special Judge (DAA), Pilibhit, whereby the learned Trial Judge has convicted the appellants in S.T. No.219 of 2017 (State of U.P. vs. Shiv Kumar and others) and S.T. No.272 of 2017 (State of U.P. vs. Shankar Lal) for the offence u/s 498A, 304B, I.P.C. and 3/4 of D.P. Act awarding sentence u/s 304B I.P.C. for life imprisonment; u/s 302 I.P.C. for life imprisonment along with fine of Rs.10,000/- each and u/s 498A I.P.C. for three years rigorous imprisonment along with fine of Rs.3000/- to each of the appellants.

The most startling feature in this case is that the learned Trial Judge while deciding the sessions trial have convicted the appellants Shiv Kumar and Jamuna Devi u/s 304B I.P.C. awarding them life sentence and also u/s 302 I.P.C. awarding life sentence. Co-accused Shankar Lal too was convicted for the same offence u/s 304B and 302 I.P.C. and in both the offence he was awarded life sentence. As mentioned above, the Court wonders as to how the learned Trial Judge can convict an accused for the offence u/s 302 I.P.C. as well as 304B I.P.C. In the preceding paragraphs of the judgment it is clearly mentioned that both these offences operate in their own and distinctive spheres having distinctive and specialized features for them and none of the spheres overlap or intercept each other and thus the learned Trial Judge has palpably committed judicial blunder in

convicting the appellants for both the offences. It reflects upon the legal acumen and knowledge of the concerned Trial Judge. He has shown and exposed himself his judicial immaturity at this stage of his career while holding the Session trial.

[46]. Though we have already quashed all the impugned judgment and orders mentioned herein above, but fact remains that this is a serious matter where respective married ladies died within 7 years of their marriage under suspicious and unnatural circumstances and therefore the truth must come out on the surface and guilty person must be punished and penalized. In order to obtain the larger good, rule of law must prevail at any cost, and therefore, this Court directs that all the sessions trials should be **re-tried** for which the court is duly empowered by Section 386 of Cr.P.C. to hold a retrial of the case. For convenience, at this juncture, Section 386 of Cr.P.C. is quoted herein below :

> *"**Section -386** : After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may -*
>
> *(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law;*
>
> *(b) in an appeal from a conviction-*
>
> *(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or*
>
> *(ii) alter the finding, maintaining the sentence, or*
>
> *(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same;*
>
> *(c) in an appeal for enhancement of sentence-*

(i) reverse the finding and sentence and acquit or discharge the accused or order him to be re-tried by a Court competent to try the offence, or

(ii) alter the finding maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, so as to enhance or reduce the same;

(d) in an appeal from any other order, alter or reverse such order;

(e) make any amendment or any consequential or incidental order that may be just or proper;

Provided that the sentence shall not be enhanced unless the accused has had an opportunity of showing cause against such enhancement; Provided further that the Appellate Court shall not inflict greater punishment for the offence which in its opinion the accused has committed, than might have been inflicted for that offence by the Court passing the order or sentence under appeal."

[47]. The Court has laid its hands on the judgment of Hon'ble Apex Court in the case of ***Mohd. Hussain @ Julfikar Ali v. State of (Govt. of NCT of Delhi), (2012) 9 SCC 408*****,** whereby Hon'ble Apex Court has held as under :

"41. 'Speedy trial' and 'fair trial' to a person accused of a crime are integral part of Article 21. *There is, however, qualitative difference between the right to speedy trial and the accused's right of fair trial. Unlike the accused's right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused's right to speedy trial have to be weighed vis-à-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of an accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end. These principles must apply as well when the*

appeal court is confronted with the question whether or not retrial of an accused should be ordered.

42. The appellate court hearing a criminal appeal from a judgment of conviction has power to order the retrial of the accused under Section 386 of the Code. That is clear from the bare language of Section 386(b). Though such power exists, it should not be exercised in a routine manner. A 'de novo trial' or retrial is not the second trial; it is continuation of the same trial and same prosecution. The guiding factor for retrial must always be demand of justice. Obviously, the exercise of power of retrial under Section 386(b) of the Code, will depend on the facts and circumstances of each case for which no strait jacket formula can be formulated but the appeal court must closely keep in view that while protecting the right of an accused to fair trial and due process, the people who seek protection of law do not lose hope in legal system and the interests of the society are not altogether overlooked."

[48]. In yet another judgment of ***Ajay Kumar Ghoshal and others vs. State of Bihar and others, (2017) 12 SCC 699*****,** wherein the Hon'ble Apex Court has observed thus :

"(i): Though the word "retrial" is used under Section 386(b)(i) Cr.P.C., the powers conferred by this clause is to be exercised only in exceptional cases, where the appellate court is satisfied that the omission or irregularity has occasioned in failure of justice.

(ii) The circumstances that should exist for warranting a retrial must be such that where the trial was undertaken by the Court having no jurisdiction, or trial was vitiated by serious illegality or irregularity on account of the misconception of nature of proceedings.

(iii) An order for retrial may be passed in cases where the original trial has not been satisfactory for some particular reasons such as wrong admission or wrong rejection of evidences or the Court refused to hear certain witnesses who were supposed to be heard."

[49]. Evaluating and assessing the present controversy in its entirety where the respective trial courts supposedly have framed the charge under the dictate and command of Hon'ble Apex Court's judgment in the case of ***Rajbir alias Raju and another vs. State of Haryana, (2010) 15 SCC 116***, whereby the Hon'ble Apex Court has circulated the judgment to all the courts throughout the country. As mentioned earlier, in the small judgment running in only seven paragraphs there is no reasoning for giving a direction, but it seems that it was an

emotional cry which was later on clarified by yet another judgment of Hon'ble Apex Court in ***Jasvinder Saini's*** case (supra), but the learned Trial Judges in State of U.P. keep on fastening the alternative charge by way of adding Section 302 I.P.C., unmindful of the fact that whether sufficient material was collected during investigation or not for *prima facie* justifying the adding of alternative charge of Section 302 I.P.C.

Secondly, fastening of the provisions of Section 106 of Evidence Act indiscreetly just to condemn and convict the husband and his relatives with the aid and help of aforesaid provisions of law which is in stark contrast with the recent judgment of Hon'ble Apex Court in **Balvir Singh's** case (supra).

[50]. Therefore, we are of the considered opinion that these are the apt cases where retrial could be ordered as the same has occurred after serious legal flaw and irregularity on account of the misconception of nature of proceedings. Accordingly, let the record of these cases be remitted back by the Registry of this Court within next 15 days to the concerned Sessions Courts for re-trial after recasting the "charges" framed against the accused-appellants strictly in accordance with the ratio laid down in the cases of ***Jasvinder Saini and others vs. State (Government of NCT of Delhi), (2013) 7 SCC 256*** **and (ii)** ***Vijay Pal Singh and others vs. State of Uttarakhand, (2014) 15 SCC 163,*** after holding a day to day trial and conclude the same by 31st December, 2024 without granting any unreasonable adjournment to either of the parties. This Court would appreciate if the concerned learned Trial Judges would fix 2-3 days in a week to conclude the trial.

[51]. Since we are remitting the matter back for retrial, it is desirable that all the appellants, namely, ***Rammilan Bunkar, Prem Chandra,***

Meena Srivastava, Amit Srivastava @ Ashu, Shiv Kumar, Jamuna Devi and Shankar Lal shall be released on bail, who have been convicted and sentenced in aforesaid sessions trials, on their furnishing a personal bond and two heavy sureties (out of which one should be their close relative) each in the like amount to the satisfaction of the court concerned, with an undertaking to the concerned court that they would not seek any adjournment whatsoever and cooperate with the trial.

The fine amount awarded by the concerned trial courts under the impugned judgments shall remain stayed subject to final decision of the case after having full-dressed re-trial of the case as ordered earlier.

[52]. Registrar (compliance) of this Court shall forthwith communicate this order to the concerned trial courts who have passed the impugned judgment and orders. The original records of the cases received from the respective sessions divisions be also returned back.

[53]. Let the copy of this Judgment be circulated to all the Sessions Divisions by the Registrar General of this Court at the earliest, so that they must frame the charge and hold the trial strictly in accordance with the ratio laid down by Hon'ble Apex Court in *Jasvinder Saini and others vs. State (Government of NCT of Delhi), (2013) 7 SCC 256* and (ii) *Vijay Pal Singh and others vs. State of Uttarakhand, (2014) 15 SCC 163*.

[54]. In addition to above, let a copy of the judgment be placed before the Director General of Police, Lucknow by the Registrar General of this Court, so that suitable direction may be given to his subordinates, that in every case of Dowry related deaths, the I.O. of the case shall hold wide spectrum of investigation to examine and collecting the material during investigation so as to

justify his report u/s 173(2) Cr.P.C. as to whether such unnatural death of the lady falls within the ambit of Section 302 I.P.C. or it is a plain and simple Dowry Death punishable u/s 304B I.P.C. or it is a case of suicide punishable u/s 306 I.P.C. where the woman died on account of any abetment by her husband or in-laws.

The I.O. of the case must specify in its report u/s 173(2) Cr.P.C. about the material collected by him during wide spectrum investigation against the accused persons that the said unnatural death of the lady falls within the realm of Section 302 I.P.C. or falls within the ambit of Section 304B I.P.C. or comes within the scope of Section 306 I.P.C.

[55]. Last but not the least, we sought help from Shri Rajiv Lochan Shukla, learned Amicus Curiae as well as Shri Ghanshyam Kumar, A.G.A.-I and Shri Satendra Tewari, learned A.G.A., who rendered their valuable argument after doing lots of research work. The Court records its word of appreciation to all the Advocates, who assisted the Court in reaching to its logical conclusion.

[56]. The aforesaid appeals are partly allowed to the above extent.

Order Date :- 30.5.2024
M. Kumar