# HIGH COURT OF UTTARANCHAL AT NAINITAL.

(Chapter VIII, Rule 32(2) (b)
Description of the Case

CRIMINAL APPEAL NO. 09 OF 2002

With

CRIMINAL APPEAL NO. 16 OF 2002

Date of decision :-31ST August, 2005

A.F.R. (Approved for reporting)

~~Not approved for reporting~~

Date :- 31.8.2005 Initials of Judge

Note : Bench Reader will attach this at the top of first page of the judgment when it is put up before the Judge for signature.

**IN THE HIGH COURT OF UTTARANCHAL**
**AT NAINITAL**

**CRIMINAL APPEAL NO. 09 of 2002**

1. Mohan Prasad S/o late Mahanand
2. Smt.Basanti Devi W/o Sri Mohan Prasad
3. Km. Seema D/o Sri Mohan Prasad, R/o village Kanda, Patwari Area-Ratura, tehsil and Janpad-Rudraprayag

.....Appellants

**Versus**

State of Uttaranchal ..... Respondent

**With**

**CRIMINAL APPEAL NO. 16 of 2002**

Vinod Prasad S/o Mohan Prasad
R/o village Kanda Patwari area Ratura,
Tehsil & district Rudraprayag ---Appellant

Versus

State of Uttaranchal ---- Respondent

Sri P.S.Adhikari-Sr.Advocate assisted by Shri B.S. Adhikari learned counsel for the appellants.
Shri D.K.Sharma learned GA for the State.

**Hon'ble J.C.S. Rawat, J.**

These two criminal appeals have been preferred against the common judgment and order dated 20.12.2001 passed by Sri R.K.Sharma the then Sessions Judge, Rudraprayag in S.T. No.13 of 2001 and S.T.No.25 of 2001 whereby the learned Sessions Judge convicted and sentenced the appellant Vinod Prasad to undergo R.I. for a period of then years u/s 304 B IPC, two years RI u/s 498 A

IPC and two years RI u/s 201 IPC. Each of the appellants Mohan Prasad,Smt. Basanti Devi and Km. Seema were convicted and sentenced u/s 498 A IPC to undergo one year RI and a fine of Rs.500/- and the they were also convicted and sentenced u/s 201 IPC to undergo one year RI and a fine of Rs.500/-. In default of payment of fine each of the appellant to undergo additional two years S.I. All the sentences were ordered to run concurrently.

The prosecution case, in brief, is that the marriage of Smt. Meena daughter of Bhupendra Prasad Maithani (PW1) was solemnized on 18.4.2000 with the appellant Vinod Prasad according to Hindu rites. After the marriage Vinod Prasad (husband), Mohan Prasad(father-in-law), Smt.Basanti Devi(mother-in-law) and Km. Seema(sister-in-law) of the deceased Meena started demanding Disk T.V.and 10 Tolas of gold. When the above demand was not fulfilled they committed the murder of Meena on 23.2.2001 who was pregnant. Smt. Meena was M.A. and was working as Nurse in a center at Kanda. On 24.2.2001 at 1.00 p.m. a telephonic message was received from her in-laws regarding the illness of Meena. Bhupendra Prasad Maithani (PW1) reached at Kanda at 6p.m. he saw her daughter laying on the cot in dead condition. On 26.2.2001 when the complainant when at the head quarter of Patwari to lodged the report he was informed that his daughter’s dead body was cremated without informing the police and without

conducting the post-mortem and disappearance of the evidence of offence was caused.

The matter was reported at Patwari patti by Bhupendra Prasad Maithani (PW1) by submitting written report (Ex.Ka1) on 26.2.2001 at 2 p.m. on the basis of which Puran Lal Patwari(PW4) prepared chick report (Ex.Ka3) and a case was registered vide Ex.Ka5.He conducted the investigation. He visited the place of occurrence and prepared site plan Ex.Ka5. Thereafter the investigation was conducted by Dwarika Prasad Bhatt (PW7) Naib Tehsildar who prepared Fard Ex.Ka6 and Ex.Ka7. He prepared site plan (Ex.Ka8). He arrested the appellants vide memos Ex.Ka9 to Ex.Ka11. Thereafter the investigations were transferred to Thakur Singh Rawat P.W.8 incharge S.P. After completing the formalities of investigation he submitted chargesheets Ex.Ka17 and Ex.Ka18 against the appellant.

Charge was framed against the appellants 120 B IPC,498 A, 304 B IPC and 201 IPC to which the appellants pleaded not guilty and claimed to be tried.

The prosecution in support of its case examined PW-1 Bhupendra Prasad Maithani, PW2 Smt. Madambari Devi, PW3 Dineshwari witnesses of fact, PW4 Puran Lal Patwari, PW5 Rajendra Singh, PW6 Chandra Singh postman who proved the letter of the deceased Ex.Ka2, PW7 Dwarika Prasad Bhatt and PW8 Thakur Singh Rawat are the Investigating Officers.

In the statement recorded u/s 313 Cr.P.C. the appellants denied the prosecution case and stated that they had been falsely implicated in this case.The appellatn produced Narain Dutt as DW, Jamuna Prasad DW2, Rakesh Gairola DW3, Hukum Singh DW4 and Smt. Brij Bala DW5, Handwriting Experts DW5 in their defence.

The learned trial court after appraisal of the evidence on record found the appellants guilty and convicted and sentenced the appellant as mentioned above.

I have heard learned counsel for the parties and perused the record.

At the outset, it is need to mention here that in order to seek the conviction under Section 304B I.P.C. against a person for the offence of the dowry death, the prosecution is obliged to prove that :

1. The death of woman was caused by burns or bodily injuries or occurs otherwise than under normal circumstances.
2. Such death should have occurred within 7 years of her marriage.
3. The deceased was subjected to cruelty or harassment by her husband or by any relative of her husband.
4. Such cruelty or harassment should be for or in connection with the demand of dowry.

5. Such cruelty or harassment the deceased should have been subjected soon before her death.

As and when the aforesaid ingredients of Section 304B are established, a presumption of dowry death shall be drawn against the accused under Section 113B of the Indian Evidence Act. It has been kept in mind that a presumption under Section 113B is a presumption of law. If the prosecution establishes the ingredients as indicated above, the presumption 113B will arise in favour of the prosecution. This presumption is rebuttable.

The deceased died on 23.02.2001 and the prosecution has taken a specific case that she was murdered. In support of the allegations the prosecution has relied upon the evidence of P.W.1 Bhupendra Prasad Maithani, complainant of the case who has stated that he went to her matrimonial house on 24.02.2001 and saw that blood was oozing from her nose and she had injuries on her person. He had also stated that she was lying on the cot and thereafter he came back to Rudraprayag. The prosecution had also tried to prove that the said murder was caused by Danda which was recovered by the Police at the instance of the accused under Section 27 of the Indian Evidence Act from the bush near Latu Mandir. A blood stained shirt was recovered from the house of the accused on 27.03.2001. The learned counsel for the defence contended that the recoveries were made from the

open place accessible to all, it can not be relied upon. The learned counsel for the defence further contended that the so called recoveries of Danda and blade were made on 10.04.2001 after a lapse about 1-1/2 month from the date of incident. Danda was recovered near the temple of Latu Devta and blade was recovered from public funeral place from where on each and every day many dead bodies are burnt and person performed last rites and used to shave their heads by blades and throw there. The learned A.G.A. refuted the contention. Section 27 of the Indian Evidence Act is an exception to the general rule that the statement made before the police is not admissible in evidence. The followings are the requirements or conditions for application of Section 27 of the Indian Evidence :-

1. The fact must have been discovered in consequence of the information received from the accused.

2. The person giving the information must be accused an offence.

3. He must be in custody of a police officer.

4. Only that portion of the information, which relates strictly to discovery can be proved. The rest is irrelevant.

6. The discovery of fact must relate to the commission of some crime.

7. Before the statement is proved somebody must depose that some article was discovered in consequence of the information received from the accused.

The basic idea embedded under Section 27 of the Evidence Act is doctrine of confirmation by subsequent events. The doctrine is found on the principle that if any fact is discovered in a search made on the strength of any information obtained from a accused, such a discovery is a guarantee that the information supplied by the accused is true. The information might be confessional or non-exculpatory in nature it becomes a reliable information. In the instant case, the Investigating Officer has stated in his evidence that he had not prepared memorandum of the disclosure statement and no recovery memo was made for that fact. As such the first ingredient to attract the Section 27 of the Indian Evidence Act is lacking in this case. The place from where the recoveries were made it were an open place and it was accessible by all the persons. It is not clear from the evidence that he had hidden in such a way as it was difficult to be noticed. It has been held in ***Anter Singh Vs. State of Rajasthan, 2005 SSC (Cri) 597*** that the recovery from an open space may not always render is vulnerable, it would depend upon the factual situation in a given case and the truthfulness or otherwise of such claim. In that case recovery was made from an open place visible from the place where the dead body was lying and at a close proximity. It is not clear from the evidence that it was hidden in such a way so as making it difficult to be noticed.

In view of the above discussion, it is not in the evidence that the Danda was hidden in such a way in the bush so as it cannot be noticed by others. Admittedly recoveries were made after a lapse of 1-1/2 months from the date of incident. The Investigating Officer P.W.8 Thakur Singh has stated in his evidence that he recorded the statement of Vinod Kumar on 27.03.2001 and the shirt was recovered from the possession of the appellant from his house on 27.03.2001 but the appellant Vinod Kumar was not arrested on the same day. The statement was recorded but the appellant had not confessed his guilt on 27.03.001. The appellant surrendered before the Court on 29.03.2001. Immediately, thereafter the Investigating Officer again took the permission to record the statement of the appellant Vinod Kumar and he recorded the confessional statement of accused on the basis of which the present recoveries were made. If the appellant was to make the confessional statement and he had to make the recoveries he could have safely stated those confessional statement on 27.03.2001. The prosecution has not given any plausible explanation as to why he was not arrested on 27.03.2001 when his statement was recorded. It is pertinent to mention here that the Investigating Officer made the recovery of blood stain shirt from his possession on 27.03.2001 meaning thereby the incriminating circumstances were available with the Investigating Officer on 27.03.2001, hence this fact leads to take the inference that the recoveries were

the creation of an afterthought theory as such the recoveries become doubtful.

The recovery of the blade from the burning Ghat was made on 10.04.2001. This is a public burning Ghat and many dead bodies are burnt and people perform their last rites in the said Ghat by shaving their heads by the blades and thereafter throw the blades there. The blade alleged to have been used to cut the womb of the deceased to get out the dead baby was recovered from the Ghat. It is pertinent to mention here that the prosecution has taken the stand that this blade was used at the time when the last rites were performed at the Ghat and her womb was cut to take out the baby from the womb and the baby was found dead. The baby was thrown in the river. It is admitted fact to the parties that there is a custom that when a lady who had pregnancy, would not be burn with the baby at the time of the death as such that is customary rites. The recovery of the blade as indicated above is not an instrument by which the murder was committed. As such the recovery is made from the public place and it cannot be relied upon in view of the reasons mentioned above. This is not the weapon by which the murder was committed. It is the prosecution case that the murder of the deceased was committed by Danda and blade. The accused Vinod Kumar pointed out that the Danda had been hidden in a bush near a temple and the blade was hidden beneath a stone in the burning ghat. The accused was taken to the places where he stated that the weapons of commission of offence

were hidden. The accused recovered the Danda and blade by the accused himself. As a matter of fact the Investigating Officer should had taken him to the places of recovery and the accused should have pointed out the place of discovery and the Danda and blade should have been discovered by the Investigating Officer in presence of the witnesses. This recovery of weapon would be called discovery.

The third incriminating circumstance was brought by the prosecution before the trial court that the blood stained shirt was recovered from the possession of the accused on 27.03.2001. The said shirt was not produced before the court at the time of the evidence. It is also admitted case that the said shirt was not sent for the serologist and no report is on the record. The evidence of blood stained shirt is not connected with the crime and this recovery was also made after a lapse of 1-1/2 months. After committing the murder nobody would like to keep the blood stained shirt in his house. If an offence is committed by the accused, it would be his firstly anxiety to destroy the evidence of the commission of offence. In view of the above discussion, I find that the recoveries are doubtful.

I have noticed that the prosecution witness P.W.1, Bhupendra Prasad Maithani has stated in his evidence that when he went to matrimonial house of the deceased, he found the dead body lying on the cot and the injuries were on the person of the deceased and the blood was oozing from her nose.

He has stated the above fact at the first time before the Court. The statement was recorded under Section 161 Cr.P.C. and he did state those material facts in his statement under Section 161 Cr.P.C. During cross examination this fact was asked as to why he had not stated this fact in the F.I.R. as well as in the statement recorded under Section 161 Cr.P.C. He could not give the plausible explanation for the same. If the P.W.1 would have seen the injuries on the person of the deceased and blood oozing from her nose, he should had stated these facts in the statement under Section 161 Cr.P.C. This fact was brought on record during evidence after a lapse of long time meaning thereby this theory was totally an afterthought. As such, the theory of the murder of the deceased is not proved by the evidence of the prosecution beyond reasonable doubt.

The prosecution adduced the evidence of P.W.1, Bhupendra Prasad Maithani father of the deceased, P.W.2, Smt. Kadambari Devi mother of the deceased and P.W.3 Dineshwari who is the aunt of the deceased. In the evidence they have stated that the deceased came in the parental house during the Deepawali and she stated that the appellant persons are demanding the dowry and they are demanding colour TV, 10 tola gold, DVD and the gold bangles. She stated to them that she was subjected to cruelty due to non-fulfillment of their desire of the dowry. She came again in the month of December, 2000 and she again narrated the same

things to the P.W.2 and P.W.3 and she went on 26.01.2001 to her matrimonial house. P.W.3, Dineshwari who is the aunt of the deceased stated that she met her on 15.12.2000 and she stated that the appellants are demanding dowry from the parents of the deceased and she was subjected to cruelty. It is to be seen that these witnesses are reliable or not. The defence has produced letter Ex.Kha-3 which was written by P.W.1 to appellant, Mohan Prasad in which it has been indicated that a sum of Rs. 15,000/- was required to meet some urgent expenses of some litigation from the appellant Mohan Prasad and he had also stated in the letter that this fact should not be disclosed to his son-in-law, daughter and mother-in-law of his daughter. He had stated in that letter that he was requiring that money to rescind some order passed against him. It is clear evidence that if the appellants were demanding the money and the daughter was subjected to cruelty, P.W.1 would not have asked for the money as had been stated in the letter Ex.Kha-3. There would not have been an occasion to ask a sum of Rs. 15,000/- for some litigation from the Mohan Prasad appellant where appellant himself demanding the dowry and was cruelly treating the deceased. P.W.1 who is the father of the deceased, is an employee in the Kedar Badri Mandir Samiti and he goes to the Supreme Court and High Court in connection with the Parvi of the cases of the Mandir Samiti. Meaning thereby he is well versed with the litigation. If there were strained relations, there was no question of

demanding the loan from the matrimonial house of the daughter. This fact entirely demolishes the prosecution theory that the appellants were demanding money.

The prosecution has relied upon the letter Ex.Ka-2 which is said to be written by the deceased to her mother Smt. Madambara Devi PW2. This letter was written on 18.02.2001 and it was received by her on 27.02.2001. The statement of the father of the deceased was recorded under Section 161 Cr.P.C. on 27th February, 2001 but that letter was not handed over to the police on 27.02.2001. The said letter was handed over to the police on 3rd March, 2001. It was pointed out by the learned counsel for the defence that this is a forged one and learned A.G.A. refuted this connection. Learned trial court had not placed reliance on this letter to convict accused person.

The defence counsel filed an application before the trial court during the trial to send this letter for comparison to the hand writing expert but the said prayer was opposed and the said application was rejected by the trial court. Feeling aggrieved by the said order the appellant preferred the petition before the High Court and High Court directed to send the letter for comparison to hand writing expert. The said letter was not sent to the hand writing expert during the prosecution evidence. The Sessions Judge said this letter for the comparison at the time of the defence. The defence adduced the evidence of

D.W.5, Smt. Brij Bala who has stated that the said letter was found after examination and comparison of the writing of the deceased and the said letter that it was not in the hand writing of the deceased. After comparison of the writing she came to the conclusion that the letter was written by different person. The evidence of expert was unrebbted. The accused were denying the fact that the letter Ex Ka-2 was in the writing of the deceased. The prosecution could have sent this letter to the Hand writing expert for his opinion. In view of the above I find that the learned trial court was correct is not relying this letter.

It is the prosecution case that the deceased made telephonic calls to her parents after 26th January, 2001. The defence has adduced the evidence of D.W.1 to D.W.3 that the telephone were installed at their house in their village and no telephonic call was made from their house by the deceased to her parents. The evidence of D.W.1 to D.W.3 is completely believable and reliable. During cross examination nothing could be elicited from their cross examination. It is also well settled position of law that the evidence of the prosecution as well as the evidence of the defence would be treated at par while appreciating such evidence. The defence evidence on this point is totally cogent and credible as such it cannot be held that the deceased made the telephonic call to her parents with regard to dowry and mal treatment.

Learned A.G.A. contended that P.W.1 was not informed about the death of the deceased on 23.02.2001 and he was informed on 24.02.2001 on the next day. The learned counsel for the defence refuted the contention. Perusal of the evidence of D.W.4, Hukum Singh clearly reveals that the appellant's Mohan Prasad, Basanti Devi and Km. Seema were in Roorkee and this fact is further corroborated from the present evidence. The father of the deceased was informed on the same day by the appellant Vinod Kumar. The evidence of D.W.4 is cogent and credible. P.W.1 Bhupendra Prasad Maithani has stated that he was informed by the someone on 24.02.2001 meaning thereby the information was received at earlier.

It is also in the evidence that the deceased stated to her father and mother that she was being subjected to cruelty due to dowry. In the letter Ex.Ka.2 it is mentioned at the top that :-

दिनांक 18.02.2001

परम

पूज्यनीय मॉ जी पिताजी को मेरा करवद्ध प्रणाम। आप वहॉ पर कुशल होगें मै भी ठीक हूॅ मॉजी मै आते समय आपको नही बता पायी क्योकि पिताजी जब भी घर आयेंगे तो पिता जी को कहना कि मेरे ससुराल वाले मुझे T.B. ड्रिक्स के लिए परेषान कर रहे हैं व हाथो के सोने के कंगनो की मांग कर रहे है जो कि ज्यादा के ज्यादा वजन के हो याने दस तोले से कम के न हो। आप पिताजी को जल्दी यहॉ भेज देना ताकि पिता जी इन्हें समझा दें। नही तो यह कभी इन चीजों की मॉग के पीछे मुझे मार सकते है। मेरे पति, ससुर, ननद, सासू जी मुझे तंग करते है। बाकी मोहन, पवन पढाई ढंग से करना ताऊ, ताई को प्रणाम सभी को नातानुसार सेवा पिताजी को जल्दी भेजना मैं प्रतिक्षा करूंगी।

आपकी बेटी

मीना

The prosecution case was that the deceased informed her parents when she went to parental home in Deewali and in the month of December. The accused were demanding dowry and they were treating her cruelly. The letter Ex.Ka-2 specifically mentioned when she came to parental home she had forgotten to tell that the accused were demanding dowry and they were treating her cruelly. This facts further falsify the evidence of the prosecution. The allegations with regard to the demand of dowry and cruelty are vague and are not cogent and credible in this regard. Thus the prosecution had failed to prove that the deceased was subjected to cruelty immediately before the death in connection with the dowry. As such, there will be no presumption in favour of prosecution under Section 113B Indian Evidence Act. Apart this the prosecution had taken a specific case that the deceased was murdered by the appellant. The prosecution had failed to establish that the accused committed the murder of the deceased. In view of the above, there is no question of presumption in favour of prosecution under Section 113B.

The F.I.R. of this case has been lodged by the complainant after more than 3 days and it was pointed out that there was an inordinate delay in lodging the same and it was further pointed out that there is no plausible explanation for the delay in the evidence or in the F.I.R. It is admitted fact that the incident took place on 23.02.2001 and the father of the deceased reached at the matrimonial house on

24.02.2001 and on same day he returned to Rudraprayag and he stayed there in the night and on 25.02.2001 he went to his home and narrated the incident to his wife. His brother met him on the way on 24.02.2005 when he was returning from the matrimonial house of the deceased to Rudraprayag. P.W.1 Bhupendra Prasad Maithani stayed in the guest house of the Mandir Samiti and there is a police check out post adjoining to this building. Patwari headquarter is also in village Ratura. The learned counsel for the appellants contended that the explanation given by the complainant is not plausible and convincing. The learned A.G.A. refuted the contention. P.W. 1 has stated in his evidence that he reached in the matrimonial house of his daughter on about 6:00P.M. on 24.02.2001 itself. He went to the police Choki Ratura and the Patwari was not available there and on 25.02.2001 then he went to his home because his wife was ill there. On 26.02.2001 when he came to know that the body of the deceased has been cremated without conducting the post-mortem. He again went to the Patwari Choki Ratura where he could not meet the Patwari and thereafter he went to Rudraprayag where he gave the report to the Naib Tehsildar. In pursuance of that information, the report was lodged by the Patwari on 26.02.2001. P.W.4 Puran Lal, Patwari stated that he was in the headquarter throughout the day from 22$^{nd}$ to 26.02.2001. he was not out of station meaning thereby if the Patwari was not out of station, he was at headquarter. The evidence of P.W.1 becomes unreliable on this point. P.W.1 at

page 14 said that the said report was prepared by Skakti Prasad Maithani who is an Advocate in Rudraprayag and thereafter it was given to the Naib Tehsildar. The F.I.R. is an important piece of evidence and the prompt F.I.R. inspires confidence that it was not the outcome of due consultation or deliberation. F.I.R. in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the F.I.R. is to obtain the earliest information regarding the circumstances in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eye witnesses, if any. Delay lodging the F.I.R. ofter results in embellishment, which is a creature of an afterthought. On account of delay, the F.I.R. not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. In the case in hand the F.I.R. was lodged after due consultation after the lapse of three days. Thus the F.I.R. creates a doubt upon the prosecution story. It is also in the evidence that P.W.1 stayed at Rudraprayag and the police outpost is adjoining to that building. He has not lodged the report to the police at Rudraprayag. The explanation given by P.W.1 that the Patwari was not available at the headquarter is not liable and correct. P.W.4 Puran Lal Patwari had stated he was in the headquarter from 24.02.2001 to 26.01.2001. The prosecution

had not plausibly explained delay in lodging the F.I.R. Inordinate delay in lodging the F.I.R. further creates the doubt with regard to the prosecution story.

It is the prosecution case that last rites were conducted by the accused without conducting the post-mortem. Learned counsel for the defence pointed out that P.W.1 Bhupendra Prasad Maithani came to Kanda on 24.02.2001 and he stated that he had no doubt about the natural death of his daughter and she may be cremated according to the Hindu rites. P.W.2 Smt. Kadambari Devi has stated in his cross examination that:

यह कहना सही है कि दाह संस्कार करने के बारे में मेरे पति मुलजिमों को कहा कि विधिपूर्वक करना।

The defence has also produced the evidence of D.W. 4, Hukum Singh who has stated in his evidence that the father of the deceased stated to the appellants to complete last rites to her daughter. The evidence of D.W.4 is reliable, cogent and creditable. The prosecution made the cross examination to the witnesses but nothing could be elicited from the cross examination of the D.W.4.

In view of the aforesaid, I am of the view that both the appeals are liable to be allowed.

Both the appeals are allowed. Judgment and order dated 20.12.2001 passed by the Sessions

Judge, Rudraprayag in S.T. No.13 of 2001 and S.T.No.25 of 2001 are set aside. All the appellants are acquitted from the charges levelled against them. their bail bonds are cancelled and securities discharged. The appellants namely, Mohan Prasad, Smt. Basanti Devi and Km. Seema are on bail. They need not surrender. The appellant Vinod Prasad shall be released forthwith, if not wanted in any other case.

Let the lower court record be sent back to the court concerned for compliance. Compliance be submitted within two months.

**(J.C.S. Rawat, J)**

August 31, 2005
Shiv