

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.REV.P. No.495/2007 & CRL.M.A.8637/2007

% Date of decision : 31.01.2008

NIRAJAN KUMAR ... PETITIONER

*Through* : Mr.V.K.Shali, Advocate

- V E R S U S -

STATE ...RESPONDENT

*Through* : Mr. Pawan Sharma, APP for the State

CORAM :

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

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| 1. Whether the Reporters of local papers<br>may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not?   | Yes |
| 3. Whether the judgment should be<br>reported in the Digest?                    | Yes |

SANJAY KISHAN KAUL, J. (ORAL)

1. A marriage was solemnized between Smt.Sushma and Shri Ashok Kumar on 4.5.2001. Smt.Sushma died on 25.6.2004, otherwise than in normal circumstances. An FIR 238/2004 dated 25.6.2004 was registered u/s 498A/304B/34 IPC against Shri Ashok Kumar at P.S. Bhajan Pura. The FIR records the allegation of the father of the deceased girl alleging dowry demands and harassment of the deceased. There was also

reference to the husband of the deceased having some extra marital relationship. After investigation was completed, charge-sheet was filed against Shri Ashok Kumar, husband; his father Shri Braham Singh; his mother Smt.Sumitra and one Shri Niranjana Kumar, petitioner herein, u/s 498A/304B/34 IPC. A diary of the deceased was also recovered. Further statements were recorded, including of the mother of the deceased, who gave details about the dowry demands and torture and harassment by the family members of the husband in order to get more dowry in the second marriage. Statement was made by Smt.Sheela Arya, the mother, before the SDM. Pursuant thereto, necessary action was directed to the IO.

2. In the statement, the mother has deposed that the deceased daughter had complained to her that the petitioner herein, who is the son of the Jeth of the Bua of Shri Ashok Kumar (husband), used to keep on inciting her in-laws and husband of the deceased to get rid of the deceased girl and that he would arrange a marriage in a high profile family which would provide them with a car. It is also alleged that the petitioner used to advise the boy's family members to inform the deceased parents that she had consumed something wrong and on their finding that nothing had gone wrong, they would undergo the harassment. The petitioner is also alleged to have advised how to extract money from the parents of the deceased. The statement further recorded that the deceased daughter used to

say that the petitioner would murder her. The statement of the complainant Dr.Dharampal Arya (father of the deceased) also refers to the role played by the petitioner.

3. The trial court framed charges on 7.7.2006 against all the four accused for offences under Section 498A/304B/34 IPC. The order of framing charges shows that insofar as the petitioner is concerned, it was stated that he was a relative, being the brother-in-law of the deceased, and there was common intention of the parties.
4. The aforesaid order of framing charges was impugned by the petitioner herein by filing a Crl.Rev.P.473/2006, which was allowed by an order dated 22.12.2006. The principal plea advanced before the learned single Judge of this Court was as to whether the petitioner could be regarded as the relative of the husband in view of the specific provisions of Sections 498A and 304B of the IPC. This was so since there was an indirect relationship of the petitioner with the husband of the deceased. This plea found favour with the learned single Judge of this Court and it was held that the expression 'relative of the husband' should be regarded as the mirror image of the expression 'relative of the victim' and the petitioner was held not to fall within any of the named categories of persons, being the father, mother, brother, sister, father's or mother's brother or sister or any other person related to him by blood or marriage or adoption.

5. The matter, however, did not rest at this as the Court found that there was another provision in the IPC which was of relevance, being Section 109 IPC, dealing with punishment for abetment. In this behalf the statement made by the mother was found relevant. It was deemed proper that the aspect regarding the conduct of the petitioner falling within the four-corners of the offence under Section 109 IPC needed to be examined and a direction was issued to the learned ASJ to examine the said aspect.
6. The matter was thereafter taken up by the learned ASJ and after giving detailed reasons in terms of the order dated 17.4.2007, a prima facie case under Section 109 IPC r/w Section 498A IPC was found to have been made out against the petitioner.
7. The trial court in terms of the impugned order has noted that before the provision for a charge to be framed under Section 109 IPC, it should be shown that the accused instigated the co-accused to do a criminal act and in consequence of the instigation, the co-accused committed that offence. Section 498A IPC required the accused to have subjected a married woman to cruelty and the accused should be either the husband or the relative of the husband of the married woman. Thus, the Section required a positive instigation on the part of the co-accused person and could be done by them on the instigation of the accused. This was different from Section

304B IPC for which no positive act was required to be done by the accused person and the offence was made out by a combination of circumstances created for the married woman by her husband or relatives of her husband and an assumption of law which could be raised when the death of the woman occurs otherwise than under normal circumstances. There could, thus, be no instigation of the co-accused by the accused for committing an offence u/s 304B IPC.

8. Learned counsel for the petitioner firstly contended that the order passed by the High Court in Crl.Rev.P.473/2006 on 22.12.2006 in effect amounted to a direction to the trial court to frame charges u/s 109 IPC and such a course could not have been adopted.

9. The aforesaid plea does not have substance for two reasons. Firstly, the petitioner chose not to challenge the order further and, thus, accepted the said order, therefore, no grievance can be made in that behalf. Secondly, the direction contained in the order was to examine the aspects which came out of the statement of the mother of the deceased and to determine whether there was sufficient material for framing of charges u/s 109 IPC.

10. The second plea of the learned counsel for the petitioner is that charge has been framed on hearsay evidence in view of the fact that what the mother of the deceased had stated is attributed to the deceased while she had no personal

knowledge about it. Learned counsel, thus, submitted that the present case did not fall within the parameter of Section 32 of the Indian Evidence Act, 1872. Relevant portion of the said Section reads as under:

**“32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant.--** Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:—

**(1) When it relates to cause of death.**— When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.”

11.Learned counsel for the petitioner referred to the aforesaid provision to submit that out of various categories of cases enumerated in Section 32 of the Indian Evidence Act, only the aforesaid provision can be said to have any relevance in the facts of the present case. However, the statement did not relate to the cause of the death or any of the circumstances of the transaction which resulted in the death.

12.I am unable to accept the plea for the reason that the statements attributed to the deceased show the role played by

the petitioner. In this behalf reference can be made to the provisions of Sections 107, 108 and 109 of the IPC, which are as under:

**“Section 107. Abetment of a thing**

A person abets the doing of a thing, who-

First: -Instigates any person to do that thing; or

Secondly: -Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly: -Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation1:- A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

**Section 108. Abettor**

A person abets an offence, who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable of law of committing an offence with the same intention or knowledge as that of the abettor.

Explanation 1: - The abetment of the illegal omission of an act may amount to an offence although the abettor may not himself be bound to be that act.

Explanation 2: - To constitute the offence of abetment it is not necessary that the act abetted should be committed, or that effect requisite to constitute the offence should be caused.

**Section 109. Punishment of abetment if the act abetted is committed in**

**consequence, and where no express provision is made for its punishment**

Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Explanation: - An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation or in pursuance of the conspiracy, or with the aid, which constitutes the abetment."

13.A reading of the provisions of Section 107 IPC shows that the instigation should be for the other person to do a thing to constitute the offence of abetment while Section 109 IPC provides for punishment of such abetment. The allegation is that the petitioner instigated the other accused to harass the deceased person on account of inability to bring adequate dowry, suggested methods to get rid of her and assured to get the husband of the petitioner re-married in a family where there would be adequate dowry, including a car. It, thus, cannot be said that the offence of abetment cannot be made out.

14.It also cannot be lost sight of that there are specific allegations made only against the petitioner and not against any other near or distant relative other than the immediate family members. The allegations are specific. The present stage is only of framing of charges.

15.On perusal of the order, I am of the view that the trial court did not commit any error in framing the charges under Sections



109 r/w Section 498A IPC. The legal position is not in dispute that the task of the trial court at the stage of framing of charge is to sift through the material to form an opinion that the commission of an offence by the accused was possible. The probative value of the material on record cannot be gone into. However, there must exist some material, which should form the basis of the framing of the charge. Such view has been expressed in Soma Chakravarty Vs. State Through CBI (2007) 5 SCC 403. However, simultaneously it has also been emphasised in Dilawar Balu Kurane Vs. State of Maharashtra (2002) 2 SCC 135 that the trial judge cannot merely act as a post office or mouthpiece of the prosecution. He has to sift and weigh the evidence for the limited purpose of finding out whether a *prima facie* case has been made out and where two views are equally possible and evidence gives rise to some suspicion but not grave suspicion, he can discharge the accused.

16.The aforesaid parameters are clearly met in the present case.

17.The last aspect urged by learned counsel for the petitioner is that Section 498A IPC was introduced by amendment to the Code and is a special provision to deal with the aspects of cruelty by the husband or relatives of the husband. It is, thus, submitted that there cannot be any offence of abetment u/s 109 IPC except in respect of relations mentioned u/s 498A IPC. The submission, thus, is that Section 109 IPC has no application

in respect of a relative who does not fall within the category of a relative of a husband within the meaning of Section 498 IPC.

18.I am afraid such a plea cannot be accepted for the reasons that the legislature in its wisdom did not exclude the operation of the provisions of Sections 107 to 109 of the IPC. No doubt the provisions of Section 498A IPC have been introduced subsequently with a particular objective in mind but it cannot be said that a person other than the husband or the relative of the husband cannot ever be said to commit the offence of abetment as envisaged u/s 109 IPC in respect of an act by cruelty within the meaning of Section 498A IPC.

19.In view of the aforesaid, the petition is dismissed.

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Application does not survive for consideration and is disposed of.

JANUARY 31, 2008  
'sp'

SANJAY KISHAN KAUL, J.