BHAIRON SINGH

v.

STATE OF MADHYA PRADESH

(Criminal Appeal No.1124 of 2009)

MAY 29, 2009

[D.K. JAIN AND R.M. LODHA, JJ.]

PENAL CODE, 1860:

Sections 304-B, 306, 498A – Case under s.304-B and 306 – Death of wife – Husband acquitted – Death neither homicidal or suicidal but accidental – Oral evidence of witnesses about what the deceased told them against the accused about the treatment meted out to her – Whether admissible under Section 32(1) of the Evidence Act to sustain conviction under Section 498A IPC – Held: Evidence of PW-4 and PW-5 about what the deceased had told them against the accused about the torture and harassment is inadmissible under Section 32(1) of the Evidence Act – Such evidence cannot be looked into for any purpose – Evidence Act, 1872, Section 32(1).

Inder Pal vs. State of M.P. **(2001) 10 SCC 736, relied on.**

Sharad Birdhichand Sarda vs. State of Maharashtra **(1984) 4 SCC 116, referred to.**

Case Law Reference:

(1984) 4 SCC 116	**referred to**	**Para 4**
(2001) 10 SCC 736	**relied on**	**Para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1124 of 2009.

A From the Judgment & Order dated 03.01.2008 of the High Court of M.P. at Jabalpur in Criminal Appeal No. 605 of 1993.

R.P. Gupta, Jamshed Bey and Parmanand Gaur for the Appellants.

B Vibha Datta Makhija for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Leave granted.

C 2. The question that arises for consideration in this appeal by special leave is : in a case where accused has been acquitted of the offence punishable under Sections 304-B and 306 IPC, and the death of wife is neither homicidal nor suicidal but accidental, whether the oral evidence of witnesses about D what the deceased had told them against the accused about the treatment meted out to her is admissible under Section 32 (1) of the Evidence Act to sustain conviction under Section 498A, IPC?

E 3. Section 32(1) of the Indian Evidence Act, 1872 reads thus:

"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 F 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 G 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 H 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."

4. The legal position relating to the admissibility of evidence under Section 32(1) has come up for consideration before this court time and again. It is not necessary to multiply the authorities in this regard as reference to a three Judge Bench decision of this Court in *Sharad Birdhichand Sarda vs. State of Maharashtra,*[1] will suffice. Regarding the application of rule under Section 32(1) Evidence Act, Fazal Ali,J. culled out the legal position as follows:

"(1) Section 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicide or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. In this respect,as indicated above, the Indian Evidence Act, in view of the peculiar conditions of our society and the diverse nature and character of our people, has thought it necessary to widen the sphere of Section 32 to avoid injustice.

(2) The test of proximity cannot be too literally construed and practically reduced to a cut-and-dried formula of universal application so as to be confined in a straitjacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story,the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement

1. (1984) 4 SCC 116.

A would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death
B of the deceased who speaks from death. For instance, where the death takes place within a very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under Section 32.

C (3) The second part of clause (1) of Section 32 is yet another exception to the rule that in criminal law the evidence of a person who was not being subjected to or given an opportunity of being cross-examined by the accused, would be valueless because the place of cross-
D examination is taken by the solemnity and sanctity of oath for the simple reason that a person on the verge of death is not likely to make a false statement unless there is strong evidence to show that the statement was secured either by prompting or tutoring.

E (4) It may be important to note that Section 32 does not speak of homicide alone but includes suicide also, hence all the circumstances which may be relevant to prove a case of homicide would be equally relevant to prove a case
F of suicide.

(5) Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, the said statement would clearly fall within the
G four corners of Section 32 and, therefore, admissible. The distance of time alone in such cases would not make the statement irrelevant."

5. A. Varadarajan, J. on the other hand referred to the legal
H position stated by Woodroffe and Amir Ali in their Law of

Evidence,(fourteenth edition) and Ratanlal Dhirajlal in their Law of Evidence (1982 Reprint). This is how A. Varadarajan, J. dealt with the admissibility of evidence under Section 32(1):

> "....The position of law relating to the admissibility of evidence under Section 32(1) is well settled. It is, therefore, not necessary to refer in detail to the decisions of this Court or of the Privy Council or our High Courts. It would suffice to extract what the learned authors Woodroffe and Amir Ali have stated in their *Law of Evidence,* Fourteenth Edn. and Ratanlal and Dhirajlal in their Law of Evidence (1982 Reprint). Those propositions are based mostly on decisions of courts for which reference has been given at the end. They are these: Woodroffe and Amir Ali's Law of Evidence, Fourteenth Edn.:
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> "Page 937: Hearsay is excluded because it is considered not sufficiently trustworthy. It is rejected because it lacks the sanction of the test applied to admissible evidence, namely, the oath and cross-examination. But where there are special circumstances which give a guarantee of trustworthiness to the testimony, it is admitted even though it comes from a second-hand source.
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> Page 941: What is relevant and admissible under clause (1) of this section (Section 32) is the statement actually made by the deceased as to the cause of his death or of the circumstances of the transaction which resulted in his death.
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> Page 945-946: A statement must be as to the cause of the declarant's death or as to any of the circumstances of the transaction which resulted in his death i.e. the cause and circumstances of the death and not previous or subsequent transaction, such independent transactions being excluded as not falling within the principle of necessity on which such evidence is received. When a person is not proved to have died as a result of injuries

A received in the incident in question, his statement cannot be said to be a statement as to the cause of his death or as to any of the circumstances which resulted in his death. (AIR 1964 SC 900.) Where there is nothing to show that the injury to which a statement in the dying declaration
B relates was the cause of the injured person's death or that the circumstances under which it was received resulted in his death, the statement is not admissible under this clause. (ILR 1901 25 Bom 45.)

C Page 947: Circumstances of the transaction resulting in his death: This clause refers to two kinds of statements: (i) when the statement is made by a person as to the cause of his death, or (ii) when the statement is made by a person as to any of the circumstances of the transaction which resulted in his death. The words 'resulted in his death' do
D not mean 'caused his death'. The expression 'any of the circumstances of the transaction which resulted in his death' is wider in scope than the expression 'the cause of his death'. The declarant need not actually have been apprehending death. (AIR 1964 MP 30.)

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Page 947: The expression 'circumstances of the transaction' occurring in Section 32, clause (1) has been a source of perplexity to courts faced with the question as to what matters are admissible within the meaning of the
F expression. The decision of Their Lordships of the Privy Council in *Pakala Narayana Swami v. Emperor* (AIR 1939 PC 47) sets the limits of the matters that could legitimately be brought within the purview of that expression. Lord Atkin, who delivered the judgment of the Board, has, however, made it abundantly clear that, except in special
G circumstances no circumstance could be a circumstance of the transaction if it is not confined to either the time actually occupied by the transaction resulting in death or the scene in which the actual transaction resulting in death took place. The special circumstance permitted to
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transgress the time factor is, for example, a case of prolonged poisoning, while the special circumstance permitted to transgress the distance factor is, for example, a case of decoying with intent to murder.... But the circumstances must be circumstances of the transaction and they must have some proximate relation to the actual occurrence.

Page 948: 'Circumstances of the transaction' is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in 'circumstantial evidence' which includes the evidence of all relevant factors. It is on the other hand narrower than 'res gestae'. Circumstances must have some proximate relation to the actual occurrence, though, as for instance, in the case of prolonged poisoning they may be related to dates at a considerable distance from the date of actual fatal dose.

Page 948: The Supreme Court in the case of *Shiv Kumar v. State of U.P.*{1966 Cri.App.R (SC) 281} has made similar observations that the circumstances must have some proximate relation to the actual occurrence, and that general expressions indicating fear or suspicion, whether of a particular individual or otherwise and not directly to the occasion of death will not be admissible.

Page 949: The clause does not permit the reception in evidence of all such statements of a dead person as may relate to matters having a bearing howsoever remote on the cause or the circumstances of his death. It is confined to only such statements as relate to matters so closely connected with the events which resulted in his death that may be said to relate to circumstances of the transaction which resulted in his death. [(1939) 66 IA 66.] 'Circumstances of the transaction which resulted in his death' means only such facts or series of facts which have a direct or organic relation to death. Hence statement made

A by the deceased long before the incident of murder is not admissible.[1974 Cri LJ 1200 (MP).]

Law of Evidence by Ratanlal and Dhirajlal (1982 Reprint)

B "Page 94: Circumstances of the transaction: General expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death are not admissible. [(1939) 66 IA 66] (18 Part 234.)

C Page 95: Circumstances must have some proximate relation to the actual occurrence and must be of the transaction which resulted in the death of the declarant. The condition of the admissibility of the evidence is that the cause of the declarant's death comes into question. It D is not necessary that the statement must be made after the transaction has taken place or that the person making it must be near death or that the 'circumstance' can only include the acts done when and where the death was caused.... Dying declarations are admissible under this E clause."

6. On October 9, 1990, the body of Smt. Ranjana Rani @ Raj Kumari was found in a well in village Pyasi. Autopsy of the dead body was done. The cause of death was asphyxia due to drowning. Smt. Ranjana Rani @ Raj Kumari had married the F appellant, Bhairon Singh, about 10 years before her death. Gauna ceremony is said to have been held after three years of marriage. The prosecution case is that after one year of Gauna, the accused subjected his wife to torture and harassment. The accused would ask his wife to ask her brother G to arrange a job for him or get the registry of the house at Ganj Basoda made in his name or that she should bring Rs. 1 lac to enable him to start business. Ranjana Rani @ Raj Kumari is said to have told the incidence of torture and harassment to her brothers Brindavan (PW-4) and Krishan Murari (PW-5).

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7. The accused was charged and tried for the offences punishable under Sections 304B, 306 and 498A, IPC and under Section 3 of Dowry Prohibition Act, 1961. The prosecution in support of its case examined seven witnesses namely, Ghuman (PW-1), Prakash Chand (PW-2), Dr. Sunil Kumar Pandya (PW-3), Brindavan (PW-4), Krishan Murari (PW-5), N.P. Rajoriya (PW-6) and Lalaram (PW-7). The accused also examined three witnesses, namely, Bala Prasad (DW-1), Surat Singh (DW-2) and Hanumat Singh (DW-3).

8. The trial court held: that it was not possible to conclude that accused committed the murder of Ranjana Rani @ Raj Kumari; that there was no evidence to prove that Ranjana Rani @ Raj Kumari had committed suicide and that Ranjana Rani @ Raj Kumari had fallen into the well accidentally and she died. Since the marriage of Ranjana Rani @ Raj Kumari with the accused was held to have taken place more than seven years before the date of her death, the trial court held that the presumption under Section 113A and 113B of the Indian Evidence Act was not attracted. The trial court, accordingly, acquitted the accused of the offence punishable under Sections 304B and 306, IPC. Relying upon the testimony of PW-4 and PW-5, the two brothers of the deceased, the trial court, however, held that the accused was guilty of the offence punishable under Section 498A, IPC and Section 3 of Dowry Prohibition Act, 1961. The trial court sentenced the accused to undergo rigorous imprisonment for three years along with fine of Rs.5,000/- for the offence under Section 498A, IPC and rigorous imprisonment for five years along with fine of Rs.15,000/- for the offence under Section 3 of Dowry Prohibition Act, 1961.

9. The accused challenged the judgment of the trial court in appeal before the Madhya Pradesh High Court. The High Court set aside the conviction and sentence under Section 3 of Dowry Prohibition Act, 1961 but maintained the conviction and sentence under Section 498A, IPC.

10. The only evidence to bring home charge under Section

A 498A, IPC, is that of PW-4 and PW-5. In their deposition PW-4 and PW-5 stated that their sister told them that accused was torturing her as he wanted that her brothers arrange a job for him or the house at Ganj Basoda is given to him or a cash of Rs.1 lac is given to enable him to do some business. They B deposed that as and when their sister come to their house, she would tell them that accused used to insert cloth in her mouth and give beatings for dowry. The trial court as well as the High Court relied on the evidence of PW-4 and PW-5 and held that charge under Section 498A, IPC, against the accused was C proved. Apart from the statement attributed to the deceased, none of the witnesses had spoken anything which they had seen directly insofar as torture and harassment to Ranjana Rani @ Raj Kumari was concerned.

11. The moot question is: whether the statements attributed D to the deceased could be used as evidence for entering upon a finding that the accused subjected Ranjana Rani @ Raj Kumari to cruelty as contemplated under Section 498A, IPC. In our considered view, the evidence of PW-4 and PW-5 about what the deceased Ranjana Rani @ Raj Kumari had told them E against the accused about the torture and harassment is inadmissible under Section 32(1) of the Evidence Act and such evidence cannot be looked into for any purpose. Except Section 32(1) of the Indian Evidence Act, there is no other provision under which the statement of a dead person can be looked into F in evidence. The statement of a dead person is admissible in law if the statement is as to the cause of death or as to any of the circumstance of the transactions which resulted in her death, in a case in which the cause of death comes into question. What has been deposed by PW-4 and PW-5 has no connection with G any circumstance of transaction which resulted in her death. The death of Smt. Ranjana Rani @ Raj Kumari was neither homicidal nor suicidal; it was accidental. Since for an offence under Section 498A simpliciter, the question of death is not and cannot be an issue for consideration, we are afraid the H evidence of PW-4 and PW-5 is hardly an evidence in law to

establish such offence. In that situation Section 32(1) of the Evidence Act does not get attracted. A

12. We are fortified in our view by the decision of this Court in *Inder Pal vs. State of M.P*[2]. , wherein this Court considered the matter thus: B

> **"4.** We will consider at first the contention as to whether there is any evidence against the appellant which can be used against him for entering upon a finding that he subjected Damyanti to cruelty as contemplated in Section 498-A IPC. PW 1 father of the deceased and PW 8 mother C of the deceased have stated that Damyanti had complained to them of her plight in the house of her husband and particularly about the conduct of the appellant. PW 4 sister of the deceased and PW 5 a relative of the deceased have also spoken more or less D on the same line. Exhibit P-7 and Exhibit P-8 are letters said to have been written by Damyanti. In those two letters reference has been made to her life in the house of her in-laws and in one of the letters she said that her husband had subjected her to beating. E
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> **5.** Apart from the statement attributed to the deceased none of the witnesses had spoken of anything which they had seen directly. The question is whether the statements attributed to the deceased could be used as evidence in this case including the contents of Exhibits P-7 and P-8 F (letters).
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> **6.** Before deciding that question we have to point out that the High Court came to a conclusion that the allegation that she committed suicide was not substantiated. A dying G declaration was recorded by the Executive Magistrate in which the deceased had stated that she got burns accidentally from a stove. If that be so, death could not be

2. (2001) 10 SCC 736. H

A the result of either any harassment or any cruelty which she was subjected to. In this context we may point out that the State has not challenged the finding of the High Court that death of Damyanti was not due to commission of suicide.

B **7.** Unless the statement of a dead person would fall within the purview of Section 32(1) of the Indian Evidence Act there is no other provision under which the same can be admitted in evidence. In order to make the statement of a dead person admissible in law (written or verbal) the C statement must be as to the cause of her death or as to any of the circumstance of the transactions which resulted in her death, in cases in which the cause of death comes into question. By no stretch of imagination can the statements of Damyanti contained in Exhibit P-7 or Exhibit P-8 and those quoted by the witnesses be connected with D any circumstance of the transaction which resulted in her death. Even that apart, when we are dealing with an offence under Section 498-A IPC disjuncted from the offence under Section 306 IPC the question of her death is not an issue for consideration and on that premise also Section 32(1) E of the Evidence Act will stand at bay so far as these materials are concerned."

13. The learned counsel for the State, however, invited our attention to Section 6 of the Evidence Act and referred to a F decision of this Court in *Sukhar vs. State of U.P.*[3]

14. Section 6 of the Evidence Act reads thus:

"6. Relevancy of facts forming part of same transaction.- - Facts which, though not in issue, are so connected with G a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places."

15. In the case of, Sukhar, this Court noticed position of

H 3. (1999) 9 SCC 507.

law with regard to Section 6 of the Evidence Act thus: A

> **"6.** Section 6 of the Evidence Act is an exception to the general rule whereunder the hearsay evidence becomes admissible. But for bringing such hearsay evidence within the provisions of Section 6, what is required to be established is that it must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. The statements sought to be admitted, therefore, as forming part of res gestae, must have been made contemporaneously with the acts or immediately thereafter. The aforesaid rule as it is stated in *Wigmore's* Evidence Act reads thus: B C
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> "Under the present exception [to hearsay] and utterance is by hypothesis, offered as an assertion to evidence the fact asserted (for example that a car brake was set or not set), and the only condition is that it shall have been made spontaneously, i.e. as the natural effusion of a state of excitement. Now this state of excitement may well continue to exist after the exciting fact has ended. The declaration, therefore, may be admissible even though subsequent to the occurrence, provided it is near enough in time to allow the assumption that the exciting influence continued." D E
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> 7. *Sarkar on Evidence* (15th Edn.) summarises the law relating to applicability of Section 6 of the Evidence Act thus: F
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> *"1.* The declarations (oral or written) must relate to the act which is in issue or relevant thereto; they are not admissible merely because they accompany an act. Moreover the declarations must relate to and explain the fact they accompany, and not independent facts previous or subsequent thereto unless such facts are part of a transaction which is continuous. G
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> 2. The declarations must be substantially H

A contemporaneous with the fact and not merely the narrative of a past.

3. The declaration and the act may be by the same person, or they may be by different persons, e.g., the declarations of the victim, assailant and bystanders. In conspiracy, riot & c the declarations of all concerned in the common object are admissible.

4. Though admissible to explain or corroborate, or to understand the significance of the act, declarations are not evidence of the truth of the matters stated."

16. The rule embodied in Section 6 is usually known as the rule of res gestae. What it means is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. To form particular statement as part of the same transaction utterances must be simultaneous with the incident or substantial contemporaneous that is made either during or immediately before or after its occurrence. Section 6 of the Evidence Act, in the facts and circumstances of the case, insofar as admissibility of a statement of PW-4 and PW-5 about what the deceased had told them against the accused of the treatment meted out to her is concerned, is not at all attracted.

17. We hold, as it must be, that there is not an iota of evidence which can be admitted in law to be used against the appellant for the offence punishable under Section 498A, IPC.

18. Consequently, the appeal has to be allowed and is allowed and the conviction and sentence passed on the appellant under Section 498A, IPC is set aside. The accused be released forthwith, if not required in any other case.

G.N. Appeal allowed.