

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

Judgment delivered on: August 09, 2010

+ **CRIMINAL APPEAL NO.59/2009**

**SUNIL KUMAR SHAH** **....APPELLANT**

Through: Mr. Rajesh Mahajan, Advocate with  
Ms. Satsheel Sheokand, Advocate.

Versus

**THE STATE (GOVT. OF NCT) DELHI** **.....RESPONDENT**

Through: Mr. Pawan K. Bahl, APP.

**CORAM:**

**HON'BLE MR. JUSTICE AJIT BHARIHOKE**

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

**AJIT BHARIHOKE, J.(ORAL)**

1. This appeal is directed against the impugned judgment dated 24.09.2008 of Additional Sessions Judge in Sessions case No.96/07, FIR No.557/07, P.S. Ashok Vihar in terms of which the appellant has been convicted under Sections 498A/304B IPC as also against the consequent order on sentence dated 26.09.2008.

2. The appellant was married to Kiran Devi (hereinafter referred to as "deceased") on 08.05.2002. The deceased died an unnatural death as a result of fire burns on 14.08.2007 i.e. within seven years of her marriage. Information about the death of the deceased was received

at P.S. Ashok Vihar on 14.08.2007 vide DD No.24A P.S. Ashok Vihar. On the receipt of said information, ASI Bhagat Singh along with Constable Jaideep reached at the spot of occurrence i.e. *gali* in front of House No.393, Wazirpur Village and found the dead body of the deceased lying there and the appellant was found standing nearby with a child in his lap. Crime Team was requisitioned at the spot of occurrence. The Crime Team inspected the spot and also took photographs of the scene of crime. SDM was also informed about the incident. Since he was out of station, he directed the Investigating Officer to preserve the dead body till his arrival. On 18.08.2007, statement of brother of the deceased Ex.PW1/C was recorded in presence of the Executive Magistrate Model Town wherein he claimed that the appellant used to ill-treat and beat the deceased in relation to demand for dowry and once a sum of Rs.20,000/- was given to him pursuant to his demand. He further alleged in the statement that on 13.08.2007, the deceased informed him on telephone that the appellant was beating her on daily basis and he was insisting that the deceased should bring Rs.50,000/- and a colour TV from her parental home failing which, he would kill her. On the basis of said statement, formal FIR was registered against the appellant under Section 498A IPC and Section 304B IPC. After the conclusion of the investigation, the appellant was challaned and sent for trial.

3. Learned Additional Sessions Judge, on consideration of the material annexed to the charge sheet, charged the appellant for the

offences punishable under Section 498A IPC and Section 304B IPC. The appellant pleaded not guilty to the charge and claimed to be tried.

4. In order to bring home the guilt of the appellant, prosecution examined 15 witnesses in all.

5. The incriminating evidence produced by the prosecution was put to the appellant in his statement under Section 313 Cr.P.C. wherein he denied the prosecution evidence in toto and claimed that he has been falsely implicated in this case after lifting him from his house. It is pertinent to mention that while examining the appellant under Section 313 Cr.P.C., he was confronted with the evidence that when ASI Bhagat Singh and Constable Jaideep reached at the spot of occurrence in front of House No.393 Wazirpur, Delhi, they found dead body of the deceased lying in the *gali* and the appellant present there having a child in his lap and also that when ASI Bhagat Singh asked the appellant about the name of the victim, the appellant told him that she was his wife. The appellant in his response to the said questions denied said evidence, meaning thereby that he has by implication denied his presence at the spot when ASI Bhagat Singh and Constable Jaideep reached at the spot.

6. On consideration of the evidence and submissions made on behalf of the respective parties, the learned Additional Sessions Judge found the appellant guilty of committing the offence of dowry death punishable under Section 304B IPC as also for the offence of subjecting

the deceased to cruelty in relation with the demand for dowry punishable under Section 498A IPC and convicted him accordingly.

7. Learned counsel for the appellant submits that while rejecting the stand of the appellant that he was not present at the time when the deceased sustained fatal burn injuries, the learned Additional Sessions Judge has referred to the MLC of the appellant purportedly prepared by B.J.R.M. Hospital on 14.08.2007 at 7:30 pm, and observed thus:

“16. ....Further more the stand of the accused that he was not present at the spot at the time of burning by his wife Kiran is falsified from the vary fact that he has not disclosed even in his statement U/S 313 Cr.P.C. as to where he was present at the time of incident of burning of his wife and as to who informed him and when he reached at the spot. Further more from the perusal of the MLC of the accused, it is reflected that he was examined at B.J.R.M. Hospital on 14.08.2007 at 7:30 P.M. and was found having flame burn injuries on his dorsum of his right palm and lateral side of right forearm and there is no explanation in this respect from the side of accused.”

8. Learned counsel for the appellant further submits that the learned Trial Court has committed a grave error on relying upon the testimony of the witnesses relating to dowry demand and cruelty on the strength of aforesaid MLC of the appellant which has neither been proved by the prosecution nor it was put to the appellant for his explanation in his statement under Section 313 Cr.P.C. Thus, he has strongly urged that either the appellant should be acquitted of the charges or his matter be remanded back to the Trial Court for recording the evidence to prove the MLC and also recording statement

of the appellant under Section 313 Cr.P.C. in the context of evidence so recorded in order to afford him an opportunity to give his explanation.

9. Section 386 Cr.P.C. deals the powers of the appellate court and Section 386(b)(i) reads thus:

**“386. Powers of the Appellate Court.-.....**

(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

10. From perusal of the aforesaid provision, it is apparent that while hearing an appeal from an order of conviction, the appellate court is competent to reverse the finding of sentence and direct retrial of the case by a court of competent jurisdiction. The purpose of the above provision is to secure the ends of justice. Object of a trial basically is to impart justice not only to the accused but to the victim as well as the society and justice cannot be allowed to be a casualty for witting or unwitting lapse committed by the prosecution in failing to produce/prove the important piece of evidence which may have impacted on the outcome of the case. In the instant case, the MLC of the deceased as well as the MLC of the appellant have not been proved on record, though both the MLCs were relied upon by the prosecution in the charge sheet. The importance of the MLC of the appellant is obvious from the fact that the learned trial Judge, in order to support his conclusions, has relied upon the same. Therefore, it ought to have

been proved during trial which apparently has not been done. Further, the Trial Court though it relied upon the MLC of the appellant did not bother to confront the appellant with the said MLC and the observations recorded therein, while recording his statement under Section 313 Cr.P.C. to seek his explanation. This failure on the part of the trial Judge has caused a serious lacuna in the trial.

11. In these circumstances, I find it imperative to set aside the impugned judgment of conviction and consequent order on sentence and remand the case back to the Trial Court with the directions to record additional evidence in relation to the aforesaid two MLCs and thereafter further examine the appellant under Section 313 Cr.P.C. in the context of the evidence so collected on record.

12. In view of the above, the impugned judgment of conviction is set aside and the case is remanded back to the Trial Court to record additional evidence as observed above and also to record further statement of the appellant under Section 313 Cr.P.C. and decide the matter afresh in the light of the additional evidence and the evidence already available on the record.

13. Appeal is disposed of accordingly.

**(AJIT BHARIHOKE)**  
**JUDGE**

**AUGUST 09, 2010**  
pst