

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 262 OF 2004

Rekha s/o. Bharat Sonawane,
Age 21 years, Occu. Household,
R/o. Sanjay Nagar, Galli No. A-15,
Aurangabad.

... APPELLANT
(Original Accused)

VERSUS

The State of Maharashtra.

... APPELLANT
(Original Complainant)

...
Mr. P. F. Patni, Advocate for appellant.
Mr. A. A. Jagatkar, APP for respondent-State.

...
CORAM : K.K. SONAWANE, J.

DATE : 19th NOVEMBER, 2019.

JUDGMENT :-

The instant appeal calls-in-question the validity and propriety of impugned Judgment and Order of conviction and resultant sentence rendered by learned Sessions Judge, Aruangabad, in Sessions Case No. 473 of 2002, dated 31-03-2004. The appellant-accused was convicted for the offence punishable under Section 498-A of Indian Penal Code (IPC) and sentenced to suffer Rigorous Imprisonment (RI) for six months and to pay a fine of Rs.100/- in default to suffer RI for 15 days. The appellant-accused was also convicted for the offence punishable under Section 306 of IPC and sentenced to suffer RI for one year and to pay a fine of Rs.100/- in default to suffer RI for fifteen days. All the above sentences were ordered to run concurrently to serve out the punishment.

2. The prosecution case sans unnecessary details in brief is that the ill-fated deceased Muktabai was the sister of PW-1 Santosh s/o. Ramdas Waghlahale r/o. Waregaon, Taluka Fulmabri, District Aurangabad. The marriage of the deceased Muktabai was solemnized on 22-04-2002 with one Sunil s/o. Fakirchand Sonawane. The gold ornaments and dowry of Rs.35,000/- was given in marriage to husband and inmates of matrimonial home of deceased Muktabai. The elder sister Anita of deceased Muktabai agreed to gift the cot/bedstead in the marriage to deceased Muktabai. After marriage, the deceased Muktabai joined the company of husband Sunil for cohabitation at her matrimonial home located in Sanjay Nagar area, Aurangabad in joint family comprising in-laws, brother-in-law Bharat and his wife accused Rekha. It has been alleged that after the marriage, the deceased Muktabai was subjected to maltreatment and harassment by the sister-in-law accused Rekha for demand of cot/bedstead agreed to be given in marriage by elder sister Anita. According to prosecution, the deceased Muktabai was subjected to torture on trifle reasons. She was also beaten-up and abused by the sister-in-law, accused Rekha for demand of money. It has been contended that on 28-11-2002, the brother PW-1 Santosh received the message that the sister Muktabai sustained burns and she was admitted in Government Hospital, Aurangabad, for medical treatment. Thereafter, the brother, parents and other relatives of deceased Muktabai rushed to the Government Hospital to see the deceased Muktabai. When they all arrived in the hospital, the accused and other inmates of matrimonial home of deceased Muktabai were present near her. Thereafter, on 30-11-2002, the deceased Muktabai

spill-the-beans that since last two days of burning incident, her sister-in-law accused Rekha was ill-treating her on flimsy reasons. She was also assaulted and abused by accused Rekha. At last, on 28-11-2002, in the wee hours of the morning at about 6.45 a.m. the accused-Rekha poured the kerosene oil on the person of deceased Muktabai and set her ablaze. Thereafter, the husband Sunil, in-laws and others taken her to the Government Hospital for medical treatment. The brother Santosh rushed to the Police of Jinsi Police Station and filed the complaint-application for recording the declaration of sister Muktabai afresh to ascertain the cause of her burns and for penal action against the culprits.

3. It is to be noted that after occurrence of burning incident of deceased Muktabai, she was immediately escorted to the Government Hospital, Aurangabad, for medical treatment. The injured deceased Muktabai verbalized that she received the burns due to sudden blaze of stove. The police personnel deputed at GHATI Hospital recorded the MLC No. 3395/SSG/dated 28-11-2002 at 7.45 a.m. The concerned P.S.O. of Jinsi Police Station took the entry of MLC in the Station Dairy and enquiry was entrusted to PSI Shri. Sirsath. The requisition was forwarded to the Executive Magistrate Mr. Imranul Haq for recording statement of injured Muktabai. Accordingly, the Special Executive Magistrate immediately on 28-11-2002, visited to the injured Muktabai in the hospital and recorded her statement for cause of her burn. The deceased Muktabai once again disclosed that she sustained the burns accidentally due to sudden blaze of stove.

4. Meanwhile, the PW-1 Santosh moved an application to the police to record the statement of his sister deceased Muktabai afresh to ascertain the cause of her burn. Therefore, the police personnel PSI Sirsath, once again rushed to the Government Hospital and recorded the statement of deceased Muktabai. However, at this juncture, the injured Muktabai blamed her sister-in-law accused Rekha for her burns. She divulged that the accused Rekha subjected her to cruelty for demand of money. She used to abuse and torture her mentally and on 28-11-2002 at 6.30 a.m., the accused Rekha poured the kerosene on her person and put her on fire. The deceased Muktabai reproduced the overtact of sister-in-law accused - Rekha in her another declaration recorded by Special Executive Magistrate on 30-11-2002.

5. Pursuant to First Information Report (FIR) of injured Muktabai recorded by police personnel PSI Shri. Sirsath, on 30-11-2002, the Crime No. I- 41 of 2002 under Sections 498-A, 307 and 504 of IPC came to be registered. The investigation was set in motion. Investigating Officer (IO) recorded statement of witnesses acquainted with the facts of the case. He collected the documents of spot panchnama, etc. prepared during enquiry of MLC. Pending the investigation, the injured Muktabai, on 02-12-2002 at about 11.25 a.m. succumbed to burn. IO drawn inquest panchnama and referred the dead body for autopsy. IO applied Section 302 of IPC against the accused. IO send the seized muddemal to forensic laboratory for Chemical Analysis. IO collected relevant documents of PM, CA report, etc. and after completion of investigation, filed the charges-heet against appellant-accused under Sections 498-A, 302 and 504 of IPC

and Section 4 of the Dowry Prohibition Act, 1961 vide Sessions Case No. 473 of 2002.

6. The learned Sessions Judge proceeded to frame charge against the appellant-accused for the offence punishable under Sections 498-A and 302 of IPC. However, in alternative the learned Sessions Judge also preferred to frame charge under Sections 306 and 304-B of IPC and Section 4 of the Dowry Prohibition Act, 1961. The appellant-accused pleaded not guilty and claimed for trial. The prosecution examined in all seven witnesses to bring home guilt of the accused. The learned Sessions Judge recorded statement of accused under Section 313 of Cr.P.C. After hearing both sides and on appreciation of evidence adduced on record, the learned Sessions Judge exonerated the appellant accused for the offence Punishable under Section 302 and 304-B of the IPC and Section 4 of the Dowry Prohibition Act, 1961. However, the learned Sessions Judge, held the appellant-accused guilty for the offence punishable under Section 498-A and 306 of IPC and rendered the impugned judgment and order of conviction and resultant sentence, which is the subject-matter of present appeal.

7. The learned counsel Shri P.F. Patni appearing for appellant scathingly assailed that the impugned judgment and order of conviction and resultant sentence is totally illegal, perverse and bad in law. The learned trial Court failed to appreciate the oral and circumstantial evidence adduced on record in its proper perspective. There were no allegation of abetment of commission of suicide by the deceased Muktabai. But the learned trial Court *suo-moto* framed the charge under Section 306 of IPC. The conviction of appellant-accused under

Section 306 of IPC without any evidence is erroneous, illegal and against the principles of law. The leaned counsel Shri Patni also criticized the findings of conviction of appellant-accused under Section 498-A of IPC. According to learned counsel Shri Patni, there are general and omnibus allegations of cruelty on the part of accused to the deceased Muktabai. The evidence of prosecution witnesses are vague and cryptic in nature and not sufficient to draw adverse inference against accused. He has also harped on the circumstances that victim Muktabai sustained burns accidentally owing to sudden blaze of stove. The documents of MLC and dying declaration recorded by Special Executive Magistrate at the earliest on 28-11-2002, all pointed out the incident of accidental burns. But, later-on, at the behest of brother and other relatives, the deceased Muktabai changed the version and blamed the accused Rekha for her burns. The multiple dying declarations of deceased Muktabai recorded on 30-11-2002, all were the product of tutoring and prompting to deceased Muktabai by her kith and kins. There was delay in lodging the FIR. According to learned counsel, all the prosecution witnesses are related and interested witnesses. The evidence of neighbourer or denizens of locality is not available on record. The learned counsel explained the circumstances on record and submits that the evidence of prosecution witnesses is not sufficient to nail the appellant-accused in this case. There are material discrepancies and contradictions in the evidence of prosecution witnesses. There were no allegations against the husband, in-laws and brother-in-law of deceased Muktabai. He fervidly contends that the prosecution failed to prove charges against the accused

beyond all reasonable doubt, and therefore, the appellant-accused be absolved from the charges pitted against her. He relied upon the legal guidelines delineated by Honourable Apex Court, in the case of *Jagdish Khatta Versus State of Himachal Pradesh*, reported on (2019) 9 Supreme Court Cases 248.

8. The learned APP raised the objections to the arguments advanced on behalf of appellant-accused. According to learned APP, the learned trial Court has correctly appreciated the circumstances on record and drawn adverse inference against appellant-accused for charges of cruelty and abetment to commit suicide by the deceased Muktabai. The learned APP submits that deceased Muktabai died due to burn and her death was occurred within 7/8 months of her marriage. The victim Muktabai in her dying declarations before Police and Special Executive Magistrate (Exhibits-20 and 23 respectively) stated about the harassment by the accused for demand of money. The brother and sister of deceased also testified about the oral dying declaration of Muktabai. Therefore, learned APP urged not to cause any interference at the instance of appellant in the findings of conviction of appellant-accused recorded by learned trial Court.

9. I have given anxious consideration to the arguments advanced on behalf of both sides. I have also delved into the oral and circumstantial evidence adduced on record including factual score of the matter. I find painful to subscribe to the findings of conviction of the appellant-accused recorded by learned trial Court. It is not in dispute that the deceased Muktabai died due to shock following 80%

burns. The PW2- Dr. Shinde conducted the Post mortem (Exhibit-3). The Inquest Panchnama (Exhibit-24) also indicate the cause of death of Muktabai due to burns. According to prosecution, the accused Rekha was the author of burn injuries sustained to deceased Muktabai and therefore, the accused Rekha was the perpetrator and responsible for homicidal death of victim Muktabai. The prosecution also cast allegation that the death of victim Muktabai was an dowry death caused due to burns within seven years of her marriage and soon before her death she was subjected to cruelty for demand of dowry. In order to bring home guilt of the accused, prosecution relied upon the oral dying declaration of deceased Muktabai made to brother and sister PW-1 Santosh and PW3-Anita. The prosecution also attempted to keep reliance on the written dying declarations (Exhibit-20 and 23) of the victim Muktabai recorded by Special Executive Magistrate PW 6 – Sanjay Vyawahare and PW – 7 PSI Sirsath.

10. Unfortunately, the learned Sessions Judge found reluctant to appreciate the versions of brother and sister, PW 1 and PW 3 of the Muktabai in regard to cause of her burns. The evidence of dying declarations (Exhibits-20 and 23) of the deceased Muktabai was also discarded by the learned trial Court on the ground that it may be the product of tutoring and prompting by the brother and sister etc. Therefore, the learned trial Court disbelieved the evidence of prosecution witnesses for the allegation of homicidal death of victim Muktabai. It was also observed by the learned trial Court that the conduct and demeanour of PW 1 Santosh and PW 3 Anita found suspicious and dubious one. The PW 1- Santosh must have received

the information about the exact cause of burn of sister Muktabai on very same day i.e. 28-11-2002, when he immediately visited to sister Muktabai in the hospital. But, PW 1- Santosh attempted to suppress these facts and approached to the Police at belated stage on 30-11-2002 with the allegation of homicidal death of sister Muktabai by the accused Rekha. Be that as it may, the learned trial Court refused to accept the evidence of oral and written dying declaration propounded on behalf of prosecution and proceeded to exonerate the accused for the charges of murder and dowry death as envisaged under Section 302, 304-B of IPC. The accused Rekha was also absolved from the allegation of demand of dowry punishable under Section 4 of Dowry Prohibition Act, 1961. The learned trial Court held that there was no agreement for giving cot/bedstead in the marriage to deceased Muktabai. The PW 3-Anita was intending to give the cot / bedstead as gift on her own volition to younger sister Muktabai in her marriage. Therefore, it cannot be termed as dowry as defined under Section 2 of Dowry Prohibition Act, 1961.

11. Eventually, the learned trial Court exonerated the accused for the charges under Section 302 and 304-B of IPC, but, held the accused guilty for the offence punishable under Sections 306 and 498-A of the IPC. It is worth to mention that there were no allegations on behalf of prosecution that owing to maltreatment/cruelty, the deceased Muktabai committed suicide. In contrast, the prosecution came forward with specific allegations that the death of victim Muktabai was homicidal and accused Rekha was responsible for her death. In alternative, the prosecution alleged that the death of victim Muktabai occurred due to

burn within seven years of her marriage and soon before her death she was subjected to cruelty by accused for demand of dowry. It was an offense of dowry death punishable under section 304-B of IPC. But, as referred above, the learned trial Court acquitted the accused on both these counts of offences under Sections 302 and 304-B of IPC pitted against her and proceeded to convict her under Sections 306 and 498-A of IPC.

12. Albeit, the learned trial Court held the accused guilty for the offence punishable under Section 306 of IPC on the allegation that the deceased Muktabai on 28-11-2002, committed suicide by pouring kerosene and set herself ablaze. The learned trial Court drawn the adverse inference of self immolation of deceased Muktabai on the basis of attending circumstances found prevailing over on the scene of occurrence reflects from document of spot panchnama (Exhibit-17). The learned trial Court in paragraph No. 19 observed as below :-

*"19. **POINT NOS. 4 AND 5** : It is not in dispute that within 8 months from the date of the marriage Muktabai died of burns. Muktabai's relatives namely her brother and sister tried to take revenge of the death of their sister making out a story that Muktabai was in fact murdered. However, it has been held that prosecution has failed to establish that the death of Muktabai was a murder. Question arises is whether it was accidental death as alleged by the defence or it was a suicidal. PW7 has stated that during investigation, he drew panchnama of the place where Muktabai was burnt. To prove panchnama Exh. 17, the prosecution examined Sk. Yakub (PW5). Sk. Yakub admitted his signature*

upon the panchnama, but refused to support its contents. However, PW 7 in his evidence stated that he drew the panchnama Exh. 17 and the articles found at that place namely a stove, match box and burnt clothes of Muktabai were seized. It is mentioned in the panchnama that the floor of the room was emitting smell of kerosene, means the kerosene was spread on the floor. The half burnt clothes of Muktabai were sent to CA and Chemical Analyzer had found residue of kerosene on the clothes. Had it been a case of accident as stated by the accused due to sudden rise of the flames of the stove, then in that case there would not have been spreading of kerosene on the floor and residues would not have found on the clothes of the deceased. The fact that kerosene was found spread on the floor and residues were found on the clothes of the deceased shows that kerosene was poured on her before she was set ablaze. The possibility of accused setting fire to Muktabai is ruled out. There is also no possibility of there being accidental rise of the flames from the stove. The only possibility is that Muktabai committed suicide by pouring kerosene on her. As she herself poured kerosene nobody could reach her till she was engulfed by flames. The relatives of the husband of Muktabai tried to suppress the fact of death of Muktabai being suicidal, as in that case they would be blamed. The prosecution witnesses namely PW 1 and PW 3 also suppressed the fact as they wanted to take revenge of the death of Muktabai, as Muktabai was telling them that accused was harassing her for not fulfilling a demand of cot. The only unescapable conclusion under the given circumstances is that Mutkabai committed suicide."

13. It would be reiterated that no one else put forward the theory of suicidal death of victim Muktabai in this case. As referred above, prosecution cast allegation of murder and dowry death as envisaged under Sections 302 or 304-B of IPC. The accused categorically came forward with specific defence of accidental death of victim Muktabai. It has been contended on behalf of accused that there was mishap occurred with the deceased Muktabai and she sustained the burns due to sudden blaze of stove. The accused also reproduced it in her statement under Section 313 of Cr.P.C. In such backdrop, the Court has to evaluate the circumstances to determine whether the death of victim Muktabai was homicidal or accidental in nature. The learned trial Court discarded both the possibilities and arrived at the conclusion that the death of victim Muktabai would be an suicidal death. The above referred observations of learned trial Court for conclusion of suicidal death appears to be rest on figment of imagination, surmises and conjuncture.

14. The deceased Muktabai at the threshold narrated the history of accidental burn for MLC No. 3395/SSG dated 28-11-2002 (Exhibit-30). It has an reference in the letter (Exhibit-31) dated 28-11-2002 addressed to Special Executive Magistrate by Police Personnel PW-7 Mr. Shirsath. Moreover, in dying declaration (Exhibit-32) recorded by Special Executive Magistrate Mr. Haq, the deceased Muktabai divulged about the accidental burns due to sudden blaze of stove. The learned trial Court refused to keep reliance on the dying declaration of victim Muktabai (Exhibit-32) recorded by Special Executive Magistrate Mr. Haq. According to learned trial Court, it was not proved and deceased

Muktabai might have given it under pressure of husband or relatives of accused. These sort of findings of learned trial Court appears to be preposterous and incomprehensible one. It is to be noted that these documents (Exhibits 30, 31 and 32) were brought on record on behalf of accused during cross-examination of IO PW-7 Mr. Shirsath only to fortify her defence. The prosecution did not painstaking to produce all these documents fairly on record to ascertain the truth. It was the defence of accused that deceased Muktabai sustained burns accidentally. The defence of accused was required to be considered on the touchstone of preponderance of probability and it is not necessary to prove the defence beyond all reasonable doubt.

15. In view of aforesaid discussion, it is crystal clear that prosecution cast allegation of homicidal death, in alternative dowry death of victim Muktabai as envisaged under Section 302 and 304-B of IPC. The accused put-forth the defence of accidental death of deceased Muktabai. The learned trial Court discarded all these probability of homicidal, accidental or dowry death of Muktabai. Ironically, the learned trial Court on its own proceeded to substitute a new story of suicidal death, totally different from one propounded on behalf of prosecution in this matter. It is to be born in mind that law does not permit such endeavour on the part of learned trial Court to reconstruct a new theory of its own from the residual part of evidence of prosecution and convict the accused on that basis.

16. It is profitable to make a reference of legal guidelines delineated by Honourable Apex Court in the case of *Bhagirath versus State of*

Madhya Pradesh reported in **AIR 1976 Supreme Court, 975**. The Honourable Apex Court in paragraph No. 11 has held that :

"11. It is well settled that the prosecution can succeed by substantially proving the very story it alleges. It must stand on its own legs. It cannot take advantage of the weakness of the defence. Nor can the Court on its own make out a new case for the prosecution and convict the accused on that basis."

17. In the case of **Prafulla Bora and others Vs. State of Assam** reported in **AIR 1988 Cri.L.J. 428** , the Division Bench of Gauhati High Court has observed that :-

"It is settled that the Court should make every effort to disengage the truth from the falsehood and to sift or separate the grain from the chaff rather than to take the easy course of rejecting the entire prosecution case merely because there are some embellishments. It is equally settled that where the grain and chaff are so inextricably mixed up that in the process of separation the court will have to reconstruct an absolutely new case for the prosecution, then the principle to make an attempt to separate the grain from the chaff and truth from falsehood will not apply."

18. It would be appropriate to make a reference of observation of their Lordship of Apex Court in the case of **Soharb and another Vs. The State of Madhya Pradesh** reported in **AIR 1972 Supreme Court, 2020**. The Honourable Apex Court elucidated that :-

"... Where the substratum of the prosecution case or material part of the evidence is dis believable,

then it will not be permissible for the Court to reconstruct a story of its own out of the rest.”

19. In the matter in hand, it would be reiterated that the learned trial Court on the basis of document of panchnama of spot of incident (Exhibit-17) and CA report attempted to introduce the new story of suicidal death of Muktabai and convicted the accused under Section 306 of IPC. The approach of the learned trial Court for inventing the new story of suicidal death of deceased Muktabai is totally absurd, illogical and not within the ambit of law. It is fallacious to fasten the guilt on the accused for offence under Section 306 of IPC under the pretext of suicidal death of Muktabai. Moreover, there are no circumstances available on record to show that accused at the relevant time instigated the deceased Muktabai to commit suicide. In the result, the conviction of accused for the offence punishable under Section 306 of IPC deserves to be set aside and quashed.

20. The conclusion drawn by the learned trial Court about the cruelty meted out to victim Muktabai also found erroneous, imperfect and perverse one. The learned Judge of trial Court in one breath disbelieved the version of PW-1 Santosh and PW3- Anita for the allegation of homicidal death of Muktabai and in another breath the learned trial Court relied upon their version for allegation of demand of money which resulted into maltreatment to Muktabai. According to learned trial Court as the deceased Muktabai committed suicide and as there was persistent demand of cot/bedstead by the accused, the adverse inference can be drawn that accused committed an offence of cruelty as envisaged under section 498-A of IPC. These findings of conviction

expressed by the learned Judge of trial Court appears totally erroneous, illegal and against the principles of law. As referred above, there were no allegations of suicidal death of deceased Muktabai, but, the learned trial Court invented the same and convicted the accused. It reveals that the learned trial Court over-looked or glossed over the serious legal pitfalls in this case and ventured to reconstruct the theory of suicidal death against the appellant-accused, which is not permissible under law. Therefore, the inference of cruelty pursuant to suicidal death found unsustainable and illogical one.

21. Admittedly, the allegation of cruelty recorded in dying declaration by public servant being hearsay evidence cannot be taken into consideration to evaluate the guilt of accused. The learned trial Court, taking recourse of legal ratio laid down in the case of ***Ganinath Patnaik Versus State of Orissa*** reported in ***(2002) 2 Supreme Court Cases 619***, rightly held that the allegations made in the dying declarations are not admissible to hold the accused guilty for the offence under Section 498-A of IPC. In such circumstances, the evidence of PW 1- Santosh and PW 3 – Anita only remained available for appreciation for the allegation of cruelty. But, the evidence of these witnesses found cryptic and slender in nature. They made allegation about maltreatment to deceased Muktabai for demand of cot/bedstead and thereafter demand for money. These witnesses cast stray and general allegations without any details of it. The learned counsel Shri. Patni for accused rightly kept reliance on the ratio laid down by Honourable Apex Court in ***Jagdishraj Khutta'*** s case as referred above. The general and omnibus statement of prosecution witnesses without

any supporting evidence cannot be taken into consideration to book the guilt of the accused. The evidence of no any neighbourer or denizens of the locality is available on record to nail the accused in this case for charges of cruelty under Section 498-A of IPC.

22. In sequel, there is no impediment to arrive at the conclusion that the entire approach of learned trial Court for convicting the accused under Section 498-A and 306 of IPC is erroneous, illegal and bad-in-law. There were no circumstances on record sufficient to conclude that the appellant-accused abated the commission of suicide by the deceased Muktabai. It would hazardous to draw inference that the suicide by deceased was the direct result of instigation by the accused. Moreover, as referred above, the prosecution did not make any allegation of abetment of suicide of the deceased Muktabai. The learned trial Court discarded the evidence of prosecution witness in the form of oral and written dying declaration and turned down the allegation of homicidal or dowry death of deceased Muktabai. Unfortunately, the learned trial Court on the basis of residual part of evidence i.e. spot panchnama (Exhibit-17), C.A. report etc, proceeded to introduce new theory of suicidal death, which was totally not in consonance with the allegations propounded on the part of prosecution. The law does not permit such endeavour to re-construct the story of its own out of the rest and convict the accused. In such circumstances, the impugned findings of conviction and resultant sentence rendered by learned Sessions Judge, Aurangabad deserves to be set aside and quashed.

23. Accordingly, the Criminal Appeal stands allowed. The impugned Judgment and order of conviction and resultant sentence passed by the learned Sessions Judge, Aurangabad, in Sessions Case No. 473 of 2002 dated 31-03-2004, against present appellant-accused for the offence under Sections 498-A and 306 of the Indian Penal Code is hereby quashed and set aside. She is acquitted from the charges pitted against her. The bail bonds furnished by appellant-accused stands cancelled. The fine amount, if any, deposited by the appellant being meager amount, same be forfeited to Government. The order about destruction of muddemal property is hereby confirmed.

24. The Criminal Appeal stands disposed of in above terms.

Sd/-
[K. K. SONAWANE]
JUDGE

MTK