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

CRIMINAL APPEAL NO.839 OF 2004

1. Rupaji @ Balasaheb Ramsaheb Kolhe
Age: 34 years, Occu.: Business,
R/o. Kumbhartale, Jamkhed,
Tq. Jamkhed, District Ahmednagar
 2. Kalyan Ramsaheb Kolhe
Age: 42 years, Occu.: Medical Practitioner,
R/o. As above
- ... Appellants

Versus

1. The State of Maharashtra
 2. Ravindra S/o. Navnath Dhobale,
Age- 32 years, Occu.: Trader,
R/o. Kada, Tq. Ashti, Dist. Beed
- ... Respondents

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Mr. Sumeet N. Bora, Advocate for Appellants
Mr. S.S. Dande, APP for Respondent No.1 – State
Mr. N.K. Choudhari, Advocate h/f Mr. K.B. choudhari, Advocate
for Respondent No.2

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CORAM : ABHAY S. WAGHWASE, J.

RESERVED ON : 26 FEBRUARY 2025

PRONOUNCED ON : 17 APRIL 2025

JUDGMENT :-

1. Appellants take exception to the judgment and order dated 25.11.2004 passed by learned 2nd Adhoc Additional Sessions Judge, Ahmednagar in Sessions Case No.105 of 2001, convicting appellant for offences punishable under Section 498-A and 304-A of the Indian Penal Code (IPC).

PROSECUTION CASE IN BRIEF

2. Sum and substance of prosecution case is that, deceased Sulbha, sister of informant, was married to appellant No.1 in the year 1995. After short span of married life, there was demand of Rs.20,000/- and for meeting such demand, there was maltreatment to the deceased. Whenever she came to matrimonial house, she reported about it. That, in-laws also taunted her, insulted her for not conceiving.

3. On 30.11.2000 news of death of Sulbha was received. That, on autopsy and on forensic examination, death was reported to be due to administering overdose of IV fluids resulting into multi organ failure. Hence, on report of PW3, crime was registered and case was investigated by PW-6, 7 and 8, respectively at each stage. After gathering sufficient evidence, appellants came to be chargesheeted and tried before learned 2nd Adhoc Additional Sessions Judge, Ahmednagar, who conducted Sessions Case bearing No.105 of 2001, wherein the prosecution adduced evidence of in all eight witnesses and also relied on documentary evidence.

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4. On appreciating the above evidence, by judgment and order dated 25.11.2004, learned trial Judge acquitted accused Nos.1 to 6 from offences under Sections 302, 304-B r/w 34 of IPC, and also acquitted accused Nos.1, 3, 4, 5 and 6 from offence under Section 498-A of IPC. Only present appellant No.1/husband Rupaji and appellant No.2 Kalyan, stated to be convicted for offences under Sections 498-A and 304-A of IPC, respectively.

Aggrieved by the above judgment, both appellants have questioned impugned judgment on various grounds mentioned in the appeal memo.

SUBMISSIONS

On behalf of appellants :

5. Learned counsel for the appellants pointed out that prosecution miserably failed to prove charges beyond reasonable doubt. That, there are general and sweeping allegations. That, cross of prosecution witnesses, i.e. informant-brother and his uncle, shatters the substantive evidence of these witnesses, and their evidence is exposed to be full of material omissions and contradictions. As regards to offence under section 498-A is concerned, learned counsel pointed out that, required

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ingredients for attracting the said charge are patently missing from their testimonies. He pointed out that, here, autopsy surgeon could not offer any opinion about cause of death. Subsequently, the medical expert PW4, who was not involved in either treatment or autopsy, and merely perused the notes of postmortem, has rendered opinion about death due to medical negligence. That, cross of such witness renders his opinion absurd. In spite of the same, it is pointed out that, learned trial Court has accepted the evidence of informant-brother and his uncle on the point of offence under Section 498-A and the evidence of PW4 on the point of offence under Section 304-A. According to the learned counsel, the learned trial Court erred in properly appreciating evidence and overlooked the settled legal position. Consequently, he questioned the legality and sustainability of impugned judgment.

On behalf of State :

6. Learned APP, who opposed the appeal, pointed out that, there is convincing and legally acceptable evidence on both Sections, i.e. 498-A and 304-A of IPC. That, essential ingredients for attracting the offence are available. According to learned APP, out of six accused, only two are held guilty, as there was

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convincing evidence against them. According to learned APP, this itself suggests that there is a meticulous analysis of evidence adduced by the prosecution. Thus, according to him, no fault can be found in the conclusion and findings reached at by the learned trial Judge.

STATUS AND ROLE OF PROSECUTION WITNESSES

7. In support of its case, prosecution has examined as many as eight witnesses. The sum and substance of their evidence is as under :

PW1 Dr. Sanjiv Mundhe, autopsy surgeon has deposed at Exhibit 54 as under:

"1. have been attached to Rural Hospital, Jamkhed since 30.6.2000. On 30.11.2000 between 2.45 p.m. and 4.15 p.m. performed myself and Dr. A.K .Boralkar performed autopsy on corpse of Sulbhabai Rupaji Kothe R/o. Jamkhed in the presence of Dr. R .B. Jadhav, Medical Supdt. Rural hospital, Jamkhed. The person had on her person brick red colour saree, black blouse red petticoat gray blue knicker, yellow metal Ganthan, yellow metal 7 piece, yellow metal earrings with Kudke, silver Jodwe and hair clips. The knicker was stained with blood and studded with few bits of fecal matter. There was no evidence of injury of external genitals-Vaginal bleeding was present. The anal opening was found studded with solid bits of stool. There was semi flexion at both lower limbs, upper limbs were extended and nails were cyanosed. I found following antemortem surface wounds and injuries.

1. 3 linear abrasions on left forearm, anteromedially -2" distant to elbow joint each of size 1", 3", 1/2", 1" apart covered with dry scab, vertical caused within 24 to 48 hours.

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2. Prick marks 2 in number on dorsum of left hand,

3. Prick marks 3 in number on dorsum of right hand with underline hematoma of the size 1"x 1", circular in shape.

2. The minings were found intact, brain tissue was contested. Eyes were naturally closed lips are fully dilated. Tongue was inside the mouth, teeth were clenched, No oozing from mouth, ear. Trachea and bronchi contain fine whitish froth, right lungs was congested, on cut section, oozing of blood tinged fine froth, left lung was found congested, on cut section, oozing of blood tinged fine froth, right ventricle of heard filled with dark fluid blood, large vessels were filled with Fluid blood, Tongue was found esophagus, mucosa congested, stomach contained 400 ml. of fluid, no food particles were seen, mucosa, both the kidneys were congested and of normal size, Uterus was non pregnant, on cut section endometrium was in menstruation phase. Both the ovaries and fallopian tubes are normal, viscera was preserved, and it consisted pieces of intestine, pieces of skin of right hand and of prick sites. Accordingly, we issued memorandum of postmortem examination, we could not give opinion as to cause of death The memorandum be at my signature and signatures of Dr. Borulkar and Dr.Jadhav. The memorandum is at Exh. 55. The CA report in respect of viscera disclose that no specific and general chemical testing does not reveal any poison in Exhs.1 to 8 3. No opinion as because of death now be given.”

PW2 Deepak acted as pancha. He deposed at Exhibit 56 as under:

“1. On 30.11.2000 Police had called me to act panch witness for the panchnama of Pot of incident at the dispensary of accused. It is situated at Kumbhar galli. The panchnama dispensary of spot situated on 3rd floor of building was drawn in our presence. There were 2 doors to the room and they were situated on east and west. The building is bounded on west by Jamkhed-Tapneshwar road, on north-by residential houses and beyond those houses MSEB Sub-Station, on south-by houses of Kolhaties and on east by residential houses. Accordingly the panchnama of spot was written, thereafter my signature was

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obtained on it The another panch Kawale put his thumb impression. The spot panchnama now shown to me is the same, its contents are true and correct. It is at Exh.57. .”

PW3 Informant Ravindra Dhobale is the brother of deceased. At

Exhibit 59, he deposed as under:

“1. I had 3 sisters. Deceased Sulbha was eldest amongst the sister. Sulbha was married to accused Rupaji Balasaheb Kolhe in the year 1995. The marriage was solemnized We gave Rs.50,000/-rand 5 tola gold to the accused at Kada. Accused Ramsaheb and Bhimabai are respectively father and mother of Rupaji. Aced. Kalyan and Mahesh are brother of accused Rupaji. Accused Mangal is wife of accused, Kalyan. All the accused persons have been jointly residing in their hospital building situated at Kumbhartale, Jamkhed. Accused Rupaji runs a medical shop. Accused Kalyan has his hospital in the said building where they resides. Accused Mahesh works as a Compounder in the said hospital.

2. After marriage Sulbha went to the house of U accused for cohabitation. Within about 15 days after the 20 marriage the accused abruptly informed us that Sulbha was mentally affected and was admitted in one Kshirsagar hospital at Ahmednagar. There on myself and my relatives went to Kshirsagar hospital to see my sister Sulbha. Sulbhai Was admitted in the said hospital for abut 8days. Thereafter, I took Sulbha to our house at Kada. At that time Sulbha told me that she saw her husband and accused Mengal indulged in illicit sexual intercourse and thereon she felt giddy and thereafter she could not understand anything. When asked Sulbha, she told me that all the accused persons ill-treat her by demanding money R.20,000/-. Thereafter, I gave R. 20,000/- with her for giving it to the accused and sent her for cohabitation. Again the accused persons continued to ill-treat Sulbha subjecting her to beating. Sulblia used to narrate the incident whenever she visited to us. Sulbha did not conceive. and on that count. The accused persons used to beat hor. Thereafter, my maternal uncle Gorakh Kardile took Sulbha to the Dr. Satalkar of Ahmednagar. Sulbha was also taken given treatment at Nashik and it was other than medical treatment,

3. Lastly Sulbha visited our house at the time of festival of Diwali proceeding the incident. In this visit Sulbha told us that the accused persons had asked her not to come back as she was not able to conceive, and if Sulbha wanted to come for cohabitation she should come with Rs.one Lakh. We convinced Sulbha and sent her to the accused for cohabitation after Bhaubij. In fact, I carried her to the house of accused. In my said visit all the accused persons met me. But they did not talk and behave properly with me. I promised the accused persons to give the money after harvesting as I had no money at that time. I returned to my viliage thereafter. After returning to my village I narrated the incident to my maternal uncle Goralch and Dattu cousin Sanjay Dhobale. On the next day, myself, Sanjay, Gorakh and Dattu went to the accysed persons and tried to convince all the aced persons not to ill-treat Sulbha.

4. On 30.11.2000 at about 8.30 a.m. while I was fertilizer siting in my shop, one Hiraseth Baldoia R/o. Dovi-Nimgaon gave me a telephonic message that my sister Sulbha died at Jamikhed in the morning. Thereon I closed my shop and rushed to my house. Thereafter myself and my relatives rushed to the house of accused persons at Jamkhed and saw corpse of Sulbha. On reaching their house within about 5 minutes accused Rupaji casually informed me that Sulbha died of Gastroenteritis. For 5 minutes after we reached, the corpse except their/female members nobody was present. We saw prick marks on dorsums of both hands and cubital fossa. Immediately, I suspect ed that accused persons must have killed my sister.

5. From there I directly went to Police Station, Jamkhed and lodged FIR. I narrated the FIR which was written down by the police. When I lodged the FIR, due to death of my sister, I was mentally disturbed. Due to which I could not narrate all the details in my FIR. Therefore, my supplementary statement was recorded on the next day. I am now shown the FIR, lodged by me, it bears my signature, its contents are true and correct, it is at Exh.60. The police delivered the corpse to us, because the accused persons refused to perform funeral of Sulbha, we performed her funeral at Kada at about 8.30 p.m.on 30.11.2000.”

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PW4 Dr. Ramkrishna Bhusale was the professor attached to Department of Forensic Medicines, Sasoon Hospital, Pune, who gave his opinion about cause of death of deceased. He deposed at Exhibit 65 as under:

“1. I had received a letter bearing no.100/2002 dt.10.10.2002 from Dy.S.P Mr.Gaikwad of GID Crime, Ahmednagar. I have brought with me the original of said letter. I producing it. It is at Exh.66. By the sal letter it was called upon to give opinion as to cause of death on the basis of postmortem report of Sulbha, letter from Civil Surgeon A'Nagar dt.30.7.2003, letter from autopsy doctor dt.28.9.2002 and C.A report dt. 27.1.2004. The xerox copy of those reports and letter were attached to Exh.66 and which I have produced alongwith Exh.66. In pursuance of the said papers, I gave my opinion vide letter dt.1.1.2003 bearing no. FFD/2/2003 addressed to Dy. S.P, CID crime, A'Nagar in respect of Cr. No.153/2000 for offences punishable under Sections 498-A, 304-B of I.P.C.(Police Station Jamkhed) I have brought with me office copy of the maid letter of my opinion. The original letter is sent to Dy. S. P, CID Crime, Ahmednagar The office copy of the said letter, boar's my signature. It also bears endorsement of Dy. S.P Mr. Gaikwad for acknowledging its receipt. The office copy of the said letter is at Exh.67. Its contents are true and correct. In my opinion of the bards of the report of p.m. there was no evidence of any natural disease to cause the death and as on the basis of C.A. report, no poison has been detected and there were no injuries on the body except linear abrasions on left forearm and multiple prick marks of I.V fluids. The features mentioned in column no.20 Thor ax at sub-clause C,D and E are produced due to pulmonary died edema in my opinion. In my opinion the deceased died due to complications produced by administration of IV fluids resulting in to pulmonary edema. After I sent my opinion, vide Exh.67, Dy. S.P. Mr.Gailovad further made certain query vide Bis letter outward no.crime/77/2003 dt.6.2.2003. I answered the query vide my letter bearing No.FMD/80/2003, Dept of F.H.B.J. Medical College, Pune dt.7.2.2003, is addressed to Dy. S.P Mr Gaikwad. The said letter now own to me bears my signature

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alongwith my official seal. Its contents are true and correct. It is at Exh.68. The original of O.C. Exh.67 is on record. O.C. Exh.67 is de-exhibited and returned to the witness and original is exhibited at Exh.67.

2. *The lungs way found swollen as mentioned in colum no.20 of P.M. notes, because of excess administration of fluids. As per the P.M. report the lungs were containing fluids. In my opinion I.V in this case it was not required to administer fluid to the patients to the extent of 4 to 5% patient is required to administer I.V fluids when there is loss of excess of fluids in the body or when there is excess loss of bleeding. There were no indications of excess bleeding from the body of the deceased. The vaginal bleeding on account of menstruation was also not excess. Due to excess administration of I.V fluids, there was the difficulty in breathing and that caused pressure on/heart-and because of that there was failure of cardiorespiratory system. The deceased must have died 8 to 12 hours prior to kex beginning of postmortem examination and 3 hours after last meal. Patients if administered excess fluid through I.V, may become unconscious. In such a case the patient should be treated to good hospital having sufficient facilities. Had the deceased not administered I.V. fluids definitely would not have died. A doctor having degree of D.H.M.S. he knows very well that if I.V. fluids are administered in a situation not required to be administered, the patient will die. In case of emergency, a qualified D.H.M.S. doctor is authorized to administer I.V. fluids. It may be a case of deliberate administration of fluids by the doctor, because as per the record the patient was complaining of nausea vomiting, loose motions and of the duration of one hour. Note:-The learned advocate for the accused objects this on the ground that it is nowhere recorded in written the/opinions given by the witnesses or any other record. Zentic and Ciprobiotic Tn are the tablets which are given for infection and acidity. Both are scheduled drugs, In case these tablets are given in excess to the patient, there was no any complication. In case if unknown poison is administered, it may not detect in process of analysis and viscera test In case of gastric poisoning there is less possibility of its detection. Notes- The learned advocate for the accused objects this recording this on the ground that it is no-where motioned in the records of opinion and witness is making improvement for the first time. The witness has re-acted by to stating this to the query raised by*

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the court as to in Which cases poison is not detected in viscera, and chemical analysis. Deceased in my opinion died dup of unnatural death.

3. I am M.D. in forensic medicines did which I dealt in the year 1983. I have experience of teaching and in performing autopsy for last 25 years. Till now I must have performed about 10000autopsys, Since last 2 years I have been Head of the Department of Forensic Medical College, Pune and Sasun Hospital, Pune.

Cross-exam by Adv.ocate Surse, for accused Nos.1 to 5.

4. It is not necessary that whatever opinion I expressed as an expert witness should be given in writing. The data before me for opinion consisted that the deceased was complaining nausea, vomiting and loose motion. The data was supplied to me by Investigating agency. Nausea, vomiting and loose motions may also be seen in Malaria patient. I do not agree with the opinion that nausea, vomiting and loose motions are the symptoms of Malaria, and also the complaints normally made by the patients suffering from Malaria. Note- The witness clarifies that nausea, vomiting may be because of Malaria. In case of Malaria a patient/Physician is an expert who can give authorized opinion. In cases of malarial analysis blood examination etc. in many cases the laboratory reports are positive. When there is a positive report,it is a case of malaria. I did make enquiry with investigating agency as to whether it has collected any laboratory report. I am shown Laboratory report dt.27.11.2002 of Sanjivani Laboratory, Jamkhed. It records malarial parasites plasmodium vivax. I agree with the opinion that four plasmodium produce malaria The four plasmodium are fast x-barium, P-vivax, P-ovale and P-Malaria. P-diabex is a type of malaria. P-vivax is very common in India. The type of P-falciparum is also & common in India. I do not know whether non cardiogenic pulmonary edema develops in malaria. I respect medical author Dr. Harison. Personally I do not know the position in respect of proposition that ideal with severe falciparum malaria may develop non cardiogenic pulmonary edema even after several days of antimalarial therapy as oppressed by Dr. Harion, in principles of Internal Medicines vol. I (15th edition page no.1205). I again say a agree with the opinion expressed by Dr. Harison. I also agreed with the Proposition by Dr. Harison

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on page no. 1206 of this book that the manifestation may also develop in otherwise uncomplicated malaria where recovery is usual. I have no occasion to treat a malarial patient. I agree with the proposition that a patient suffering from malaria it requires I.V fluids. The quantity of IV fluids depend on the condition of patient and loss of fluids from the body of the patient. In this case I have not observed the conduct of autopsy, nor I have seen the patient in this case. The doctor treating a particular patient is the best person to decide what medicines should be given to the patient.

Que - What according you must be ideal quantity of I.V fluids, which ought to have been administered to the deceased?

Ans: I cannot assure because my opinion is based upon the finding of P.M. examination.

I.V central line test is the only tout quantity of I.V fluids to be given to a particular person. The wit. clarifies that-for his opinion is based on the material of a dead body and not of a living person. The Test in meant for living person. I do not agree with the proposition that unless this central line test is conducted a treating doctor cannot determine quantity of I.V fluids to be given to the patient or whether a particular quantity is excessive or not. I do not know whether the/central line Test is only available at Pune and Mumbai, in big hospitals.

Que.- Whether you have tried ascertain from investigating agency whether treating doctor has tried to obtain I.V central line test?

Ans1: The Investigating Officer informed me that no record was produced before ms by the treating doctor, and therefore, there is no question of I am making enquiry.

Pulmonary edema are of about 50 types. In the instant case pulmonary edema is the only cause of death.

Que- Whether H. B. of 7% in a case severe anemia?

Ans.: It is true, but in the instant case it was not a case of severe anemia,

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The report of Sanjivani Laboratory Jamkhed dated 27.11.200 records 7 gran Percent of H.D. I am now shown report of Dr. Satalkar hospital dt.26.10.1998. The report may be true. Generally a patient having symptoms of diarrhea, nausea coupled with menstrual bleeding, may be required to give I.V. Fluids. It is true that I was not called upon to give my opinion whether any poison is detected in the Viscera I was also not asked to mention whether it was undetected poison. I have given opinion regarding those 2 things as part of cause of death, The medicines given to the patient through saline are more effective than oral doses. The medicines given through saline directly reach heart length, then heart and then kidneys. I' cases of oral doses of medicines given with water, they are collected in stomach,

Que.- Whether while giving opinion that on the basis of P.M. report and the results of G.A. when you have stated that you found excess fluids were given to the patients for basing this opinion whether you are fortified by any authority common try in this regard?

Ans.- I have based opinion on my personal experiences an a medical expert.

The pulmonary edema according to me in the instant case is developed because of excess application of I.V. fluida. According to me, complication in this case means due to excess fluids through I.V., resulted in accumulation in lunge that has affected respiration and due to that there is excess load on the heart, and resultantly cardiorespiratory system failed. I was supposed to give these complications in my written opinion. In the instant case in my opinion, giving I.V. fluids in excess is medical negligence. It is not true to say that the material supplied to me for my opinion did not contains anything and, therefore, I have given opinion that it is a case of giving excess I.V. fluids.

Cross examination by Adv. Mr. Chaware, for accused no.6.

6. The result of complication is cardiorespiratory failure. Ordinarily, cardiorespiratory flame is reflected in postmortem examination. I did find reflection in the instant postmortem examination memorandum. This is recollected in col. no.20

sub-column c, d, e and g of memorandum of P.M. examination. A patient suffering from Malaria is prescribed. Chlroquine Primaquine. In India, the results of laboratory have 5% plus minus cases and in most of the cases the Malaria is falciparum and P-vivax but in most of the case of P-vivax cases are detected in Laboratory reports. I completed my M.B.B.S.in 19876. During 1976 to 1983 I was Lecturer in forensic medicines. I was suspended in the year 2000. The witness explains that his suspension has been declared by the Court as null and void.”

PW5 Gorakh Kardile is the maternal uncle of the deceased. At Exhibit 73, he deposed as under:

“1. Deceased Sulbha was daughter of my sister, Sulbha was married to accused Rupaji on 25.3.1995.The marriage was celebrated at Kada, by giving Rs.50,000/- and 5 tola gold to the accused. After the marriage Sulbhaa went to accused at Jamkhed for cohabitation. Within about 15 to 20 days the accused persons admitted Sulbha at the hospital of one Dr. Kshirsagar at Ahmednagar. Thereon myself and my brother visited Dr.Kshirsagar hospital to see Sulbha. Thereafter, Sulbha told me that she had a fit on seeing incident of illicit relations between her husband and aced. Mangal. We persuaded Sulbha and thereon sent her for cohabitation with accused. Thereafter, the accused persons continued to ill-treat Suibha. The accused persons demanded Rs.20,000/- for their medical shop (as a capital investment). This was told to us by Sulbha, hen she came to her parental home. Sulbha had no issue. On that count the accused persons used to insult her and passed teasing comments. Thereafter, my brother toos, Sulbha to the hospital of Dr. Satalkar of Ahmednagar and gave her treatment. Sulbha had also told us that the accused persons threatened her not to resume cohabitation unless she brings Rs. one Lakh from her parents. This was, disclosed by her to us in her last visit of Kada on the occasion for festival of Diwali. Thereafter, we sent Suilha alongwith her brother Ravindra for resuming cohabitation with the accused. Thereafter, Raindra told us that the accused persons were not prepared to accept when he said to them that ar necessary arrangment for money is being made after-wards. On the next day, myself, Sanjay Dhobale, Dattatraya Kardile, Ravindra Dhobale visited the house of accused persons. We tried to convince the accused persons that at that time money was not available to give

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them and we will give money on making it available. This was 4-5 days prior to the incident of death of Sulbha.

2. On 30.11.2000 at about 8.45 a.m. while I was sitting in my shop came to know about death of Sulbha. I closed my shop and alongwith Ravindra and others 7-8 went to the house of Sulbha and accused. Sulbha had already died. We saw the dead body of Sulbha. We asked her husband as to what had happend and her husband informed us that, Sulbha had Gastroenteritis. Considering that Rupaji and Kalyan have considerable knowledge of medicine, they must to have given such a medicine in her in her, so that appears not visible and thereby killed Sulbha.”

PW6 Sadashiv Gaikwad was the retired ASI, who conducted the enquiry U/s.174 of Cr.PC.

PW7 Dashrath Ugale was the ASI, who registered A.D.

PW8 Shridhar Jivraj Kendre was the Investigating Officer.

ANALYSIS

8. At the outset, here, including present appellants, in all six accused were chargesheeted and tried by learned 2nd Adhoc Additional Sessions Judge, Ahmednagar. After appreciating the evidence, judgment was rendered by which, all accused, i.e. accused Nos. 1 to 6 were acquitted from charge under Section 302 r/w 34 of IPC. Similarly, accused Nos.1, 3, 4, 5 and 6 are also acquitted from charge for offence under Section 498-A. Only appellant No.1, i.e. original accused no.2 Rupaji Ramsaheb Kolhe-husband of deceased, is alone convicted for offence under

Section 498-A IPC, and appellant No.2 (original accused no.6) Kalyan Ramsaheb Kolhe is held guilty for offence under Section 304-A IPC.

Admittedly, State has not filed appeal against the acquittal of remaining accused or even acquittal of accused, who were chargesheet under Section 302 and 304-B r/w 34 of IPC.

CHARGE UNDER SECTION 498-A

9. Firstly, it would be appropriate to deal with the evidence as regards the conviction of appellant No.1 Rupaji Kolhe for offence under Section 498-A.

The only evidence supporting this conviction is that of PW3-informant brother, and PW5-informant's uncle. The appellant has criticized the evidence of these two witnesses, more particularly on the ground that, they are inconsistent and their versions are improvised and rather being general and omnibus in nature. That, their evidence is full of material omissions. Therefore, on such count, evidence of PW3 and PW5 needs to be minutely scrutinized.

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10. On re-appreciation of evidence of PW3, it is emerging that, after reporting about marriage of his sister with present appellant Rupaji in the year 1995, he claims that, at the time of marriage, Rs.50,000/- and five *tola* gold were given to the appellant No.1 husband. Then, he stated that, within fifteen days of marriage, husband and in-laws informed that deceased was mentally ill and was admitted in Kshirsagar Hospital at Ahmednagar. It is to be noted that, his evidence is devoid of particulars and details of alleged ailments. He further claims that, his sister was admitted in Kshirsagar Hospital for eight days. But, no document of Kshirsagar Hospital is admittedly brought on record either by Investigating Officer, nor this witness has taken pains to gather it and to place it on record, and to this extent, he has already admitted in his cross. In his evidence he alleges that, after being brought from the Hospital, his deceased sister told him that she saw her husband and accused Mangal in compromising position, and thereafter she felt giddy and she did not remember anything beyond that. There is no distinct evidence in this regard from other witnesses. He further claims that, when he asked his deceased sister, she allegedly told that, accused ill-treated her. Again, as submitted,

allegations are general, sweeping and omnibus in nature. Who inflicted ill-treatment and in what form and when, is not narrated by him. Though, he alleges demand of Rs.20,000/-, by whom the said demand was raised and for what purpose, is also not clarified by him. He alleged that all accused i.e. husband and in-laws ill-treated her by subjecting her to beatings, but no instances like date, month are stated by him. Further, he claims that whenever his sister visited them, she reported the above incidents. When she visited him and what she reported, is also not specified by him. He further stated that, last visit of his sister was at the time of the festival of Diwali preceding the incident. It is to be noted that, marriage is of the year 1995 and deceased allegedly died in November 2000.

11. Therefore, there is almost a gap of five years. Furthermore, as stated above, no specific instances or form of ill-treatment and when and by which of the accused ill-treated was meted out, is not stated by him. He has also put up the case in his testimony in witness box that, accused husband and in-laws were also taunting her sister for not conceiving and she was asked not to come back as she was unable to conceive. He further stated that, his sister told him that accused husband and

in-laws asked her to bring Rs.1,00,000/ if she wanted to come for cohabitation and also claims to have informed his relatives, but only his uncle Gorakh is examined, and rest of the relatives namely; Dattu, or Sanjay Dhobale are not examined to lend support to his above testimony. Resultantly, there is no sufficient corroboration to informant's evidence.

In chief paragraph 4, he stated that on 30.11.2000, message was received that his sister was admitted, but when they reached there, he was allegedly told that, she died due to gastroenteritis. But, again in para 4, he expressed his suspicion about his sister being killed. Thus, apparently, suspicion was entertained by him.

On visiting his cross, in para 7, he has admitted that, he did not have papers of Hospital of Dr. Kshirsagar. Further, he admitted that he did not notice any beating marks.

Paragraph 10 of his cross shows that there are material omissions regarding giving Rs.50,000/- and five *tola* gold at the time of marriage. He admitted that his sister specifically did not disclose the name of any particular accused, who demanded Rs. 20,000/- and that she generally stated to him that her in-laws demanded Rs. 20,000/-.

In paragraph 11, while being cross-examined in question-answer form, he admitted that due to his mental disturbance, he did not state in the report about demand of Rs.20,000/-. He also admitted that, he did not state in FIR that accused demanded Rs.1,00,000/-. Therefore, as submitted, brother-informant's evidence is apparently full of material omissions and full of omnibus, general and sweeping allegations.

Here, it is to be noted that, allegations were levelled against other accused, but accused husband alone is held guilty by the learned trial Judge for offence under Section 498-A IPC. It is apparently evident from the above evidence that, instances of cruelty, nature of cruelty are not coming in his evidence and even he has admitted about this in his cross.

12. Another witness for prosecution is PW5-Gorakh seems to be the uncle of deceased. Like PW3, he also testified that accused persons demanded Rs.20,000/-. However, according to him, the said demand was for setting up medical shop, but such is not the version of informant-brother. He has alleged insulting, teasing and commenting for not bearing a child. Even, this fact is not stated by informant-brother.

Therefore, as pointed out by learned counsel for appellants, both these witnesses are not consistent on the aforesaid points.

In Cross, PW5 Gorakh is unable to state when he had occasion to meet deceased and date of the festival. According to him, demand of Rs.20,000/- was made within 2 to 3 months after deceased was brought back to her parents' house, but brother has attributed the demand barely after 15 days of marriage. Therefore, as stated, neither PW3 nor PW5 are consistent on the point of cruelty or demand.

13. It needs to be noted that Hon'ble Apex Court in Case of *Kans Raj Vs. State of Punjab and Ors. (2000)5SC C 207*, has categorically held that, there has to be evidence demonstrating form and nature of cruelty as well as specific instances are required to be quoted in support of such allegations. Similarly, in case of *Manju Ram Kalita v. State of Assam* (2009) SCC 330, the Hon'ble Apex Court has held that harassment has to be continuous in order to attract Section 498-A.

Here, evidence to this extent is apparently missing. Evidence of brother-PW2, and his uncle PW5 is not

corroborating each other or lending support to each other on the charge of Section 498-A. Resultantly, on re-appreciation, this Court is of the opinion that required ingredients for attracting Section 498-A are missing in the prosecution evidence.

CHARGE UNDER SECTION 304-A

14. So far as charge of Section 304-A is concerned, it is directed only against accused No.6 Kalyan Kolhe.

15. Before testing whether said charge is proved as required, or not, it would be desirable to spell out the essential ingredients for attracting the said charge, which are as follows :

- (1) Death of a person was caused;*
- (2) Such death was caused by any rash or negligent act;*
- (3) That the death of such human being has been caused by the act of the accused.*
- (4) such act does not amount to culpable homicide”*

16. PW3 brother, who set law into motion, claims in his substantive evidence that he noticed prick marks on the dorsum of both hands and cubital fossa and therefore he became suspicious that accused persons must have killed his sister and so further claims to have immediately approached police.

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After funeral, autopsy was conducted by PW1 Dr. Sanjiv Kisanrao Mundhe and he, in para 2 of his substantive evidence, deposed that he and Dr. A. K. Baralkar, who both conducted autopsy, could not give opinion as to cause of death. Autopsy seems to have been done on 30.11.2000. Thus, after PM, cause of death was inconclusive.

Services of PW4 seems to have been engaged by investigating machinery and he was called upon to opine cause of death. He seems to be the Head of the Department of Forensic Medicine, Sasoon Hospital Pune, and in his evidence Exh.65, he deposed that he received letter on 10.10.2002 from Dy.S.P, CID.

He deposed that, in his opinion there was no evidence of natural disease to be the cause of death and on the basis of C.A. report, even no poison was detected and even there are no injuries on the body except abrasions on left forearm and multiple prick marks. According to him, features mentioned in column no.20, in his opinion, are produced due to pulmonary edema. He further opined that, deceased died due to complications produced by administration of IV fluid, resulting into pulmonary edema. Due to access administration of IV fluid

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there was difficulty in breathing and this further caused pressure on heart, resulting into cardio respiratory failure. He expressed possibility of patient falling unconscious due to excess IV fluid. He deposed that, it may be a case of deliberate administration of IV fluid by doctor because, as per record patient was complaining of nausea, vomiting, loose motions for a duration of one hour.

The above opinion and above evidence has been appreciated by learned trial judge in returning guilt for offence under section 304A of IPC.

17. On complete re-appreciation of above testimony, it is emerging that, autopsy was conducted on 30.11.2000, whereas, PW4 was called upon to study PM notes and issue opinion about probable cause of death i.e. after two years, and this is evident from his testimony, as he speaks receiving letter from Dy. S.P on 10.10.2002. It further emerges that only PM notes are scrutinized by PW4, who is a forensic expert.

18. In cross he agreed with the medical proposition that patient suffering malaria requires IV fluids and that the treating doctor is the best person to decide course of medicine. After

being confronted with report of Dr. Satwalkar hospital, he answered that, the report of said hospital may be correct and that generally, a patient having symptoms of diarrhea with mensural bleeding may require IV fluids. To a question, whether his opinion after considering PM report and CA report is fortified by any medical authority or commentary, he answered that, he has based opinion only on personal experience as a medical expert, but he has already, in cross, admitted that he did not treat malaria patients and that he is a lecturer since completing MBBS in 1976. This indicates that, he is in academics and has not practiced or conducted autopsies at all. It is also pertinent to note that in his substantive evidence, paragraph 2, he has merely expressed possibility of deliberate administration of fluids and as such, he is not sure.

19. Firstly, medical opinion is always opinion evidence and is not substantive evidence. It is only corroborative one. Only in case of availability of other convincing evidence, it can be relied and taken recourse to. As stated above, only on PM notes and CA report, PW4 has issued a mere probable opinion. Notes at the time of conducting PM are not maintained. Apparently, after

two years of autopsy, only on paper examination, opinion has been rendered to the police. It is expected that opinion on such cases has to come from a specially constituted body comprising of civil surgeon and other two doctors. It is the opinion of such body which can be relied upon. Here, no such body was constituted and only a medicine and forensic science lecturer is called upon to issue opinion about exact cause of death which even two autopsy surgeon could not issue.

20. For attracting charge of Section 304-A IPC, it is essential for prosecution to prove medical negligence. The essential requirements spelt out in aforesaid para are patently missing in this case. Informant brother does not dispute that his sister was sick and was being treated. Exactly which IV fluids were administered, has also not come on record so as to accept the opinion of PW4 that there was access administration resulting into edema and complications.

Consequently, in the considered opinion of this court on the strength of above material, charge of Section 304 IPC does not get attracted remotely also.

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21. Visited the judgment passed by learned trial Judge on this issue and there seems to be discussion touching this aspect from paragraph no.17 onward. It seems that, learned trial Judge has invoked Section 113B of the Evidence Act to record finding about said charge to be proved. This presumption, though available under law, cannot be straightaway applied unless foundational facts are demonstrated and established. Here, this court did not find a situation to enable a court to draw presumption available under the Evidence Act. Therefore, the findings recorded by trial Judge cannot be allowed to be sustained. Hence, I proceed to pass following order :

ORDER

- I. The appeal is allowed.
- II. The conviction awarded to the appellants i.e. (1)Rupaji @ Balasaheb Ramsaheb Kolhe and (2) Kalyan Ramsaheb Kolhe, by learned 2nd Ad-hoc Additional Sessions Judge, Ahmednagar in Sessions Case No. 105 of 2001 under Sections 498-A and 304-A of IPC respectively, on 25.11.2004 stands quashed and set aside.
- III. Both the appellants stand acquitted of the offences punishable under Sections 498-A and 304-A of the IPC, respectively.

- IV. The bail bonds of the appellants stand cancelled.
- V. Fine amount deposited, if any, be refunded to the appellants after the statutory period.
- VI. It is clarified that there is no change as regards the order regarding disposal of *muddemal*.

**ABHAY S. WAGHWASE,
JUDGE**

S P Rane