

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

CRIMINAL APPLICATION NO. 2319 OF 2007

1. Dattarao s/o Vitthalrao Kute,
age 24 yrs, Occ. Agri,
R/o Zari, Tq. & District Parbhani.
2. Vitthalrao s/o Santoba Kute,
age 56 yrs, Occ. Agril,
R/o as above.
3. Shakuntalabai w/o Vitthalrao Kute,
age 53 yrs, Occ. Agril.,
R/o as above.
4. Renukabai w/o Shivajirao Mhaske,
age 32 yrs, Occ. Agril and Household,
R/o Malegaon, Tq. Jintoor,
Dist. Parbhani.
5. Anita d/o Vithalrao Kute,
age 20 yrs, Occ. Household,
R/o Zari, Tq. & Dist. Aurangabad. ..Petitioners..
(orig. accused.)

VERSUS

1. State of Maharashtra,
Through
Department of Home,
Mantralaya, Mumbai,
(Copy served upon PP of
High Court of Bombay at
Aurangabad.
2. Jankiram s/o Bapurao Kakde,
age 51 yrs, Occ. Service,
R/o Parwa, Tq. & Dist. Parbhani. ..Respondents..
(Resp No.2 orig.
complainant.)

...

Advocate for Applicants : Mr Swapnil S Rath
APP for Respondent No.1 : Mr A R Kale
Advocate for Respondent 2 : Mr N.S. Jagdale h/f V D
Salunke

...

CORAM : V.K. JADHAV, J.
Dated: September 20, 2016

...

PER COURT :-

1. Being aggrieved by the order dated 25.5.2006 passed by the Judicial Magistrate First Class, court No.2, Parbhani in RCC No.170/2005 directing thereby issuance of process for the offence punishable under section 304-B and 498-A read with section 34 of the Indian Penal Code and the judgment and order passed by the Adhoc Additional Sessions Judge,-1 Parbhani dated 7.2.2007 in Criminal Revision Application No.45 of 2006 thereby confirming the order passed by the Magistrate, the original accused preferred this Criminal Application.

2. Brief facts, giving rise to the present application are as follows :-

a] That respondent no.2 filed a complaint before the Magistrate against the present applicants alleging

therein that the marriage of his daughter namely Ushabai was solemnized with the applicant No.1 Dattarao on 15.5.2004 and after the marriage she had gone to her matrimonial house for cohabitation. It has further alleged in the complaint that, at the time of panchami when she was brought to his house, she made complaint against all the applicants about subjecting her to cruelty on account of the non-fulfillment of the unlawful demand of Rs.50,000/-. Even the complainant had accompanied her back to her matrimonial house and requested the applicants that they should not subject her to cruelty. Even 15 days prior to death of Ushabai complainant had gone to her matrimonial house and at that time even she disclosed him that the applicants continued her subjecting to cruelty. Again, respondent no.2-complainant had given understanding to the applicants. It has alleged in the complaint that on 29.10.2004 the applicants in furtherance of their common intention forcibly administered poison to her and committed her murder. The learned Magistrate has recorded the verification statement of the complainant. Complainant has also

examined two witnesses and further filed an application at Exh.20 before the Magistrate that instead of issuing process under section 302 of the Indian Penal Code, process may be issued under section 304-B of Indian Penal Code. The Learned Magistrate by impugned order dated 25.5.2006, after considering the material on record, issued process under section 304-B and 498-A read with section 34 of the Indian Penal Code against all the applicants. Being aggrieved by the same, the applicants preferred Criminal Revision Application no.45/2006 and the learned Adhoc Additional Sessions Judge-1, Parbhani by impugned order dated 7.2.2007 dismissed the said Criminal Revision application. Hence, this application.

3. The learned counsel for the applicants submits that, deceased Ushabai was suffering from epilepsy and respondent no.2 had specifically stated before the concerned police on 31.10.2004 that he has no complaint against the applicants as regards to the death of Ushabai. Even respondent no.2/complainant's wife namely Gangubai has also given the same statement

before the police on the same date. Learned counsel submits that, after about six months of death of Ushabai without explaining the delay properly, respondent no.2 filed complaint before the Magistrate with some ulterior-motive. Learned counsel further submits that, in the postmortem notes, no cause of death has been specified and even the poison is also not detected in her viscera. Learned counsel submits that, even though in the complaint six witnesses have been mentioned, respondent no.2 complainant has examined only two witnesses and in view of the same there is non-compliance of the provisions of Section 202 of the Criminal Procedure Code. Sub-section 2 of Section 202 provides that, if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complainant to produce all his witnesses and examine them on oath. Learned counsel submits that, both the courts below have not considered all these important aspects. The learned Magistrate has mechanically issued process against the accused and the learned Adhoc Additional Sessions Judge, Parbhani has confirmed the said order

without applying the mind.

4. Learned counsel for respondent no.2-original complainant submits that, respondent no.2 repeatedly complained before the police that applicant subjected deceased Ushabai to cruelty on account of non-fulfillment of their unlawful demands and forcibly administered poison to her. Even respondent no.2 complainant has approached to the Superintendent of Police complaining inaction on the part of the concerned police station. Respondent no.2 original complainant has gone to the extent of self immolation, in case, cognizance of his complaint is not taken, however, instead of taking cognizance of his complaint, he was detained in jail by the concerned police by lodging one non-cognizable case against him. Thus, respondent no.2 constrained to file a private complaint before the Court on account of the inaction on the part of the concerned police station. Learned counsel submits that, it is also alleged in the complaint that, signature of respondent no.2-complainant was obtained on blank paper by the police when he was not mentally fit on

account of the untimely death of his daughter. Learned counsel submits that, the other point such as cause of death, viscera report, etc., can be considered during the course of the trial. Learned counsel submits that, there is sufficient compliance of the provisions of Section 202 of the Code of Criminal Procedure. Other witnesses cited in the complaint are the formal/expert witnesses and their statement is not required to be recorded before the Magistrate. The complainant has examined two witnesses as cited in the complaint and thus there is sufficient compliance of section 202 of the Criminal Procedure Code. Learned counsel further submits that, deceased Ushabai died within five months of her marriage and her death occurred otherwise than under normal circumstances. Learned counsel submits that, in view of the presumption under section 113-B of the Evidence Act, prima facie case is made out against the applicants-accused for issuance of process under section 304-B, 498-A read with section 34 of the Indian Penal Code. Learned counsel submits that, there is no substance in the criminal application and criminal application is thus liable to be dismissed.

5. I have also heard the learned APP for the State.

6. On careful perusal of the complaint, I find that, serious allegations have been made against the applicants. It has specifically alleged in the complaint, that due to inaction on the part of the concerned police station, the complainant has filed the complaint before the Court. It has also stated in the complaint that, even he had informed the concerned police station that he would self immolate himself in case cognizance of his complaint is not taken by the police. Even then, his complaint was not accepted and therefore, he was constrained to send the complaint to the concerned police station by post. It further appears that, deceased Ushabai died within five months of her marriage otherwise than under the normal circumstances. It has stated in the present application that she was suffering from epilepsy, however, deceased Ushabai was 25 years old at the time of her death and it is difficult to accept that she died because of said epilepsy fits.

7. The learned counsel for the applicant submits

that, no cause of death has been specified in the post mortem notes and further no poison is detected in viscera. In a text book of Medical Jurisprudence and Toxicology 24th Edition of Jaising P. Modi on page no.19 of Section 2 Toxicology it is observed as follows :-

“It is possible that a person may die from the effects of a poison, and yet, none may be found in the body after death if the whole of the poison has disappeared from the lungs by evaporation, or has been removed from the stomach and intestines by vomiting and purging, and after absorption has been detoxified, conjugated and eliminated from the system by the kidneys and other channels. Certain vegetable poisons may not be detected in the viscera, as they have no reliable tests, while some organic poisons, especially the alkaloids and glucosides, may, by oxidation during life or by putrefaction after death, be split up into other substances which have no characteristic reactions sufficient for their identification.

Modi saw cases in which there were definite signs of death from poisoning, although the Chemical Examiner failed to detect the poison in the viscera preserved for chemical analysis.”

8. It is made clear that this Court has not expressed any opinion and it is for the Trial Court to consider this aspect during the course of the trial.

9. It appears from the complaint that in all six witnesses have been cited as witnesses in the complaint, out of them witness no.3 to 6 are the formal/expert witnesses. It is well settled that, in view of the proviso to Section 202 of the Code of Criminal Procedure, Magistrate shall call upon the complainant to produce all his witnesses and examine them on oath for the reason that if the case wherein offence complained of is exclusively triable by the Court of Session, in that event, statement of those witnesses are not available to the Sessions Court during the course of the trial and in that way in terms of proviso to section 202 of the Code of Criminal Procedure, the complainant is required to produce all his witnesses and examine them. In a case of formal and expert witnesses, there is no question of recording their statement on oath before the Court for the reason that they are independent witnesses and their expert's evidence is based upon certain documents

which are produced before the Court alongwith complaint. Furthermore, deceased Ushabai died within five months of her marriage and prima facie there is evidence to show that soon before her death she was subjected to cruelty in connection with demand. Whether said unlawful demand of Rs.50,000/- is a part of dowry or not, that can be seen during the course of the trial, however, there is material to show that deceased Ushabai died otherwise than under the normal circumstances. In view of the same, the presumption as provided under section 113-B of the Indian Evidence Act also comes into picture and it is for the Court below to consider whether said presumption stands attracted in the case or not during the course of the trial.

10. In view of this, I do not find any fault in the order passed by the Judicial Magistrate First Class, Court No.2, Parbhani dated 25.5.2006 issuing process against the applicants for the offence punishable under sections 304-B, 498-A read with section 34 of the Indian Penal Code and in the Judgment and Order dated 7.2.2007

passed by the Adhoc Additional Sessions Judge-1, Parbhani in Criminal Revision No.45/2006 confirming the order passed by the Judicial Magistrate First Class, Parbhani. There is no substance in the Criminal Application. Hence, order.

O R D E R

- I. Criminal Application is hereby dismissed.
- II. Rule discharged.

sd/-

(V.K. JADHAV, J.)

...

aaa/-