

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

CRIMINAL APPEAL NO. 493 OF 2001

Kaduba s/o Bhavrao Tak
Age : 19 years, occu.: nil
R/o Verul, Taluka Khultabad,
District Aurangabad.

Appellant.

Versus

The State of Maharashtra
(Copy to be served on the Public
Prosecutor, High Court, Bench at
Aurangabad).

Respondent.

Mrs. Varsha S. Ghanekar, Advocate holding for
Mr. N.S. Ghanekar, Advocate for the appellant.
Mr. Y.G. Gujarathi, A.P.P. for the State/respondent.

CORAM : SUNIL K. KOTWAL,J.

**Reserved on : 14th March, 2018.
Pronounced on : 20th March, 2018.**

JUDGMENT :

1. Vires of the judgment passed by Ad hoc Additional Sessions Judge, Aurangabad in Sessions Case No. 80/1999, dated 23.11.2001 is challenged by the original accused, where the accused was convicted for the offence punishable under Section 306 of the Indian Penal Code (hereinafter referred to as "I.P.C." for brevity) and sentenced to suffer rigorous imprisonment for 5 years and to pay a fine of Rs. 500/-, in default to suffer rigorous imprisonment for 3 months, and for the offence punishable under Section 509 of the I.P.C. the accused is sentenced to suffer rigorous

imprisonment for for one month and to pay a fine of Rs. 100/-, in default to suffer rigorous imprisonment for one week. Respondent is State of Maharashtra.

2. Brief facts of the prosecution case, in nutshell, are that the informant Raosaheb Sampatrao Aher (PW-1), who is the resident of village Takali, Taluka Kannad, District Aurangabad, had a daughter namely Savita who used to take education in 9th Class in Gurukul High School at Verul. For that purpose she used to reside at the residence of Gulabrao Baburao Aher (PW-2) who was her cousin paternal grandfather. At the relevant time the accused was also completing his study in 9th Standard, but in a separate Division-A. Vanita Gajbhar (PW-9) was also student of the 9th Class in Division-A in the same School. Savita and Vanita were friends and they used to go to school together from their respective residences which were adjoining to each other. On way to school accused used to tease Vanita and subsequently he started teasing even Savita. Parents of these both girl students made oral and written complaint to the Headmaster of Gurukul High School against the accused. Despite giving understanding and warning to the accused, no positive result could be achieved and he continued his act of teasing to these both girl students.

3. On 15.04.1998, after attending annual examination paper in the School, Savita returned to her house and set herself

ablaze. Hearing shouts of Savita, her neighbours including Pramila Ajmera (PW-8) rushed on the spot and extinguished the fire. However, by that time Savita sustained severe burn injuries. Therefore, Gulabrao Aher (PW-2) was informed. He took the injured Savita to Primary Health Centre, Verul. However, Medical Officer, Primary Health Centre, Verul referred Savita to Civil Hospital, Aurangabad, known by local name as "Ghati Hospital". Though Savita was admitted in Ghati Hospital at about 4.00 to 4.30 p.m., she succumbed to her burn injuries.

4. On postmortem examination, Medical Officer opined that cause of death of Savita was "shock due to burns". He noted 98% burns on the body of Savita. By that time, father of the deceased was informed. On the same day he rushed to Ghati Hospital and came to know about death of Savita. Police Station, Aurangabad was informed about the death of Savita and accordingly Accidental Death (A.D.) was registered. In the A.D. Inquiry, inquest panchnama (Exh.8) was prepared. At the time of preparation of spot panchnama, suiucidal note (Exh.50) was seized from spot. However, till 24.04.1998 no action was taken in the matter.

5. At last on 24.04.1998 Raosaheb Aher (PW-1) lodged report (Exh.12) to Police Station, Khultabad. In the result, Crime No.70/1998 was registered under Sections 354, 306, 506 of the

I.P.C. against the accused. Accused was arrested on the same day. P.S.I. Bhanudas Mante (PW-11) conducted investigation of this crime and filed charge-sheet against the accused in the Juvenile Court, Aurangabad. As the accused was held not to be a juvenile, this case was returned and submitted before the Judicial Magistrate, First Class at Aurangabad. Further investigation was conducted by A.P.I. Ashok Khatke (PW-12). He collected specimen handwriting of deceased Savita and referred the suicidal note to Handwriting Expert for his opinion. He submitted report under Section 173 (8) of the Code of Criminal Procedure before Judicial Magistrate, First Class at Aurangabad.

6. Offence punishable under Section 306 of the I.P.C. being exclusively triable by Court of Sessions, this case was committed to Sessions Court, Aurangabad.

7. Charge was framed against the accused for the offence punishable under Sections 306, 354, 506 of the I.P.C. Accused pleaded not guilty and claimed trial.

8. Prosecution examined 12 witnesses. Defence of the accused is of total denial.

9. After considering the evidence placed on record by prosecution, the trial Court pleased to convict the accused for the offences punishable under Sections 306 and 509 of I.P.C. and above-said sentence was imposed against the accused. Therefore,

this appeal arises.

10. Heard strenuous arguments submitted by Smt. Varsha S. Ghanekar Advocate for the appellant and learned A.P.P. for the State.

11. Learned Counsel for the appellant assailed the judgment of conviction on the ground of inordinate unexplained delay in lodging F.I.R. She pointed out that though the incident occurred on 15.04.1998, the F.I.R. was lodged after the delay of 9 days for which no plausible explanation has been submitted by the prosecution.

12. Her next limb of the argument is that the evidence of prosecution witnesses regarding teasing of victim by accused by uttering words or sound intending to insult modesty of the deceased, is absolutely vague, and therefore, accused cannot be convicted under Section 509 of the I.P.C.

13. The learned Counsel for the appellant submitted that assuming that offence punishable under Section 509 of the I.P.C. is proved against the accused, even that itself is not sufficient to hold that accused abetted the commission of the suicide by the deceased Savita. According to learned Counsel for the appellant, the intended act of the accused was only to insult modesty of the deceased, however, he never intended to drive the deceased to commit suicide. She submitted that the nexus in between act of the

accused and suicidal death of the deceased is missing, and therefore, benefit of doubt goes in favour of the accused. She placed reliance on the judgment in the case of “**Kailas Vs State of M.P.**” reported in **[(2013 ALL MR (Cri) 3303 (SC)]** and “**Faisal Abdurahiman Vs State of Kerala**” reported in **[(2016 CRI.L.J. 3008) (Kerala)]**.

14. Learned A.P.P. for the State submitted that on the date of incident the deceased gave three dying declarations. First dying declaration is given in presence of Pramila Ajmera (PW-8) who extinguished fire of the deceased. Second and third dying declarations are given before Gulabrao Aher (PW-2) and Bhaginath Adhane (PW-3) in the jeep when the deceased was shifted from P.H.C. Verul to Ghati Hospital, Aurangabad. According to A.P.P., in these dying declarations deceased had made allegations against the accused that even on the date of the incident he harassed the deceased. A.P.P. has also placed reliance on suicidal note (Exh.50) of the deceased wherein she had made reference of her harassment at home as well as in the school.

15. In the case at hand, no doubt though incident occurred on 15.04.1998, the father of deceased lodged report to Police Station, Khultabad on 24.04.1998 i.e. after delay of 9 days. The reason assigned by Raosaheb Aher (PW-1) for this delay is marriage of his niece at village Takali. Obviously this explanation

furnished by father of the deceased Raosaheb (PW-1) is not acceptable, because he himself admits in his cross-examination that lodging of the complaint to police about death of Savita was of prime importance. From his examination-in-chief itself it emerges that on 16.04.1998 police-sub-inspector came to Takali and inquired with him, however, he did not inform the police regarding misconduct of the accused. Thus, I have no hesitation to hold that there is inordinate unexplained in lodging F.I.R. against the accused

16. However, it cannot be ignored that Raosaheb (PW-1) had no reason to make any false allegations against the accused. Evidence on record does not show that the relations in between accused and family of Raosaheb Aher (PW-1) were strained since before the occurrence. Therefore, there was absolutely no grudge in the mind of Raosaheb (PW-1) against the accused, to falsely implicate him in the present case. In the circumstances, though there is inordinate unexplained delay in lodging F.I.R., that itself is not sufficient to hold that there is possibility of concoction of false allegations against the accused. I hold that inordinate unexplained in lodging F.I.R. is not fatal to the prosecution case.

17. Initially I propose to examine the correctness of finding of the trial Court regarding conviction of the accused under Section 509 of the I.P.C. Section 509 of the I.P.C. reads as under :-

“Word, gesture or act intended to insult the

modesty of a woman—Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to three years and also with fine”.

18. A bare glance at Section 509 of the I.P.C. makes it clear that it must be established beyond reasonable doubt that accused intending to insult the modesty of deceased, uttered any word or made any sound or gesture, intending that such word or sound shall be heard by the deceased.

19. After going through the evidence placed on record by prosecution, it emerges that except Vanita Gajbhar (PW-9), no other student of Gurukul High School is examined by prosecution to prove that in the Gurukul School or in the class of the deceased she was harassed by accused by uttering filthy word or by making any objectionable gesture. Investigating Officer has not even taken pains to examine the class-teacher of the deceased to know about harassment of the deceased in the classroom by accused. In fact, from the evidence on record, it becomes clear that accused and deceased were in different Divisions. Vanita (PW-9) admits that accused was in her Division i.e. 'A' and the deceased was in Division 'B'. Therefore, there is absolutely no possibility of teasing of the deceased by accused in the ongoing classes of the students. Thus, absolutely no evidence is available against the accused to

establish that in the school or in the class the accused harassed the deceased in any manner.

20. However, Vanita (PW-9) categorically deposes before the Court that in the year 1998 initially accused used to tease her on way to school and even in the school. According to this witness, subsequently deceased Savita secured admission in the same school in 9th Standard and on way to school and from school to home, accused used to follow Savita by blowing whistles and singing songs. This witness has referred one instance of pulling *Odhni* of Savita by accused. However, she has not made clear exactly in which month or how many days prior to the incident pulling of *Odhni* by accused occurred. No doubt, in her cross-examination Vanita (PW-9) admits that she could not tell the day, date or month when accused teased her while passing by the road. However, no school girl is expected to note down date-wise such instances. Therefore, I do not find any reason to disbelieve the testimony of Vanita (PW-9) that accused used to tease this witness as well as the deceased whenever they passed by the road while going to school or while returning to their home from school.

21. Evidence of Vanita (PW-9) is also corroborated by the testimony of her father Damodar Gajbhar (PW-7) who deposed that after knowledge of teasing of her daughter by accused, he made a written complaint (Exh.24) to Headmaster, Gurukul High School and

even guardian of accused was called by Headmaster in the office and understanding was given to them. Even Headmaster of Gurukul Highschool namely Deokumar Kanher (PW-6) corroborated this version by deposing that in the month of January 1998 deceased Savita made oral complaint to him regarding her harassment by accused by blowing whistle when she passed by the road. According to this witness, even father of Savita met to him regarding this incident. Headmaster (PW-6) has also deposed regarding written complaint (Exh.24) submitted by Damodar Gajbhar (PW-7). He has also proved the written assurance (Exh.25) given by father of the accused dated 21.02.1998 that there would be no such complaint in future. From the evidence of this witness, it further emerges that on request application (Exh.26) submitted by parents of the accused he was allowed to appear in the annual examination. This evidence is certainly sufficient to prove that prior to 15.04.1998 accused frequently teased deceased Savita and her friend Vanita (PW-9) by blowing whistle on road when they were passing by road to school as well as from school to home. This act of the accused is definitely sufficient to hold that accused intentionally blew whistle on road to insult the modesty of deceased Savita and her friend Vanita and thereby he committed offence punishable under Section 509 of I.P.C. I hold that conviction of the accused for the offence punishable under Section 509 of the I.P.C. is proper and needs no interference.

22. In this appeal, learned Counsel for appellant mainly assailed the conviction of the accused under Section 306 of the I.P.C. The learned trial Court convicted the accused for the offence punishable under Section 306 of the I.P.C. mainly relying on oral dying declarations of deceased before her cousin grandfather Gulabrao (PW-2) and Bhaginath (PW-3) as well as before Pramila Ajmera (PW-8). In addition to this, trial Court has also considered the day-to-day teasing of deceased by accused while passing by the road.

23. Regarding oral dying declarations of deceased on 15.04.1998, the evidence of Gulabrao Ahire (PW-2) and Bhaginath Adhane (PW-3) is important. According to both these witnesses, when they were shifting the deceased from Verul to Ghati Hospital by jeep, on way deceased made a disclosure statement regarding her harassment by accused on the date of incident. According to Gulabrao (PW-2), the words uttered by deceased in the jeep are that, "Kaduba had harassed her in the school and he had shown knife to her through window". On the other hand, according to Bhaginath (PW-3), on way to Ghati Hospital in the jeep, Savita once or twice said that, "student in the school by name Kaduba had harassed her". It is to be noted that Bhaginath (PW-3) nowhere deposes regarding harassment on the date of incident or showing of knife by accused to the deceased on the date of incident. These

both witnesses were present near the deceased at one and the same time, however, both of them have deposed regarding altogether different disclosure statement by deceased to them. It is to be noted that as the F.I.R. itself was lodged after delay of 9 days from the date of incident, certainly statements of these both important witnesses were recorded by Investigating Officer after more than 9 days from the date of occurrence. Considering the above-referred inconsistent statements of these both witnesses regarding the words uttered by deceased in their presence and the inordinate delay in recording their statements by the Investigating Officer, I do not find testimony of these both witnesses trustworthy to base the conviction on the basis of such a vague dying declaration.

24. Next important witness relied by prosecution is Pramila Ajmera (PW-8) who claims that her house is at some distance from the house of deceased and accused used to sit on the Ota of her house and used to blow whistles at deceased Savita. According to this witness, despite her objection accused used to sit on the Ota of her house and speak in filthy language. According to this witness, on the date of incident after noticing smoke coming outside the house of deceased, she rushed on the spot and extinguished fire by pouring water on the body of deceased Savita. According to this witness, Savita told her that accused Kaduba used to harass her, and therefore, she set herself ablaze. It is to be noted that Pramila

Ajmera (PW-8) has not whispered a word regarding teasing by accused to Savita on the date of incident. Another important aspect is that though this witness deposes that accused uttered filthy words by sitting on the Ota of her house, from her cross-examination it emerges that she could not hear what accused used to utter on Ota which is about 50 to 60 ft from her house. It is to be noted that neither father of deceased Raosaheb (PW-1) nor paternal grandfather Gulabrao (PW-2) deposed that before the occurrence of the incident Smt. Pramila Ajmera (PW-8) informed them about teasing of Savita by accused from the Ota of her house. In natural course, had the accused teased Savita by sitting on the Ota of the house of Pramila Ajmera (PW-8), definitely she would have informed this misconduct of the accused to the father and grandfather of deceased. Therefore, considering this abnormal conduct of Pramila Ajmera (PW-8) and unreasonable delay in recording her statement by police due to belated lodging of the F.I.R., possibility of preparation of this false witness cannot be ruled out. Therefore, I hold that otherwise also testimony of Pramila Ajmera (PW-8) is not trustworthy to hold that accused used to tease deceased by sitting on the platform of the house of this witness.

25. Assuming worst situation against the accused that he used to tease deceased Savita by blowing whistle when she passed by the road or by sitting on the Veranda of the houses of neighbours

of deceased. Whether such conduct of the accused would amount to abetment of her suicide.

26. The term “abetment” is defined u/s 107 of I.P.C. as under :-

“Abetment of a thing – a person abets the doing of a thing, who-

First- Instigates any person to do that thing; or

Secondly – Engages with one or more other person or persons in any conspiracy for the doing, of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly – Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.- A person, who by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

27. A bare glance of Section 107 of the I.P.C. makes it clear that, to prove abetment by accused, prosecution must establish that accused instigated deceased to commit suicide or accused intentionally aided the suicide committed by the deceased or prior to the time of commission of suicide by deceased, accused, by his act facilitated the commission of suicide.

28. In the case of **“Ramesh Kumar Vs. State of Chhattisgarh” [(2001) 9 SCC 618]**, the Apex Court in paragraph 20 has examined different shades of meaning of instigation. Para 20 reads as under:-

“20. Instigation is to goad, urge forward, provoke, incite or encourage to do “an act”. To satisfy the requirement of instigation though it is not necessary that actual words must be used to that effect or what constitutes instigation must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. The present one is not a case where the accused had by his acts or omission or by a continued course of conduct created such circumstances that the deceased was left with no other option except to commit suicide in which case an instigation may have been inferred. A word uttered in the fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation.

29. The Apex Court in the case of **“Chitresh Kumar Chopra Vs. State” [2011 (1) Mh.L.J. (Cri.) (SC) 290]** had an occasion to deal with this aspect of “abetment”. Apex Court dealt with dictionary meaning of word “instigation” and “goading”. The Court opined that there should be intention to provoke, incite or encourage the doing of an act by latter.

30. The Apex Court in case of **“M.Mohan Vs. State” [2011 (3) Mh.L.J. (Cri.) 127]** observed that,

“Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. The intention of the Legislature and the ratio of the cases decided by this Court are clear that in order to convict a person under Section 306, Indian Penal Code there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he/she committed suicide”

31. In the case at hand, while blowing whistle addressing to the deceased on road or from near her house, the intention of the accused is to only tease the deceased by insulting her modesty. Merely on the basis of the act of blowing whistle by accused or by following the deceased by road, inference cannot be drawn that accused intended that deceased should commit suicide. In ordinary course also nobody would imagine that merely by hearing the sound of whistles blown by Road Romeos, any girl would commit suicide. Thus, the suicide committed by the deceased was never intended or even imagined by accused as a prudent person.

32. In the circumstances, in view of the law settled by Apex Court in above-referred authorities, I have no hesitation to hold that though the prosecution has proved that prior to the date of the incident accused teased the deceased by blowing whistles and by following her on road, that would not be sufficient to hold that accused intentionally instigated or aided the suicide committed by the deceased. In other words, prosecution cannot establish beyond reasonable doubt that accused abetted the suicide committed by deceased on 15.04.1998.

33. Before parting with the judgment, I must refer the authorities relied by learned Counsel for the appellant. In **Kailash Vs. State of M.P.** (cited supra), the Apex Court did not consider

Section 306 of the I.P.C., but the Apex Court was considering correctness of the conviction of accused under Section 326 of the I.P.C. In **Faisal Vs State of Kerala** (cited supra) accused outraged modesty of the deceased and two days thereafter the deceased committed suicide. In the circumstances, Kerala High Court held that nexus in between act of the accused and suicidal death is missing and therefore, abetment of the suicide cannot be established. These both cases are distinguishable on facts.

34. Before parting with the judgment, I must consider the suicidal note (Exh.50) which was found by police on the spot. The suicidal note was referred to Handwriting Expert and he opined that it is in the handwriting of the deceased (opinion Exh.51). The suicidal note and opinion of the Handwriting Expert are admitted by defence.

35. After going through suicidal note (Exh.50), it emerges that before occurrence of the incident of suicide, the deceased had informed her parents regarding tension in the school as well as at home. She has mentioned that she could not tolerate taunting by anybody. The suicidal note (Exh.50) clearly indicates that Savita was supersensitive and that the deceased had some problem at the residence of her cousin grandfather. So also she had some problems in the school. In suicidal note the deceased had nowhere named the accused or her harassment at the hands of the accused

on road or in the school. It is also not mentioned in the suicidal note that she was going to commit suicide as she was fed up with the harassment by accused. Therefore, otherwise also the suicidal note itself ruled out the possibility of commission of suicide by deceased only on account of teasing by accused on road. But this note creates the possibility of commission of suicide by Savita due to other tension in the school or at home. Thus, benefit of doubt goes in favour of accused

36. In the result, I have no hesitation to hold that conviction of the accused for the offence punishable under Section 306 of the I.P.C. is bad in law and deserves to be set aside by partly allowing this appeal. However, conviction of the accused for the offence punishable under Section 509 of the I.P.C. is to be confirmed. The learned trial Court has already given set-off to the accused under Section 428 of the Cr.P.C. The record shows that the accused was arrested on 24.04.1998 and he was released on bail on 24.07.1998. Thus, the accused had already undergone sentence imposed by the trial Court under Section 509 of I.P.C. Therefore, accused need not be called upon to again undergo the sentence for the offence punishable under Section 509 of the I.P.C.

37. In view of the discussion, this appeal deserves to be partly allowed.

38. Hence, the following order.

ORDER

1. Criminal Appeal No. 493 of 2001 is partly allowed.
2. Conviction of the accused Kaduba Bhavrao Tak, in Sessions Case No.80/99 for the offence punishable under Section 306 of I.P.C. is set aside.
3. Accused Kaduba Bhavrao Tak is acquitted of the offence punishable under Section 306 of the I.P.C.
4. Fine amount, if deposited by accused in the trial Court in respect of the offence punishable under Section 306 of I.P.C., be refunded to him.
5. Conviction of the accused under Section 509 of I.P.C. is confirmed.
6. Set-off is already given under Section 428 of Cr.P.C. for the period undergone by accused i.e. 24.04.1998 to 24.07.1998.
7. Bail bonds of the accused shall stand cancelled. He be set at liberty if not required in any other case.

(SUNIL K. KOTWAL)
JUDGE