

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

Criminal Appeal No. 373 of 2003

Balaji s/o Angad Suryawanshi
Age 30 years,
Occupation: Labour,
R/o Kalmugali, Taluka Nilanga,
District Latur. **.. Appellant.**

Versus

The State of Maharashtra. **.. Respondent.**

Shri. Paresh B. Patil, Advocate, for appellant.

Shri. V.S. Badakh, Additional Public Prosecutor, for respondent.

With

Criminal Appeal No. 434 of 2003

- 1) Angad s/o Gundaji Suryawanshi
Age 65 years,
Occupation: Labour,
R/o Kalmugali, Taluka Nilanga,
District Latur.
- 2) Rasikabai w/o Angad Suryawanshi,
Age 60 years,
Occupation: Household,
R/o Kalmugali, Taluka Nilanga,
District Latur. **.. Appellants.**

Versus

* The State of Maharashtra. .. **Respondent.**

Shri. Paresh B. Patil, Advocate, for appellants.

Shri. V.S. Badakh, Additional Public Prosecutor, for respondent.

**Coram: T.V. NALAWADE &
S.M. GAVHANE, JJ.**

**Judgment reserved on : 18 December 2017
Judgment pronounced on : 11 January 2018**

JUDGMENT (Per T.V. Nalawade, J.)

1) Both the appeals are filed against the judgment and order of Sessions Case No.2/2003 which was pending in the Court of the learned Additional Sessions Judge, Nilanga, District Latur. The appellants from both the appeals are convicted for the offence punishable under section 498-A read with 34 of Indian Penal Code and the appellant from Criminal Appeal No.373/2013 is convicted for the offence punishable under section 302 of Indian Penal Code. Both the sides are heard.

2) In short, the facts leading to the institution of the appeals can be stated as follows :-

3) Deceased Gendabai was daughter of first informant, Dattu Kamble. Dattu was resident of village Yelnoor, Tahsil Nilanga. Gendabai was given in marriage to the appellant of Criminal Appeal No.373/2003 and the appellants are residents of Kalmugali, Tahsil Nilanga, District Latur. The marriage had taken place about 6 years prior to the date of the incident. Allegations are made that at the time of settlement of the marriage the first informant had agreed to give Rs.15000 as dowry and gold ornament of 5 grams but the first informant could not give the gold ornament of 5 grams in the marriage. The marriage expenses were borne by the side of the husband.

4) It is the case of the prosecution that for about six months there was no ill-treatment to the deceased but after six months ill-treatment was started to the deceased by her husband and parents of the husband on the ground that the gold ornament of 5 grams was not given as per agreement by the first informant. The appellants from

proceeding No.434/2003 are the parents of the husband. It is contended that the deceased used to disclose that the accused used to harass her and they used to give beating to her. One daughter was then born to the deceased and more ill-treatment was given after the birth of the daughter. It is the contention of the prosecution that the demand of gold ornament of 5 grams was met with but after that new demand of Rs.5000 was made by the accused persons by saying that they were indebted. After that one son was born to the deceased and the birth of the son took place about one and half years prior to the date of the incident.

5) It is the case of the prosecution that the ill-treatment was continued to the deceased by accused as the demand of Rs.5000 was not met with. It is contended that on the occasion of Gudi Padwa of the year in which the incident took place the deceased was left at the house of her parents by the accused and warning was given that unless and until the demand of Rs.5000 was met with, he would not take back the deceased to the matrimonial house. However, after two months the deceased was taken

back to the matrimonial house by the maternal aunt of the husband and undertaking was given that they will not give ill-treatment to the deceased. It is the contention that even after giving of such undertaking, ill-treatment was given to the deceased by the husband and his parents.

6) The incident took place on 21-8-2002 in the field of the accused situated at Kalmugali. Adjacent to this land, there is land of one Sunil Warwate. On the day of the incident work of spreading fertilizer was going in the field of Sunil. There was standing crop of hybrid in the field of the accused. Sunil and the persons working in his field had seen the deceased in the field of the accused with two kids. At about 2.00 p.m. of that day the persons working in the field of Sunil had invited the deceased to have lunch with them but she had said that she had already taken lunch. The place where these persons were taking lunch is situated near the common bandh of the two lands and the deceased was sitting in the vicinity of the place where Sunil and the persons working with him were taking lunch. After some time the accused husband and the deceased entered the hybrid crop and the kids were with

them.

7) After some time, the persons from the field of Sunil heard calls given by the husband from hybrid crop and so they rushed to the hybrid crop of the accused. They noticed that the deceased was lying in unconscious condition in the hybrid crop. On inquiry the husband disclosed that on that day the deceased had quarrel with his mother and so he questioned the deceased, when he was questioning the deceased, the deceased gave arrogant replies and due to that he became angry. He disclosed to them that out of anger he held the legs of the deceased and he virtually threw the deceased away and due to that the deceased fell on her neck and due to that she was lying on the ground.

8) Sunil and the persons working with him helped the accused to shift the deceased to road where a jeep was called and in the jeep the deceased and her husband were sent to hospital. The husband then took the deceased to Aurad Sahajani hospital where the doctor advised to take her to Nilanga Government hospital. The

accused took the deceased to Nilanga Government Hospital where the doctor from Nilanga hospital declared that Gendabai was already dead.

9) On 21-8-2002 itself father of the deceased learnt that the dead body of Gendabai was kept in Nilanga Government Hospital. He went to the hospital. He gave report to police on 22-8-2002. Prior to that, A.D. was registered and during A.D. inquiry, inquest panchanama of the dead body was done and the dead body was referred for post mortem. On the basis of the report given by the father of the deceased, the crime for aforesaid offences came to be registered in Nilanga Police Station.

10) The doctor, who conducted the post mortem examination, gave opinion that the death took place due to neurogenic shock due to fracture of second cerebral vertebra. During investigation, statements of the relatives of the deceased on parents side came to be recorded and the statements of Sunil and the persons working with him in his field came to be recorded. After completion of investigation, charge-sheet came to be filed for the

aforesaid offences. All the accused pleaded not guilty. The prosecution examined in all 12 witnesses. The accused took defence of total denial. The accused examined three witnesses in defence. The trial Court has given conviction as the trial Court found that burden was on the accused to explain the things and he had failed to explain as to how his wife had sustained the aforesaid injury. The trial Court has held that it is a case of homicide.

11) To ascertain as to whether Gendabai died homicidal death, the evidence of the medical officer who conducted the post mortem examination needs to be considered first. Dr. Vijaykumar Nimbalkar (PW-12) is examined to prove that it is homicide. He conducted the post mortem examination on the dead body on 22-8-2002. He found one contusion over backside of the neck of the size of 3 cm x 2 cm and this contusion was present on either side of neck. It was at the level of ear and there was lax movement of neck. On exploration of neck it revealed that there was fracture of second cervical vertebra. The doctor gave opinion that the death took place due to neurogenic shock due to fracture of second cervical

vertebra. He has given opinion that such injury can be caused by hitting of hard and blunt object on the neck. He has specifically stated in the evidence that such injury cannot be sustained if person falls when he is walking. Considering the site of the injury, this Court holds that the opinion given by the doctor about the possibility of cause of injury due to hitting of hard and blunt object needs to be accepted. The post mortem report is proved in his evidence as Exhibit 44 and the advance opinion given by him is proved at Exhibit 43. In the cross-examination, the doctor has deposed that such patient cannot survive even after giving the treatment and the patient may die immediately after sustaining of such injury. He has denied that if a person falls on neck such injury can be caused. This expert evidence of the doctor is accepted by the trial Court. So the opinion of the expert given under section 45 of the Evidence Act has become the opinion of the Court. This Court sees no reason to interfere in that opinion. This Court has no hesitation to hold that Gendabai died homicidal death.

12) The accused gave statement in writing when his statement was recorded under section 313 of the Cr.P.C. He took the defence that when he entered the field he noticed that Gendabai was already lying in the field and then with the help of persons like Sunil he shifted Gendabai towards the road and from there he was taking Gendabai on motor cycle. He contended that after crossing some distance, he saw one jeep and when he started towards the jeep, Gendabai fell on the neck. Thus the accused has tried to give explanation in respect of the injury sustained by Gendabai and this explanation is not acceptable in view of the opinion given by the doctor and also due to the site of the body where the injury was sustained. It can be said that the witnesses like Sunil and the persons working with him have not wholeheartedly supported the prosecution but whatever evidence they have given and the aforesaid statement of the accused are sufficient to show that the accused was present with the deceased at the relevant time in the field and only the accused had the opportunity to inflict such injury.

13) Sunil (PW-5) is the owner of the adjacent field and he has given evidence that first he and his men had seen Gendabai in the field with the two kids and they had even invited Gendabai to have lunch. He has given evidence that after some time the accused came to the field and he was also invited by them for lunch but he refused by saying that he had taken lunch. He has given evidence that the accused then gave call to him and due to that he and his men went to the field of the accused. He has given evidence that after entering hybrid crop of the accused they noticed that Gendabai was lying there and she was making movements of receiving shocks and fits. He has given evidence that the accused requested them to help him to shift Gendabai to hospital. At this point, the learned A.P.P. took permission of the trial Court to cross examine Sunil and further evidence was recorded as the evidence brought in the cross-examination.

14) Sunil (PW-5) has admitted that after the incident, police had made inquiry with him and his statement was recorded. The portions from his police statement which are denied by Sunil were confronted to

him and they were marked as "A" and "B". These portions are duly proved in the evidence of the investigating officer (PW-11). It can be said that, this witness has avoided to give evidence on the extra judicial confession given by the accused and also on some circumstances like Gendabai was found unconscious in the standing crop of hybrid. Whether the deceased was really unconscious or not could not have been inferred on the basis of the evidence given by Sunil but there is the opinion given by the doctor. Further, the opinion needs to be kept in mind as the accused has tried to take a defence that when he was shifting Gendabai from motor cycle she had a fall. There was no such statement of PW-5 before police. Before police he had given statement that from the road Gendabai was shifted in a jeep for taking her towards hospital.

15) Prosecution has examined Sudhakar Warwate (PW-6). He was also working in the field of Sunil (PW-5) at the relevant time. He was cross-examined by the APP for the State. His evidence also shows that they had seen Gendabai live in her field and she was sitting near the

hybrid crop and after some time they had seen that Balaji had come there. Thus when this witness had seen Gendabai and Balaji together, Gendabai was alive. The other part of the evidence is similar to the evidence given by Sunil (PW-5). Relevant portions from the police statement of this witness were confronted to him by the APP and they were marked as "A" and "B". There is similar evidence of Venkat (PW 7) who was working in the field of Sunil at the relevant time. He also turned hostile. There is evidence of Suresh Suryawanshi (PW-8) who was also working in the field of Sunil on that day. He also turned hostile. Similar evidence is given by him and the relevant portions from his police statements were confronted to him and they were marked as "A" and "B". In the evidence of Phulchand Rathod (PW-11), the investigating officer those portions of the aforesaid witnesses are duly proved and they are exhibited. It can be said that the aforesaid witnesses tried to help the husband of the deceased by hiding the truth but whatever evidence is given by them is sufficient to prove that they had seen both Gendabai and her husband together and they had entered the hybrid crop in the presence of these witnesses. Thus, Gendabai

was seen lastly in the company of the husband alive. Within few minutes of the incident of last seen these witnesses saw Gendabai lying in the field of the accused. Due to these circumstances, the burden was on the husband to explain the things.

16) The medical evidence already discussed shows that there was only one blow given on the neck. If Gendabai was suffering from fits and she was lying in the hybrid crop, other injuries like bruises, abrasions would have been noticed on her body. If she had a fall then also some other injuries could have been noticed on the dead body. This did not happen.

17) Defence witnesses like Shesherao (DW-1), Ram (DW-2) and Sachin Awale (DW-3) are examined by the accused in his defence. DW-1 and DW-2 have given evidence that on that day they were working in the field of Sunil (PW-5). Their evidence is similar to the evidence of witnesses examined by the prosecution. Their evidence also shows that they had seen Gendabai alive when the accused had entered his field. DW-1 and DW-2 have tried

to say that they had helped the husband to take Gendabai on motor cycle. If Gendabai was unconscious it was necessary for the accused to explain as to how he had taken Gendabai on motor cycle when he was riding the motor cycle. If there was third person on motor cycle to hold Gendabai, it was necessary for the accused to examine that person. In absence of such evidence, not much weight can be given to the evidence of DW 1 and DW 2. The third witness Sachin Awale (DW-3) has tried to say that he was called to Aurad Sahajani with jeep by the accused and from there he had shifted Gendabai in his jeep to the hospital from Nilanga. This evidence is not consistent with the written statement filed under section 313 of the Cr.P.C. by the accused. In the statement he has contended that the jeep was available at the square in his village and from there he had taken Gendabai to the hospital from Aurad Sahajani. Thus there is clear falsity in the evidence of DW-3. In any case this defence of the accused is not acceptable for the reasons already given by this Court.

18) The aforesaid evidence if considered together leads to only one inference that one blow was given on the neck of the deceased from back side in the field of the accused and only the accused, husband of the deceased, had opportunity to inflict such injury. Gendabai was not in a position to speak or most probably she died after some time when she was shifted to Aurad Sahajani hospital. In the evidence of the investigating officer it is brought on record that the investigation revealed that some treatment was given to Gendabai in Aurad Sahajani hospital. This circumstance cannot help the accused as the injury was inflicted and it could not have been sustained in accidental fall. The accused could have produced some record from Aurad Sahajani hospital to show that the deceased was suffering from fits and for that the treatment was given to her. But no such attempt was made by the accused. As already observed, burden was on the accused to show that he was not the author of the injury. Provisions of sections 106 and 114 of the Evidence Act are applicable in this case and the accused has failed to give plausible explanation.

19) The question arises as to what offence the accused has committed. Only one injury was found on the person of the deceased. The police statements of the witnesses were confronted to them by the learned APP and those portions are proved in the evidence of PW 11. That is not the substantive evidence but the initial case of the prosecution needs to be kept in mind for ascertaining the offence committed by the accused. Such case also creates a probability. As per the medical evidence only one blow was given on the backside of the neck of the deceased and that proved to be fatal. However, in such a case it can be said that there are always two probabilities. There was either the intention of the accused to inflict such blow or to finish the deceased or there was knowledge of the accused that by such act he was likely to cause the death. As per the principles of criminal law the probability which is in favour of the accused needs to be considered and accepted by the Courts. Further, the subsequent conduct of the accused also needs to be considered in view of section 8 of Evidence Act. He called the neighbours and he made attempt to save the life of Gendabai by shifting her to the hospital. PW-11 has stated

that during his investigation it revealed that Gendabai was alive when she was shifted to Aurad Sahajani hospital. These circumstances cannot be ignored and these circumstances create probability that the accused had no intention to finish the deceased. Due to these circumstances this Court holds that the accused committed the offence punishable under section 304 Part II of the Indian Penal Code. To that extent, the decision of the trial Court needs to be modified.

20) The prosecution has examined father of the deceased, Dattu (PW-1), Bharat (PW-4), Kondiba (PW-9) and Nagendra (PW-10) to give evidence on the ill-treatment given by the accused to Gendabai. There was cohabitation of 6 years and Gendabai gave birth to two issues from accused Balaji. It does not look probable that for 5 gram gold ornament ill-treatment was given for many years and after that new demand of Rs.5000 was made by accused from the parents and on that ground ill-treatment was given to the deceased. Evidence of the father of the deceased shows that the financial condition of the accused was good and only after making necessary

inquiry with close relatives he had given Gendabai in marriage to accused Balaji. He had not approached mediators in the past to convince the accused to behave well if there was such ill-treatment to the deceased. There is nothing on the record to show that the accused was indebted. The evidence on the demand of Rs.5000 is very vague and it can be said that the so called demand was very old if the approximate time given by the father of the deceased in his evidence is considered. There is no independent witness on this demand or on ill-treatment. Though the accused has caused the death of Gendabai, there is clear possibility that the incident took place out of a quarrel and anger on that day and so it cannot be said that so called ill-treatment had connection with the cause of death. Thus, the evidence on so called disclosures of the deceased is not available under section 32 of Evidence Act. For these reasons this Court holds that the evidence on ill-treatment is not sufficient and not convincing in nature. Thus, the conviction given to the parents of the husband and also to the husband for the offence punishable under section 498-A read with 34 IPC needs to be set aside.

21) The learned counsel for the accused has placed reliance on following reported cases :

- (1) **2006 MCR 713 - (Sunil Ram Sapkal v. State of Maharashtra);**
- (2) **(2005)9 SCC 237 (State of A.P. v. Patnam Anandam);**
- (3) **2000(1) Mh.L.J. 549 (Dilip Ramaji vs. State of Maharashtra.**

Facts and circumstances of each and every criminal case are always different. One case is on the effect of delay caused in giving FIR. In the present matter, the delay could have been considered only in respect of offence punishable under section 498-A of IPC. For the offence of culpable homicide not amounting to murder this delay cannot be used in favour of the husband. In the result, following order.

22) Criminal Appeal No.434/2003 is allowed. Criminal Appeal No.373/2003 is partly allowed. The judgment and order of the trial Court convicting all the accused for offence punishable under section 498-A read with 34 of the Indian Penal Code is hereby set aside. All the accused stand acquitted of the offence punishable under section 498-A read with 34 of Indian Penal Code.

The judgment and order of the trial Court convicting the accused - Balaji, husband of the deceased for offence punishable under section 302 of the Indian Penal Code is hereby set aside. However, this accused stands convicted for offence punishable under section 304-II of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for 5 years and to pay a fine of Rs.1000/-. In default of payment of fine, he is to undergo rigorous imprisonment for two months. The accused is entitled to set off in respect of the period for which he was behind the bars as under trial prisoner. The accused Balaji to surrender to his bail bonds for undergoing the sentence. The bail bonds of other accused stand cancelled.

Sd/-
(S.M. GAVHANE, J.)

Sd/-
(T.V. NALAWADE, J.)

rs1