

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.595 OF 2017

Mohan Gangaram Kesade
Age 42 years, R/o. Near Boudha
Samaj Mandir, Kini, Tal. Hatkanangale,
Dist.Kolhapur.(Kalamba Central Jail) ... **Appellant**
V/s.

The State of Maharashtra,
(through Sr. Police Inspector,
Peth Vadgaon police station) ... **Respondent**

.....

Mr.Jayant J. Bardeskar, Advocate for the Appellant.

Mrs.M.R.Tidke, APP for the Respondent/State.

....

CORAM : A.M.BADAR J.

DATED : 26th NOVEMBER 2018.

ORAL JUDGMENT :

1 By this appeal, the appellant/accused is challenging the Judgment and Order dated 29/04/2017 passed by the learned Assistant Sessions Judge, Kolhapur in Sessions Case No.155 of 2016 thereby convicting him of the offences punishable under Section 498(A) of the Indian Penal Code as well as under Section 306 thereof. On first count, he is sentenced to suffer rigorous imprisonment for two years apart from payment of fine for

Rs.1,000/- and default sentence of rigorous imprisonment for three months. On the other count, the appellant/accused is sentenced to suffer rigorous imprisonment for five years apart from directing him to pay fine of Rs.1,000/- and to undergo rigorous imprisonment for three months in default thereof. Substantive sentences are directed to run concurrently by the learned trial Court. The appeal is taken up for final hearing in the light of the fact that the appellant/accused is undergoing jail sentence imposed on him from 04/09/2016 and despite Order dated 22/08/2017 releasing him on bail, passed by this Court (Coram : Smt.Anuja Prabhudessai, J.), he could not secure his release as he is unable to furnish surety.

2 Facts leading to the prosecution of the appellant/accused and his resultant conviction can be summarized thus :

- (a) Appellant/accused Mohan Kesade married Sushila, who is daughter of First Informant/P.W.No.1 Indu Kamble prior to seventeen years of the incident of commission of suicide by Sushila. After marriage, Sushila started cohabitation with the appellant/accused at village Kini in Hatkanangale Taluka of Kolhapur District. Marriage of Sushila with the appellant/accused was a love marriage. P.W.No.1/Indu Kamble also started residing at Kini thereafter.

- (b) According to the prosecution case, the appellant/accused was addicted to liquor. He used to suspect character of his wife Sushila. As such, he used to quarrel with her and frequently used to beat her. Out of this wedlock, the couple was blessed with two daughters namely P.W.No.2 Megha Vadgave and P.W.No.4 Mayuri Kesade. Son of the couple was mentally retarded and he was admitted in the residential Special School.
- (c) The incident in question took place on 16/04/2015 at the residential house of the couple. The appellant/accused returned home in the evening hours of that day after consuming liquor. He quarreled with his wife Sushila and uttered that Sushila should get herself incinerated and he no longer requires her company. Being fed up with the constant harassment and beating as a result of suspicion about her character by the appellant/accused, Sushila indulged in effacement by pouring kerosene on her person and setting her ablaze. She sustained severe burns and was then admitted to C.P.R. Hospital, Kolhapur.
- (d) Upon getting information about sustaining burns by Sushila, her mother P.W.No.1 Indu Kamble went to the C.P.R. Hospital, Kolhapur and heard dying declaration of her daughter Sushila. P.W.No.1 Megha Vadgave, married

daughter of Sushila also visited that hospital and heard dying declaration of her mother Sushila.

- (e) On getting intimation about admission of Sushila with burn injuries to C.P.R. Hospital, Kolhapur, P.W.No.6 Anant Gurav, Nayab Tahsildar was summoned and he initially recorded dying declaration (Exhibit 26) of Sushila on 17/04/2015. All these oral as well as officially recorded dying declarations are to the effect that because of constant harassment by the appellant/accused, Sushila got herself burnt by pouring kerosene on her person.
- (f) During course of medical treatment, Sushila Mohan Kesade succumbed to burn injuries on 21/04/2015. Her mother P.W.No.1 Indu Kamble then lodged report of the incident on 28/04/2016. Accordingly, Crime No.115 of 2015 for offences punishable under Section 306 and 498(A) of the Indian Penal Code came to be registered against the appellant/accused.
- (g) Routine investigation followed. The Investigating Officer collected papers of postmortem examination of Sushila. Spot was inspected in presence of panch witnesses. Statement of witnesses came to be recorded and on completion of investigation, appellant/accused came to be charge-sheeted.

- (h) Charge for offences punishable under Sections 306 and 498(A) of the Indian Penal Code was framed and explained to the appellant/accused. He pleaded not guilty and claimed trial.
- (i) In order to bring home the guilt to the appellant/accused, the prosecution has examined in all nine witnesses. First Informant, mother of deceased Sushila Indu Kamble is examined as P.W.No.1. The report lodged by her is at Exhibit 12. Megha Vadgave, daughter of deceased Sushila is examined as P.W.No.2. Rani Dhanwade, neighbourer of deceased Sushila is examined as P.W.No.3. Maya Kesade, the other daughter of deceased Sushila is examined as P.W.No.4. Rahul Jadhav, a panch witness to spot panchanama is examined as P.W.No.5. The spot panchanama dated 26/04/2015 is at Exhibit 23. Nayab Tahsildar Anant Gurav is examined as P.W.No.6. The dying declaration of Sushila recorded by him on 17/04/2015 is at Exhibit 26. Dr.Prashant Chaudhari, Junior Residence Medical Practitioner with C.P.R. Hospital is examined as P.W.No.7. Investigating Officers ASI Ashok Kadam and API Parashuram Kamble are examined as P.W.No.8 and P.W.No.9.
- (j) Defence of the appellant/accused was that of total denial. However, he did not enter in the defence.

(k) After hearing the parties, by the impugned Judgment and Order dated 29/04/2017, the learned trial Court came to the conclusion that the appellant/accused had subjected his wife Sushila to cruelty and had abetted commission of suicide by her. Accordingly, he was convicted of the offences punishable under Sections 498(A) and 306 of the Indian Penal Code and is sentenced accordingly as indicated in the opening paragraph of this Judgment.

3 I heard Shri.Bardeskar, the learned Counsel appearing for the appellant/accused. He took me through the entire Record and Proceedings and argued that even if prosecution case is accepted as it is, then also the offence cannot be travelled beyond the one punishable under Section 498(A) of the Indian Penal Code. The learned Counsel appearing for the appellant/accused argued that in order to make out the offence of abetment the prosecution is required to establish by the cogent evidence instigation, incitement or provocation by the accused to the deceased to commit suicide. The prosecution is enjoined to adduce evidence establishing *mens rea* of the accused and evidence adduced by the prosecution is silent on these aspects, which are necessary for establishing the offence punishable under Section 306 of the Indian Penal Code. In support of his contention, the learned Counsel had relied on Judgment of the Honourable Apex Court in the matter of **Sanju @ Sanjay Singh**

Sengar v. State of M.P.¹ and Ramesh Kumar v. State of Chhattisgarh².

4 As against this, the learned Additional Public Prosecutor argued that officially recorded dying declaration of the deceased coupled with reliable evidence of daughters of deceased and appellant as well as evidence of First Informant P.W.No.1 Indu Kamble unerringly point out guilt of the appellant/accused for the offences which are held to be proved by the learned trial Court.

5 I have carefully considered the submissions so advanced and also perused the Record and Proceedings including oral as well as documentary evidence.

6 According to the prosecution case, as reflected in the FIR, marriage between the appellant/accused and deceased Sushila was a love marriage solemnized at least seventeen years prior to the incident of commission of suicide by Sushila in the month of April 2016. P.W.No.2 Megha Vadgave, who is daughter of the couple has deposed about her age as 22 years while in the witness box in the year 2017. The incident in question took place on 16/04/2015. Thus, this factual position emerging on record makes it clear that the marriage of the appellant/accused with the

1 (2002) 5 Supreme Court Cases 371.

2 (2001) 9 Supreme Court Cases 618.

deceased was at least 17 years old at the time of commission of suicide by deceased Sushila. Section 113(a) of the Evidence Act prescribes rule of presumption as to abetment of suicide by a married woman. As per provisions of this Section, if it is shown that a married woman has committed suicide within a period of seven years of her marriage and if it is established that the husband or other relatives of husband had subjected her to cruelty, then having regard to all other circumstances of the case, the Court can presume the fact that such suicide has been abetted by the husband or other relatives of the husband. This presumption is entitled to operate against the accused in the field of criminal law. However, such a presumption is not applicable to the case in hand because the marriage was about seventeen years old. Therefore, even if it is established that the appellant/accused had subjected his deceased wife Sushila with cruelty, this fact alone would not be sufficient to infer abetment by the appellant/accused to the deceased to commit suicide.

7 At this juncture, it is apposite to quote the observations of the Honourable Apex Court in the case of ***Ramesh Kumar (supra)*** relied by the learned Counsel appearing for the appellant/accused as found in paragraph 20 to 22 thereof. These read thus :

“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.

21. In *State of West Bengal v. Orilal Jaiswal and Anr.*, [(1994) 1 SCC 73], this Court has cautioned that the Court should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end her life by committing suicide. If it transpires to the Court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance, discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the Court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty.

22. Sections 498-A and 306 IPC are independent and

constitute different offences. Though depending on the facts and circumstances of an individual case, subjecting a woman to cruelty may amount to an offence under Section 498-A and may also, if a course of conduct amounting to cruelty is established leaving no other option for the woman except to commit suicide, amount to abetment to commit suicide. However, merely because an accused has been held liable to be punished under Section 498-A IPC it does not follow that on the same evidence he must also and necessarily be held guilty of having abetted the commission of suicide by the woman concerned.....”

It is thus clear that only because the offence punishable under Section 498(A) of the Indian Penal Code is held to be proved, as a rule it cannot be held that the appellant/accused is guilty of the offence of abetment to commit suicide.

8 Now, let us examine evidence of the prosecution as to ascertain whether it is proved that the deceased had committed suicide and the appellant/accused had abetted the deceased to commit suicide apart from subjecting her to cruelty.

9 Suicidal death of Sushila Mohan Kesade occurring on 21/04/2015 is not in much dispute. The defence has admitted the inquest panchanama (Exhibit 17) and report of postmortem examination of deceased Sushila Mohan Kesade, which is at Exhibit 19. Both these documents reflect that Sushila died because of burn injuries. Cause of her death as reflected from the

postmortem report (Exhibit 19) is septicemia due to 68% mixed burns. How Sushila Mohan Kesade sustained burn injuries has come on record through the cogent, consistent and trustworthy evidence of P.W.No.1 Indu Kamble (mother of Sushila) P.W.No.2 Megha Vadgave and P.W.No.4 Mayuri Kesade (daughters of Sushila). Evidence of P.W.No.4 Mayuri Kesade shows that there was quarrel between her father i.e. appellant/accused and her mother deceased Sushila on 16/04/2015 and then she left the house for attending Prize Distribution function. On returning, she saw her mother with burn injuries. P.W.No.1 Indu Kamble and P.W.No.2 Megha Vadgave attended Sushila when she was admitted to the C.P.R. Hospital at Kolhapur. Both these witnesses have spoken about oral dying declaration of deceased Sushila. Evidence of both these witnesses so also the officially recorded dying declaration of Sushila makes it clear that she indulged in effacement by pouring kerosene on her person and setting her ablaze. Thus, prosecution has established suicidal death of deceased Sushila occurring on 21/04/2015.

10 Now, let us examine whether suicidal death of deceased Sushila has resulted because of instigation, provocation or incitement by the appellant/accused to her and whether he has subjected Sushila to cruelty. At this juncture, it is relevant to mention that the term 'cruelty' is defined by explanation to Section 498(A) of the Indian Penal Code. As defined by this explanation,

cruelty implies harsh and harmful conduct of certain intensity and persistence. It covers acts causing both physical and mental agony and torture or tyranny and harm to a married woman. The conduct of the husband or his relatives must be of such a nature to cause feelings to a married woman that life is not worth living and she should die being that only option. The provisions of Section 498(A) of the Indian Penal Code envisages the intention to drag or force the woman to commit suicide by unabatted, persistent and grave cruelty. Similarly, it is necessary to look into the aspect as to what amount to abetment. Section 107 of the Indian Penal Code defines the term 'abetment'. The term 'abetment' implies instigation, incitement and provocation to the other to commit the act of offence. It requires *mens rea* and without intention, there cannot be an abetment. The prosecution is required to prove that the accused had intended and desired that the deceased should commit suicide in order to make out the offence of abetment.

11 Let us, now examine what is the evidence regarding cruelty as well as abetment to the deceased by the appellant/accused for commission of suicide. P.W.No.1 Indu Kamble, who is mother of deceased Sushila used to reside in the neighbourhood of the appellant/accused after marriage of Sushila for two to three years. She had given an amount of Rs.5,000/- to the appellant/accused for constructing the house and that amount was not refunded by the appellant/accused. This, according to the defence, is a cause for false implication of the appellant/accused in

the subject crime. In the wake of this defence, it is in evidence of P.W.No.1 Indu Kamble that appellant/accused used to consume liquor and he used to beat her daughter Sushila by suspecting her character. P.W.No.1 Indu Kamble has spoken about dying declaration of Sushila heard by her in the C.P.R. Hospital. As per version of P.W.No.1 Indu Kamble, her daughter Sushila told her that because of harassment of the appellant/accused she set herself ablaze, the appellant/accused then tried to extinguish the fire and then ran away. Similar is the testimony of P.W.No.2 Megha Vadgave, daughter of deceased Sushila. She also deposed that her father i.e. appellant/accused was addicted to liquor, he used to beat her mother by suspecting her character and when she used to intervene in the quarrel, her mother i.e. deceased Sushila used to prohibit her from intervening. P.W.No.2 Megha Vadgave heard the oral dying declaration of her mother Sushila to the effect that the appellant/accused came to the house under influence of liquor, had beaten Sushila by a wooden bat suspecting her character and, therefore, Sushila set herself ablaze.

12 The next witness, who is relevant for determining this point is P.W.No.4 Mayuri Kesade – a thirteen years old daughter of the couple. As per her version, in her presence, her father i.e. appellant/accused came to the house after consuming liquor and then quarrel started between her parents. P.W.No.4 Mayuri Kesade then went out of the house and on return saw her mother in burnt condition.

13 P.W.No.3 Rani Dhanwade, is the neighbourer of the couple. As per version of this witness, the appellant/accused was addicted to liquor and he used to quarrel with the deceased Sushila.

14 Apart from this oral evidence, there is evidence of dying declaration of deceased Sushila. Her dying declaration at Exhibit 26 was recorded on 17/04/2015 by P.W.No.6 Anant Gurav Nayab Tahsildar. Deceased Sushila has stated in the said dying declaration (Exhibit 26) that her husband used to suspect her character and used to beat her regularly. Being fed up with regular beating on suspicion as stated by Sushila, she poured kerosene on her person and set herself ablaze. Deceased Sushila also stated in her officially recorded dying declaration that the appellant/accused was very much present at the time of the incident. He was saying that he do not need her. Deceased Sushila has further stated in her dying declaration that when she set herself ablaze, the appellant/accused extinguished the fire and ran away. Thus, we have two sets of evidence in order to ascertain whether the deceased was subjected to cruelty and was driven to commit suicide by the appellant/accused. One is oral evidence which also includes dying declaration of Sushila and another is that of her officially recorded dying declaration. If both these sets of evidence are carefully scrutinized, coupled with the case of the prosecution reflected in the FIR lodged by P.W.No.1

Indu Kamble, then it becomes clear that even after seventeen years of married life and after having begotten three children from the said wedlock, the appellant/accused used to suspect character of his deceased wife Sushila. He used to beat her frequently by picking a quarrel with her. However, P.W.No.3 Rani Dhanwade, who is neighbourer of the couple though had spoken about addiction of liquor of the appellant/accused and frequent quarrel between him and deceased Sushila, has not spoken about beating by the appellant/accused to deceased Sushila. Thus, though close relatives of the deceased are speaking about addiction to liquor, picking up the quarrel by suspecting the character and frequent beating by the appellant/accused to deceased Sushila, P.W.No.3 Rani Dhanwade, who appears to be the independent witness having an occasion to watch events happening in the matrimonial life of the couple, has not spoken about suspicion about the character of the deceased Sushila by the appellant/accused so also beating by the appellant/accused to the deceased Sushila because of such suspicion. Thus, in the wake of this variance and shortcoming in the evidence of closely related witness to the deceased and that of the independent witness, the appellant/accused is certainly entitled for benefit of doubt so far as suspicion about the character of the deceased wife and frequent beating is concerned. If these aspects are ignored, then what remains is addiction to liquor and frequently quarreling with the deceased. Though such frequent quarrels with a married woman after

consuming the liquor during married life of seventeen years may amount to cruelty as such conduct is harsh and harmful conduct of requisite intensity and persistence, the same may not be sufficient to infer abetment. The allegations which are established from evidence of P.W.No.3 Rani Dhanwade are not of such a nature which would drive the deceased to commit suicide, forming a natural result of normal conduct of a married woman. That apart, evidence regarding *mens rea* is missing. Without knowledge or intention, there cannot be abetment and the knowledge and intention must relate to the crime in question. In the instant case, as soon as Sushila set herself ablaze, the appellant/accused extinguished the fire on her person and ran away may be because of fear. This evidence of the prosecution reflected from the officially recorded dying declaration negates the case of abetment by the appellant/accused to the deceased for driving her to commit suicide.

15 In the result, though the appellant/accused by his willful conduct has subjected the deceased to cruelty, he is entitled for benefit of doubt so as to charge of abetment to deceased to commit suicide is concerned. In the result, the following Order :

ORDER

- (i) The Appeal is partly allowed.
- (ii) Conviction and resultant sentence imposed on the appellant/accused by the impugned Judgment and Order

for the offence punishable under Section 306 of the Indian Penal Code is quashed and set aside. He is acquitted of the offence punishable under Section 306 of the Indian Penal Code.

(iii) Needless to mention that conviction and resultant sentence of appellant/accused for the offence punishable under Section 498(A) of the Indian Penal Code is confirmed.

(iv) The Appeal is disposed of accordingly.

(A.M.BADAR J.)