

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH : NAGPUR**

Criminal Appeal No. 65 of 2001

Appellants : 1) Sanjay son of Gajanan Naitam, aged about 28 years,
2) Moreshwar son of Gajanan Naitam, aged about 25 years,
Both residents of Mahadoli, Tahsil Kelapur,
District Yavatmal

Versus

Respondent: The State of Maharashtra, through Police
Station Officer, Pandharkawda, Dist. Yavatmal

Shri R. M. Daga, Advocate for appellants
Ms Ritu Kaliya, Addl. Public Prosecutor for respondent-State

Coram : S. B. Shukre, J

Dated : 16th February 2018

Oral Judgment

1. This appeal challenges the legality and correctness of the judgment and order dated 21.3.2001 rendered in Sessions Trial No. 47 of 1995 by 2nd Additional Sessions Judge, Yavatmal.

2. By the judgment and order impugned herein, the appellants

who are original accused nos. 1 and 2 out of five accused persons, have been found guilty of offences of dowry death, abetment to commit suicide and cruelty punishable under Sections 304-B and 306 read with Section 34 of the Indian Penal Code. Accordingly, they have been convicted and sentenced by the impugned judgment and order to different punishments ranging from seven years' to two years' rigorous imprisonment together with fine amount ranging from Rs. 1000/- to Rs. 500/- accompanied by default sentences to suffer RI for six months to two months. Being aggrieved by the same, the appellants are before this Court in the present appeal.

3. Accused nos. 1 and 2 were respectively husband and brother-in-law of deceased Nayana. Original accused no. 3 Gajanan, original accused no. 4 Sau Saraswatibai and original accused no. 5 Balkrishna were also related to deceased Nayana. They were respectively her father-in-law, mother-in-law and brother-in-law.

4. The marriage of deceased Nayana was solemnized with appellant no. 1 on 17.5.1993. After the marriage, deceased Nayana started cohabiting with accused no. 1 and she resided with him at his house situated at village Mahadoli, Tahsil Kelapur, District Yavatmal along with accused nos. 3 to 5. Initially, it was alleged, Nayana was

treated well by the appellant and other family members. After two months thereafter, her ill-treatment at the hands of appellants and other accused persons began. It was alleged that the accused persons used to demand Rs. 25,000/- in cash and TV set from deceased Nayana and on her failure to do so, used to ill-treat her. After the marriage, Nayana had an occasion to go back to parental house and it was her such first visit to her parental home. At that time, deceased Nayana had disclosed to her father and brother about the illegal demand of accused persons and her ill-treatment. Thereafter, Nayana had paid second visit to her parental house at which time again deceased Nayana had disclosed about the illegal demand and ill-treatment to her at the hands of accused persons to her father and brother.

5. At about 11.00 am on 6.9.1994, Nayana left her house for going to an agricultural field to perform some work. She did not return home on that day. The accused persons got worried and, therefore, they lodged a missing report in respect of Nayana on 7.9.1994 with Kelapur Police Station. In the morning of the next day i.e. 8.9.1994, one Shekhar discovered one dead body floating in a well constructed in the field of one Prabhakar which was on the eastern side of the village. He informed of the same to Police Patil, Mahadoli. Police Patil verified the fact and immediately reported the incident to Kelapur or Pandharkawda Police

Station. An AD report was registered and enquiry into it was started. Meanwhile, brother of the deceased lodged the report that behind the death of Nayana was the ill-treatment given to her by all the accused persons on account of failure of Nayana to bring from her father cash amount of Rs. 25000/- and a TV set.

6. The spot panchanama and inquest panchanama were prepared. Further enquiry was made by the police to ascertain if there was any prima facie substance in the allegations made against all the accused persons by brother of the deceased. When police were satisfied about existence of prima facie substance in the allegations, First Information Report was lodged on 18.9.1994 and offences punishable under Sections 304B, 306 and 498A read with Section 34 of the Indian Penal Code were registered against both the appellants and also the remaining accused persons.

7. As the case involved the offences exclusively triable by the sessions court, it was committed to the Sessions Court for trial of the accused persons in accordance with law. The accused persons were prosecuted for the aforesaid offences. On merits of the case, the learned Additional Sessions found that the prosecution failed to prove beyond reasonable doubt these offences against original accused nos. 3, 4 and 5

and succeeded in proving beyond reasonable doubt these offences against original accused nos. 1 and 2 i.e. the present appellants. Therefore, by the impugned judgment and order, the learned Additional Sessions Judge convicted and sentenced both the appellants of these offences, as stated earlier.

8. I have heard Shri R. M. Daga, learned counsel for the appellant and Ms Ritu Kaliya, learned Additional Public Prosecutor for the respondent-State. I have carefully gone through record of the case including impugned judgment and order.

9. In order to prove the offence of dowry death punishable under Section 304B of the Indian Penal Code, it must be shown that the death of a woman is unnatural, was within seven years of her marriage and that soon before her death, she was subjected to cruelty or harassment by her husband or any relative of her husband or in connection with any demand for dowry. The cruelty or harassment, as required under Section 304-B IPC is the one as defined under Section 498-A of IPC. Section 498-A of IPC defines cruelty as any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health of the woman either mental or physical. It also defines harassment which amounts to

cruelty by requiring that the harassment must be made with a view to coerce a woman or any person related to her to satisfy any unlawful demand for any property or valuable security. In other words, the cruelty or harassment must be of such a nature as is likely to drive the woman to commit suicide or must be of such a nature as to cause grave injury or danger to life, limb or physical/mental health of the woman and if it is not of such a nature, it should be an ill-treatment meted out to a woman in order to force her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

10. It has been held in several cases by the Hon'ble Apex Court that the harassment or ill-treatment, as discussed above, must be of consistent nature and should not be in the nature of stray incidents. It has also been held in these decisions that the particular act committed by the accused persons viz-a-viz the woman must be described so that an appropriate decision can be made as to whether or not these acts constitute cruelty or harassment, as contemplated under Section 498-A IPC, and if no such details are given, no positive finding regarding commission of an offence of cruelty punishable under Section 498-A of IPC can be recorded.

11. Whenever death of a woman occurs within seven years of her marriage, presumption about dowry death contemplated by Section 304-B of IPC is also available. But in order that such presumption of causing of dowry death is drawn against the accused, it must be proved by the prosecution that soon before her death, the woman was subjected to cruelty or harassment by the accused. Cruelty or harassment referred to in Section 304-B IPC is something which is defined in Section 498-A IPC about which I have already made discussion to explain the essential requirements.

12. In the case of **Bijendra & ors v. State of Haryana** reported in *2015 ALL SCR 626*, the Hon'ble Apex Court has held that the main ingredient of the offence of dowry death is the cruelty or harassment given for coercing woman to meet unlawful demand and that unless main ingredient is established, the offence of dowry death cannot be constituted. It is also held that in order to prove the offence of cruelty as contemplated under Section 498-A of IPC, it is necessary that specific allegations of ill-treatment are made and in the absence of such categorical allegations, conviction for such an offence cannot be maintained.

13. Now, in the light of aforesaid requirements of law and

principles enunciated by the Hon'ble Apex Court in the case of **Bijender & ors** (supra), let us appreciate the evidence available on record.

14. In the present case, nobody has seen deceased Nayana at or near the well from which her dead body was recovered in the morning of 8.9.1994. There is no evidence available to tell us as to how deceased Nayana fell into the well in question. The post-mortem report (exhibit 33) states that cause of death cannot be given as the body was decomposed. Viscera of the deceased was preserved and was sent to the chemical analyzer for analysis and report. C. A. Report (exhibit 32) was also produced in evidence. It was negative for presence of poison in the intestine of the deceased. After this C. A. Report, the doctor who conducted the post-mortem examination was not asked about his final opinion. So, this is a case wherein no final opinion of doctor as regards cause of death of Nayana is available.

15. Added to the absence of final opinion regarding cause of death of the deceased is the difficulty arising from absence of any external injuries on the person of deceased Nayana. Post-mortem report (exhibit 33) indicates clearly that no external injuries were noticed on the person of deceased Nayana. If no external injuries were noticed, reasonably one can say that possibility of an accidental fall into the well in

question of deceased Nayana is ruled out. Then, only the two possibilities remain - one of homicidal death and second of suicidal death. On these aspects of the case, unfortunately, no evidence whatsoever has been brought on record by the prosecution. There is not a single witness who would give any clue to us to make any determination in this regard. So, the question, as to whether deceased Nayana died of suicidal death or homicidal death has remained unanswered. But, one thing is certain and it is that her death was unnatural and in suspicious circumstances.

16. Once it is found that the death of woman i.e. deceased Nayana occurred in the circumstances otherwise than normal, one can direct the course of enquiry to examine the possibility of dowry death. So, from this angle, let us examine the prosecution evidence first.

17. There are only three witnesses out of five witnesses whose evidence is required to be considered to ascertain whether there was any cruelty or harassment meted out to Nayana soon before her death as it is only these witnesses who were related to her and to whom, as per their version, deceased Nayana used to disclose her woes.

18. On going through their evidence, it can be noticed instantly

that so far as the aspect of cruelty or harassment is concerned, their testimonies are similar in nature. PW 1 Devidas was the brother of deceased Nayana; PW 2 Nyaidas was the father of deceased and PW 3 Vatsala was her mother. These witnesses have stated that when Nayana visited their house for the first time after marriage, she told them that accused were demanding Rs. 25,000/- in cash as well as TV set. They have also stated that there was yet another visit to their house by deceased Nayana when she spoke to them about such demands. On both these occasions, the witnesses have stated, Nayana told them that she was being ill-treated by the accused persons on the count of these two demands. Of course, there is some variation in the evidence of PW 1 Devidas on the one hand and PW 2 Nyaidas and PW 3 Vatsala, on the other, in the sense that PW 1 Devidas has stated that these demands came only from accused no. 1 (appellant no. 1) while PW 2 Nyaidas and PW 3 Vatsala have stated that the demands came from all the accused persons. But, these witnesses are in agreement with each other that on the count of these demands, there was ill-treatment given to Nayana not just by her husband (appellant no. 1), but appellant no. 2 as well as original accused nos. 3, 4 and 5. These witnesses have not elaborated anything about the nature of ill-treatment allegedly given to deceased Nayana. PW 1 Devidas says that its nature was household. One does not understand as to what he intended to convey when he said that it was

“household ill-treatment”. When the witnesses say that particular acts were in the nature of ill-treatment, the witnesses must describe those particular acts constituting ill-treatment and if they do not describe those acts sufficiently, their evidence that there was ill-treatment, would be reduced only to the state of opinion of the witnesses. Such evidence does not help the Court to decide the question of cruelty. Cruelty is not what witnesses opine, but is what is found by the Court on the basis of particular acts, incidents and events stated about in detail to enable the court from an opinion if indeed they constituted cruelty or ill-treatment or harassment, as defined under Section 498A of IPC. Ultimately, it is for the Court to opine and find an act as prohibited or not prohibited under the law and not for the witnesses to do so. Such evidence is lacking here. In the absence of any such specific evidence coming on record, it cannot be found that what has been opined to be the ill-treatment given to deceased Nayana at the hands of all accused, was indeed an ill-treatment or harassment, as contemplated under Section 498A of the Indian Penal Code.

19. Apart from above, I must say that such opinion of ill-treatment has been given by all the three witnesses not only against appellants no. 1 and 2, but also against original accused nos. 3, 4 and 5. The learned Additional Sessions Judge, however, by the impugned

judgment and order found original accused nos. 3,4 and 5 as innocent and not guilty of the offences punishable under Sections 304-B, 306 and 498-A read with Section 34 of the Indian Penal Code, but by the same judgment, found the accused nos. 1 and 2/appellants as guilty of these very offences. The State has accepted the acquittal of original accused nos. 3,4 and 5 when it chose not to file any appeal against it. Admittedly, there is no other evidence available on record to distinguish the case of present appellants from that of accused nos. 3, 4 and 5. So, these appellants also deserved to be treated at par with those acquitted of the same offences. But, the learned Additional Sessions Judge discriminated against them and the discriminatory treatment can be said to have violated the principle of equality and reasonableness found in Articles 14 and 21 of the Constitution of India.

20. Leaving aqside the question of discriminatory treatment of appellants no. 1 and 2, on merits of the case also, one can see that there is no evidence forthcoming from the prosecution about the particular act committed by the appellants against deceased Nayana on account of her failure to meet the alleged illegal demands. There is also no whisper about the frequency of ill-treatment. I have already found that in the absence of any such details, the offence of cruelty as contemplated under Section 498-A of IPC cannot be seen to have been made out and it has not

been made out in a reasonable manner against the appellants by the prosecution.

21. Once it is held that the offence of cruelty has not been proved beyond reasonable doubt against appellants, no presumption under section 113A of the Evidence Act regarding causing of dowry death of deceased Nayana can be drawn. In other words, I find that one of the essential ingredients of the offence of dowry death punishable under Section 304-B of IPC has not been established beyond reasonable doubt by the prosecution. All these aspects of the case have not been considered appropriately by the learned Additional Sessions Judge. The appellants deserve to be acquitted of the offences with which they have been charged in the present case.

22. In the result, appeal deserves to be allowed. Appeal stands allowed. The impugned judgment and order are quashed and set aside. The appellants are acquitted of the offences punishable under Sections 304-B, 306 and 498-A read with Section 34 of the Indian Penal Code. Their bail bonds stand discharged. *Muddemal* property, if any, be destroyed after a period of six months.

S. B. SHUKRE, J