

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

CRIMINAL APPEAL NO.47 OF 2016

- 1) Asid Amir Jahagirdar
Age: 41 Yrs., occu. Labour,
- 2) Shaikh Mansoor Sk.Gani,
Age: 50 Yrs., occu. Labour,
- 3) Sayarabi Sk. Asid Jahagirdar,
Age: 40 Yrs., occu. Housewife,
- 4) Taymunbi Shaikh Mansoor,
age: 47 Yrs., occu. Housewife,

All 1 to 4 R/o Balanagar,
Tq.Paithan, Dist.Aurangabad.

- 5) Sima Sk.Shakir,
Age: 27 Yrs., occu. Housewife,
R/o Piragapwadi, Tq.Ghansavangi,
District Jalna.
- 6) Shaikh Bashir Shaikh Rasid,
Age: 60 Yrs., occu. Driver,
- 7) Maimuna Shaikh Bashir
Age: 55 Yrs., occ. Housewife,
- 8) Faimunabi Shaikh Ahmed,
Age: 49 Yrs., occu. Housewife,
- 9) Shaikh Ahmed Shaikh Hussain,
Age: 53 Yrs., occu.Service,

All 6 to 9 R/o Baijipura,
Aurangabad.

= APPELLANTS
(Orig.Accused Nos.1 to 9)

VERSUS

The State of Maharashtra = RESPONDENT

Mr.Joydeep Chatterji, Advocate for Appellants;
Mr.AM Phule, APP for Respondent-State.

CORAM : SMT.VIBHA KANKANWADI,J.**RESERVED ON : 12/10/2020****PRONOUNCED ON : 24/11/2020****JUDGMENT:-**

1. Present appeal has been filed by original accused persons, challenging their conviction in Sessions Case No.190/2011 by learned Assistant Sessions Judge-2, Aurangabad dated 25.1.2016 for the offences punishable under Sections 143, 147, 306, 452, 294, 323, 504, 506, read with 34 of Indian Penal Code. All the appellants are referred to by their nomenclature before trial Court for the sake of convenience.

2. A brief conspectus of the facts relevant to unfold the controversy is as under :

a) First Information Report (FIR) has been lodged by one Munifa Shaikh on 18.1.2011 with Paithan MIDC Police Station, wherein she contended that she resides with her husband and children at Balanagar, Tq. Paithan. Original Accused No.1 resides in the same vicinity and is distantly related to her. She contended that when she had gone to the forest area to pick up fire-wood around

2.00 pm on 13.1.2011 and returned at about 4.00 pm, she found original accused No.3 assaulting nephew of the informant, who is aged 13-14 years, by stick. Said nephew's parents had gone for work, and therefore, the informant asked accused No.3 as to what has happened. At that time, she told that nephew of the informant has committed rape on daughter of accused No.3, who is aged two and half to three years. Accused No.3 started picking up quarrel with the informant. According to the informant, some other ladies were also present. In the evening, brother-in-law and sister-in-law of the informant, i.e. parents of said nephew came. Accused No.3 had picked up quarrel with them also. Accused No.4 was present along with accused No.3 and she had also abused. Thereafter, there was no quarrel on 14.1.2011. However, at about 9.00 am on 15.1.2011, when husband of the informant went for work, so also her brother-in-law and sister-in-law went outside, the informant was at home; all the accused went inside the house of the informant and started assaulting her with fists and kick blows. They were asking her as to why she has intervened in the assault given by accused No.3 to her nephew.

Accused Nos.1 and 2 were standing outside the house and they were instigating the ladies that they should drag the informant out of the house. Accused Nos.6 and 9 were in the first room of the informant's house and were instigating the lady members to assault the informant. Accused No.9, who is serving in police department, was uttering that he would rape the informant. The ornaments on person of the informant as well as from person of her daughter as well as cash amount was thrown. Accused Nos.6 and 9 were also saying that kerosene should be brought and her house should be put to fire. Accused No.1 gave a phone call to mobile of informant's brother-in-law, viz. Tayyab, and he was calling him to return back to home. He was abusing. House of brother-in-law of the informant was closed and latched by the accused persons. When people started gathering, accused persons went home. The informant further states that at about 5.00 pm, one Akil Ahmed from her village, went to house of the informant and informed that Tayyab had consumed poison and was lying on the ground. The informant went there and thereafter arrangements were made to shift Tayyab to Ghati hospital,

Aurangabad and on the basis of the said report, thereafter, offence under Sections 452, 147, 323, 504 and 506 of IPC came to be registered. Thereafter, Shaikh Tayyab expired on 14.2.2011 at about 6.30 am and, therefore, offence under Section 306 of IPC came to be added.

b. After the FIR was lodged, panchanama of the spot was carried out and statements of witnesses were recorded. It appears that prior to the death of Shaikh Tayyab, all the accused persons came to be arrested in between 19.1.2011 to 21.1.2011. After demise of Shaikh Tayyab, inquest panchanama was drawn and dead body was sent for post mortem. His cause of death is 'poisoning'. However, viscera was preserved for chemical analysis. It appears further that a receipt in respect of purchase of insecticides rogor, in the name of Tayyabbhai from Krishi Seva Kendra, Balanagar, Tq. Paithan, has been recovered. Again statements of witnesses were recorded and after completion of the investigation, chargesheet has been filed.

c. After committal of the case, Charge has been framed at Exh.60 against all the appellants-accused persons. They have pleaded not guilty and, therefore, trial has been conducted. Prosecution examined in all five witnesses to bring home guilt of the accused. After considering the evidence on record and hearing both sides, all the accused persons have been convicted, thus, -

1)	Under Section 143 of IPC	Six months S.I.each
2)	Under Section 147 of IPC	Two years' S.I. each
3)	Under Section 306 read with 149 of IPC	Eight years' R.I. each, fine Rs.5000 each
4)	Under section 452 read with 149 of IPC	Five years' R.I. each with fine of Rs.5000 each
5)	Under Section 294 read with 149 of IPC	Three months' S.I. each
6)	Under Section 323 read with 149 of IPC	Six months' S.I.each
7)	Under Section 504 r/w 149 of IPC	Two years' S.I. each
8)	Under Section 506 r/w 149 of IPC	Seven years' S.I. each

The aforesaid conviction is under challenge in this appeal.

3. It has been vehemently submitted on behalf of the appellants that the FIR shows that

there were two different incidences. The allegation by accused No.3 was that son of Shaikh Tayyab had committed rape on her daughter, who was then two and half to three years of age and according to the informant, when she had intervened and stopped accused No.3 from further assaulting son of the deceased. According to her, the incident is alleged to have taken place on 13.1.2011. Without even going to the testimony; yet only on the basis of the FIR, it can be seen that deceased Tayyab was not aware about as to exactly what had happened inside the house on 15.1.2011 with the informant. Then where is the question of instigation by accused persons to him to commit suicide. The appellants are not challenging the fact that Tayyab has committed suicide by consuming poison, but they are challenging the allegations that they had instigated or abetted commission of suicide by Tayyab.

4. It has been further submitted on behalf of appellants that the prosecution has examined only interested witnesses. PW 2 – Alishanbi Shaikh Tayyab is wife of the deceased, who was admittedly

not present in the house of the informant or in her house also when the alleged incident had taken place around 9.00 am on 15.1.2011. PW 3 – Shaikh Kadu Shaikh Rahim is brother of the deceased and husband of the informant. PW 4 – Zakir Husen Pathan is also the relative of the deceased and it is his contention that accused No.1 had given a phone call on his mobile for the deceased. However, in his cross-examination, it has come on record that, he had not saved mobile number of accused No.1 and it was his guess-work that accused No.1 had given a phone call to the deceased. Even after the said phone call was attended by the deceased, PW 4 says that the behaviour of the deceased was normal to him. He was not aware as to what was the exact conversation, because he could not have heard what the other person would have spoken with the deceased. The ingredients of Section 306 of IPC are not at all attracted. Further, PW 1 – Munifa Shaikh Kadu has given names of four accused persons only, who had allegedly come inside the house. If this is so, how she could see, as to who was standing outside the house, is a question.

If only four persons had come then, the ingredients of Section 143 and 147 of IPC are not attracted, which require five or more persons to commit the offence. Further, in respect of Section 294 of IPC, she has not given as to what were the alleged obscene words uttered. Therefore, the conviction of the appellants-accused is erroneous and illegal. Learned Advocate therefore prayed for the acquittal of the appellants.

5. The learned Advocate for the appellants placed reliance on a decision in the case of S.S.Chheena Vs. Vijay Kumar Mahajan and Anr. - (2010) 12 SCC 190, wherein the ingredients of offence under Section 306 of IPC have been reiterated. In the said case, relevance of the temperament of the person committing suicide has also been considered and it is opined that, when deceased was undoubtedly hypersensitive and the human sensitivity of each individual differs, different people behave differently in same situation, then facts of each case will have to be minutely considered.

6. Per contra, learned APP supported the reasons given by learned Trial Judge and submitted that when there was connection to the incident that had taken place on 13.1.2011 and the two incidences occurred on 15.1.2011, then cumulative effect of all these incidences is required to be considered. The incident dated 15.1.2011 at about 9.00 am would show that in all nine persons had barged into the house of the accused. Therefore, Sections 143 and 147 of IPC are attracted as all the accused persons had come with an intention to commit the offence. Further, though the Charge, in fact, has not been framed; yet offence under Section 509 of IPC has also been proved against accused No.9. He is a police officer yet he has dared to give threat that he would commit rape on the informant, which act on the part of accused No.9, definitely amounts to outraging modesty and criminal force that was intended. The learned APP lastly submitted that the learned Trial Judge has rightly convicted the appellants-accused and, therefore, there is absolutely no need to set aside the same.

7. Testimony of PW 1- Munifa Shaikh would

show that she has broadly supported her FIR (Exh.89). However, it requires a minute scanning. She has stated that when she came back from the forest on 13.1.2011, she found accused No.3 beating her nephew. She asked accused No.3 as to why she is beating that boy, whereupon accused No.3 replied that said boy has committed rape on the daughter, aged two and half years old. The informant then says that accused No.3 had abused her. She has not given the details as to what kind of abuses were uttered. Mere use of a word 'abuse' will not prove offence under Section 504 of IPC. An intention and use of the words would be then necessary. She has further stated that again quarrel took place in the evening. Accused No.3 and 5 were involved in the incident of quarrel. Here also, vague term has been used as quarrel and on the basis of such vague term, we cannot say that ingredients of any offence have been proved.

8. According to the informant, on the next day, again quarrel took place. Accused Nos. 2,3,5,6 and 9 told that they would lock door of Tayyab. They all had beaten her, threw away the

household articles belonging to the informant and then they made a phone call to Tayyab. Threat was given by the accused that they would put three houses to fire, belonging to informant, Tayyab and Mukhtar. The accused persons also abused that they would kill Tayyab. Thereafter, in the evening, son of her brother-in-law told that Tayyab has consumed poison and committed suicide. According to her, Tayyab had consumed poison due to fear of quarrel and one of the accused person is employed in police department and thereafter she states that she, therefore, lodged the report at Exh. 89. Thus, it can be seen from her examination-in-chief that she has not stated many facts in her substantive evidence, i.e. examination-in-chief; which were there in her FIR. The Courts of Law are required to go by substantive piece of evidence and merely by saying that 'the contents of the FIR are correct', will not prove those contents. She has not given the wordings of any abuse in her testimony, that was allegedly given by accused No.9, which would attract offence under Section 509 of IPC; though it appeared in her FIR. Further, she has not even

disclosed the presence of accused Nos.4, 7 and 8; yet these accused persons have been convicted by the learned Trial Judge, which shows there is total lack of application of mind by him. Specific role has not been attributed to each of the accused, whose names have been taken by the informant in para 3 of her examination-in-chief.

9. One important fact to be noted is that the learned Trial Judge has even convicted all the accused persons under Section 294 of IPC, without even considering the ingredients of the offence together with the ingredients of Section 452 of IPC. Section 294(a) of IPC would be attracted if accused commits any obscene act in public place. As regards Section 294(b) of IPC is concerned, it would be attracted if the accused sings, recites or utters any obscene song, ballad or words, in or near any public place. Therefore, the basic ingredient is that the offence should have been committed 'in or near any public place'; whereas Section 452 of IPC is in respect of committing house trespass. That means an act should occur or happen inside the house. If we consider para 3 of examination-in-chief of the informant as it is, it

is totally silent on the point as to which accused was standing at which place. She has figured names of five accused persons and then states that they had thrown her household articles out of the house. That means, we may infer that they all were inside the house. If the entire act was done inside the house, then definitely ingredients of Section 294 of IPC are absolutely not attracted. This is another incidence where there is absolutely lack of application of mind by the learned Trial Judge while considering as to which offence has been proved against which accused. The Trial Courts, where there are more than one accused, are definitely supposed to consider act of each of the accused and if at all in collective activity also specific role will have to be considered in order to come to a conclusion as to whether offence has been proved beyond reasonable doubt or not.

10. As regards the said incident, which has allegedly taken place in the morning of 15.1.2011, except the informant, nobody else has been examined by the prosecution. When the contents of the FIR suggest that people from the vicinity had

gathered there, then there was absolutely no hurdle for the prosecution to examine any person from the vicinity, who had seen the incident. PW 2 – Alishabi is wife of the deceased. So also, PW 3 – Shaikh Kadu is brother of the deceased. PW 3 is husband of PW 1. They both are hear-say witnesses in respect of the incident dated 15.1.2011, which is stated to have taken place at about 9.00 am. When the informant is not supporting the contents of her own FIR, then only on the basis of her cryptic examination-in-chief; by no stretch of imagination, it can be seen that the ingredients of any of the offences with which the accused have been charged, have been proved by the prosecution beyond reasonable doubt.

9. It appears that the prosecution has given much stress on the evidence in support of the offence under Section 306 of IPC. Testimonies of PW Nos.1, 2 and 3 are very much clear to state that none of them were present along with the deceased in major part of the day. They had no occasion to see mental condition of the deceased during the course of the day. It is the case of the prosecution that though some incident had

taken place on 13.1.2011; yet, nothing had happened on 14.1.2011. It appears that the deceased and his wife went out of the house on 15.1.2011 as usual. Even if we consider the examination-in chief of PW 1 as it is, then we can see that she states that "Tayyab consumed poison due to fear of quarrel and one of the accused person is police personnel." The question, therefore, crops up is, as to whether, 'fear' would amount to instigation or abetment? Definitely, in view of the observations in the decision in the case of S.S.Chheena (supra), in case of fear or hyper-sensitivity of a person, individual actions and reactions would be different. The prosecution has not taken pains to adduce evidence as to what was the nature of the deceased. Whether he was tough enough or hyper-sensitive. It could have been brought on record easily when his wife has been examined. The wife is silent on the happenings after alleged incident on 13.1.2011. She has not stated as to what was the discussion between her and deceased, when they came to know about the allegation levelled against their minor son by accused No. 3. If those

allegations were false, then deceased as well as PW 2 would have reacted in support of their son. Feelings of the father after hearing such allegations ought to have been brought on record. There ought to have been some background to come to a conclusion that because of the sensitivity, Tayyab could not sustain the allegations. In fact, which dialogues were exchanged between accused No.1 and Tayyab have not at all come on record. Mere threat to put the houses, as aforesaid, to fire or threat to kill, cannot drive a person to commit suicide, when he has every option to lodge a report with the police. In the instant case, additional factor has been tried to be brought in when the prosecution witnesses alleged that since the accused No.9 is in police department, Tayyab had no hopes that the police would support or help him. If that belief is carried, without any reason by a person, then his alleged fear cannot amount to 'instigation or abetment'. Though PW 1- Munifa states that a phone call was given to Tayyab when the accused persons were in her house; yet she has not given timing. As per her FIR, the incident had taken

place between 11.00 am to 12.00 pm. According to PW 4 – Zakir Husen Pathan, he states that he had received a phone call at about 12.00 pm. His Call Details Record (CDR) have not been produced. It could have been easy for the Investigating Officer (PW 5) to collect his CDR so also the Call records of accused No.1. The tower location could have been ascertained. Further, from the testimony of PW 4, it can be seen that he was not knowing mobile phone number of accused No.1. He has not saved the number of accused No.1 in his hand-set. In his cross-examination, he has stated that he had heard the other person instructing him to give phone call to Tayyab. It was his guess-work that the said phone call was by accused No.1. He has not stated that after the talk was over, he had asked deceased who was the caller. He also does not say as to what were the facial expression of deceased, when he was talking on phone. When every opportunity was available to bring such evidence to identify that the said call was given by accused No.1, no such evidence has been collected by the Investigating Officer and adduced by prosecution. No explanation to that effect has

been given.

11. Another fact, which can be naturally seen from the testimony of PW 4 that he would not have heard the conversation from the side of accused No.1 because he has not come with a case that Tayyab had put the mobile phone on speaker mode and heard what the other person is saying. So unless those dialogue or conversation would have come on record, we cannot say that there was any kind of 'instigation or abetment'. Neither PW. Nos. 1, 2 nor 3 are saying that Tayyab was not holding mobile phone and accused No.1 knew that he was along with PW 4 - Zakir, whose number was supplied by any one of them. A simple question that arises as to how accused No.1 could have got knowledge that he should contact PW 4 - Zakir first and then ask him to give phone to Tayyab. Therefore, the attempts of the prosecution to connect the alleged talks and submitting that it amounts to 'instigation or abetment', is absolutely weird.

12. In Ramesh Kumar Vs. State of Chattisgarh - (2001) 9 SCC 618, the Hon'ble Apex court had considered the scope of Section 306 of IPC and the

ingredients thereof, which are essential for abetment, as set out in Section 107 of IPC. In the said decision, the Hon'ble Apex court has observed 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."

13. Further, in the case of Chitresh Kumar Chopra Vs. State (Govt. of NCT of Delhi) – 2009 (16) SCC 605, the Hon'ble Apex Court had an occasion to deal with the aspect of abetment. The Court dealt with the dictionary meaning of the word "instigation" and "goading". The Court opined that there should be intention to provoke, incite or

encourage the doing of an act by the latter. Each person's suicidability pattern is different from the others. Each person has his own idea of self-esteem and self-respect. Therefore, it is impossible to lay down any straight-jacket formula in dealing with such cases. Each case has to be decided on the basis of its own facts and circumstances.

14. Further pronouncement by the Hon'ble Apex Court in the case of M.Mohan Vs. State represented by the Dy. Superintendent of Police – 2011 STPL (Web) 204 SC, is helpful, wherein, it has been observed thus, -

"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 IPC, 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."

15. Further, recently in the decision in the case of Gurcharan Singh Vs. The State of Punjab (Criminal Appeal No. 40/2011 decided on 1st October, 2020), it has been observed by the Hon'ble Apex Court thus,

" In order to bring a case within the purview of Section 306 IPC, there must be a case of suicide and in the commission of the said offence, the person who is said to have abetted the commission of suicide must have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide. Therefore, the act of abetment by the person charged with the said offence must be proved and established by the prosecution before he could be convicted under Section 306 IPC."

16. Thus, after applying the aforesaid legal position to the prosecution evidence brought on record in this case, it can be seen that there was absolutely no active role played by any of the accused persons, which could be connected to the instigation, as contemplated under Section 107 of IPC, which is further required to be considered in the abetment, as contemplated under Section 306 of IPC. The entire prosecution story itself is doubtful, untrustworthy. The conviction of the

accused persons under Sections 143, 147, 452, 394, 323, 504, 506 read with 149 of IPC, only on the basis of testimony of a sole witness, i.e. the informant, who appears to be highly interested, is erroneous and illegal. She herself has not supported the entire story in her FIR and therefore her testimony ought not to have been accepted as gospel truth. We cannot ignore the background regarding the allegation of accused No.3 that the son of the deceased had committed the offence though he himself was minor; yet rape was committed on a very small child and, therefore, possibility that Tayyab going in depression or worries as to what will happen with his son and then fear due to defamation of the family, driving him to commit suicide, cannot be ruled out, which are the reasons, wherein there was absolutely no active role played by the accused persons.

17. Based on the foregoing discussion, it becomes evident to observe that the impugned judgment of conviction passed by the learned Trial Judge is absolutely perverse and cannot be sustained even for a moment. Resultantly, the

appeal deserves to be allowed. Hence, following order, -

ORDER

- i. The appeal stands allowed;
- ii. The conviction and sentence imposed upon the appellants-accused by the learned Assistant Sessions Judge-2, Aurangabad in Sessions Case No.109/2011 on 25.1.2016 for the offences punishable under Sections 143, 147, 306, 452, 294, 323, 504, 506, read with 34 of Indian Penal Code, is hereby set aside.
- iii. The appellants-accused stand acquitted of all the aforesaid offences.
- iv. Fine amount, if any, be refunded to them after the appeal period is over.
- v. Needless to say, the order regarding disposal of the muddemal property, if any, stands confirmed.
- vi. Bail bonds of appellants stand cancelled.

(SMT. VIBHA KANKANWADI, J.)