

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 140 OF 2002

The State of Maharashtra

(Through the police of Rajarampuri
Police Station, Kolhapur)

... Appellant
(Ori. Complainant)

V/s

1. Rajesh Sadashiv Dhaware

Age- 33 yrs.

2. Sadashiv Sawalarama Dhaware

Age- 60 yrs.

3. Ashok @ Ajit Sadashiv Dhaware

Age- 26 yrs.

All residents near the Mosque of
Vikramnagar, Kumbhar Chal,
Kolhapur.

... Respondents
(Ori. Accused).

Mr. H. J. Dedhia, APP for the State-Appellant.

Mr. Pratap Patil, for Respondent Nos. 1 to 3.

**CORAM : PRASANNA B. VARALE &
V. G. BISHT, JJ.**

DATE : 8th DECEMBER, 2020.

JUDGMENT (PER : V. G. BISHT, J.)

This Appeal is filed by the State challenging the judgment and order of acquittal dated 30th June, 2001 passed in Sessions Case No. 143 of 1999 by 4th Ad-hoc Assistant Sessions Judge, Kolhapur, for the offences punishable under Sections 498A, 304B, 306, 323 and 504 read with 34 of the Indian Penal Code 1860 (for short “IPC”).

2 The prosecution case in short is as under:

(a) On 18/04/1999 one Usman Bapu Mujawar, Police Head Constable (PW-8), was attached to Rajarampuri Police Station. PSO Mr. Nimbalkar received a message that a patient of burn is admitted in the hospital and accordingly he deputed PW-8 Head Constable to C.P.R. hospital for recording the statement of that patient. Accordingly, PW-8 visited the C.P.R. hospital, Kolhapur and met Medical Officer, namely, Dr. Reshma Paygonda Patil (PW-6). PW-6 Medical Officer examined the patient in his presence and after verifying that the patient was conscious and able to give her statement and accordingly gave her endorsement whereupon PW-8 recorded the statement of the patient (Exh. 44), which after the death of the patient came to be treated as her dying declaration and FIR as well.

(b) It appears from the dying declaration that Vasanti Rajesh Dhaware (since deceased) was the wife of the accused Rajesh Sadashiv Dhaware (A-1). Accused Sadashiv Sawalarama Dhaware (A-2) is father-in-law while A-3 Ashok @ Ajit Sadashiv Dhaware is brother-in-law of the deceased.

(c) In the dying declaration the deceased alleged that after the marriage all the accused started ill-treating and beating her on the ground that no honour was given to them at the time of marriage. Prior to the main incident in question, on Thursday a quarrel took place between the deceased and A-2 on the ground as to why the dinner was not adequate. A-3 was also present in the house while A-1 had gone on duty. It further alleges that A-2 expelled the deceased from the house and therefore, she went to her parents at Siddharth Nagar, Kolhapur. She returned only after her husband rang her up. Her mother Aruna (PW-3) accompanied her till the house of accused and at that time a quarrel took place between her mother and A-1. After the departure of the deceased's mother, she was beaten by her husband.

(d) It is then seen from the dying declaration that on the day of incident i.e. on 18/04/1999 at about 2-00 p.m. her husband came from duty and a quarrel took place between her and her husband and thereafter husband left the house. A-2 was sleeping in the house while A-3 had gone to other city. Therefore, at about 3-00 p.m. being fed up with the constant harassment and beatings given by all the accused, she poured kerosene oil on her person and set herself on fire. After hearing her commotion the neighbours rushed and threw water on her person. She was then taken to the hospital by A-1.

(e) It then appears from the record that on the basis of her statement-cum-dying declaration PW-10 Khanderao Atmaram Nimbalkar registered Crime No. 53 of 1999 under Sections 498A, 323, 504 r/w 34 of the IPC with Rajarampuri Police Station. However, as the deceased succumbed to the burn injuries during the course of treatment, Section 304-B came to be added.

(f) It further appears from the record that after recording of the statement of the deceased PW-8 Usman Bapu Mujawar visited the scene of occurrence and prepared spot panchanama and thereafter, he handed over further investigation to PSI Vasanti Gopal Kamble (PW-12).

(g) PW-12, investigating officer, on her part, recorded the statements of witnesses, prepared inquest panchanama (Exh. 31) and then handed over further investigation to Mr. Bhambure. After completion of the investigation Mr. Bhambure submitted the charge-sheet against the accused.

3 The prosecution in order to prove its case has examined as many as 12 witnesses and exhibited number of documents. The respondents-accused were questioned under Section 313 of the Code of Criminal Procedure, 1973 (for short "the Cr.P.C.") about the incriminating evidence and circumstances and they denied all of them as false. According to them, a false case is filed against them at the instance of relations of Vasanti (the deceased).

4 Mr. Dedhia, learned APP for the appellant-State, vehemently submitted that the learned trial judge ought to have appreciated the fact that the incident had taken place within six years of the marriage of the deceased with A-1 and as also the evidence led on the point of cruelty and dowry demand. All the necessary ingredients of the offences though duly established by adducing the evidence of the brother and mother of the deceased and in addition the dying declaration of the deceased, still the learned trial judge erred in coming to the conclusion that neither evidence is satisfactory nor the dying declaration of the deceased. If the whole evidence adduced by the prosecution coupled with the dying declaration of the deceased is read in proper perspective then there cannot be any conclusion other than that the accused were responsible for the death of the deceased. In view of this, the impugned judgment and order of acquittal needs to be quashed and set aside, argued learned APP

5 Per contra, Mr. Patil, learned counsel for the respondents-accused opposed the submissions of the learned APP by contending that no fault can be found with the impugned judgment and order of acquittal inasmuch as it has taken into consideration all the infirmities and short comings appearing in the prosecution evidence by the learned trial

judge. At the same time, the learned trial judge has also given cogent and convincing reason for not accepting the dying declaration which is surrounded by suspicious circumstances. Thus, according to learned counsel, the Appeal sans merits and deserves to be dismissed.

6 At the very outset, it may be noted that the death of the deceased in question is not disputed. PW-7 Dr. Supriya Sambhajirao Jadhav, who performed an autopsy over the dead body, states in her evidence (Exh.41) that probable cause of death was due to shock due to 95% mixed burns. As already noted that there is no quarrel as to the death as also cause of death, the only question to be determined about is the authorship of the death of the deceased.

7 Now, since the prosecution has come with a case of cruelty and dowry death and before undertaking the exercise of assessment of evidence led by prosecution, we think it appropriate to refer to Section 498-A and 304B of the IPC. The said provisions read as follows :

*“498-A – HUSBAND OR RELATIVE OF
HUSBAND OF A WOMAN SUBJECTING HER TO
CRUELTY:*

Whoever, being the husband or the relative of

the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation : For the purposes of this section, “cruelty” means

(a) Any willful 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 (whether mental or physical) of the woman;

or

(b) Harassment of the woman where such harassment is with a view to coercing her or any person related to 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”.

8 The said provision came up for consideration in **Giridhar Shankar Tawade v. State of Maharashtra**¹, where the Apex Court dwelling upon the scope and purport of Section 498-A IPC has held thus:-

“ The basic purport of the statutory provision is to avoid ‘cruelty’ which stands defined by attributing a specific statutory meaning attached thereto as noticed herein before. Two specific

¹ (2002) 5 SCC 177; (AIR 2002 SC 2078)

instances have been taken note of in order to ascribe a meaning to the word 'cruelty' as is expressed by the legislatures: Whereas explanation (a) involves three specific situations viz., (i) to drive the woman to commit suicide or (ii) to cause grave injury or (iii) danger to life, limb or health, both mental and physical, and thus involving a physical torture or atrocity, in explanation (b) there is absence of physical injury but the legislature thought it fit to include only coercive harassment which obviously as the legislative intent expressed is equally heinous to match the physical injury : whereas one is patent, the other one is latent but equally serious in terms of the provisions of the statute since the same would also embrace the attributes of 'cruelty' in terms of Section 498-A."

9 Section 304B of the IPC reads as follows:

"304B. Dowry death.— (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for

dowry, such death shall be called “dowry death”, and such husband or relative shall be deemed to have caused her death.

Explanation. —For the purpose of this subsection, “dowry” shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.”

10 Section 113B of The Indian Evidence Act, 1872 reads as follows:

“113B. Presumption as to dowry death.— When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.

Explanation.—For the purposes of this section, “dowry death” shall have the same meaning as in section 304B, of the Indian Penal Code, (45 of 1860).”

11 Thus, it can be seen that the offence created by Section 304B requires the following elements to be present in order that it may apply:

I. Within 7 years of the marriage, there must happen the death of a woman (the wife).

II. The death must be caused by any burns or bodily injury.

OR

The death must occur otherwise than under normal circumstances.

III. It must be established that soon before her death, she was subjected to cruelty or harassment.

IV. The cruelty or harassment may be by her husband or any relative of her husband.

V. The cruelty or harassment by the husband or relative of the husband must be for, or in connection with, any demand for dowry.

12 Section 304B treats this as a dowry death. Therefore, in such circumstances, it further provides that husband or relative shall be deemed to have caused her death. Section 113B of the Indian Evidence Act, 1872 provides for presumption as to dowry death. It provides that when the question is whether the dowry death, namely, the death contemplated under Section 304B of the IPC, has been committed by a

person, if it is shown that soon before her death, the woman was subjected by such person to cruelty or harassment, for in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death. It is no doubt a rebuttable presumption and it is open to the husband and his relatives to show the absence of the elements of Section 304B.

13 The foremost aspect to be established by the prosecution is that there was reliable evidence to show that the woman was subjected to cruelty or harassment by her husband or his relatives which must be for or in connection with any demand for dowry, soon before her death. Before the presumption is raised, it must be established that the woman was subjected by such person to cruelty or harassment and it is not any cruelty that becomes the subject matter of the provision but it is the cruelty or harassment for or in connection with, demand for dowry.

14 The aforesaid analysis of the provisions lay down how coercive harassment can have the attribute of cruelty that would meet the criterion as conceived of under Sections 498-A and 304B of the IPC.

15 Keeping above analysis in mind, we now consider the evidence on record.

16 PW-1 Sanjay Dinkar Kamble, brother of the deceased, states in his evidence (Exh. 26) that the deceased was married to A-1 on 19/05/1994. As and when the deceased used to visit her parental home, she used to inform him that the accused used to beat and ill treat her. They were giving troubles to her on the ground that at the time of marriage they were not honoured properly.

17 It is his further evidence that on 15/04/1999 the deceased came to his house and told that she was beaten by her husband and in-laws and was expelled from the house.

18 Adducing evidence on the point of main incident, PW-1 states that on 18/04/1999 the accused persons had beaten Vasanti i.e. deceased. As soon as he came to know about it, he rushed to C.P.R. hospital, Kolhapur and found that the deceased was in a burnt condition. When he asked the deceased about her condition, she told that due to ill treatment given by all the accused she set herself on fire. She also told that as the accused persons had abused her she poured kerosene on her person.

19 Lastly, he states that when his sister was carrying pregnancy of six months he was told that the accused-husband used to demand Rs.50,000/- for purchasing a plot.

20 As far as the evidence of PW-1 brother pertaining to the harassment given to the deceased after the marriage and on the ground that the accused were not properly honoured at the time of marriage ceremony is concerned, the same gets due corroboration from the dying declaration. The dying declaration also shows that after the marriage the accused used to harass her and beat her on the ground that they were not honoured properly at the time of marriage ceremony. Whatever has been declared in the dying declaration and as also by PW-1 brother is nothing but a generalized statement without giving any specific details of the harassment. Even assuming it to be so, we would be considering the truthfulness and genuinity of the dying declaration at some later stage.

21 Coming to the incident of 15/04/1999, as is deposed by PW-1 brother, it appears that on that day not only the deceased was beaten by all the accused but was also expelled from the house. On the other

hand, if the dying declaration is read carefully then it would show that a quarrel had taken place between the deceased and her father-in-law i.e. A-2 on the ground that there was no dinner left in the house. It further shows the presence of brother-in-law i.e. A-3, however, A-1-husband was not there and was out of the house in connection with his employment. The dying declaration, as is deposed by PW-1 brother, nowhere alleges that on 15/04/1999 the deceased was beaten by all the accused and then was expelled from the house. The dying declaration simply shows that because of the quarrel between the deceased and A-2 on the ground as stated herein-above, she was expelled from the house by the latter.

22 Coming to the main incident of 18/04/1999, the evidence of PW-1 brother shows that on that day also the deceased was beaten by all the accused but then this piece of evidence has come by way of omission and when confronted in the cross-examination PW-1 insisted of having said so before the investigating officer but the investigating officer-PW 12 in her cross-examination at para 4 has very categorically stated that this witness had not stated before her that on 18/04/1999 the deceased was beaten by all the accused.

23 The main part of the evidence of PW-1 is that he was told by the deceased that as the accused persons had abused her, she poured kerosene on her person and set herself ablaze. This means and should be taken seriously that the deceased was provoked by the accused persons by abusing her and because of that provocation she got herself ablazed after pouring kerosene on her person. We are disappointed to note that no such reason behind the act of self immolation is forthcoming in the dying declaration. All that dying declaration shows is that since the deceased was fed up with the ill treatment and harassment given by the accused, she took the extreme step of getting herself ablazed.

24 Lastly, the only evidence adduced by PW-1 brother on the point of alleged dowry demand is that he was also told by the deceased that her husband (A-1) used to demand Rs.50,000/- from her for purchasing a plot. Again we are unable to locate this serious accusation from the dying declaration of the deceased. The dying declaration nowhere alleges that A-1 husband at any point of time had demanded Rs.50,000/- from the deceased for purchasing a plot. Even this piece of evidence has come by way of omission on the record and again the said omission is duly proved by PW-12, investigating officer, in her evidence

at para 4. According to PW-12, investigating officer, PW-1 had not stated before her that he was told by the deceased that there was demand of Rs.50,000/- from the side of accused persons for purchasing a plot.

25 Having regard to the above serious infirmities noted by us from the evidence of PW-1 brother, we are absolutely not satisfied with the testimony of this witness and therefore, would not like to place any reliance on it.

26 PW-3 Aruna Dinkar Kamble, mother of the deceased, states in her evidence (Exh. 32) that after the marriage the accused used to beat, ill treat and expel the deceased from the house on the ground that they were not honoured properly at the time of marriage. This fact was told to her by the deceased herself.

27 On 15/04/1999 at about 10-00 p.m. the deceased came to her house and told that accused Sadashiv (A-2) and Ajit (A-3) had picked up a quarrel with her on the ground that as to why dinner was not there and expelled her from the house. On the next morning, she took her

daughter to the house of accused. She confronted A-1 as to why he had driven out the deceased out of the house and at that time A-1 beat her daughter with hands and also started expelling her from the house on the ground that he was not honoured in the marriage.

28 Her evidence then shows that on 18/04/1999 she received a message from A-1 that she should come at his house for taking lunch (*mahal* dinner) means the lunch given after the death of a person. When she started proceeding towards the house of accused, an auto rickshaw came from opposite direction in which A-1 and her daughter, who was wrapped in a bed-sheet, were there. In the said auto rickshaw Manisha, daughter of her sister, was also found. She then asked the deceased as to what had happened, to which she told that due to the troubles given by husband, father-in-law and brother-in-law she poured kerosene on her person and set herself on fire.

29 The evidence of PW-3 mother is somewhat on the line of PW-1 son with an addition that the accused were also in habit of driving away the deceased from the house on the ground that they were not honoured in the marriage properly. This regular expulsion from the matrimonial

house is neither the part of dying declaration nor that of evidence of PW-1 son.

30 Then coming to the incident of 15/04/1999, according to PW-3 mother, on that day A-2 and A-3 had picked up a quarrel with the deceased and thereafter, she was driven away from the house. The dying declaration, on the contrary, nowhere implicates A-3. Similarly, while the evidence of PW-1 shows that she was driven out from the house after a beating by all the accused, no such evidence is adduced by PW-3 mother. Her evidence nowhere shows that it is only after beating given by all the accused, the deceased was driven away.

31 The evidence of PW3-mother then shows that when she accompanied the deceased to the house of accused there again A-1 quarreled with the deceased, beat her and drove her away on the ground that he was not honoured in the marriage. Interestingly, this material piece of evidence neither gets corroboration from deceased's own dying declaration nor from the mouth of PW-1 son.

32 Coming to the last part of her evidence, we note that when this

witness asked the deceased in an auto rickshaw as to how she got burns the latter replied that because of the troubles given by all the accused she herself poured kerosene on her person and set on fire.

33 It is worth mentioning that in the evidence of this witness it is nowhere explained the kind of troubles suffered and which compelled the deceased to commit the suicide. As against this piece of evidence, if we see the evidence of PW-1 brother, which we already have quoted, then it would be seen that the provocation behind such an extreme step of such self immolation was the abuses allegedly given by the accused to the deceased. Thus, two very contradictory pieces of evidences are there on record. Two different sets of reasons behind the self immolation by the deceased are given by these witnesses, namely PW-1 brother and PW-3 mother, which in a natural course could not have been.

34 For the aforesaid reasons, like PW-1, we are not encouraged by the testimony of PW-3 mother.

35 PW-11 Manisha Sudheer Kale, who is niece of PW-3, states in her evidence (Exh.49) that she was told by the deceased that accused used

to ill treat her on the ground that they were not honoured properly at the time of marriage ceremony. This is rather a very weak piece of evidence like PW-1 and PW-3 and does not take further as to the accusation of cruelty or for that matter dowry demand.

36 As far as incident dated 18/04/1999 is concerned, her evidence shows that when she asked as to the injuries sustained by the deceased, the deceased told that her husband had quarreled with her, abused and beat her and left the house and therefore, feeling fed up she poured kerosene on her person and set herself on fire. Again, this piece of evidence runs counter to the contentions of the dying declaration. Although dying declaration shows that some quarrel had taken place between the deceased and her husband and then the husband had left the house but it nowhere shows, as is deposed by PW-11, that in the said quarrel A-1 husband had not only abused the deceased but had also beaten her.

37 Surprisingly, the above piece of evidence has come by way of omission inasmuch as the said fact was missing from the statement recorded by the police. What is more surprising is that the investigating

officer, who examined this witness during the course of investigation, was not brought before the court for the reasons best known to the prosecution. Therefore, the said omission could not be proved by the defence for which the defence cannot be blamed. Even otherwise, we have found how her oral version does not get corroboration from the dying declaration. In such circumstances, this witness is also of no help to the prosecution.

38 After having cleared the reliability and credibility of above-said witness, we are now left with the dying declaration.

39 PW-8 Usman Bapu Mujawar states in his evidence (Exh.43) that at the relevant time he was attached to Rajarampuri Police Station. PSO Nimbalkar received a message on 18/04/1999 that the patient is admitted in the C.P.R. Hospital in a burnt condition and, therefore, he asked him to visit the C.P.R. Hospital and record the statement of the said patient. It is his further evidence that he accordingly visited the hospital. He along with Dr. Reshma Paygonda Patil (PW-6) went to the ward. Dr. Patil examined the patient and put an endorsement to that effect that the patient was conscious and was able to give her statement.

She also put an endorsement to that effect and thereafter he recorded the statement of the deceased. He then proved the statement at Exh.44.

40 Similarly, PW-6 Dr. Reshma Patil states in her evidence (Exh.38) that on 18/04/1999 she was attached to C.P.R. Hospital, Kolhapur as a Medical Officer. The deceased was admitted in her hospital at about 3.45 p.m. in a burnt condition. She examined her and found that the patient was in a good condition for giving statement. Accordingly, she made an endorsement before and after the completion of the statement.

41 From the evidence of PW-8, who recorded the statement of deceased and as also PW-6 Medical Officer, it is very much clear that the dying declaration of the deceased came to be recorded by PW-8 PHC in the very presence of PW-6 Medical Officer. We are unable to understand as to why either of these two witnesses have not deposed as to what was the nature of the dying declaration allegedly given by the deceased. Even PW-8, who recorded the dying declaration, nowhere states in his whole evidence as to what was told to him by the deceased that is to say under what circumstances the deceased suffered burn injuries. If we have to read the contents of the dying declaration which

we have already pointed it out exhaustively from the oral evidence of material witnesses, namely, PW-1 brother and PW-3 mother as to how the dying declaration or for that matter their oral testimonies vis-a-vis the dying declaration do not get satisfactory corroboration. Here it is not the case that the case is only based on dying declaration and not the oral evidences of the eye witnesses, namely, PW-1 and PW-3.

42 The said dying declaration becomes more questionable particularly, when the main accusation of cruelty and dowry demand allegedly at the hands of accused are not convincingly established by the prosecution. There is absolutely no evidence that soon before the death of deceased she was subjected to cruelty by the accused persons in connection with demand of the dowry. It is also to be noted pertinently that Section 498A does not contemplate every kind of cruelty which is made punishable by said section. It involves the specific contingencies, viz., (i) to drive the woman to commit suicide (ii) to cause grave injury or (iii) danger to life, limb or health, both mental and physical, and thus involving a physical torture or atrocity. Similarly, it also involves coercive harassment with a view to meet any unlawful demand for any property or valuable security or is on account of failure by her or any related person to her meet any such demand.

43 None of above ingredients are clinchingly brought on record by the prosecution. In such circumstances, no presumption can be raised under Section 113-B of the Indian Evidence Act, 1872.

44 On re-appreciating the evidence on record, we are of the considered view that the evidence of PW-1 brother and PW-3 mother is not upto the mark. It is not inspiring and reliable. So is the case with dying declaration, if juxtaposed the oral testimonies.

45 The learned trial judge has considered aforesaid legal and factual aspects in its proper perspective. As such, the impugned judgment and order does not warrant interference and deserves to be maintained.

46 In the result, we find no merit in the appeal and accordingly the appeal stands dismissed.

(V. G. BISHT, J.)

(PRASANNA B. VARALE, J.)