

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.222 of 2002

Judgment Reserved on : 19.3.2021

Judgment Delivered on : 24.5.2021

Sanjay Sahu, son of Dehul Ram Sahu, aged about 24 years, resident of Village Parana, P.S. Arjunda, District Durg, Chhattisgarh

---- Appellant

versus

State of Chhattisgarh

--- Respondent

For Appellant : Shri N.S. Dhurandhar, Advocate
For Respondent : Shri Roshan Dubey, Panel Lawyer

Hon'ble Shri Justice Arvind Singh Chandel

C.A.V. JUDGMENT

1. This appeal is directed against the judgment dated 12.2.2002 passed by the Special Judge and Additional Sessions Judge, Durg in Sessions Trial No.147 of 2000, whereby the Appellant has been convicted and sentenced as under:

<u>Conviction</u>	<u>Sentence</u>
Under Section 306 of the Indian Penal Code	Rigorous Imprisonment for 3 years and fine of Rs.2,000/- with default stipulation

2. According to the case of prosecution, the Appellant is husband of Mainabai (deceased). Their marriage was solemnised 3 years prior to the incident. After 1 year from the marriage, ill-treatment and cruelty started taking place with Mainabai by her husband/Appellant

and her mother-in-law/co-accused Jaiwanbai (acquitted by the Trial Court). 1 week prior to the incident, Mainabai left her matrimonial house and went to her paternal house. There, she narrated the entire alleged incident to her parents. Thereafter, family members of the Appellant brought her back to her matrimonial house. Allegedly, on 6.6.1999, again a dispute took place between the accused persons and Mainabai. Thereafter, Mainabai poured kerosene on her and set herself on fire. She was immediately taken to the District Hospital, Durg. Thereafter, for better treatment, she was taken to Sector-9 Hospital, Bhilai. During the course of treatment, she died in the hospital on 11.6.1999. Prior to her death, i.e., on 10.6.1999, written complaint (Ex.P4) was lodged by her father Suresh (PW4). Morgue intimation (Ex.P8) was also lodged. On the basis of morgue inquiry and written complaint (Ex.P4), First Information Report (Ex.P11) was registered. Post mortem examination over the dead body of Mainabai was conducted. Post mortem report is Ex.P3, according to which, deceased Mainabai had sustained 85% burn injuries and cause of her death was shock. Inquest proceeding (Ex.P5) was conducted. Statements of witnesses were recorded under Section 161 of the Code of Criminal Procedure. On completion of the investigation, a charge-sheet was filed. The Trial Court framed charges against the Appellant and co-accused Jaiwanbai.

3. To bring home the offence, the prosecution examined as many as 15 witnesses. Statements of the Appellant and co-accused were also recorded under Section 313 of the Cr.P.C. in which they

denied the guilt, pleaded innocence and false implication. It was the defence of the Appellant that there was cordial relation between him and his wife/deceased. Her death was accidental. During the course of treatment in the hospital, after obtaining a certificate of fitness of Mainabai to make statement, her written dying declaration (Ex.D2) was also recorded by an Executive Magistrate. In his defence, the Appellant has examined two witnesses, namely, Dr. V.K. Sao, who gave the fitness certificate, as Defence Witness No.1 and Naib-Tahsildar/Executive Magistrate U.S. Agrawal, who recorded the written dying declaration (Ex.D2), as Defence Witness No.2.

4. On completion of the trial, the Trial Court acquitted co-accused Jaiwanbai of the charge framed against her under Section 306 read with Section 34 of the Indian Penal Code, but convicted and sentenced the Appellant as mentioned in 1st paragraph of this judgment. Hence, this appeal.
5. Learned Counsel appearing for the Appellant argued that without there being sufficient and clinching evidence on record against the Appellant, the Trial Court has convicted him. It was further argued that immediately after the incident, the Appellant took injured Mainabai to District Hospital, Durg and thereafter for her better treatment took her to Sector-9 Hospital, Bhilai. On 6.6.1999 itself, Executive Magistrate U.S. Agrawal (DW2), after obtaining a fitness certificate from Dr. V.K. Sao (DW1), recorded written dying declaration (Ex.D2) of injured Mainabai. But, the prosecution has

suppressed this fact and did not submit the said written dying declaration (Ex.D2) along with the charge-sheet. According to the contents of the written dying declaration (Ex.D2), the incident was accidental. Injured Mainabai died on 11.6.1999. Between 6.6.1999 and 11.6.1999, injured Mainabai did not make any complaint that she was put under pressure for making the said written dying declaration (Ex.D2). It was further argued that the written dying declaration (Ex.D2) has a higher evidentiary value. Executive Magistrate U.S. Agrawal (DW2) had nothing to do with injured Mainabai or the accused persons. He recorded what was said by Mainabai. Ex.D2 is a vital material document which was suppressed by the prosecution by not filing it along with the charge-sheet. The Investigating Officer did not make a fair investigation. Oral dying declaration, as stated by Suresh (PW4) and Sushila (PW5), father and mother of deceased Mainabai respectively, is a weak type of evidence. Therefore, finding of the Trial Court in this regard is not in accordance with law. It was further argued that even if for the sake of argument it is considered to be true that the death was suicidal, there is no evidence on record to show that Mainabai was instigated or abetted to commit suicide as defined under Section 107 of the Indian Penal Code. Therefore also, conviction of the Appellant is not sustainable. In support of his contention, Learned Counsel placed reliance on a judgment of this Court in **Criminal Appeal No.711 of 2013 (Tilak Kumar Nayak v. State of Chhattisgarh)** rendered on 8.11.2017. He also relied on (2008) 16 SCC 705 (**Samadhan Khudaka Koli v. State of Maharashtra**).

6. On the other hand, Learned Counsel appearing for the State supported the impugned judgment and opposed the above arguments advanced by Learned Counsel appearing for the Appellant. He argued that the conviction of the Appellant is strictly in accordance with law and it does not bear any infirmity. It was further submitted that once the written dying declaration (Ex.D2) has been produced before the Court and the Court has considered the same, no prejudice is caused to anyone and, therefore, it cannot be said that the document is suppressed by the prosecution and as such the Appellant is not entitled to derive any benefit out of this.
7. I have heard Learned Counsel appearing for the parties and perused the material available on record including the statements of witnesses of both the sides with utmost circumspection.
8. Before discussing the evidence available on record, it would be appropriate to refer to the provisions of Sections 107 and 498A of the Indian Penal Code, which read as under:

“107. Abetment of a thing.—A person abets the doing of a thing, who—

First.—Instigates any person to do that thing; or

Secondly.—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly.—Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Explanation 2.—Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

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 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 (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.”

9. Dealing with the similar issue, in (2007) 11 SCC 205 (**Bhagwan Das v. Kartar Singh**), it has been observed by the Supreme Court as under:

“15. In our opinion the view taken by the High Court is correct. It often happens that there are

disputes and discords in the matrimonial home and a wife is often harassed by the husband or her in-laws. This, however, in our opinion would not by itself and without something more attract Section 306 IPC read with Section 107 IPC.

16. However, in our opinion mere harassment of wife by husband due to differences per se does not attract Section 306 read with Section 107 IPC, if the wife commits suicide. Hence, we agree with the view taken by the High Court. We, however, make it clear that if the suicide was due to demand of dowry soon before her death then Section 304-B IPC may be attracted, whether it is a case of homicide or suicide. (Vide *Kans Raj v. State of Punjab*, (2000) 5 SCC 207, *Satvir Singh v. State of Punjab*, (2001) 8 SCC 633 and *Shanti v. State of Haryana*, (1991) 1 SCC 371.)”

10. Further, it has been observed by the Supreme Court in **AIR 2010 SC 327 (Gangula Mohan Reddy v. State of Andhra Pradesh)** as under:

“20. 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.

21. The intention of the Legislature and the ratio of the cases decided by this court is 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 committed suicide.”

11. In (2011) 3 SCC 626 (*M. Mohan v. State Represented By The*

Deputy Superintendent of Police), the Supreme Court, by the following observation, has clearly held that in order to convict a person under Section 306 of the IPC there has to be a clear *mens rea* to commit the offence:

“45. 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.”

12. With regard to a dying declaration, in **Samadhan Khudaka Koli case** (supra), it is observed by the Supreme Court as under:

“12. A dying declaration made before a Judicial Magistrate has a higher evidentiary value. The Judicial Magistrate is presumed to know how to record a dying declaration. He is a neutral person. Why the prosecution had suppressed the dying declaration recorded by the Judicial Magistrate is not known. Prosecution must also be fair to the accused. Fairness in investigation as also trial is a human right of an accused. The State cannot suppress any vital document from the court only because the same would support the case of the accused.

13. The learned Sessions Judge as also the High Court, in our opinion, committed a serious illegality in refusing to consider the said question in its proper perspective. The prosecution did not explain as to why the said dying declaration was not brought before the court. The learned Sessions Judge as also the High Court surmised about the contents thereof. Not only the contents of a dying declaration, but also the manner in which it is

recorded and the details thereof play a significant role in the matter of appreciation of evidence.”

13. In the light of above enunciation of law, I shall now discuss the evidence available on record of the present case. It is not in dispute that marriage between the Appellant and Mainabai (deceased) was solemnised 3 years prior to the incident. It is also not in dispute that Mainabai was brought to the District Hospital, Durg by the Appellant on 6.6.1999. Thereafter, she was brought to Sector-9 Hospital, Bhilai for better treatment. There, during the course of treatment, she died on 11.6.1999. According to the post mortem report (Ex.P3) and the opinion given therein by Autopsy Surgeon Dr. P.C. Deshmukh (PW3), Mainabai had sustained 85% burn injuries and cause of her death was shock.
14. Suresh (PW4) and Sushila (PW5), father and mother of deceased Mainabai respectively have deposed that till about 1 year after the marriage of the Appellant and Mainabai, Mainabai was living at her matrimonial house happily. According to the Court statement of Suresh (PW4), the Appellant was in the habit of consuming liquor and was also committing *marpeet* with Mainabai saying her that she was not fit for him. He has further deposed that 1 week before the incident, Mainabai had run out of her matrimonial house and come to his house. At that time, she had told him that the Appellant and her mother-in-law used to beat her. Thereafter, when family members of the matrimonial house of Mainabai came to his house, this witness sent Mainabai back to her matrimonial house. 1 day thereafter, he came to know that Mainabai had burnt. He went to

the District Hospital, Durg and saw there that Mainabai had burnt. According to this witness, Mainabai told him in the hospital that as a result of the harassment due to *marpeet* being committed with her daily, she poured kerosene on her and set herself on fire. This witness has further deposed that he made written complaint (Ex.P4) in Police Station Arjunda. In his cross-examination, this witness has admitted that whenever he visited the matrimonial house of the deceased, the Appellant and his family members gave him proper respect and whenever he asked to send back the deceased with him to her paternal house, they sent her with him. He has further admitted that the deceased had run out of her matrimonial house once only and had made a complaint of *marpeet* with her. Since such quarrels took place in every houses, he did not make any report. This witness has further admitted that it is the Appellant who had taken the deceased to the District Hospital, Durg and thereafter to Sector-9 Hospital, Bhilai and the Appellant himself borne all the expenses of treatment of the deceased.

15. Sushila (PW5), mother of the deceased has deposed that the deceased had come to her maternal house after 1 year of her marriage and at that time she had told her that whenever she had been returning late after fetching water, her mother-in-law used to suspect on her character and on this issue the Appellant used to commit *marpeet* with her. This witness has further deposed that at that time the deceased stayed at her maternal house for 8 days and thereafter she returned to her matrimonial house. Thereafter, this witness came to know that the deceased set herself on fire. This

witness has further deposed that after getting information, she went to see the deceased. At that time, the deceased told her that on the date of incident, a serious quarrel had taken place with her mother-in-law. At that time, the Appellant came and asked her to prepare tea for him and herself. At that time, the Appellant told her that when she had gone to her maternal house in anger, at that time, he was feeling happy. The Appellant also told her that why does not she die and he further told that the person going to die does not take tea. On this, she poured kerosene on her and set herself on fire. This witness has also admitted the fact that no quarrel took place between the Appellant and the deceased for about 1 year after their marriage. Whenever husband of this witness (father of the deceased) went to the matrimonial house of the deceased to take her back to her paternal house, he was given proper respect there. This witness has further admitted that quarrels were taking place only on the dispute of fetching water. This witness has further admitted that such kind of dispute takes place in every houses. She has further admitted that on the date of incident also, the dispute between the Appellant and the deceased had taken place for preparing tea. She has further admitted that after the incident, it was the Appellant who brought the deceased to the hospital for treatment and all the expenses of her treatment were borne by him. She has further admitted that in the hospital, the deceased had given a statement before the Executive Magistrate that she burnt while preparing tea.

16. Punitram (PW7), who was a teacher of the deceased, has deposed

that 1 week prior to the incident the deceased had run out of her matrimonial house and came to her maternal house. At that time, she had come to his house also to meet him. At that time, she had told him that her husband/Appellant and mother-in-law suspect on her character and abuse her. This witness has further deposed that when they had gone to the District Hospital, Durg, police officials had inquired from the deceased. At that time, first the deceased had told them that she burnt while preparing tea. On being asked again politely, the deceased told them that while taking tea, a quarrel had taken place between her and the Appellant. On this, she told the Appellant that he always abuses her and commits *marpeet* with her, therefore, she will die. On this, the Appellant told her that the person going to die does not take tea. If she wants to die, she can die. On this, she could not control her anger and in anger she poured kerosene on her and set herself on fire. According to this witness, the deceased also told him that the Appellant had asked her that she should tell that she burnt while burning stove otherwise he will not take her to the hospital for treatment and, therefore, she had made such statement. During cross-examination, this witness has admitted that when for the first time he met with the deceased in the hospital, at that time, on being asked by him, the deceased had told him that her dying declaration had been recorded in which she had stated that she burnt while preparing tea. This witness has further deposed that when he asked again, then the deceased told him that she burnt while preparing tea on stove.

17. Dr. V.K. Sao (DW1) has stated that on on 6.6.1999, an Executive Magistrate had come to record dying declaration of the deceased. At that time, he was present on duty. On being asked by the Executive Magistrate, he had examined the deceased and found that she was fully fit to make statement and, therefore, he had given a fitness certificate in this regard. This witness has denied the suggestion that at the time of recording of the dying declaration of the deceased, her relatives were present there. This witness has further denied the suggestion that he gave the fitness certificate under pressure of the relatives of the deceased.
18. Executive Magistrate/Naib-Tahsildar U.S. Agrawal (DW2) has also deposed that on 6.6.1999 he had gone to the District Hospital, Durg for recording dying declaration of the deceased. At that time, he saw that the deceased was in a condition to make statement. Thereafter, he obtained a fitness certificate in this regard from the doctor and thereafter he recorded dying declaration (Ex.D2) of the deceased. According to the contents of the dying declaration (Ex.D2), on 6.6.1999 at 4:00 p.m., the deceased was preparing tea on a stove at her matrimonial house. At that time, a burning chimney kept on her back on a height fell over her as a result of which fire caught her clothes and she burnt. Executive Magistrate U.S. Agrawal (DW2) has further deposed that on being asked by him, the deceased told that nobody set her on fire and there was cordial relation between her and the Appellant and mother-in-law.
19. On a minute examination of the above evidence, I find that there

are two sets of evidence regarding dying declaration. One is the statement/declaration (Ex.D2) made before Executive Magistrate U.S. Agrawal (DW2) and other is the oral dying declaration made by the deceased before her father Suresh (PW4), mother Sushila (PW5) and her one teacher Punitram (PW7). Both the statements are totally contradictory. From perusal of the dying declaration (Ex.D2) recorded by Executive Magistrate U.S. Agrawal (DW2), it is evident that before recording such statement, he had duly obtained a fitness certificate from the doctor regarding mental fitness of the deceased to make a statement. Deputy Superintendent of Police S. Bramhe (PW12) has also admitted the fact that on 6.6.1999 the Executive Magistrate had recorded dying declaration of the deceased. However, the dying declaration (Ex.D2) recorded by the Executive Magistrate could not be filed by the Investigating Officer along with the charge-sheet. Sushila (PW5), mother of the deceased has also admitted the fact that in the District Hospital, the deceased had made a statement before the Executive Magistrate that she burnt while preparing tea. Both Dr. V.K. Sao (DW1) and Executive Magistrate U.S. Agrawal (DW2) were government servants. They had no relation with the Appellant or the deceased. Therefore, there is no reason to believe that the dying declaration (Ex.D2) was recorded by the Executive Magistrate under any pressure. Though Suresh (PW4), Sushila (PW5) and Punitram (PW7) have stated that when they had gone to the District Hospital to see the deceased, at that time, the deceased had given an oral dying declaration that while taking tea a dispute had taken place with the Appellant and due to quarrels being taken and she was

being beaten daily she got harassed and poured kerosene on her and set herself on fire. According to the case of prosecution, the deceased died on 11.6.1999 and one day before, i.e., on 10.6.1999, her father Suresh (PW4) had made written complaint (Ex.P4). But, in the written complaint (Ex.P4), no fact is mentioned that the deceased, as discussed above, made any such statement before Suresh (PW4), Sushila (PW5) and Punitram (PW7). If any such oral dying declaration/statement was made by the deceased, why this fact is not mentioned in the written complaint (Ex.P4). Therefore, it is suspicious that the deceased had made any oral dying declaration before Suresh (PW4), Sushila (PW5) and Punitram (PW7). Therefore, taking into consideration all the above evidence, it cannot be ruled out that according to the contents of the written dying declaration (Ex.D2), death of the deceased was accidental. Even if for the sake of argument it is considered that death of the deceased was not accidental and was suicidal, material ingredients of the offence under Section 306 of the Indian Penal Code are missing in this case because from the evidence of the prosecution itself it is well established that there was cordial relation between the Appellant and the deceased till 1 year from their marriage. Till that time, there was no complaint by the deceased. After 1 year from the marriage, when the deceased ran out of her matrimonial house and came to her maternal house, for the first time she told about committing of *marpeet* with her. But, both her parents Suresh (PW4) and Sushila (PW5) have admitted that such type of dispute usually takes place in every houses and, therefore, they did not make any complaint. From the statements

of Suresh (PW4) and Sushila (PW5), it also appears that whenever Suresh (PW4) visited the matrimonial house of the deceased, he was given proper respect there and on all those occasions, the deceased never made any complaint of her being subjected to ill-treatment or *marpeet* with her. Moreover, immediately after the incident, the Appellant took the deceased to the District Hospital, Durg and thereafter for better treatment he took her to Sector-9 Hospital, Bhilai. There is no evidence on record to show that the Appellant had been continuously ill-treating the deceased or committing *marpeet* with her or subjecting her to harassment. Therefore, material ingredient of the offence, i.e., instigation as defined under Section 107 of the Indian Penal Code is missing in this case. Thus, the finding of the Trial Court is not in accordance with law and the evidence available on record. The Appellant is entitled to get benefit of doubt.

20. Consequently, the appeal is allowed. The judgment under challenge is set aside. The Appellant is acquitted of the charge framed against him.

Sd/-

(Arvind Singh Chandel)
JUDGE