

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 420 OF 1998

Rajendra Virappa Telia @ Mangnure ..Appellant
Vs.
The State of Maharashtra ..Respondent

Mr. Jayant Bardeskar i/b. Mr. S. V. Marwadi, for the Appellant.
Mr. S. R. Agarkar, APP for the Respondent / State.

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CORAM : C.V. BHADANG, J.
DATE : 10 DECEMBER 2021

Judgment:

. By this Appeal, the Appellant – Accused No.1 is challenging the judgment and order dated 24 February 1998 passed by the learned Additional Sessions Judge at Gandhinglaj in Sessions Case No.17/1997. By the impugned judgment, the Appellant has been convicted for the offence punishable under Section 306 and 498-A of IPC. Under Section 498-A of IPC, the Appellant has been sentenced to suffer imprisonment for one year with fine and under Section 306 of IPC, the Appellant has been sentenced to suffer imprisonment for two years with fine. The Appellant however has been acquitted of the offence punishable under Section 304-B of IPC. Mrs. Hirabai Teli who is the mother of the Appellant and who was Accused No.2 has been acquitted of all the offences as charged.

2. The prosecution case may be briefly stated thus-

That Complainant Mallappa Kabbure (P.W.1) is the brother of deceased Mahananda who was married to the Appellant in the year 1992 at Village Gargoti, District Kolhapur. At the time of marriage, the Appellant was serving as a Peon at Ghali College at Gandhinglaj and as a driver with Dr. Ghali. According to the prosecution, deceased Mahananda was mentally and physically ill-treated by the Appellant and his mother on account of the fact that deceased had delivered two daughters and further on the ground of non satisfaction of the demand of money from her brother.

3. In the year 1994, the Complainant (P.W.1) received an anonymous letter informing that the deceased was ill-treated by the Appellant and she be taken to her maternal house. Upon receipt of the said letter, Complainant alongwith Manohar Phale (P.W.4) and one Shrikant Teli visited the house of the Appellant at Gandhinglaj with Mr. Vishwanath P. Shetty of Ghandinglaj. After visiting the house of the Appellant, P.W.1 noticed that deceased was weeping and had allegedly told the Complainant that she was beaten by the Appellant on account of their financial condition and the fact that she delivered daughters. The Complainant tried to persuade the Appellant not to harass the deceased. After the aforesaid incident, the deceased was taken to her maternal house for her third delivery, when she delivered a male child. The Appellant and his mother

attended the naming ceremony and after the deceased returned to her matrimonial house, she was continued to be ill-treated by the Appellant.

4. In the year 1997, P.W.1 received a post card (Exh.14) purportedly written by the deceased setting out the ill-treatment meted out to her. Upon receipt of the letter, P.W.1 alongwith Mr. Namdeo Khatavkar (P.W.2) and Mohan Phalle (P.W.4) again visited the house of the Appellant with Mr. Patan Shetty from Gadhinglaj and made an attempt to persuade the Appellant not to illtreat the deceased. According to P.W.1, he noticed that the face of the Complainant was swollen and she was unable to talk properly. She had informed P.W.1 that she had been to Dr. Ghali for medical treatment.

5. On 25 June 1997, the Complainant received a message that his sister was in a serious condition and he therefore visited her house, the following morning at about 5.30 a.m. and noticed that his sister was lying dead in the kitchen having received burn injuries.

6. P.W.1 Mallappa Kabbure lodged a complaint (Exh.15) with Police Station Gadhinglaj, on the basis of which Crime No.76/1997 was registered under Section 498-A and 304-B read with Section 34 of IPC against the Appellant and his mother. During the course of the investigation, PI Vilas Patil (P.W.7) drew an inquest panchanama

of the dead body and it was sent for post mortem examination. He also prepared a spot panchanama (Exh.18) in presence of the panchas. The Medical Officer conducting autopsy gave an advance certificate of death (Exh.29) and Post Mortem report (Exh.30). After completion of the investigation, a chargesheet came to be filed against the Appellant and his mother.

7. The record discloses that the learned Sessions Judge framed charge for the offence punishable under Section 498-A and 304-B read with Section 34 of IPC. The Appellant pleaded not guilty to the charge and claimed to be tried. The defence of the Appellant is one of total denial and false implication.

8. At the trial, the prosecution has examined in all eight witnesses namely Mallappa Kabbure (P.W.1), Namdeo Khatavkar (P.W.2), Rajaram Jadhav (P.W.3), Mohan Phalle (P.W.4), Geetanjali Kabbure (P.W.5), Kasim Kazi (P.W.6), Vilas Patil (P.W.7) and Pundlik Koli (P.W.8) and produced the record of investigation. The Appellant did not lead any evidence in defence.

9. The learned Sessions Judge has found the Appellant guilty of the offence under Section 498-A and 306 of IPC. The learned Sessions Judge in para 27 of the judgment has found that the offence under Section 306 of IPC being a lesser offence, the Appellant can

be convicted although no specific charge has been framed under the said section.

10. I have heard Mr. Bardeskar, the learned counsel for the Appellant and Mr. Agarkar, learned APP for the Respondent / State. With the assistance of the learned counsel for the parties, I have gone through the record.

11. It is submitted by the learned counsel for the Appellant that the allegations about ill-treatment being meted out to the deceased are not proved by the prosecution. In the submission of the learned counsel, neither of the two grounds or reasons for such ill-treatment did survive. The learned counsel pointed out that the deceased had delivered a third child which was a male child and the evidence also shows that the Appellant had constructed a house out of his own funds. It is thus submitted that neither of the reasons for which the deceased was allegedly ill-treated were in existence. It is submitted that one of the letters received in the year 1994 was an anonymous inland letter. The second one which is a post-card at Exh.14 is also not shown to be in the handwriting of the deceased. He pointed out that there is no acceptable evidence brought on record to show that there was a specimen handwriting or admitted handwriting of the deceased for comparison with handwriting in Exh.14. It is submitted that the evidence of P.W.1 that the letter (Exh.14) is in the

handwriting of the deceased, thus cannot be accepted. It is submitted that there is no evidence of an expert witness on the point of hand writing of the deceased led by the prosecution in this case. It is submitted that except the evidence of P.W.1 and his wife Sou. Geetanjali Kabbure (P.W.5) who are related and interested witnesses, there is no evidence of the neighbours on the point of ill-treatment to the deceased. The learned counsel pointed out that when P.W.1 went to the house of the Appellant on 26 June 1997, the Appellant was seen sitting with his children and this conduct of the Appellant would clearly show that he was innocent.

12. The learned counsel has placed reliance on the decision of the Supreme Court in *Jagdishraj Khatta Vs. State of Himachal Pradesh* ¹ *Appasaheb and Anr. Vs. State of Maharashtra* ² and the decision of this Court in *Arjun S/o. Babarao Parche and Ors. Vs. State of Maharashtra* ³. It is submitted that in any event, the alleged demand cannot partake of the nature of 'dowry' under the Dowry Prohibition Act, as the same cannot be said to be made in consideration of the marriage.

13. Learned APP has supported the impugned judgment. It is submitted that the deceased had sustained 100% burn injuries in her own house while staying with the Appellant. Therefore, in the

¹ (2019) 9 SCC 248

² 2007 1 OLR 353

³ 2012 ALL MR (Cri) 2932

submission of the learned APP, it is for the Appellant to explain the circumstances leading to the death of his wife as they are within the special knowledge of the Appellant. He submitted that as the Appellant has failed to give any explanation as to the manner in which and the circumstances under which his wife had sustained the burn injuries, an adverse inference needs to be drawn against him. It is submitted that there is evidence of P.W.1, P.W.5 and some other witnesses on the point of ill-treatment of the deceased by the Appellant which is also corroborated by letter of the deceased at Exh.14. It is submitted that P.W.1 being her real brother ought to be aware of the handwriting of his sister and therefore, evidence of P.W.1 is sufficient to show that the letter (Exh.14) was written by the deceased.

14. He submitted that the post mortem report also shows that the deceased had external injuries on her person including CLW (+) on the skull Parieto Occipital area 1 x 1½ inch muscle deep. Learned APP pointed out that the said injury is shown to be ante mortem in nature and the spot panchanama also shows that there was a wooden stool lying there which was in broken condition. The spot panchanama also shows existence of a pool of blood on the spot. He therefore submitted that the possibility of the deceased having met with a homicidal death cannot be ruled out. Learned APP however, in all fairness submitted that there was no charge under Section 302

of IPC nor there is an Appeal filed by the State challenging the acquittal of the Appellant from the offence punishable under Section 304-B of IPC. However, in the submission of the learned APP, the conviction under Section 498-A read with Section 306 of IPC deserves to be confirmed.

15. I have considered the circumstances and the submissions made.

16. The learned Sessions Judge had framed a charge under Section 304-B and 498-A read with Section 34 of IPC against both the Accused. As noticed earlier, the Accused No.2 Hirabai, who is the mother of the Appellant has been acquitted of both the offences as charged. The Appellant has also been acquitted from the offence under Section 304-B of IPC. However, he has been convicted for the offence punishable under Section 306 and 498-A of IPC.

17. It is not disputed that deceased Mahananda was married to the Appellant in the year 1992 and she met with an unnatural death in her matrimonial house on 25 June 1997 i.e. within seven years of marriage. The deceased was found lying in the kitchen with 100% burnt injuries. The first question is about nature of death of Mahananda. Whether it is accidental or suicidal in nature. The perusal of the impugned judgment shows that even before the learned Sessions Judge it was submitted on behalf of the prosecution

that the death is homicidal in nature as deceased was found to have sustained an injury namely CLW on the skull i.e. Parieto Occipital area and there was a pool of blood lying on the spot. However, the Appellant was not chargesheeted for the offence punishable under Section 302 of IPC nor there was any such charge framed. Thus, it is not possible to go into the said submission on behalf of the prosecution. Even no attempt was made to point out that Mahananda met with a homicidal death. In view of the circumstances and the evidence on record, it is too late in the day to claim or decide as to whether Mahananda met with a homicidal death.

18. The next question is whether she met with an suicidal death as claimed on behalf of the prosecution and which is part of the charge framed against the Appellant or she met with an accidental death as was the defence of the Appellant. Although, the learned Sessions Judge has not framed any specific point on this aspect, the learned Sessions Judge in para 24 of the judgment has held that considering the recitals of the letters (Exh.14) and attending circumstances, 'an inference of suicidal death would be easier than the homicidal death'. However, at the same time, in para 24, the learned Sessions Judge has held that the recitals in the spot panchanama and the inquest panchanama show the presence of a can of kerosene found at the scene of offence with the lid of the can at some distance and a

matchstick. This according to the learned Sessions Judge suggests either the homicidal or suicidal death but not at all accidental death. Considering the nature of the evidence available on record, indeed there is a serious doubt whether Mahananda suffered a homicidal death. This is because she has not only been found to have suffered burn injuries but also a head injury which was bleeding and a pool of blood was lying on the spot. However, at the cost of repetition, it is necessary to note that it is not possible at this stage to go with the hypothesis of Mahananda having met with a homicidal death for the reason that it was never the charge framed against the Appellant or the co-accused. The entire trial was about the deceased having met with a dowry death and being subjected to ill-treatment as contemplated under Section 498-A of IPC. The finding of the learned Sessions Judge in paragraph 24 of the judgment would also indicate that the Sessions Judge has only held the death to be suicidal as according to the learned Sessions Judge, the inference of suicidal death was “easier to be drawn”. Such a finding, in my considered view, cannot be countenanced. The learned Sessions Judge has to record a specific positive finding on the basis of the evidence on record about the deceased having met with a suicidal death, which is not forthcoming in the present case.

19. There is one more reason why the conviction under Section 306 of IPC would be difficult to be maintained. This is because the

charge which was framed against the Appellant was one under Section 304-B of which would take into its ambit any unnatural death of a married woman within seven years of marriage, coupled with the evidence to show that she was subjected to cruelty (as contemplated under Section 498-A of IPC) in connection with non satisfaction of demand for dowry. In that sense, Section 306 can be distinguished as Section 306 can only apply where the death is suicidal. To put it differently, Section 306 cannot take into its ambit any unnatural death, other than a suicidal death.

20. The question whether the person can be convicted for the offence punishable under Section 306 of IPC, when the charge framed against him was one under Section 304-B of IPC, is no longer *res integra* as it is subject matter of several decisions of the Supreme Court. In the case of *K. Prema S. Rao and Anr. vs Yadla Srinivasa Rao and Ors.*¹, the Supreme Court has held that the accused charged under Section 498-A and 304-B of IPC can be convicted on same facts and evidence under Section 306 provided the necessary ingredients are there in the prosecution evidence. In a subsequent decision in *Harjit Singh Vs. State of Punjab*², the Supreme Court, after referring to the decision in the case of *K. Prema S. Rao (supra)* has held that the ingredients of Section 306 and Section 304-B of IPC are different and distinct (see para 30 of

¹ (2003) 1 SCC 217

² (2006) 1 SCC 463

the judgment). The Supreme Court in the case of *Harjit Singh* has held that the omission to frame charge under Section 306 of IPC in terms of Section 215 of Cr.P.C. may or may not result in failure of justice, or prejudice to the accused. It has further been held that it is not in all cases, that an accused may be held guilty of commission of an offence under Section 306 of the IPC wherever the prosecution fails to establish the charge against him under Section 304-B thereof.

It can thus be seen that the question would depend upon facts and circumstances of each case. In a given case, where the unnatural death suffered by a married woman is suicidal in nature and the necessary ingredients of the offence under Section 306 of IPC are present, in the charge and if the Court on the facts and circumstances of the case, comes to the conclusion that there is no prejudice to the accused, a conviction may be recorded under section i.e. Section 306 of IPC, notwithstanding that there is no specific charge framed under that section. It is not necessary to dwell on the issue any further, as in the present case, as noticed earlier, there is a serious doubt whether Mahananda has met with a suicidal or homicidal death. The finding of the learned Sessions Judge is also not quite reassuring. In these circumstances, including for the reason that there was no specific charge under Section 306 of IPC framed in this case, in my view, the conviction under Section 306 of IPC cannot be sustained.

21. This takes me to the conviction recorded under Section 498-A of IPC. It is necessary to note that although Section 498-A refers to the willful conduct of the husband or the relatives of the husband of a woman which is of such a nature, as is likely to drive the woman to commit suicide, the offence under Section 498-A is distinct than one under Section 306 of IPC. It is trite that Section 498-A of IPC does not require the married woman having actually met with a suicidal death. It only contemplates (a) 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.

22. Coming to the prosecution evidence, the ill-treatment meted out to the deceased has been deposed by P.W.1 who is brother of the deceased and P.W.5 who is his wife. It has come in their evidence that the deceased was initially ill-treated on account of the fact that she had begotten only daughters. However, it has come on record that subsequently the deceased had delivered a male child. She died after about two years of the birth of the male child. The learned Sessions Judge has found that, in all probability, the ill-treatment on account of the deceased having delivered only daughters, would not

have survived after the birth of a son. The learned Sessions Judge has also noticed that after the birth of the male child, the Appellant and her mother had visited his naming ceremony. The second reason for ill-treatment is the financial condition of the Appellant. It has come on record that the Appellant was serving as a Peon and had constructed a house. Learned Sessions Judge, in such circumstances, has observed that in all probability and looking to the nature of the employment of the Appellant and fact that he had constructed a house, he must be in a financial difficulty. P.W.1 has spoken about his visits to the house of the deceased and has stated about the deceased having informed him about the ill-treatment. On the first occasion, she was found weeping and on the second occasion P.W.1 stated that her face was swollen and she had informed him that she had visited Dr. Ghali for treatment. It was submitted on behalf of the Appellant that Dr. Ghali has not been examined. However, in my considered view, the learned Sessions Judge has rightly refused to accept such contention. The evidence of P.W.1 and P.W.5 on the point of ill-treatment meted out to the deceased has rightly been found to be trustworthy by the learned Sessions Judge. In para 24 of the judgment, the learned Sessions Judge has found that the said evidence is also supported by the two letters. The first, which is an anonymous inland letter received in the year 1994 (Art. A) and the second which is a post card received in the year 1997 (Exh.14). In so far as the inland letter (Art.A1) is concerned, the same is anonymous

and has not been formally proved by the prosecution and therefore, will have to be excluded from consideration. Coming to the letter at Exh.14, the learned counsel for the Appellant has placed reliance on the decision of the Supreme Court in *Jagdishraj Khatta (supra)*. In that case, the Supreme Court on facts had found that the allegation of cruelty, harassment, physical violence and mistreatment etc. by the Appellant / husband which allegedly drove the deceased / wife to commit suicide were not established. The Supreme Court has found that there was neither the evidence of the family members of the deceased nor the alleged letter written by the deceased shortly before her death could establish said ill-treatment. In my humble opinion, the said case turned on its own facts. In that case, the funeral ceremony of the deceased was completed and subsequently on 13 January 1990, the father of the deceased had produced a letter which was allegedly written to him by the deceased. It is necessary to note that according to the father, he had received the letter on 10 January 1990 i.e. after death and the funeral of the deceased. These were some of the circumstances on the basis of which the Supreme Court on facts, refused to accept the said letter.

23. In the present case, the letter is shown to be received by P.W.1 on 1 March 1997 i.e. three months prior to the death of Mahananda. P.W.1 has stated about the handwriting to be that of his sister. The letter also bears the postal endorsement from Gadhinglaj and having

been received at Kolhapur. I have carefully perused the said letter (Exh.14) and it appears to be genuine and without any suspicious circumstances as to fabrication or otherwise. It is true that the Investigating Officer had not made any attempt to secure admitted handwriting of the deceased and to get the letter compared from an expert. However, these lapses, in my considered view cannot come in the way of the prosecution in this case for the reason that the circumstances clearly indicate that the letter is not fabricated and is genuine. It is not unusual for the brother to know the handwriting of his sister. In my considered view, the evidence of P.W.1 and P.W.5 finds corroboration from the letter (Exh.14) which in clear terms carries the details of the ill-treatment suffered by Mahananda. The contention on behalf of the Appellant based on the presence of the Appellant in the house in the morning, following the night, when Mahananda died, cannot be accepted. Merely because the Appellant was present in the house with kids is hardly sufficient to draw inference about innocence of the Appellant. The non production of the letter (Exh.14) at the time of lodging of the FIR also cannot cast any doubt on the genuineness of Exh.14. The learned Sessions Judge has rightly observed that after receiving the news of the death of his sister, in the night, the following morning P.W.1 rushed to her house at about 5.30 a.m. in the morning. P.W.1 was not expected to carry the letter as the complaint was immediately lodged after P.W.1 reached the house of deceased.

24. Reliance placed on behalf of the Appellant on the decision of this Court in *Arjun (supra)* to my mind is misplaced. In my considered view, the decision in the case of *Arjun Parche* turned on its facts. In that case, it was found that the witnesses, deposing about ill-treatment had no occasion to visit the matrimonial house of the deceased and the allegations were found to be sweeping and baseless.

25. Considering the over all circumstances, in my considered view, the conviction under Section 498-A of IPC deserves to be confirmed.

26. Hence, the following order is passed.

ORDER

1. The Appeal is partly allowed.
2. The conviction and sentence awarded to the Appellant for the offence under Section 306 of Indian Penal Code is hereby set aside.
3. The conviction and sentence under Section 498-A of Indian Penal Code is hereby confirmed.

C.V. BHADANG, J.