

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

CRIMINAL APPEAL NO. 1155 OF 2002

The State of Maharashtra

...Appellant
(Orig. Complainant)

Versus

1. Fatima Mahamad Shaikh,
Age 49 years, Occupation Household,
R/o. Pulachi Shirol, Tal. Hatkanangale,
Dist. Kolhapur.
2. Iqbal Mahamad Shaikh,
Age 27 years, Occupation Service,
R/o. Pulachi Shirol, Tal. Hatkanangale,
Dist. Kolhapur.
3. Rafiq Mahamad Shaikh,
Age 30 years, Occupation Rickshaw driver,
R/o. Pulachi Shirol, Tal. Hatkanangale,
Dist. Kolhapur.
4. Son. Nilofar alias Radhika Rafiq Shaikh,
Age 21 years, Occupation Household,
R/o. Pulachi Shirol, Tal. Hatkanangale,
Dist. Kolhapur

...Respondents
(Orig. Accused)

.....
Mr.V.B.Konde-Deshmukh,APP for the Appellant-State.
Mr.S.D.Thokade for the Respondents.
.....

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

**RESERVED ON : 15TH DECEMBER, 2020
PRONOUNCED ON: 19TH JANUARY, 2021**

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

1. This appeal is filed by the State challenging the judgment and order of acquittal dated 20th April, 2002 passed in Sessions Case No. 115 of 2000 by learned 5th Additional Sessions Judge, Kolhapur for the offences punishable under Sections 498-A, 304 (b) read with 34 of the Indian Penal Code, 1860 (for short "IPC").

2. The occurrence that led to launching of prosecution is that, Yasmin Iqbal Shaikh (since deceased), daughter of informant, was married to accused Iqbal Mahamad Shaikh (A-2) in October, 1999. After the marriage, the deceased started residing with her husband and the family members viz. accused Fatima Mahamad Shaikh, mother-in-law (A-1), Rafiq Mahamad Shaikh, brother-in-law (A-3) and Nilofar alias Radhika Rafiq Shaikh, wife of A-3(A-4).

(a) The prosecution alleges that the deceased was treated well for some days. Since last four to five months prior to the incident started harassing her and demanded gas, stove, TV, steel cupboard and gold ornaments. All these facts were told by deceased to her mother. Even they gave their own gas cylinder, gas, stove and regulator but despite that harassment continued.

(b) On 7th April, 2000 as there was festival of “Urs” the informant invited all the accused to his residence. However, A-2 and deceased only visited his house. A-2 after dropping the deceased went away without having a word with the family members. When informant’s wife confronted deceased as to conduct of A-2, the deceased started crying and revealed that all the accused are harassing her and used to beat on the ground of non-fulfillment of demand of TV, safe and gold ornaments. All these facts were told to informant by his wife.

(c) According to prosecution, on 13th April, 2000, the informant received a message of admission of the deceased in CPR Hospital, soliciting his immediate presence over there. Informant’s wife and daughter Farzana rushed to the hospital and found deceased in a totally burnt condition.

(d) When the informant’s wife enquired as to how she was burnt, deceased told that since she was fed up with the harassment in connection with the demands of gold ornaments, safe and TV from the side of accused, she got herself burnt. By the time informant reached, the deceased succumbed to the injuries.

3. Informant accordingly lodged the report with Shirolī MIDC Police Station, Kolhapur on the basis of which Crime No. 47 of 2000 for the offences punishable under Sections 498-A and 304B read with 34 of IPC came to be registered against all the accused.

4. It appears from the record that PW-7 Bhagwant R. Patil, PSI visited the place of occurrence and prepared spot panchnama (Exh. 22). He also recorded the complaint of informant. During the course of investigation, he recorded the statements of prosecution witnesses, seized muddemal articles and forwarded the same to the Forensic Science Laboratory. After receiving Chemical Analyzer's report and completion of investigation, he forwarded the chargesheet against the accused.

5. The prosecution in order to prove its case has examined as many as seven 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.PC") about the incriminating evidence and circumstances and they denied all of them as false. According to them, they have been falsely implicated.

6. Mr. Konde-Deshmukh, learned APP for the appellant -State, assailing the impugned judgment and order of acquittal submitted

that the evidence of parents on the point of cruelty and demand has been totally overlooked by the learned trial Judge. It ought to have been considered in proper perspective. According to him, the prosecution has adduced sufficient evidence on record to prove cruelty at the hands of respondents-accused on the ground of demand of various articles. In short, the evidence on record is sufficient to connect the accused to the alleged offences and in such circumstances, the present appeal deserves to be allowed, argued learned APP.

7. Heard Mr. Thokade, learned Counsel for the respondents-accused.

8. The death of deceased in question is not disputed. The post-mortem report (Exh. 26) is duly admitted in evidence by the defence during the course of trial. The opinion as to the cause of death given by concerned autopsy surgeon is that the deceased died due to shock and due to 100% superficial to deep burns.

9. 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".

10. 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 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

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

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."

11. 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 sub- section, "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."

12. 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).”

13. 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.

14. 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.

15. 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.

16. 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.

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

18. PW-1 Babalal Mohamad Bargir, father of deceased and informant, states in his evidence (Exh. 14) that the deceased was married to A-2 on 17th October, 1999. After one month of marriage when deceased visited him and upon being asked about her well-being, the deceased told that there are demands of gas stove connection, TV, cupboard and gold ornaments at the hands of A-1 and A-2. She further told that she is being abused and troubled.

19. It is his further evidence that after some time he called A-2 and gave his own LPG cylinder along with regulator and gas stove but

still the harassment continued. The deceased was abused and asked to fetch water from long distance.

20. PW-1 father then states that on 7th April, 2000 there was "Urs" festival in his village and therefore, he invited all the accused for that function but only deceased and her husband came. However, her husband after dropping the deceased went away. The deceased then told this witness that A-1 and A-2 had asked her to bring the cupboard, TV and gold ornaments and if the demands are not fulfilled, she will not go back because of ill-treatment and being beaten at the hands of accused. In the evening, A-2 came. While leaving the parental home she was reluctant to go and was crying apprehending that she would be beaten there. However, this witness pacified and persuaded her to go with her husband.

21. His evidence then shows that on 13th April, 2000 he had gone for work to RTO office. One phone call was received by Police Patil, his neighbour, asking all the members to come to CPR hospital. Hence his younger daughter Farzana and his wife (PW-2) went to CPR Hospital and saw the deceased in a burnt condition. The deceased told her mother that she burnt herself as she was ill-treated more and more for ornaments. He came to know this fact at about 5 O'clock in the evening. By the time he could reach the

hospital, his daughter had already died. He then proved his FIR at Exh. 50.

22. The first part of examination-in-chief of this witness is full of vagueness and does not give insight as to what kind of abuses were allegedly given by accused and deceased was subjected to trouble on the ground of demand of gas stove connection, TV, cupboard and gold ornaments. His evidence then shows that he had also given his own LPG regulator and gas stove and despite that ill-treatment still continued and deceased was abused and asked to fetch water from long distance. Here again the nature of ill-treatment is not explained.

23. The evidence of this witness then gives an account of the incident which took place on the day of "Urs" festival i.e. on 7th April, 2000. Although this witness had invited all the accused for the said festival but only his daughter and A-2 came and that too A-2 went away after dropping the deceased.

24. His evidence is suggestive of the fact that the deceased told him that A-1 and A-2 had asked her to bring cupboard, TV and gold ornaments and if these demands are not fulfilled, she was not ready to go back, fearing ill-treatment and being beaten at the hands of accused.

25. Interestingly, this material fact as per contents of FIR was told to this witness by his wife and not by deceased directly to this witness. The reliability of this piece of evidence can only be gauged at the time when we go to evidence of PW-2 wife.

26. Again coming to the main incident dated 13th April, 2000. According to this witness, in the hospital deceased told her mother that being fed up with the ill-treatment on the ground of fulfillment of demand of ornaments, she got herself burnt. This evidence is in the nature of hearsay evidence and therefore, necessarily will have to be ascertained and assessed from the testimony of PW-2 wife.

27. PW-2 Bibijan Babalal Bargir, mother of deceased and wife of PW-1- informant, states in her evidence (Exh. 17) that after marriage when deceased came for the festival of Ramzan-Id, she was told by deceased that all the accused were demanding fan, safe, gold and cash and on this count they all used to beat her and ill-treat her mentally. However, she sent back her daughter after pacifying her.

28. Her evidence then shows that on the last occasion deceased came for "Urs" festival and told about harassment and demands of accused. When her husband came to take her back, she personally

talked to her husband who promised to treat her properly.

29. Deposing on the incident dated 13th April, 2000 she states that pursuant to the message received by her, she rushed to CPR Hospital. She found husband and brother-in-law of her daughter there. Her daughter was completely burnt. She was conscious and was able to speak. According to her, her daughter told her that all the accused had beaten her during the whole night and she was fed up with the treatment given to her by them and therefore, she attempted to commit suicide by setting herself on fire.

30. The version of PW-2, mother of deceased, materially differs from the version of PW- 1 informant -father. According to PW-2, there were demands of fan and safe apart from other demands but then in the cross examination she states that she did not tell before police about accused demanding fan and other things after marriage and because of that the deceased was beaten by accused. Even PW-1 father does not corroborate the version of this witness on the aspect that because of non-fulfillment of demands the deceased was regularly subjected to beating.

31. As far as accused and deceased visiting the house of this witness on account of "Urs" festival is concerned, it appears from

the version of PW-2 that her daughter again apprised her about continuous harassment and demands but the nature of harassment is nowhere explained. The evidence of PW-2 also shows that she even talked with A-2 personally and persuaded her to treat the deceased properly to which the latter promised. It then again this material piece of evidence does not get any corroboration or support from the mouth of PW-1 informant.

32. Lastly, her evidence to the effect that in the hospital she was told by deceased that as she was subjected to beating throughout whole night, a day prior to the incident and as also being fed up with ill-treatment she attempted to commit suicide by setting herself on fire, is a very crucial piece of evidence. The fact that she was beaten throughout the night a day prior to the incident which ultimately aggravated situation and thus being unable to cope up with the harassment the deceased tried to extinguish her life spark by committing suicide is neither elaborated in the FIR nor gets any support even remotely from the testimony of PW-1 informant-father. Therefore, much cannot be read from this piece of evidence.

33. PW-3 Ayesha Altaf Sayyed, cousin of deceased, states in her evidence (Exh. 18) that after marriage deceased had met her for two times and told the demands, namely, safe, fan, cash and gold

from the side of accused. She further told that on that count she was physically and mentally tortured.

34. Her evidence further shows that when she visited hospital the deceased told her about ill-treatment and demands of articles and as also beating given by them because of which she attempted suicide.

35. The first part of her evidence is quite vague, like PW-1-informant, and is a generalised statement about physical and mental torture given by accused to the deceased and as told to her by latter. As far as the second part of her evidence is concerned, that is also not in consonance with the FIR and as also does not get support from the evidence of PW-1 informant.

36. PW-6 Gajanan Shankar Joshi is a very important witness whose evidence in a sense totally upsets the case so far put forth by the prosecution. He states in his evidence (Exh. 23) that at the relevant time he was working as Assistant Sub Inspector at Rajwada Police Station and was on duty at CPR Chowky. One burning case had come in the hospital. He went to the patient who was conscious and able to talk. When he took down the statement of patient her husband only was present. It is his further evidence that he recorded the statement in the presence of Medical Officer and

her husband. He then proved the said statement at Exh. 24, which according to him also bears the signature of concerned Medical Officer.

37. We have carefully gone through the statement of deceased recorded at Exh. 24 by PW -6 ASI. Her statement clearly shows that in the morning of 13th April, 2000 when her husband left for work she started preparing tea on a stove which all of sudden exploded and clothes on her person caught fire. She started crying. After hearing her cries her mother-in-law came and poured water and extinguished the fire. It further shows that at the relevant time nobody was there and that she had no complaint. The incident took place because of her negligence.

38. The above statement/ dying declaration of deceased is in direct conflict with the oral evidence adduced by other prosecution witnesses. What surprises us is that neither the parents, cousin nor Investigating Officer, in their respective substantive evidence, put a question mark on the reliability and genuineness of the last statement of the deceased. Under what circumstances the kind of statement exculpating the accused was given by the deceased is nowhere explained. It is also neither the case of parents nor that of Investigating Officer that this dying declaration was secured from

the deceased under duress, threat or coercion. This statement/ dying declaration of the deceased throws away whole prosecution case in one blush.

39. In the state of evidence, which we have referred to, does not commend itself to us for acceptance. There is abysmal failure on the part of prosecution to bring home the charge against accused.

40. There is one more aspect and that is delay in lodgment of FIR. The incident in question took place on 13th April, 2000 whereas the FIR came to be lodged on 15th April, 2000. According to PW-1-informant father, he was shocked due to death of daughter and was suffering from blood pressure. His mental condition was not proper as a result of which he lodged the report on 15th April, 2000. The reason so given in the evidence is conspicuously absent and does not form part of FIR. Even his own wife does not say that at the relevant time the blood pressure of PW-1 informant had shot up abnormally and as also because of shocking incident in question the FIR came to be filed belatedly.

41. It is in the facts and circumstances of the case there is delay and the same is fatal to the cause of prosecution.

42. Having regard to the nature of evidence and as also the discussion thereon, we are of the considered view that the kind of cruelty requisite with the fulfillment of the above noted provisions are not satisfactorily established. Apart from lackluster evidence adduced by the prosecution in the form of parental testimonies, there is testimony of PW-5 Rafiq Gulab Pakhali which gives altogether a different story quite unfavorable to the cause of prosecution. PW-5 although is witnessed on the point of spot panchnama (Exh. 21) but his cross-examination is full of significance.

43. In the cross-examination, this witness states that he resides adjacent to the house of accused. According to him, he had seen Iqbal Mahamad Shaikh and his wife i.e. deceased residing happily. He did not see couple quarreling. He was on visiting terms to them and had seen articles like cupboard, TV etc in their house. This witness being the prosecution's own witness clearly negates the theory of demand and ill-treatment at the hands of accused.

44. On re-appreciating the evidence on record, it clearly emerges that the evidence of parents of the deceased and her cousin is not inspiring and reliable, rather there is evidence of PW-5 and also dying declaration of the deceased which takes away the sail from the ship of the prosecution. The learned trial Court 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.

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

(V. G. BISHT,J.)

(PRASANNA.B.VARALE, J.)

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