

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL APPEAL NO. 28 OF 2009

Jogeshwar s/o Govinda Latore,
Aged about 42 years, Occ. Agriculture,
R/o Marakbodi, Tq. And distt. Gadchiroli

.... **APPELLANT**

// VERSUS //

State of Maharashtra, through Police
Station Officer, Police Station
Gadchiroli, District Gadchiroli.

.... **RESPONDENT**

Shri Sumit G. Joshi, Advocate for Appellant.
Shri S. Haider, A.P.P. for Respondent-State.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

CLOSED FOR JUDGMENT : 02.02.2021.

DATE OF PRONOUNCEMENT : 08.03.2021.

JUDGMENT :

Heard learned Counsel for respective parties.

2. This appeal filed under Section 374 of the Code of Criminal Procedure, is directed against the judgment and order dated 16.12.2008 in Sessions Case No.33 of 2004 whereby learned Additional Sessions Judge, Gadchiroli convicted the Appellant/Accused for the offence punishable under Section 498-A and 306 of the Indian

Penal Code and sentenced him to undergo rigorous imprisonment for two years and to pay fine of Rs.1,000/- in respect of offence under Section 498-A of the Indian Penal Code and rigorous imprisonment for 5 years and fine of Rs.2,000/- for the offence punishable under Section 306 of the Indian Penal code. The Appellant shall be hereinafter referred to as 'the Accused'.

3. The case of the prosecution in brief is that the Accused was married to Nirmala, who was his second wife. It is the case of the prosecution that the Accused used to beat and ill-treat his wife Nirmala as she was unable to conceive and he was interested in marrying again. Said Nirmala consumed poison on 03.05.2003. She was shifted to the Hospital, but she died on the same night at about 12.00 pm. The Post Mortem over the body of the deceased was conducted and the viscera was preserved for chemical analysis and opinion to cause of death was reserved.

4. P.W.2-Mangal, father of the deceased, lodged the First Information Report on 05/05/2003 at Exhibit 18 alleging that his daughter had committed suicide because of the ill-treatment meted out to her by the Accused. Based on the said First Information Report, Crime No.92 of 2003 was registered against the Accused for offences

under Section 498-A and 306 of the Indian Penal Code.

5. The Investigating Officer conducted the spot panchnama and recorded the statements of the witnesses. He also forwarded the viscera and other incriminating material to the Forensic Laboratory, State of Maharashtra for chemical analysis. As per the report of the Chemical Analyzer, Organochloro insecticide Endosulfan (Thiodan) and petroleum hydrocarbons was found and it was opined that it was a fatal poisoning case involving Endosulfan. Upon completion of investigation, the Investigating Officer filed the charge-sheet against the Accused for offences punishable under Sections 498-A and 306 of the Indian Penal Code.

6. The case being sessions triable was committed to the Court of Sessions. The Charge was framed against the Accused to which the Accused pleaded not guilty and claimed to be tried. The Prosecution in support of its case, examined seven witnesses. The statement of the Accused was recorded under Section 313 of the Code of Criminal Procedure. The Accused denied having ill-treated his wife Nirmala. The defence of the Accused was that said Nirmala was used to be in disturbed state of mind for not being able to conceive and that she had committed suicide in the state of depression.

7. Learned Judge relied upon the evidence of PW-2 – Mangal, PW-5 - Bebitai and PW-7 – Pramila to hold that the Accused was ill-treating the deceased since her marriage. The learned Judge also relied upon the oral dying declaration allegedly made by the deceased to P.W.5 – Bebitai in presence of P.W.6 Meenabai that she had committed suicide because she was beaten by the Accused and it was unbearable. The learned Judge held that non-examination of the Investigating Officer was not fatal to the prosecution as no prejudice was caused to the Accused. Learned Judge concluded that the evidence on record proves beyond reasonable doubt that the deceased was unable to conceive, for which reason, Accused wanted to remarry. It was for these reasons that she was subjected to cruelty. Learned Judge further held that the deceased had committed suicide by consuming poison because of the ill-treatment meted out to her. Learned Judge therefore held that the Accused had abetted the suicide and hence, held him guilty for offences punishable under Sections 498-A and 306 of the Indian Penal Code and sentenced him as stated above. This conviction and sentence is under challenge in this appeal.

8. I have perused the record and considered the submissions advanced by learned counsel for the Accused and the learned

Additional Public Prosecutor for the State.

9. The point falls for consideration is whether the prosecution has established the guilt of the Accused beyond reasonable doubt.

10. The Accused has been held guilty of offence under Section 498-A of the Indian Penal Code, which reads thus :

“498-A : 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”.

11. The essential ingredients of Section 498-A are that the woman must be subjected to cruelty by her husband and his relatives.

- a) by any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or cause grave injury or danger to her life,
- b) she subjected to harassment with a view to coercing her or any person related to her to meet any unlawful demand for property or valuable security or on account of failure to meet such demand.

12. Section 306 of the Indian Penal Code which relates to the offence of abetment of suicide under reads thus :

“ 306. Abetment of suicide.- If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”

13. The essential ingredients of the offence punishable under Section 306 is ‘abetment’ is defined under Section 107 of the Indian Penal Code 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 facilitate the commission thereof, is said to aid the doing of that act.”.

14. In the case of suicide, a person is liable for abetment if the

person has *inter alia* instigated the deceased for committing suicide or has engaged in any conspiracy for committing suicide or intentionally aided the commission of suicide. It will be advantageous to refer to the judgment of the Hon'ble Supreme Court in ***Rameshkumar vs. State of Chhattisgarh (2001) 9 SCC 618*** wherein three Judge Bench of the Supreme Court has observed thus :

“20. *Instigation is to goad, urge forward, provoke, incite or encourage to do "an act". To satisfy the requirement of instigation though it is not necessary that actual words must be used to that effect or what constitutes instigation must necessarily and specifically be suggestive of the consequence. Yet a reasonable certainty to incite the consequence must be capable of being spelt out. The present one is not a case where the accused had by his acts or omission or by a continued course of conduct created such circumstances that the deceased was left with no other option except to commit suicide in which case an instigation may have been inferred. A word uttered in the fit of anger or emotion without intending the consequences to actually follow cannot be said to be instigation.*

21. *In State of W.B. v. Orilal Jaiswal this Court has cautioned that the Court should be extremely careful in assessing the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end the life by committing suicide. If it transpires to the Court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance, discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the Court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty.*

22. *Sections 498-A and 306 IPC are independent and constitute*

different offences. Though depending on the facts and circumstances of an individual case, subjecting a woman to cruelty may amount to an offence under [Section 498-A](#) and may also, if a course of conduct amounting to cruelty is established leaving no other option for the woman except to commit suicide, amount to abetment to commit suicide. However, merely because an accused has been held liable to be punished under [Section 498-A](#) IPC it does not follow that on the same evidence he must also and necessarily be held guilty of having abetted the commission of suicide by the woman concerned. Evidential value of the two writings contained in diary, Article A is that of dying declarations. On the principle underlying admissibility of dying declaration in evidence that truth sits on the lips of a dying person and the Court can convict an accused on the basis of such declaration where it inspires full confidence, there is no reason why the same principle should not be applied when such a dying declaration speaking of the cause of death exonerates the accused unless there is material available to form an opinion that the deceased while making such statement was trying to conceal the truth either having been persuaded to do so or because of sentiments for her husband. The writing on page 11 of diary (Article A) clearly states that the cause for committing suicide was her own feeling ashamed of her own faults. She categorically declares - none to be held responsible or harassed for her committing suicide. The writing on page 12 of diary (Article A) clearly suggests that some time earlier also she had expressed her wish to commit suicide to her husband and the husband had taken a promise from her that she would not do so. On the date of the incident, the husband probably told the deceased that she was free to go wherever she wished and wanted to go and this revived the earlier impulse of the deceased for committing suicide. The dying declaration Exbt. P/10 corroborates the inference flowing from the two writings contained in the diary and as stated hereinabove. The conduct of the accused trying to put off the fire and taking his wife to hospital also improbabilises the theory of his having abetted suicide”

15. In ***Ude Singh and ors vs. State of Haryana (2019) 17 SCC 301*** the Apex Court after considering the previous judgments has held

that abetment involves a mental process of instigating a person in doing something. A person abets the doing of a things when : (i) he instigates any person to do that thing; or (ii) he engages with one or more persons in any conspiracy for the doing of that thing; or (iii) he intentionally aids by acts or illegal omission the doing of that thing. It is held that these are essential to complete the abetment as a crime. The word 'instigate' literally means to provoke, incite, urge on bring about by persuasion to do anything. The Apex Court has held that in cases of alleged abetment of suicide, there must be proof of direct or indirect acts of incitement to the commission of suicide. It is held that mere allegation of harassment of the deceased by another person, would not suffice unless there be such action on the part of the Accused which compels the person to commit suicide, and such an offending action ought to be proximate to the time of occurrence. Whether a person has abetted in commission of suicide by another or not, can only be gathered from the facts and circumstances of each case.

16. The question which therefore falls for consideration is whether the Accused had subjected the deceased to cruelty and abetted her suicide. In this regard, P.W.2 Mangal has deposed that the Accused used to beat and ill-treat Nirmala since she was unable to conceive.

P.W.2 has admitted in his cross-examination that he had not stated this fact in the First Information Report. This is a material omission which casts doubt on the veracity of the said statement. Apart from this statement this witness has not levelled any other allegations against the Accused.

17. P.W.7 Pramila is the sister of the deceased. She claims that the Accused used to ill-treat Nirmala as he used to suspect her character. She does not claim that the deceased was subjected to cruelty as she was unable to conceive or because the Accused wanted to remarry as it has been deposed by P.W.5 Bebitai, the neighbor of the Accused. The evidence of this witness is totally at variance with the evidence of P.W.5 Bebitai.

18. It is also pertinent to note that P.W.5 claims that on the relevant date i.e. on the date when Nirmala had committed suicide, at about 5.00 p.m. there was quarrel between the Accused and Nirmala. P.W.5 has deposed that the Accused had closed the door and assaulted Nirmala. The neighbors had rushed to the house despite which the Accused did not open the door. Thereafter, at about 5.30 p.m. Nirmala opened the door and went towards the field. It is pertinent to note that P.W.5 had not stated in her statement under Section 161 of Code of

Criminal Procedure, that on the date of the incident, there was a quarrel between the Accused and Nirmala and that the Accused had closed the door of the room and had assaulted her. She had also not stated that the neighbors had rushed to the spot and that she had seen Nirmala going towards the field.

19. It is pertinent to note that the prosecution has not examined the Investigating Officer. It is true, that non-examination of Investigating Officer is not fatal in every case. However, considering the fact that there are material omissions and contradictions in the evidence of this material witness, non-examination of the Investigating Officer prejudices the case of the Accused. Hence, considering the decisions of the Apex Court in *Ravishwar Manji and ors. Vs. State of Jharkhand (2008) 16 SCC 561*, I am of the considered view that this is one of those cases, where non-examination of the Investigating Officer has created a lacuna in the case of the prosecution.

20. It is also to be noted that the evidence of PW-6 indicates that she had gone to the field. She had seen Nirmala lying on the cot and crying she asked them to pour water on her body. PW.5 claims that she had asked Nirmala as to what had happened and that Nirmala had told her that she had consumed poison as the Accused used to beat her

and that she was unable to bear the ill-treatment. Learned Judge has relied upon the oral dying declaration in holding the Accused guilty of the offence . There can be no dispute that conviction can be based solely on oral dying declaration provided implicit reliance can be placed on such evidence. In the case of ***Jagbir Singh vs. State (NCT of Delhi) (2019) 8 SCC 779*** the Apex Court after considering the previous judgments has held thus :

“31. A survey of the decisions would show that the principles can be culled out as follows:

31.1(i) Conviction of a person can be made solely on the basis of a dying declaration which inspires confidence of the court;

31.2(ii) If there is nothing suspicious about the declaration, no corroboration may be necessary;

31.3(iii) No doubt, the court must be satisfied that there is no tutoring or prompting;

31.4(iv) The court must also analyse and come to the conclusion that imagination of the deceased was not at play in making the declaration. In this regard, the court must look to the entirety of the language of the dying declaration;

31.5(v) Considering material before it, both in the form of oral and documentary evidence, the court must be satisfied that the version is compatible with the reality and the truth as can be gleaned from the facts established;

31.6(vi) However, there may be cases where there are more than one dying declaration. If there are more than one dying declaration, the dying declarations may entirely agree with

one another. There may be dying declarations where inconsistencies between the declarations emerge. The extent of the inconsistencies would then have to be considered by the court. The inconsistencies may turn out to be reconcilable.

31.7(vii) In such cases, where the inconsistencies go to some matter of detail or description but are incriminatory in nature as far as the accused is concerned, the court would look to the material on record to conclude as to which dying declaration is to be relied on unless it be shown that they are unreliable;

31.8(viii) The third category of cases is that where there are more than one dying declaration and inconsistencies between the declarations are absolute and the dying declarations are irreconcilable being repugnant to one another. In a dying declaration, the accused may not be blamed at all and the cause of death may be placed at the doorstep of an unfortunate accident. This may be followed up by another dying declaration which is diametrically opposed to the first dying declaration. In fact, in that scenario, it may not be a question of an inconsistent dying declaration but a dying declaration which is completely opposed to the dying declaration which is given earlier. There may be more than two.

31.9(ix) In the third scenario, what is the duty of the court? Should the court, without looking into anything else, conclude that in view of complete inconsistency, the second or the third dying declaration which is relied on by the prosecution is demolished by the earlier dying declaration or dying declarations or is it the duty of the court to carefully attend to not only the dying declarations but examine the rest of

the materials in the form of evidence placed before the court and still conclude that the incriminatory dying declaration is capable of being relied upon?

21. In the instant case, the evidence of P.W.5 – Bebitai indicates that this oral dying declaration was made in the presence of Devji Burse. However, the testimony of P.W.3 Devji Burse does not indicate that P.W.5 Bebitai had come to the field. On the contrary, he has stated that Nirmala had come to the field. She had stayed in the house which was in the field. He has stated that the Accused had come to the field and taken her home and thereafter she was taken to the Hospital. The witness has not been treated as a hostile witness. He has not been cross-examined by the prosecution and there is no reason to believe that he is an untruthful witness. The testimony of this witness therefore raises suspicion about the oral dying declaration made to P.W.5.

22. Though P.W.5 has deposed that the deceased was severally beaten and that she had committed suicide as she was unable to tolerate the beatings and ill-treatment, the Post Mortem report indicates that there was not a single injury mark on the body of the deceased. It is also pertinent to note that the P.W.5 Bebitai has stated that she had gone to the field along with P.W.6 Meenabai. The evidence of P.W.6 Meenabai reveals that it was the Accused who had gone to the house of

P.W.5 Bebitai and requested her to accompany him to the field. She claims that thereafter she along with P.W.5 Bebitai and the Accused had gone to the field. Under such circumstance no implicit reliance can be placed on the testimony of this witness. The prosecution has failed to establish that the Accused had subjected Nirmala to cruelty as envisaged in Section 498-A of the Indian Penal Code. Consequently, the offence under Section 306 is also not made out.

23. In the facts and circumstances, the prosecution in my considered view has failed to establish the guilt of the Accused beyond reasonable doubt. Under the circumstances, the conviction and sentence for offences punishable under Section 498-A and 306 of the Indian Penal Code cannot be sustained. Hence, the following order :

- (i) The appeal is allowed.
- (ii) The impugned judgment and order is hereby set aside. The Accused is acquitted. Bonds stand discharged.

JUDGE

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