

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 785 of 2009

Goutam Dey

-Vs-

The State of West Bengal

For the Appellant : Mr. Avishek Sinha
(Amicus Curiae)

For the State : Ms. Faria Hossain
Mr. Anand Keshari

Heard on : 22.06.2023, 14.07.2023, 19.07.2023, 07.12.2023

Judgment on : 11.12.2023

Ananya Bandyopadhyay, J.:-

1. This appeal is directed against a judgment and order of conviction and sentence dated 24.04.2009 passed by the Learned Additional Sessions Judge, Fast Track, 2nd Court, Paschim Medinipur in Sessions Trial Case No. XXXIII/March/2006, arising out of Kotwali P.S. Case No. 10/05, convicting the appellant under Sections 498A & 306 of the Indian Penal Code.
2. The prosecution case originated on the basis of a complaint filed by the mother of the victim which precisely stated that her daughter was tortured both physically and mentally by the appellant being inebriated and 1½ years of marriage the de-facto complainant both suspected and believed the

appellant to have set ablaze the victim on 21st December 2004. The complainant delayed to lodge the complaint on 10.1.2005 being engaged to organize financial resource for the treatment of her daughter in the hospital exclusively.

3. Based on the aforesaid complaint Kotwali P.S Case No. 10/05 dated 10.1.05 under Section 498A/302 of the Indian Penal Code was registered. On the completion of investigation Charge Sheet was submitted, pursuant to the same charges were framed under Section 498A/306 of the Indian Penal Code to which the appellant pleaded not guilty and claimed to be tried.
4. The prosecution cited 9 witnesses and exhibited certain documents. The defence cited one witness. The defence cited one witness.
5. The Learned Amicus Curiae for the appellant submitted that :-
 - i. There is no eye witness at the time of alleged incident who will be able to state the exact reason behind the death of deceased wife where charges under Section 498A/306 of the Indian Penal Code had been leveled against the appellant Goutam Dey.
 - ii. Scientifically it was not ascertained by the Autopsy Surgeon whether the present case was either accidental burn or suicidal burn.
 - iii. The exact motive or intention behind the death had not been established during interrogation, investigation and during the depositions in the Open Court before the Trial Judge not only by investigating agency but also by the prosecution.

- iv. On perusal of the materials on records it is established at the time of alleged incident the appellant was sitting out side the Temple and after hearing the mourning cry of his burning wife the appellant rushed to the place of occurrence in order to save the life of his wife where he also was burnt on his person and had been later on admitted in Hospital. So, the abetment of suicide in the instant case by the appellant was not proved.
- v. It is clarified that the burned injured victim after admission in the hospital breathed her last after 22 days. The I.O. of this case did not pray before the Learned concerned Court to obtain dying declaration of the deceased under Section 164 Cr.P.C. from where the exact cause of death would have been ascertained. It was further stated that the doctor was not examined with regard to the dying declaration.
- vi. The strained relationship and cordial relationship between husband and wife have been established after going through the evidence on records and due to some frustration because of poor economic condition the appellant might reportedly consume alcohol and become intoxicated it may happen in a poor family. The prosecution on over all consideration absolutely failed to prove continuation of torture both physically and mentally on the of the deceased. So, the allegation of cruelty along with abetment of suicide have not been established by the Trial Judge and the appellant is liable to be set aside.

6. The injury report of the victim denoted 45% been injury at the time of hospitalization and to have been survived for 22 days thereafter provided sufficient opportunity to the investigating officer to record her statement in any form. The investigation officer did not record the statement of the appellant too.
7. The Learned Advocate for the State submitted that Ext.-5, the injury report will depict the appellant to have been intoxicated at the time of admission. The appellant's addiction of alcohol and subsequent conduct amounted to mental cruelty to constitute an offence under Section 498A I.P.C.
8. In view of the absence of the eye witness, under Section 106 of the Indian Evident Act, the appellant had the special knowledge and since the death occurred within 7 years of marriage presumption under Section 113A of the Indian Evidence Act can be resorted to. Moreover, the history Sheet marked as Ext.5/2 dated 21.12.2004 revealed the note of the attending Doctor that the patient was conscious and complained of severe pain all over the body and disclosed that she set herself on fire in order to commit suicide by pouring kerosene at 4.30 p.m. on 21.12.2004. The attending Doctor notes the smell of kerosene to be present. The continuous mental torture inflicted by the appellant under the influence of alcohol was the cause to commit suicide by the victim including the date of the incident when the appellant was intoxicated which had been the proximate instigation to commit suicide. The prosecution was able to prove its case and the appeal shall be dismissed.

9. A circumspection of the prosecution witnesses revealed PW-1 to be the mother of the victim who was present at the place of occurrence as would be evident from the inquest report marked as Ext.-2. The evidence of PW-1 projects her personal dislike of the appellant's peculiar conduct and misbehavior towards her in an inebriated state with an objection of the victim's marriage to the appellant. Her evidence bear contradictions and inconsistencies PW-2 the scribe is an interested witness ignorant of the relationship between the married couple.
10. PW-3 and PW-4 were declared hostile by the prosecution.
11. The evidence of PW-4a, PW-5 and PW-7 was based on hearsay without having any personal knowledge being residents of a different village being the neighbors of the mother of the victim i.e. PW-1, PW-8, the post mortem Doctor opined to the death of the victim due to burn and sepsis ante mortem in nature. Other than burn injury he did not find any other injury.
12. PW-9, the investigating officer stated that *"During investigation I visited P.O and attended Sadar Hospital, Midnapore. I also held inquest over the dead body of Rakhi Dey aged about 27 years, wife of Goutam Dey of Hanspukur I also enquired U.D. case arising out of same matter vide no. 9/05 dated 10.1.05 of Kotwali P.S. After inquest in the hospital dead body was taken by doctor for P.M. examination and it was identified by Tapasi Das P.M. of victim wife was done and I also collected P.M. report. This is the inquest report in respect of deceased Rakhi Dey prepared by me at Midnapore hospital. Inquest report is already marked Ex.2. Signature of this witness is marked Ex.2/2. I also collected P.M. report of the deceased. I also collected some medical papers*

in respect of deceased Rakhi Dey and also Goutam Dey from Midnapore hospital. These are those medical papers 15 in number marked Ex.5 series on formal proof dispensed with. I also examined witnesses and recorded their statements under Section 161. I also prepared rough sketch map of the P.O. with index. This is the rough sketch map marked Ex.6 series. I did not get F.S.L. report though I sent for it. I could not receive report retarding cause of death. Not a fact that I submitted under Section 306 I.P.C. on assumption and without any basis. Dying declaration was not recorded by Magistrate. It is a fact that when deceased was taken to doctor her condition was very serious. I cannot say whether she was in state of stabbing or not capable of understanding everything or not. Not a fact that it is not case of 306 I.P.C. but accidental burning. Not a fact that I did not make any person residing near the house of Goutam Nayan III s/o Dulal of Colonelgola is a witness residing near the P.O. Not a fact that there is no such witness named Nayan III P.O. in inside a room. I did not mention names of persons residing surrounding the P.O. I did not contact Churamoni Hemram who was local commissioner. In the there are 5 rooms and I cannot say who were persons who reside in those rooms. I did not see any pot containing kerosene. I did not record 161 statement of accd. While he was in Midnapore hospital.”

13. PW-1, the investigating officer stated that “On 21.12.2004 during the mid day I was fetch water from Municipal tap, which is located adjacent to the house of Goutam. At that time I heard cries coming out from the house of Goutam, and immediately I entered his house and going there and I found that the wife of Goutam was cocking on kerosene stoves and it suddenly gave a flash of fire

and that burnt the victim(wife). At that time like myself many others also came at that time that Goutam was in the temple, and after that Goutam also came and started to save his wife from being burnt and in that process Goutam was also burnt, and after that I talked with wife of Goutam, and she addressed me by saying Didi, and she also stated that she was burnt due to blust of that stove. It was heard by many others also. Marriage between the victim and accused Goutam took place following a romance and mother of victim did not give her consent to the marriage, and victim married accused Goutam against will of her mother Smt. Nilima Mukherjee.

I entered frequented to the house of Goutam who give me tea and biscuit to my daughter and I found that the relation between the accused Goutam and victim(wife) was good. Fact that at present I reside in the house of the accused Goutam as a tenant.”

14. In the instant case, the prosecution failed to produce any independent eye witness, the local people, the other inmates of the house, the immediate neighbors were not cited as witnesses but the persons being PW- 2,4a,5,7 to be the associates of PW-1 the mother of victim were examined who did not have any personal knowledge of the marital relationship between victim and the appellant and emphasized on stray incident of the appearing at the house of PW-1 clad in a 'bermuda' and hurling abusive language, which in rural parlance is a common feature not taken into serious consideration, however the said act of the appellant did annoy PW-1 coupled with the fact of her anger concerning the victim's marriage to the appellant against her will and consent.

15. The attending Doctor to whom the victim stated to have attempted to commit suicide and the same Doctor to have noted to have treated the appellant sustaining burn injurious in order to save the victim wife was intoxicated, had not been examined.
16. The investigating officer did not examine any other inmates of the house specifically the tenants and the neighbors as independent witnesses.
17. Section 106 of the Evidence Act states as follows:

“106. Burden of proving fact especially within knowledge.- When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustration

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.”

18. Section 113A of the Evidence Act states as follows:

“113A. Presumption as to abetment of suicide by a married woman. - When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

Explanation. -- For the purposes of this section, "cruelty" shall have the same meaning as in section 498A of the Indian Penal Code (45 of 1860).”

19. Section 498A of the Indian Penal Code stated as follows :-

“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.”

20. Section 306 of the Indian Penal Code stated as follows :-

“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.”*

21. In the case of **Kamalakar Vs. state of Karnataka**¹ the Hon’ble Supreme Court observed as follows :

“8. Applicability of 306 IPC.

8.1. Section 306 deals with abetment of suicide wherein whoever abets the commission of suicide of another person, he/she shall be punished with imprisonment of either description for a term not exceeding ten years and shall also be liable to fine. This provision has to be read with Section 107 IPC which reads as:

¹ 2023 SCC Online SC 1458

“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.”

8.2. Section 306 IPC penalizes abetment of commission of suicide. To charge someone under this Section, the prosecution must prove that the accused played a role in the suicide. Specifically, the accused's actions must align with one of the three criteria detailed in Section 107 IPC. This means the accused either encouraged the individual to take their life, conspired with others to ensure the person committed suicide, or acted in a way (or failed to act) which directly resulted in the person's suicide.

8.3. In *Ramesh Kumar v. State of Chhattisgarh*, this Court has analysed different meanings of "instigation". The relevant para of the said judgment is reproduced herein:

"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.”

8.4. The essentials of Section 306 IPC were elucidated by this Court in *M. Mohan v. State*, as under:

“43. This Court in Chitresh Kumar Chopra v. State (Govt. of NCT of Delhi) [(2009) 16 SCC 605 (2010) 3 SCC (Cri) 367] had an occasion to deal with this aspect of abetment. The Court dealt with the dictionary meaning of the word "instigation" and "goading". The Court opined that there should be intention to provoke, incite or encourage the doing of an act by the latter. Each person's suicidability pattern is different from the others, Each person has his own idea of self-esteem and self-respect. Therefore, it is impossible to lay down any straitjacket formula in dealing with such cases. Each case has to be decided on the basis of its own facts and circumstances.

44. 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.

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.

8.5. *The essential ingredients which are to be meted out in order to bring a case under Section 306 IPC were also discussed in Amalendu Pal alias Jhantu v. State of West Bengal in the following paragraphs:*

12. Thus, this Court has consistently taken the view that before holding an accused guilty of an offence under Section 306 IPC, the court must scrupulously examine the facts and circumstances of the case and also assess the evidence adduced before it in order to find out whether the cruelty and harassment meted out to the victim had left the victim with no other alternative but to put an end to her life. It is also to be borne in mind that in cases of alleged abetment of suicide there must be proof of direct or indirect acts of incitement to the commission of suicide. Merely on the allegation of harassment without there being any positive action proximate to the time of occurrence on the part of the accused which led or compelled the person to commit suicide, conviction in terms of Section 306 IPC is not sustainable.”

22. In the case of **Pinakin Mahipatray Rawal Vs. State of Gujarat**² the Hon’ble Supreme Court observed as follows :

“24 Section 113A which was inserted by the Criminal Law (Second Amendment) Act, 1983, w.e.f. 26.12.1983, is given below for easy reference:

113A. Presumption as to abetment of suicide by a married woman. When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is

² MANU/SC/0916/2013

shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.

Explanation.--For the purposes of this section, "cruelty" shall have the same meaning as in Section 498A of the Indian Penal Code (45 of 1860).

25. Section 113A only deals with a presumption which the Court may draw in a particular fact situation which may arise when necessary ingredients in order to attract that provision are established. Criminal law amendment and the rule of procedure was necessitated so as to meet the social challenge of saving the married woman from being ill-treated or forcing to commit suicide by the husband or his relatives, demanding dowry. Legislative mandate of the Section is that when a woman commits suicide within seven years of her marriage and it is shown that her husband or any relative of her husband had subjected her to cruelty as per the terms defined in Section 498A Indian Penal Code, the Court may presume having regard to all other circumstances of the case that such suicide has been abetted by the husband or such person. Though a presumption could be drawn, the burden of proof of showing that such an offence has been committed by the accused Under Section 498A Indian Penal Code is on the prosecution..”

23. In the case of **Bhanuben and Ors. Vs. State of Gujarat**³ the Hon’ble Supreme Court observed as follows :

³ MANU/SC/1009/2015

“26. The learned Counsel for the Appellants has placed reliance upon the decision of this Court reported in the case of Ramesh Kumar v. State of Chhattisgarh MANU/SC/0654/2001 (2001) 9 SCC 618 at paragraph 22 wherein it is held that Sections 498A and 306 Indian Penal Code are independent and constitute different offences. Merely because an accused has been held liable to be punished Under Section 498A Indian Penal Code, 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 women concerned under 306 Indian Penal Code. Therefore, the conviction and sentence for offence punishable Under Section 306 read with Section 114 of the Indian Penal Code of the present Appellants is contrary to the legal evidence on record particularly, the dying declaration of the deceased and the conduct of the accused who took the deceased to the hospital. This fact has been grossly ignored by the courts below while convicting and sentencing the Appellants for the aforesaid offences. Therefore, the conviction and sentence for the aforesaid offence is erroneous and accordingly it is liable to be set aside.”

24. The prosecution failed to prove that the victim was tortured to an extent to constitute the offence under Section 498A and 306 of the Indian Penal Code.

25. Under such fact and circumstances of case the prosecution has failed to prove its case beyond reasonable doubt and accordingly the instant criminal appeal is allowed.

26. In view of the aforesaid discussions, judgment and order of conviction and sentence dated 24.04.2009 passed by the Learned Additional Sessions Judge, Fast Track, 2nd Court, Paschim Medinipur in Sessions Trial Case No.

XXXIII/March/2006, arising out of Kotwali P.S. Case No. 10/05, convicting the appellant under Sections 498A & 306 of the Indian Penal Code is set aside.

27. Accordingly, the criminal appeal being CRA 785 of 2009 stands disposed of.

28. There is no order as to cost.

29. I record my appreciation for the able assistance rendered by Mr. Avishek Sinha, Learned Advocate, as *Amicus Curiae* in disposing of the appeal.

30. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.

31. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)