

(2011) 02 BOM CK 0071

In the Bombay High Court

Case No : Criminal Appeal No. 463 of 1999

Abdul Jabbar and Others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 11-02-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 174, 313
Penal Code, 1860 (IPC) — Section 107, 304, 306, 34, 498

Citation : (2012) 1 DMC 37

Hon'ble Judges : S.S. Shinde, J

Bench : Single Bench

Advocate : P.V. Mandalik, instructed by Amol Gandhi, for the Appellant; Y.M. Kshirsagar, APP, for the Respondent

Final Decision : Allowed

Judgement

S.S. Shinde, J.—This appeal is filed challenging the judgment and order of conviction passed by the Joint District Judge and Additional Sessions Judge at Nanded in Sessions Case No. 26 of 1997 dated 01st December, 1999.

2. The prosecution story in brief is as under:

It is the case of prosecution that P.W. 1 Shaikh Ainu is resident of village Rahur which is about 20 k.m. from Mahur in Kinwat taluka. Shaihin now deceased was eldest daughter of Shaikh Ainu. Her marriage was solemnized with one Mr. Abdul Aziz i. e. original accused No. 2 on 12th April, 1996. In the marriage a golden ring of 5 gms, certain utensils, furniture and a cash amount of Rs. 5,000/ for purchasing garments were given to the Abdul Aziz as per the custom prevailing in their community.

It is the case of the prosecution that, there was no agreement as such as to what was to be given to Abdul Aziz by the complainant in the marriage. After marriage Shaheen went to the matrimonial house at Mahur. It is the case of prosecution that all the accused persons are members of joint family and residing in the

same house.

After about eight days stay in the matrimonial house of Shaheen, Shaheen was taken to the parents home at Rahur. At that time, she was not in a pleasant mood, and showed the signs of disinterestedness. The parents of Shaheen thought that Shaheen may be finding it difficult to adjust in the matrimonial house, it being new for her. After about eight days stay at the parents house, Shaheen was again taken back to village Mahur. After about a month Shaheen was again brought to Rahur. That time also she was not happy. On enquiry by the parents she told that her in laws were demanding money from her. She told that Rs. 2,000/ were demanded by in laws and, therefore, P.W. 1 Shaikh Ainu made arrangement to give Rs. 2,000/ and sent Shaheen along with husband to their house at Mahur.

There after, Shaheen came to Rahur twice and on every occasion she told the parents that the in laws have demanded the money. The P.W. 1 gave Rs. 2,000/ on each of the two occasions and sent her to the matrimonial home. There after, P.W. 1 came to know that Shaheen was ill. Therefore, he sent his father Shaikh Yakhoob to Mahur to bring her at Rahur. On 19.08.1996, Shaheen was brought to Rahur by Shaikh Yakhoob. At that time Shaheen was in unpleasant mood. On enquiry by parents she sweepingly told that she has troubles in the matrimonial house. She told that all the accused are asking to bring money from the parents home and on that count they were giving physical and mental torture. Shaheen made it clear to the parents that she did not disclose earlier about ill treatment so as to avoid disappointment to the parents. But the torture and trouble in the matrimonial home went on increasing and the accused persons had asked her to bring Rs. 25,000/ from parents because the accused wanted to purchase new stock in their utensils shop. P.W. 1 Shaikh Ainu expressed his inability to pay amount as it was off season for him. However, he assured Shaheen to pay afterwards during the harvesting season, the amount as demanded by the accused.

It is further case of prosecution that, Abdul Gaffar i. e. accused No. 3 on 24.08.1996 had gone to Rahur to bring Shaheen Shaikh Ainu persuaded Shaheen by telling that he will come at Mahur and try to settle the matter. He had sent Shaheen along with Abdul Gaffar to Mahur.

3. It is further case of the prosecution that on 27th August, 1996 the accused so also Shaheen took the dinner and thereafter Shaheen slept in her room by latching the door from inside. At about 10.00 p.m. accused and their neighbourers heard shouts raised by Shaheen, "Save Save" from her room. The accused got up and rushed towards the room of Shaheen. They notices that the door was latched from inside, and the smoke and fire was seen inside. All the accused then raised shouts which attracted the attention of the neighbourers. Some of them climbed wall of the room and removed some tins and entered in the room and extinguished burning flames of Shaheen. Abdul Aziz (Accused No. 2) went to the house of Dr. Amanulla Khan (P.W.4) and awakened him and

informed about the incident. Along with Abdul Aziz (Accused 2) Dr. Amanulla Khan came to the house of accused and found that Shaheen had burns all over her body. Fatimabi (Accused 4) had taken Shaheen's head on her lap. Shaheen was unable to talk but with difficulty she was asking for water. Dr. Amanulla Khan advised the accused to remove Shaheen immediately to the Government Hospital and left the house. (emphasis supplied).

After returning from the house of accused Dr. Amanulla Khan went to the house of Sarpanch and thereafter along with him went to the Government Hospital at Mahur. Dr. Pande examined her and found 100% burns on the body. He advised the accused and Dr. Amanulla Khan to take her immediately for treatment to the Civil Hospital either at Yawatmal or Nanded. When Shaheen was in the hospital at Mahur police head constable Jankar (the court witness), as per the directions of P.S.O. Mahur had recorded the statement of Shaheen at Exhibit 34.

Shaheen was taken to Yawatmal by jeep, however, on the way to Yawatmal Dr. Amanulla Khan who was accompanying Shaheen found that Shaheen is no more. They, therefore, came back to Mahur. It is the prosecution case that at about 3.00 a.m. Abdul Gaffar (Accused3) arrived at Rahur by jeep and informed Shaikh Ainu that Shaheen sustained burns and was taken to the hospital at Yawatmal for treatment. Having come to know that Shaikh Ainu along with his wife Zullekha Begum (PW3) proceeded to Yawatmal along with Abdul Gaffar in the same jeep. Shaikh Ainu saw the dead body of Shaheen. They all along with dead body went to the Government Hospital at Mahur.

4. At about 8.00 a.m. on 28th August, 1996, Shaikh Razzaq lodged report Exhibit 29 at Mahur Police Station that, Shaheen sustained burns in the house at about 10.00 p.m. on 27.08.1996 and while being taken to the Hospital at Yawatmal, she expired and the dead body has been brought and kept in the Government Hospital at Mahur. Accordingly, A. D. was registered bearing A.D. No. 16/1996 u/s 174 of the Criminal Procedure Code. P.W. 5 P.S.I. Mugalikar took over the investigation. He proceeded to the Government Hospital Mahur, drew inquest panchanama on the dead body of Shaheen as per Exhibit 13. The dead body was sent for postmortem. Then P.W. 5 proceeded to the place of incident, drew the panchanama of place of incident as per Exhibit 31 and seized certain articles such as pillow cover smelling of kerosene, match box, tin of rigor in which there was three liters of kerosene, half burnt pieces of Yellowish petty coat and green saree and some beads of Mangalsutra, a country lamp made of glass bottle, by inserting a rag in the crock. Smelling of kerosene was also noticed on the spot. All things were seized by the PSI Mungalikar. He recorded the statement of witnesses which consisted of some of the accused and their neighbourers. After postmortem dead body of Shaheen was delivered to P.W. 1 Shaikh Ainu who carried the same to Rahur and buried it down in the evening of 28.08.1996.

5. On next day i. e. on 29.08.1996 P.W. 1 accompanied by Dr. Amanulla Khan (PW4), Allabaz and Zakiulla Khan (PW2) and one Phatru went to Mahur, where Shaikh Ainu lodged complaint Exhibit 40 against the accused persons for having

subjected deceased Shaheen to cruelty on account of money and having brought about her death by burns.

6. On the said complaint Crime No. 61/1996 u/s ec. 498A, 304B r/w 34 of Indian Penal Code was registered against the accused persons at about 3.00 p.m. on 29.09.1996. Statement of Dr. Amanulla Khan (PW4), Zakiullah Khan, Phatru and others were recorded at about 4.30 p.m. On the same day accused Nos 2 to 5 were arrested. Statements of remaining witnesses were recorded on 01st September, 1996 at Rahur. Thereupon charge u/s ec. 306 of the Indian Penal Code was added in the original crime on 23.11.1996. The accused No. 6 (deceased Abdul Razzaq) was arrested on 21.09.1996, when he suo muto appeared at Mahur Police Station . After completing investigation charge sheet was filed . After completing the formalities matter was committed to the Court of Sessions. The necessary charges were framed. The Trial Court after recording the evidence and framing points for determination convicted all the accused persons for the offences punishable u/s ec. 498A and 306 r/w 9 Section 34 of the Indian Penal Code. All the accused were acquitted of the offence of dowry death punishable u/s ec. 304B r/w Section 34 of the Indian Penal Code. The original accused No. 1 Abdul Jabbar, accused No. 2 Abdul Aziz and accused No. 4 Fatimabi were sentenced to suffer R.I. for five years and to pay fine of Rs. 500/ in default to suffer further R. I. for two months on account of the offence u/s 306 r/w Section 34 of the I. P. Code. Each of them further sentenced with R. I. for one year and to pay fine of Rs. 500/ in default further R. I. for three months on account of offence u/s ec. 498A r/w Section 34 of I. P. Code. Therefore, maximum sentence awarded to the Appellant/accused is five years, so far accused No. 1, 2 and 4 are concerned. However, accused No. 3 and 5 are sentenced for only one year and to pay fine of Rs. 500/ and in default to suffer further imprisonment for three months u/s ec. 498A and 306 r/w Section 34 of I. P. Code. Hence this appeal filed by the original accused Nos. 1 to 5. Since the accused No. 6 died during the trial, there was no question of any further proceedings in respect of accused No. 6.

7. The learned senior counsel appearing for the Appellants submitted that to constitute the offence u/s ec. 498A the following ingredients are required to be proved which are:

- i) A woman was married
- ii) She was subjected to cruelty
- iii) such cruelty consisted of

A. Any lawful conduct as was likely to drive such woman to commit suicide or to cause grave injury or danger to her life, limb or health mental or physical.

B. Harm of such woman with a view to coercing her to meet unlawful demand for property or valuable security or on account of failure of such woman or any of her relation to meet the lawful demand.

C. The woman was subjected to such cruelty by her husband or any relative of her husband.

8. It is further submitted that, to prove offence u/s ec. 306, the prosecution has to prove that suicide was committed in consequence of abetment by the accused. It is further submitted that, so far Section 34 of the Indian Penal Code is concerned, there must be meeting of mind of all the accused prior to commission of the offence and the accused must have participated into the said meeting intending to commit the offence, all the accused must have participated in the crime and criminal act must have been committed in furtherance of their common intention. Therefore, the learned senior counsel would submit that none of these ingredients are proved by the prosecution. The learned senior 11 counsel further submitted that, all the witnesses which are examined on behalf of prosecution are interested witnesses in the sense that they are close relatives of the complainant. There is no evidence against all the accused to establish ingredients of Section 498A and 306 r/w Section 34 of the Indian Penal Code.

9. It is further submitted that, the statement of Shaheen was recorded at Exhibit 24 which was recorded by the police constable in presence of the doctor and, therefore, there was no reason for the trial Court to disbelieve the said statement which was recorded at the earliest point of time when Shaheen was hospitalized at Mahur. It is submitted that, there is no other statement of the deceased which was recorded by the prosecution and, therefore, the statement which was recorded by the police constable on the directions of the P.S.O. and in presence of the Medical Officer is required to be believed. The concerned police constable was examined by the Court as Court witness. It is further submitted that, the alleged incident had taken place on 27th August, 1996 at 10.00 p.m. and the complaint is lodged on 29th August, 1996 at 3.00 p.m. It is further submitted that, said complaint is filed after thought and there is no substance in the allegations in the said complaint. Therefore, filing the complaint at belated stage created doubt about the prosecution story. It is further submitted that, Dr. Amanulla Khan (PW4) has stated in his deposition that he never heard any complaint about each other from the Shaheen or her husband. It is further submitted that, evidence of all the witnesses is hear say. It is further submitted that, the allegations in the complaint have been made first time and there was no any prior complaint about ill treatment by the Appellants to the deceased Shaheen. It is further submitted that, the independent witness whose names are mentioned in the spot panchanama are not examined. There was no intention on the part of the Appellants/accused to commit such alleged offence. It is submitted that, the entire prosecution story is required to be disbelieved. The prosecution has not approached the case with fair and reasonable manner. Initially the Appellants were tried for the offence punishable u/s ec. 498A and 304B, however, Section 306 was added subsequently after thought. The learned Senior Counsel therefore submitted that the impugned judgment and order passed by the Sessions Court cannot be sustained in law, since prosecution has not proved by bringing specific evidence on record about each accused about

demand or their abetment or participation soon before the death of the Shaheen so as to draw the inference that Shaheen has committed suicide and the accused/Appellants have abetted the commission of suicide. The learned senior counsel in support of his contention placed reliance on the reported judgment of this Court in case of Ganesh Y. Bhutekar Vs. State of Maharashtra, and submitted that in the facts of that case Court discarded the prosecution story on the ground that no independent evidence of villagers/neighbourers was recorded and only evidence of interested witnesses was recorded. Therefore, this Court acquitted the Appellant/accused in that case. The learned senior counsel further placed reliance on the reported judgment in case of Sangannagari Narsimulu v. State of A. P. reported in 2005 Cri. L. J. 4166 and submitted that as like in the present case in that case also the evidence of the prosecution witness was hear say and, therefore, such statement becoming hear say are not admissible in the evidence. The learned senior counsel further invited my attention to the reported judgment of this Court in case of Deepak Bharne and Others Vs. State of Maharashtra, and submitted that concept of cruelty has to be proved by direct evidence. The learned senior counsel appearing for Appellants would submit that Appellants deserve to be acquitted from all the charges leveled against them.

10. On the other hand learned Additional Public Prosecutor for the Respondent/ State invited my attention to the evidence of prosecution witnesses and submitted that, there was demand of money. Rupees 2,000/ were demanded thrice. It is further submitted that, the deceased sustained 100% burn injuries. She committed suicide due to ill treatment of the accused/Appellants. The size of cot was 4 x 6 feet and it was not possible that the deceased Shaheen fell down from said cot. In fact, she had committed suicide. Her death was not accidental. She was alone in the room. The door was latched from inside. The learned A.P.P. further invited my attention to the fact that, the evidence of P.W. 1 and P.W. 2 on demand has been fully corroborated by the evidence of P.W. 4 and 5. The learned A.P.P. further submitted that, the Appellants/accused are rightly convicted u/s ec. 498A, 306 r/w Section 34 of the Indian Penal Code. She invited my attention to the examination in chief of Dr. Amanulla Khan and contended that, P.W. 1 Shaikh AINU stated to Dr. Amanulla Khan about demand of money by the accused from Shaheen. Therefore, the learned A.P.P. would submit that the appeal is devoid of any merit and same deserves to be dismissed.

11. Since the conviction is awarded to the Appellant u/s ec. 306 for abetment to commit suicide, it would be relevant to refer to 15 important sections. Section 107 of the Indian Penal Code reads thus:

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 persons 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 willful misrepresentation, or by willful 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.

Section 306 of the Indian Penal Code 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.

12. In case of suicide how the evidence is required to be appreciated has been stated by the Hon''ble Supreme Court in number of judgments. In *State of West Bengal Vs. Orilal Jaiswal and another*, , the Hon''ble Supreme 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 appears 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. Further the Hon''ble Supreme Court in case of *Chitresh Kumar Chopra Vs. State (Govt. of NCT of Delhi)*, had an occasion to deal with this aspect of abetment. The Court dealt with the dictionary meaning of the words "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 sociability pattern is different from the other. 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.

13. The Hon''ble Supreme Court in case of *Amalendu Pal @ Jhantu Vs. State of West Bengal*, , after considering various earlier judgments in para 15 observed that,

15. Thus, this Court has consistently taken the view that before holding an accused guilty of an offence u/s 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 their 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.

16. In order to bring a case within the purview of Section 306 of IPC there must be a case of suicide and in the commission of the said offence, the person who is said to have abetted the commission of suicide must have played an active role by an act of instigation or by doing certain act to facilitate the commission of suicide. Therefore, the act of abetment by the person charged with the said offence must be proved and established by the prosecution before he could be convicted u/s 306 IPC.

14. The Hon''ble Supreme Court in the case of Randhir Singh v. State of Punjab (2004) 13 SCC 129 has reiterated the legal position as regards Section 306 IPC which is long settled in para 12 and 13. Para 12 and 13 reads thus:

12. Abetment involves a mental process of instigation a person or intentionally aiding that person in doing of a thing. In cases of conspiracy also it would involve that mental process of entering into conspiracy for the doing of that thing. More active role which can be described as instigating or aiding the doing of a thing is required before a person can be said to be abetting the commission of offence u/s 306 IPC.

13. In State of W. B. v. Orilal Jaiswal this Court has observed that the courts 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 or ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belongs and such petulance, discord and differences were not expected to induce a similarly circumstances individual in a given society to 19 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.

15. Upon perusal of the judgments of the Hon''ble Supreme Court cited supra, it is required 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 allegations 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 of I. P. Code is not sustainable. Therefore, what is required is that, unless there is 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 u/s ec. 306 is not sustainable.

16. The prosecution case is that the incident of burning took place at about

10.00 p.m. on 27th August, 1996. Admittedly, Shaheen was alone in the said room. The panchanama of place of incident is at Exh. 31 which shows that the room was 7 x 10 feet and it was facing towards East. It's height was six and half feet and is roofed by three zink sheets out of which two tins from northern side were removed. The floor of that room had no tiles and even Shahabad stones. The room was having door on the eastern side. On the northern side there was one wooden cot on which a mattress, Razai and pillows were lying. It is further case of the prosecution that kerosene had fallen on mattress, Razai as well as pillows. The size of the cot was 4 x 6 feet. There was open space of the width of 3 to 4 feet towards south of the cot. Utensils and some books were kept on the wooden planks fixed to the wall with the nails. In the open space some burnt pieces of paper and yellow colored petticoat and green coloured saree were seen lying. Three yellow coloured beads and a piece of thread containing some black beads were also lying there.

Besides that there was one tin of 5 liters capacity of rogour, containing three liters kerosene. The opening of the tin was shut with a cork. A match box of 7 number brand containing only one match stick was lying on the cot. A pant and shirt were hanging to the nails on western wall of the room. One white shirt of terry cot showed the signs of burns. The tins of the room had become black because of the smoke and fire. The door had latch one lamp made of bottle of Parvesh Hair Oil brand by inserting a rag through cork was also noticed on the floor of the room. It is further case of the prosecution that at the time of incident Shaheen alone was present in the room and at that time the door was latched from inside and when there was cry and shouts raised by Shaheen the accused with the help of some persons had removed two tins of that room and effected entry inside the room. It has not come on record that at the relevant time husband was not present in the house.

(emphasis supplied)

The defense case is that Shaheen was waiting arrival of her husband. In the mean while she went into sleep, but accidentally fell from the cot on burning lamp which was on the floor and, therefore, her cloths caught fire due to which she sustained burns.

The defense taken by the Appellants i. e. original accused is not accepted by the Trial Court on the ground that the size of the cot is 4 feet wide and 6 fit in length. Shaheen alone was on the cot. According to the Trial Court judgment, if regard been had to the size of the cot and she alone being on it appears unnatural that, she would fall down from the cot during a sleep. Secondly, the extent of burns are 100% all over the body. Unless there was application of kerosene to the saree and cloths, the whole portion of saree would not have caught fire simultaneously and resulted in to 100% burns. If, it is assumed that she fell from the cot and certain portion of her saree caught fire and she would have immediately awakened because of the heat and the extent of burns would have been limited. The Trial Court observed that, the presence of kerosene tin on the

floor and the fact that some kerosene was fallen on mattress, razai and pillows on cot given an indication that Shaheen must have poured kerosene on her body.

In my opinion, the inference drawn by the Trial Court is needs to be examined carefully in the light of statement of Shaheen recorded at Exhibit 34 in the hospital on 28th August, 1996 at about 00.05 a.m. The Shaheen (deceased) has stated in her statement before the police head constable Mahur that on 27th August, 1996, in the evening after doing the household work, I alone went to sleep in the room after taking dinner at about 8.00 p.m. She has stated that, there was burning lamp near the cot on ground floor. She was waiting arrival of her husband, she fell asleep and thereafter fallen from the cot on the burning lamp. She further stated that her saree caught fire at that time she was shouting loudly "Save me", "Save me". At that time, my father-in-law Abdul Razzak, Nizamuddin rushed there by removing tin shed and extinguished her fire. Nobody had burned her, but she caught into fire by falling down on the lamp and burn. She has stated that, about 22.00 hours said incident had happened. She has further stated that she will disclose the truth when her parents will come. She has further stated that statement is read out to her and it is true and correct.

(emphasis supplied)

The above statement was recorded by P.W. 6 Digambar Balaji Jankar at Exhibit 54. At the relevant time, he was working as Police Head Constable B. No. 647. In his deposition before the Court, he has stated that, at the relevant time, he was attached to Mahur police station. On 28th August, 1996 his duty was at Mahur police station. Head Constable Chavan B. No. 572 was on P.S.O. duty. At about 11.30 p.m. while he was performing P.S.O. duty head constable Chavan told him that one woman had sustained burns and is admitted in the Government Hospital, Mahur, and her statement was to be recorded. Police Head Constable Chavan gave him a letter for recording statement of that woman. Along with that letter he went to the hospital. He met Dr. Pande. He told him that he came to record statement of woman who had sustained burn. Shaheen was the name of that woman. Dr. Pande came with him in the ward and shown the woman Shaheen to him. She had burns all over the body. This witness frankly admitted that statement of Shaheen was recorded in front of her relatives including father-in-law and husband. He has further stated that Shaheen told him that she fallen from the cot in the sleep and her cloths i. e. saree caught fire. Shaheen told that she would tell everything what is truth after her parents could come there. He further stated that he obtained the thumb mark below the statement, then doctor's signature was obtained. Doctor simply put his signature in the margin and put the date and time below the signature. He has identified the signature of himself and also the signature of doctor.

Therefore, at the earliest point of time, statement of Shaheen was recorded at 00.05 hours. Admittedly, this is the only statement of deceased Shaheen recorded by the prosecution. It appears from the discussion in the judgment of the Trial Court that, the said statement is discarded by the Trial Court mainly on

the ground that Shaheen in her statement has stated that she will disclose the truth after her parents will come.

Initially Appellant/accused were charged u/s ec. 498A, 304B r/w Section 34 of the Indian Penal Code. However, it appears that, subsequently, Section 306 came to be added. The prosecution story as it reflects from the record and accepted by the Trial Court is that due to ill treatment and harassment and demand of money the Shaheen committed suicide. The Trial Court has also observed that since there was kerosene on the pillows, mattress, razai, etc, therefore, it is not the case of accidental death, but it is case of suicidal death.

From perusal of entire evidence on record, only in the panchanama it is mentioned that the kerosene was there on the mattress, razai and pillows, etc. there is no any C. A. report or report of expert brought on record by the prosecution in order to convincingly establish that kerosene was on the mattress, razai, pillows, etc. The recovery of article and in particular kerosene tin itself shows that kerosene could not have been poured from said tin, because opening of the tin was shut with a cork.

17. If, it is the case of the prosecution that Shaheen committed suicide because of the ill treatment and due to harassment given by the Appellants/accused, in that case medical report assumes importance. The medical report shows that there were 100; burns. The medical report unequivocally indicates that there were no injuries on the person of Shaheen. There is also inquest panchanama, which shows that there were no any injuries found on the person of the Shaheen. Therefore, any possibility of assaulting or beating or any cruel treatment soon before commission of suicide is ruled out. It has also come on record and it is rather prosecution case that the room was latched from inside, when Shaheen caught fire. Some of the Respondents removed the tin and entered in that room and tried to extinguish the fire that itself indicates that at the relevant time, Shaheen was alone inside the room and room was latched from inside. It has also come on record that the relatives of the Shaheen were immediately communicated about the said incident. It has also come on record that, P.W. 4 Dr. Amanulla Khan who was mediator in arranging the marriage of the Shaheen and accused No. 2 Abdul Aziz was also personally communicated by said Abdul Aziz about the said incident. There is no doubt that, the Appellants were prompt in their action in communicating said incident to all the relatives. It further appears that Shaheen was taken immediately to the hospital. The inference drawn by the Trial Court that since there are 100% burns and said is not possible by the falling on the kerosene lamp which was near cot on floor has no basis. The Shaheen was caught fire. She was alone in the room. The room was latched from inside and after fire, though some of the accused/Appellants took immediate steps to remove two tins of the said room and entered in the room, however, some time might have consumed in that process and during that period, there is possibility that, Shaheen was completely burned. It has also come on record that flames of fire have reached up to tins of the said room. It has also come on

record in 313 statement of one of the accused that on the relevant date and time electricity was not available and, therefore, said lamp was used which was burning. It is also stated by P.W. 4 and other witnesses that, when they arrived to the scene, the head of the Shaheen was resting on the lap/thigh of her mother-in-law. Therefore, the case in hand is required to be examined in the light of ingredients of Section 306, 498A and 34 of the Indian Penal Code. Even if the prosecution story is taken as it is that it was suicidal death in that case it is necessary to refer to the evidence of prosecution witnesses on the point of harassment and cruelty. Section 498A of the I. P. Code reads thus:

498A. 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 purpose 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.]

18. The object of introducing chapter XXA containing Section 498A in the I. P. Code was to prevent torture to a woman by her husband or relatives of her husband. Section 498A was added with a view to punishing the husband and his relatives who harass and torture the wife to coerce her or her relatives to satisfy unlawful demand of dowry.

In the light of above provisions let us discuss the evidence of prosecution witnesses on the point of cruelty and harassment P.W. 1 Shaikh Ainu Shaikh Yakhoob has stated in his evidence before the Court that Shaheen (now deceased) was his daughter. Abdul Aziz (Accused2) is the husband of Shaheen. The marriage was performed on 12th April, 1996. In the marriage he presented gold ring of five grams, cash of Rs. 5,000/ for garments to Abdul Aziz in the marriage. He further stated that some items of furniture and utensils were also given in the marriage. After the marriage Shaheen lived with the husband at Mahur. Eight days after that, she returned to his house. They did not pay much attention to assess the cause of the disinterestedness of Shaheen, probably because they felt that, she may be finding it difficult to adjust in the matrimonial house. It is further stated that, she was sent back to the matrimonial home after about eight days stay in their house. This witness has further stated that after one month one Mr. Shaikh Mustafa went to Mahur i. e. matrimonial place of the Shaheen and brought Shaheen to the complainants house. At that time they noticed that she was not talking much to them and showed signs of

disinterestedness. On enquiry she told that the in laws are demanding money from her. They are demanding Rs. 2,000/ .

Accordingly complainant paid Rs. 2,000/ to Abdul Aziz, when Abdul Aziz came to take Shaheen back to matrimonial house. It is further stated by the complainant that, about 10 to 12 days thereafter Shaheen along with her husband Abdul Aziz came to the house of complainant. Both of them told him that he should pay Rs. 2,000/ more.

Shaheen told him that, her in laws were demanding Rs. 2,000/ more and that is why she requested him to pay additional amount of Rs. 2,000/ . This witness has specifically stated that, "Now I say that Shaheen's husband (Accused2) did not speak anything about monetary demand. I handed over Rs. 2,000/ to Shaheen. then she along with the husband returned to Mahur.

(emphasis supplied)

19. It is further stated that again Shaheen was brought to the complainant's house by Shaikh Yakhoob and at that time she was seen nervous and was weeping. She told that her in laws were subjecting her to cruelty and forcing her to bring money from the complainant. It is also stated that she was beaten by in laws.

All the persons were giving trouble to her. All the accused warned her to bring Rs. 25,000/ from complainant. Said amount they were demanding for purchase of utensils in their shop. On 24th August, 1996 Abdul Gafar (Accused3) came to take Shaheen and complainant sent back Shaheen with said Abdul Gafoor to Mahur. It is further stated that on 28th August, 1996 at 3.00 a.m. Abdul Gafoor (Accused3) came by jeep and informed that Shaheen got burns at her house. So far demand is concerned, it has come in the evidence of this witness that on two occasions Rs. 2,000/ were demanded by the in laws and Rs. 25,000/ by all the accused for the purchase of utensils in their shop. This witness has admitted that he has lodged the complaint on 29th August, 1996. He has stated that because of the ill treatment in the matrimonial home Shaheen died.

20. In his cross examination he has specifically stated that, "twice or thrice I had been to the house of accused. I stayed there for one day. I held talk with son-in-law, Abdul Aziz. I took meals with him. It is a fact that, Abdul Aziz (Accused2) talked with me every time in normal mood. The atmosphere in the home was peaceful." This witness has further stated that he did not remember when Rs. 2,000/ were paid. He has further stated that he never told to Dr. Amanulla Khan about monetary demands of the accused. He did not tell to Dr. Amanulla Khan at the time when Rs. 25,000/ were demanded by Shaheen. He did not lodge any complaint with police when the demand of Rs. 25,000/ was disclosed by Shaheen to him on 19.06.1996. This witness in his cross examination has further stated that, "it is not true that, police recorded my statement and also my wives in the hospital on 28th August, 1996." (emphasis supplied).

21. If the entire evidence of this witness is perused, it appears that the omnibus statement is made about the demand of Rs. 2,000/ on two occasions by the in laws of the deceased Shaheen and on one occasion Rs. 25,000/ for purchase of utensils in the utensils shop belonging to accused persons. There are no specific allegations against each accused that which accused has demanded how much amount and what type of cruel treatment/harassment was given by the Appellants/accused to the deceased Shaheen. The complainant has made only omnibus statement that on two occasions Rs. 2,000/ were demanded by the in laws and on one occasion Rs. 25,000/ was demanded.

At this stage, it is relevant to mention that the accused/Appellants were initially charged u/s ec. 498A, 304B r/w Section 34 of Indian Penal Code. The Section 306 came to be added subsequently. Therefore, if the provision Section 34 is invoked in that case ingredients of Section 34 are required to be met. On reading the evidence of P.W. 1 it does appear that no any specific act or overt act is attributed to each of the accused about harassment or ill treatment given by them to the deceased Shaheen. The prosecution has not brought on record any evidence that, before occurrence there was meeting of mind amongst the accused. Secondly, in his cross examination this witness has admitted that, when he went to the house of the accused his son-in-law Abdul Aziz had conversation with him in normal mood. The atmosphere in the house was peaceful. He has further stated that, he did not lodge any complaint prior to lodging the complaint on 29th August, 1996. He has also stated that even he did not tell about unlawful demand of Rs. 2,000/ or Rs. 25,000/ by the accused/Appellant to the complainant. In fact, P.W. 4 Dr. Amanulla Khan was the mediator and because of him marriage was settled. In case there was any harassment or ill treatment on account of non payment of amount as demanded by the Respondent, in that case certainly this witness should have disclosed the same fact to Dr. Amanulla Khan/ P.W. 4. Though the P.W. 4 Amanulla Khan has stated in his examination in chief that while going to lodge the complaint P.W. 1/complainant stated him about illegal demand by the accused/Appellants. However, on reading the evidence of P.W. 1, he has specifically stated that, he did not disclose anything to P.W. 4 Dr. Amanulla Khan about the demand of Rs. 2,000/ or Rs. 25,000/ by the Appellants/accused to the complainant. It is admitted position that the complaint is lodged on 29th August, 1996 at 3.00 p.m. Therefore, the evidence of P.W. 1 on the point of ill treatment or harassment does not inspire confidence so as to sustain the conviction of the accused/Appellants.

22. P.W. 2 Zakiulla Khan has stated in his evidence about the demand of Rs. 2,000/ as like P.W. 1. From reading of evidence of P.W. 2 it does not inspire confidence that there was specific demand by each of accused and there was some motive or intention behind asking such alleged unlawful demand or harassment as stated by the prosecution.

P.W. 3 Zulekhabegum is mother of deceased Shaheen. Here evidence is at Exhibit 45. More or less she has stated the same story as like P.W. 1. She has stated

that, there was demand of Rs. 2,000/ on two occasions by the in laws. Omnibus statement is made that there was ill treatment. There was beating and the accused Appellants were asking Rs. 25,000/ from the complainant for purchasing utensils in their utensils shop. Therefore, the evidence of P.W. 3 on demand and harassment is more or less like P.W. 1.

23. P.W. 4/Dr. Amanulla Khan's evidence is at Exhibit 46. In his evidence he has stated that, when he went to the house of Abdul Aziz and saw Shaheen in one room. Near her, her mother-in-law was also present. The head of Shaheen was resting on the lap/thigh of her mother-in-law. Shaheen was not able to tell anything. She was suffering from pains and was demanding water. He has mentioned in his evidence that Shaheen told him that she would disclose everything to us in presence of her father. However, this statement of P.W. 4 contradicts with his own statement in his examination in chief that, Shaheen was not able to talk anything except asking for water. This witness has stated in his examination in chief that on the way to Mahur to Yawatmal Shaheen's father weepingly told him that, Shaheen was asking for money and he never expected such type of incident of burning. This evidence of P.W. 4 is falsified by the statement of P.W. 1. P.W. 1 in his deposition before the Court has specifically stated that, he never told Dr. Amanulla Khan about demand of Rs. 25,000/ or Rs. 2,000/ by the accused/Appellants. Therefore, no weight can be given to the statement of P.W. 4 regarding what was told by Shaheen's father to him that Shaheen was asking for money. This witness in his cross examination stated that, "Once or twice I had seen Shaheen at her house i. e. at the house of accused, when I was invited for dinner. The atmosphere in the house was normal." In his cross examination he has specifically stated that, "She was not able to talk and only she was uttering the words, "water water". Therefore, his statement in the examination in chief that Shaheen told him that she will disclose everything in front of her father is falsified by his own statement in the cross examination.

(emphasis supplied)

24. P.W. 5 Vivek V. Mungalikar was working as PSI with police station Mahur. He was I. O. and investigating the complaint registered by the P.W. 1/complainant. In his examination in chief he has stated about the things recovered from the spot and also about spot panchanama. He has specifically stated that one kerosene lamp made of glass bottle having a rag inside was noticed by the side of said articles in the room. Though, this witness has stated in his examination in chief that some yellowish beads and pillow cover was containing kerosene smell, however, nowhere this witness has stated that said cloths were sent for examination to the C. A to see, whether really there was kerosene on the said pillow cover or on yellowish beads. He has stated in his examination in chief that there were witnesses for the spot panchanama namely Nizamoddin and Sayed Ali. However, prosecution has not examined these witnesses. He has stated that he has registered the complaint/FIR on 29th August, 1996 at 3.00 p.m. The

father of deceased namely Shaikh Ainu came there and lodged a complaint orally which was got reduced into writing by personally in his hand writing. On his complaint he registered crime u/s ec. 498A and 304B of the Indian Penal Code vide Cr. No. 61/1996. The papers of A. D. No. 16/96 were included in the papers of Cr. No. 61/1996. He recorded statements of six witnesses on 29.08.1996. Thereafter, after completion of investigation he stated that, charge sheet came to be filed before the competent Court.

25. If the evidence of the prosecution witnesses on the aspect of cruelty and harassment if read together, it does not inspire confidence that, Appellants had subjected to Shaheen to cruelty by willful conduct which was of such a nature as it resulted the commission of suicide by the Shaheen. In my opinion, the evidence of prosecution witnesses is general in nature and does not inspire confidence and also does not met ingredients of Section 498A or Section 306 of the Indian Penal Code. The Trial Court has convicted the Appellants/accused with aid of Section 34 of the I. P. Code. Nothing has been brought on record by the prosecution to attract Section 34 postulates, (1) the criminal act should have been done, not by one person, but more than one person (2) Doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of common intention of all such persons. The Hon"ble Supreme Court in case of Jaswant Singh Vs. State of Haryana, has held that u/s ec. 34 the emphasis is on physical presence and promotion of facilitation of the crime. In the case of Nandu Rastogi @ Nandji Rastogi v. State of Bihar reported in 2003 SCC 177 it is held that to attract Section 34 of I. P. Code it is not necessary to each one of the accused must assault the deceased. It is enough if it is shown that they shared a common intention to commit the offence and in furtherance thereof each one played his assigned role by doing separate acts similar or diverse. In the instant case, nothing has been brought on record by the prosecution to suggest that each accused has played separate role in commission of offence. In fact, the statements of witnesses about alleged cruelty and harassment to the victim is stated in general. Nothing has been stated specific about each accused/Appellants. At least there are two witnesses, P.W. 1 and P.W. 4 who have stated in their cross examination that when they visited the house of the Appellants, they found normal atmosphere in the house. It appears that, the complainant and P.W. 4 when visited the house of Appellants, they were properly treated. These admissions of the witnesses in cross examination does indicate that, there is no substance in the prosecution story about alleged harassment or cruelty by the Appellants/accused to the deceased Shaheen.

26. The medical officer has opined probable cause of death is "cardiac respiratory arrest due to 100% burns". Upon careful perusal of postmortem report and in particular Column 15 of the said postmortem report, there are no any external injuries shown on the body of the Shaheen. It has also come in the inquest panchanama that, there were no any injuries on the person of deceased Shaheen.

27. Coming to the defense of the accused, in their statement recorded u/s ec.

313 of the Cr. P. C. is concerned, all the Appellants have admitted that, the complainant/father of Shaheen presented a gold ring of 5 gms, Rs. 5,000/ for garments, some furniture and utensils in the marriage. This attitude of the Appellants shows their truthfulness. It has also come in the statement of Abdul Jabbar that only once Shaheen went to the parents house after the marriage and it was in the beginning and thereafter she never went to the parents home. While answering question No. 7 about ill-treating Shaheen and coercing her to bring money from parents, the Appellant No. 1 has stated that, Shaheen's husband leave with her in a separate room and likewise I along with my wife and my brother live separately from me. We had nothing in common or joint. While replying question No. 10 again about alleged ill treatment given to the Shaheen, the accused No. 1 has replied that Shaheen did not commit suicide. We never demanded any money from her. She slept on a cot in a room. A lamp was burning on the floor in the room. She fell from the cot and her cloths caught fire, when they came in contact with burning lamp. Therefore she died. While replying question No. 11, why the prosecution witnesses deposing against the accused persons, he has stated false case is lodged against them.

The accused No. 1 Abdul Aziz has stated that all brothers are staying separately, though he stated all of us live in one wada, however, there are rooms in that wada. I along with my wife Shaheen live separately in one room. So also my other two brothers along with their respective wives live in separate rooms like me. While replying question No. 8 about the alleged demand of Rs. 25,000/ to purchase fresh stock of goods in his utensils shop, he replied that P.W. 2 Shaheen's grand father never came to their house even to see the Shaheen when she was not well. so far how the incident had taken place, all the Appellants have stated like Appellant No. 1 in their statement u/s ec. 313 of the Cr. P. C. It has also come in the statement of Abdul Gafar that since their family is self reliant and earning in better way, there is some feeling of jealousy in other persons from the community and they have instigated the complainant to file false complaint. This accused has also denied that he went to Rahur to bring Shaheen as stated by the prosecution witnesses. Therefore, if the statements of all these Appellants u/s ec. 313 of Cr. P. C. are perused, their defense appears to be probable. There is also statement of the Shaheen recorded in the hospital by the police constable in presence of the doctor. Upon reading said 41 statement, the defense taken by the accused appears to be trustworthy.

28. The prosecution case is that due to ill treatment and harassment Shaheen committed suicide and, therefore, charge u/s ec. 306 was added subsequently. The Trial Court has convicted the accused/Appellants u/s ec. 306, 498A r/w Section 34 of I. P. Code. As stated earlier the entire evidence of the prosecution witnesses does not lead to the only conclusion that due to alleged harassment and ill treatment by the Appellants/accused to deceased Shaheen, she committed suicide. Language of Section 498A is very clear, unless it is established that the cruel treatment and harassment given to the victim is of such a nature that, it would drive the woman to commit the suicide, then only

conviction u/s ec. 306 can be sustained. In the instant case, at the cost of repetition, it is to be stated that, the omnibus statement is made by each witness that there was demand of Rs. 2,000/ on two occasions and Rs. 25,000/ on one occasion without giving any particulars that which accused has demanded this amount and on which date and for what purpose. If the accused are convicted with the aid of Section 34, in that case it is necessary to attribute overt act to each accused/Appellant. It should be brought on record that there was meeting of mind before the occurrence.

29. Even if the prosecution case is considered on the basis of the evidence brought on record that, the Shaheen committed suicide because of ill treatment or harassment by the Appellants/accused. The abetment contemplated u/s ec. 306 of the I. P. Code has to be of such a nature that, act of the accused is such which instigated to commit the suicide or they were engaged in any conspiracy in the doing or forcing the victim for commission of suicide or they have intentionally aided in the said commission of offence. The prosecution has not brought anything on record that soon before the commission of suicide, there was abetment of things which forced the Shaheen to commit suicide. To attract provisions of Section 306, it is necessary to show that cruelty meted out to victim had in fact induced her to end the life by committing suicide. There should be intention to provoke incite or encourage committing of an act by the accused. 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, there should be convincing, clinching and cogent evidence on record. Unless there is a proof of direct or indirect act of incitement to the commission of suicide, merely on the allegations of harassment without there being any positive action proximate to the time of occurrence on the part of the accused which lead or compelled the person to commit suicide, conviction in terms of Section 306 of the I. P. Code is not sustainable. This position has been stated by the Hon'ble Supreme Court in case of Amalendu Pal @ Jhantu cited supra. In case of Randhir Singh cited supra, the Supreme Court held that abetment involves a mental process of instigation a person or intentionally aiding that person in doing of a thing.

In the instant case, on careful scrutiny of the evidence brought on record by the prosecution, it does not inspire confidence and does not show that the cruel treatment or harassment is given by the Appellants which lead to commission of suicide by the deceased Shaheen. Nothing has been brought on record to show that soon before the commission of suicide, there was any direct or indirect act of incitement to the commission of suicide by the accused/Appellants. It has also come on record that, the Appellants are staying separately in their respective rooms and out of three brothers two were already married before the date of incident and they were staying with their wives in their respective rooms. Therefore, viewed from any angle, in my opinion, the prosecution has failed to bring cogent and clinching evidence on record to sustain the conviction of the Appellants/accused u/s ec. 306, 498A r/w Section 34 of the Indian Penal Code.

Therefore, taking over all view of the matter, in my opinion, the benefit of doubt is required to be given to the accused Appellants. In the result, the appeal is allowed. The impugned judgment and order dated 01st December, 1999 in Sessions Case No. 26 of 1997 passed by learned Additional Sessions Judge, Nanded is quashed and set aside. The Appellants/accused are acquitted from all the charges leveled against them. Their bail bonds stands cancelled. The original Record and Proceedings be sent back immediately to the concerned Court.