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**(2006) 11 BOM CK 0040**  
**In the Bombay High Court**  
**Case No : Criminal Appeal No. 451 of 2004**

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|-----------------------------------|------------|
| Abdul Majid Mohd. Shafique Ansari | APPELLANT  |
| Vs                                |            |
| State of Maharashtra              | RESPONDENT |

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**Date of Decision :** 17-11-2006

**Acts Referred:**

Evidence Act, 1872 — Section 113A  
Penal Code, 1860 (IPC) — Section 306, 34, 498A

**Citation :** (2007) 2 DMC 526

**Hon'ble Judges :** A.M. Khanwilkar, J

**Bench :** Single Bench

**Advocate :** Anita G. Bhaktwani, for the Appellant; S.S. Tatkare, Assistant Public Prosecutor, for the Respondent

**Final Decision :** Allowed

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## Judgement

A.M. Khanwilkar, J.—This appeal takes exception to the judgment and order passed by the IV Ad-hoc Assistant Sessions Judge, Thane dated 23rd January, 2004 convicting the appellant/accused No. 1 for offence punishable under Sections 306 and 498A of Indian Penal Code. The appellant along with accused No. 2 were tried for offence punishable under Sections 498A and 306 read with Section 34 of Indian Penal Code. However, the trial Court on analysing the evidence on record has found that there was absolutely no evidence against the accused No. 2. On that basis, the accused No. 2 has been acquitted of the alleged offence. In the circumstances, this appeal is only by accused No. 1 / appellant, who incidentally happens to be the husband of deceased Faimunissa.

2. Broadly stated, the prosecution case is that Faimunissa was married to appellant/ accused No. 1 on 15th May, 1999. They were residing at Shashtri Nagar, Bhiwandi. The mother of appellant/accused No. 1 was residing in the neighbouring house along with accused No. 2. In so far as case against the appellant is concerned, it was alleged that initially for 7-8 months, after marriage with deceased Faimunissa, there was no incident of any demand or harassment.

However, after 9th month of the marriage, it is alleged that the appellant started demanding sum of Rs. 50,000 and colour T.V. from Faimunissa to be brought from her father. It is alleged that there was dispute between the couple on that account. It is the prosecution case that on 24th October, 2002 quarrel took place between the appellant and Faimunissa. As a result, Faimunissa committed suicide by pouring kerosene and set herself on fire. It is not in dispute that Faimunissa sustained about 90% burn injuries and succumbed to those injuries. It is not in dispute that immediately after the incident, the appellant had carried Faimunissa to the house of P.W.2, who happens to be the real sister of Faimunissa. There the appellant is stated to have disclosed that quarrel took place between him and deceased Faimunissa on account of not preparing food properly. Faimunissa was then taken to different hospitals and ultimately was admitted to Deep Nursing Home on 24th October, 2002 itself. She was under treatment, till succumbed to the injuries on 30th October, 2002. P.W.2 reported the case of suicide committed by Faimunissa on account of cruelty caused by the appellant/accused No. 1 by demanding sum of Rs. 50,000 and colour T.V. The offence was registered on 28th October, 2002. Thereafter, statements of P.W.1, P.W.3 and P.W.4 came to be recorded. P.W.1 was residing in the neighbouring house. The trial Court has declared this witness as hostile as he did not support prosecution case. Accordingly, prosecution case of Faimunissa having committed suicide on account of cruelty caused to her is spoken only by P.W.2, P.W.3 and P.W.4. P.W.3 is also staying in the neighbourhood and is good friend of P.W.2. P.W.4 is the father of deceased Faimunissa. Prosecution has also examined P.W.5 the Investigating Officer.

3. As stated earlier, the case of defence is that Faimunissa sustained burn injuries on account of accidental fire caused to the stove. According to the defence, even Faimunissa had deposed about that in her dying declaration given to the police. The Investigating Officer however, has deposed to the contrary. According to him, no dying declaration was recorded. The defence however, has examined D.W.1-Omprakash Ramvilas Mourya, who is Advocate by profession and claims to have visited the hospital on the request of the police officer for recording dying declaration in the capacity of Special Executive Magistrate. The trial Court has analysed the evidence. In so far as the inquest Panchanama Exh. 26 and post-mortem report are concerned, that were taken on record as admitted. The opinion about the cause of death has been admitted by the defence, which has been exhibited.

4. The trial Court on analysing the evidence on record in the first place proceeded to reject the defence theory of accidental death. The trial Court then analysed the oral evidence of P.W.1 to P.W.5. It is found that the evidence of P.W.1 was of no avail, as he has turned hostile and did not support prosecution case. Even with regard to the evidence of P.W.3, the trial Court has found that the earlier part stated in her evidence cannot be acted upon, but the version given in her latter part of evidence supports the prosecution case. Insofar as P.W.4 is concerned, the trial Court though records that he has improved his case on

material respects, still proceeds to find appellant guilty on the reasoning that the version of P.W.4 about disclosure made by Faimunissa to him on 26th October, 2002 was acceptable and can be acted upon. The trial Court has broadly accepted the version given by the P.W.2 and, therefore, proceeded to find that the prosecution established the fact that the appellant caused cruelty to Faimunissa by demanding sum of Rs. 50,000 and colour T.V. On account of that harassment Faimunissa was driven to commit suicide. On this finding, the trial Court observed that having regard to the legislative presumption available u/s 113(A) of the Evidence Act, the appellant will have to be held guilty for offence punishable u/s 498A as well as u/s 306 of Indian Penal Code. The trial Court accordingly, ordered that the appellant shall suffer sentence of R.I. for 3 years and to pay fine of Rs. 5,000 i.d. to suffer further R.I. for one year for offence u/s 306 of I.P.C. and to suffer sentence of R.I. for one year and to pay fine of Rs. 5,000 i.d. to suffer further R.I. for six months for offence u/s 498A of Indian Penal Code. The trial Court further ordered that the substantive sentences are to run concurrently. This decision is the subject matter of challenge in the present appeal,

5. Having considered the rival submissions and on marshalling the evidence on record, I have no hesitation in taking the view that there was no legal evidence to find that the prosecution has proved the case beyond all reasonable doubts. That is to say, regarding the case against the appellant of having caused cruelty to Faimunissa and that the harassment was of such nature that she was driven to commit suicide. To my mind, the manifest error committed by the trial Court is that of examining the defence version in the first place; and not scrutinising the evidence adduced by the prosecution, to consider whether the prosecution has proved beyond reasonable doubt, the case alleged against the accused. As the approach is manifestly wrong, that has inevitably resulted in wrong conclusion reached by the trial Court. I may hasten to add that merely because the trial Court first proceeded to examine the defence version, is not the basis on which, I am inclined to take the view that the prosecution has failed to establish the case against the appellant beyond reasonable doubt. There are other reasons which I will now proceed to record.

6. The prosecution is essentially relying on the evidence of P.W.2 and P.W.4 on the factum of appellant being responsible to subject Faimunissa to cruelty or harassment. P.W.2 happens to be the real sister of the deceased Faimunissa and P.W.4 is the father. Indeed, the prosecution also relies on the evidence of P.W.I and P. W.3 to support the prosecution case in relation to the case of inflicting cruelty. In so far as P.W.I is concerned, his evidence has been discarded on the finding that he has turned hostile and his version was of no avail.

7. In the circumstances, I shall first advert to the evidence of P.W.4, who happened to be the father of deceased Faimunissa. In his examination-in-chief he has stated that when he visited matrimonial house of Faimunissa, at that time she told him that her husband, parents-in-law and two brothers-in-law

demanded from her Rs. 50,000 and colour T.V. He further states that Faimunissa also stated that they harassed her on that account. However, he has not spoken about the day or month or year when this disclosure was made to him by Faimunissa or regarding the manner of harassment suffered. He has then deposed about the next episode when the appellant/accused No. 1 along with his wife Faimunissa had visited his house, at that time some quarrel took place between both of them on account of sum of Rs. 50,000. As a result, the appellant left Faimunissa behind in his house and went away. Later on, he (P.W.4) persuaded Faimunissa to go back to Bhiwandi. Even with regard to this episode no specific day, month or year is spoken by this witness. In so far as the incident in question is concerned, the case of this witness is that on 24th October, 2002 about 9.30 p.m. he had received phone from his daughter (P.W.2). Immediately, he reached Bhiwandi on the next day i.e. on 25th October, 2002. He has then stated that he met Faimunissa in Deep Nursing Home on 25th October, 2002 and when he enquired with her about the incident of fire, she told him that quarrel ensued with her husband on account of Rs. 50,000 and colour T.V. and also on account of cooking vegetable. He has then stated that she also disclosed to him that as she got enraged, she set herself on fire by pouring kerosene. This is the only version given in the examination-in-chief. In the cross-examination with regard to the first incident, this witness conceded that he does not remember the date on which demand of Rs. 50,000 was made by the accused when he had visited his house. This witness has also deposed that while Faimunissa was in the hospital between 26th October, 2002 to 30th October, 2002, police did not come in the hospital and that statement of Faimunissa was recorded by the police before his arrival. He has also admitted that his statement was recorded by police on 29th October, 2002. He has been confronted with the version given by him in the examination-in-chief regarding demand of Rs. 50,000 and colour T.V. He asserts that he had given that statement to the police and cannot assign any reason why the police did not refer to the same in the statement. He also asserts that he had stated before the police that accused had come to his house after the death of his son, but he is not in a position to say as to why that statement has not been noted by the police. Suggestion has been put to this witness that he is deposing false that, when he had gone to the hospital on 26th October, 2006, Faimunissa had disclosed to him about the demand of Rs. 50,000 made by the accused or about quarrel between them and as a result she set herself on fire by pouring kerosene. The Trial Court has analysed his evidence. Even when the trial Court has found that there was improvement in respect of the episodes given by P.W.4 in his examination-in-chief; the trial Court has observed that, even if that evidence of witness P.W.4 was to be excluded from consideration, his evidence as regards his inquiries about cause of injuries is material one. The Trial Court has observed that nothing was brought on record to discard the evidence of P.W.4 in respect of his coming to see his ailing daughter and of having made inquiry with her about the cause of injuries. The trial Court thus found that the evidence given by P.W.4 supported the prosecution case that deceased committed suicide because of the ill-

treatment by her husband. The approach of the trial Court with regard to appreciation of evidence of P.W.4, in my opinion, is misdirected. Once it is found that this witness has improved his version on material facts with regard to the instances of ill-treatment or the demand of dowry and on excluding that evidence, there was no legal evidence to conclude that the prosecution has proved beyond reasonable doubt factum of cruelty or harassment of such kind that would force Faimunissa to commit suicide. Moreover, it would follow that this witness had the tendency of conjuring case to implicate the appellant. In the examination-in-chief P. W.4 asserts that Faimunissa made disclosure to him on 25th October, 2002 when he had visited her in the hospital. However, in the cross-examination, he admits that he had come to Bhiwandi only on 26.10.2002. Be that as it may, in spite of this disclosure he did not bother to inform about the same to anyone even to P. W.2, his real daughter and sister of Faimunissa. For the first time, he has disclosed that to the police only on 29th October, 2002. Suffice it to observe that there is no corroboration of the factum of disclosure made to him. Going by his version, Faimunissa made the disclosure when he alone was present at the relevant time. If such is the evidence of P.W.4, it will be unsafe to accept his version, as it is obvious that he has the tendency of conjuring the case against the accused, in his evidence given before the Court. If this evidence was to be discarded, then the only other evidence with regard to the factum of demand of amount and Articles and of cruelty and ill-treatment that remains to be considered is of P.W.2 and P.W.3.

8. In so far as P.W.3 is concerned, she was staying in the neighbourhood of deceased Faimunissa. She is the close friend of P.W.2. In the examination-in-chief P.W.3 states that Faimunissa and appellant/ accused were not on good terms. The appellant threatened Faimunissa that he was not interested in continuing with her and he would bring stamp paper and she should sign thereon. She has deposed that the appellant wanted to give divorce to Faimunissa. She has then stated that on inquiry, Faimunissa told her that accused was every now and then demanding Rs. 50,000/ - or 60,000 and ill-treating her on that count. However, no mention or details regarding the nature of ill-treatment or harassment is spelt out. Besides, the above facts are not stated before the police. With regard to the date of incident 24th October, 2002 in her examination-in-chief, she states that at about 9.30 p.m. she learnt that Faimunissa was burnt. Thereafter, she visited the house of P.W.2. She then states that at that time, the appellant had brought Faimunissa to the house of P.W.2 in burnt condition. All of them took Faimunissa to Mamata Hospital and therefrom to hospitals at Gopal Nagar and eventually, to Deep Nursing Hospital where Faimunissa was admitted as indoor patient. She has then stated that during the period when Faimunissa was indoor patient, she had enquired about the incident. At that time, she (Faimunissa), had disclosed that she had set herself on fire because of the ill-treatment of her husband and brother-in-law. No further details are mentioned in the disclosure made by Faimunissa except word "ill-treatment". It was surely not attributed to the demand of Rs. 50,000. In the cross-

examination, this witness has denied the suggestion that when Faimunissa was being taken to the hospital on 24th October, 2002, she was properly speaking. This denial is inconsistent with the version of P.W.2, who has stated that Faimunissa was properly speaking at the relevant time. Interestingly, in the examination-in-chief, no mention is made as to when the alleged disclosure was made to P.W.3 by Faimunissa. Faimunissa was admitted on 24th October, 2002 and died on 30th October, 2002. It is inconceivable that Faimunissa would not make the disclosure on the same day even though she was speaking properly. In any case, if the disclosure was made prior to 28th October, 2002, this witness would have immediately informed the same to the near relatives of Faimunissa. No such case is spelt out from the version of P.W.3 or from the version of other witnesses. Interestingly, no specific date on which such revelation made to her by Faimunissa is mentioned. Her (P.W.3) statement is recorded by the police obviously after 28th October, 2002 when formal complaint has been registered at the instance of P.W.2. We have already noticed that according to P.W.4, Faimunissa had disclosed to him about the relevant fact on 25th October, 2002. If so, Faimunissa would have had disclosed the same to P.W.3 who was also present in the hospital, The trial Court has analysed the evidence of P.W.3. The trial Court has noted that version of P.W.3 is contradictory to the version of P.W.5 Investigating Officer, who has stated that P.W.3 had not stated relevant portion in her police statement. The trial Court has also noted that there are omissions amounting to contradiction in the evidence of P.W.3 on the relevant facts. In paragraph 19 of the judgment, the trial Court then proceeded to observe that even though her other version was to be discarded being vague, however, P.W.3 has positively spoken about the disclosure made to her by Faimunissa while in the Nursing Hospital. The trial Court has then observed that there is nothing in the cross-examination to discard this version of P.W.3. As is observed earlier, if Faimunissa had disclosed certain facts to P.W.3, she would have definitely informed the same at least to P.W.2 and P.W.4. There is nothing in the evidence that she informed about the same to any one much less the close relatives of Faimunissa i.e. P.W.2 and P.W.4. Instead the evidence shows that she has given her statement for the first time directly to the police only after 28th October, 2002. The trial Court has rightly found that there are improvements as well as omissions amounting to contradictions in the version of P.W.3. That necessarily means that the witness had the tendency to speak facts, which are other non-existing or to conjure up certain facts so as to indicate complicity of the appellant. Even this witness, as in the case of P.W.4 and P.W.2 claimed that when the disclosure was made by Faimunissa, at the relevant time no one else was present. Stiff ice it to observe that evidence of P.W.3 is shaky and it would be unsafe to convict the accused on the basis of such version.

9. Having said this, it necessarily follows that the prosecution has failed to prove beyond reasonable doubt the fact of subjecting Faimunissa to cruelty or ill-treatment of such nature that would drive her to commit suicide. If the version of P.W.3 and P.W.4 were to be discarded for the reasons already recorded and even

if version of P.W.2 was to be accepted, that by itself cannot be the basis to record finding of guilt against the appellant.

10. We shall now turn to the version of P.W.2. In her examination-in-chief, she has stated that after marriage for first 7-8 months accused/ appellant treated Faimunissa properly but from 9th month of marriage trouble started between them. The appellant started demanding Rs. 50,000 from Faimunissa for starting grocery shop. She has then stated that after 8 months of marriage, appellant and his mother had poured kerosene on the person of Faimunissa. This incident was allegedly witnessed by Javed Solapurkar Saved (P.W.I). However, P.W.I has not supported the prosecution case and has been declared hostile. Moreover, no such case is spoken by P.W.4 father of Faimunissa. She has then deposed that Faimunissa frequently used to visit her house and used to tell her about the ill-treatment given to her by the appellant. No other witness has spoken about this. She has also spoken about the some altercations between Javed (P.W.I) and appellant, which were to impress upon the appellant that he should treat Faimunissa properly and to bring about settlement. With regard to the date of incident, she has deposed that, on 24th October, 2002, Faimunissa and her husband had come to her house. At that time the appellant/ accused had stated that there was some quarrel between him and Faimunissa on account of not adding salt in the vegetable. She has then stated that the appellant however, disclosed that because of that quarrel Faimunissa got enraged and Get herself on fire. She has stated that Faimunissa had sustained burn injuries all over her body especially on front side, such as chest, stomach, legs, both hands and other parts of the bodies. She has then stated that she took Faimunissa to hospital and eventually admitted her in the private hospital. She has also stated that during the incident the appellant sustained injuries due to fire, on the three fingers of left hand. In paragraph 3 of the examination-in-chief, she has stated that on 26th October, 2002, when she met Faimunissa, she disclosed to her about the incident, which started with quarrel as cooked food was not prepared properly. She stated that thereafter, Faimunissa disclosed that during the quarrel the appellant insisted that Faimunissa should bring Rs. 50,000 and colour T.V. from her father. On that basis she proceeded to report the matter to the police. It has come in the evidence that her complaint was registered on 28th October, 2002. Faimunissa died on 30th October, 2002. This is the entire version given by P.W.2 in the examination-in-chief. In the cross-examination, this witness has admitted that the appellant/accused No. 1 was with her althroughout when Faimunissa was taken from one hospital to other till admitted in Deep Nursing Home. She has also admitted that the police had enquired with Faimunissa after she was admitted on 24th October, 2002. At that time she was standing outside. She has also admitted that when Faimunissa was taken to hospital, she was speaking properly. She has also admitted that her complaint was recorded. She admitted that she had not lodged complaint about ill-treatment prior to the present complaint Exh.16. One thing is certain that in her evidence no explanation is offered by P.W.2 as to why she asked about incident to Faimunissa only on 26th

October, 2002 for the first time i.e. after two days from the date of incident even though she was with Faimunissa during most of this period. For, it is her case that she was althroughout along with Faimunissa from 24th October, 2002. She also admitted that Faimunissa was speaking properly, when admitted to hospital. There is no incriminating disclosure made by Faimunissa herself to the police on 24th October, 2002, which is evident from the fact that if such disclosure had been made on 24th October, 2002, the police would have immediately proceeded in the matter by registering necessary offence. The complaint in question has been registered only on 28th October, 2002. The disclosure made by Faimunissa is said to be on 26th October, 2002. What prevented P.W.2 to ask Faimunissa from 24th October, 2002 till 26th October, 2002 about the details of the incident has remained unexplained. Moreover no explanation is offered as to why the matter was not immediately reported on 26th October, 2002 till 28th October, 2002. What is interesting to note is that, in the cross-examination, in paragraph-6, P.W.2 has admitted that when Faimunissa was in the hospital undergoing treatment she and her family members withdrew sum of Rs. 80,000 which was lying in the account of Faimunissa in the Bank of India, Bhiwandi Branch maintained in her school name. Having regard to such quality of evidence, which has come on record, it will be unsafe to take the view that the prosecution has succeeded in proving beyond reasonable doubt on the factum of appellant having subjected Faimunissa to cruelty or ill-treatment of such kind that Faimunissa was driven to commit suicide. Once this finding is reached, it is not necessary to dwell upon the stand taken by the defence. It is well established position that the prosecution cannot succeed because of the weakness of the defence. The prosecution will have to stand on its own legs. As the prosecution has failed to establish the charge against the appellant on the factum of demand or cruelty and ill-treatment being of such nature that it drove Faimunissa to commit suicide, question of recording finding of guilt against the appellant/accused No. 1 does not arise. On the above basis, I have no hesitation in taking the view that the judgment and order, which is impugned in this appeal, cannot be sustained on facts or in law.

11. Hence, this appeal succeeds. The impugned judgment and order is set aside. The appellant is acquitted of the charge for which he was found guilty by the trial Court. As a consequence, the appellant is directed to be set at liberty forthwith, unless his custody is required in respect of some other offence.