

(2017) 06 BOM CK 0031
In the Bombay High Court
Case No : 81 of 2000

The State of Maharashtra

APPELLANT

Vs

Kailas s/o. Walmik Gore & Ors.

RESPONDENT

Date of Decision : 23-06-2017

Acts Referred:

[Indian Penal Code, 1860](#), [Section 302](#),
[Section 34](#), [Section 498A](#), [Section 306](#) - Punishment for murder - Acts done by several persons in furtherance of c

Citation : (2017) 06 BOM CK 0031

Hon'ble Judges : S.S.Shinde, S.M.Gavhane

Bench : DIVISON BENCH

Advocate : S.D.Ghayal, N.S.Ghanekar

Judgement

1. This Appeal is filed by the appellantState, challenging the judgment and order of acquittal passed by the Additional Sessions Judge, Aurangabad on 30th October, 1999 in Sessions Case No.241/1997.

2. The prosecution case in nutshell is as under: It is the case of prosecution that deceased Mhalsabai, daughter of informant namely Baburao Punjaba Gavli, was married with accused no.1 prior to 4 years of the incident. After the marriage, she was happily maintained for the period of about 3 years. Further, during the said period, she could not give a birth to a child. Therefore, since last 6 months prior to the incident, accused no.1 started illtreating her on the ground that, she was intending to perform a second marriage. Prior to two months, the accused had also given shock of iron to the deceased, and informant came to know about it when she had been to his house. Therefore, he persuaded accused no.1 and requested not to repeat such acts.

3. Prior to 20 to 25 days of the incident, deceased Mhalsabai came at village Deolana, and lateron she went to Mahalgaon to visit relative, who was counting last days of his life. At that time the tablets, which were with the deceased

Mhalsabai, were shown to the informant. He took Mhalsabai to Dr.Boralkar for check up, and during checkup he came to know that the said tablets are useful for abortion purpose, and because of consuming said tablets, she aborted. Later on the elder brother of accused no.1 Kailash i.e. son-in-law of the informant, maternal uncle of accused no.1 Kailas namely Kachru Tupe, Kashinath Dadke requested the informant to give permission to perform the second marriage, and if not permitted, then accused no.1 will perform the second marriage. Because of receiving such threats, permission was given to accused no.1 by the informant to perform a second marriage. Further, two rooms out of the residential house of the accused were also given to the deceased Mhalsabai under the registered partition deed.

4. It is further the case of the prosecution that, on 24th June, 1997, accused no.1 performed second marriage with the daughter of Chandrabhaga Jadhav. On 27th June, 1997 at about 10.00 a.m. one unknown person from Andhaner came to him, and informed that, Mhalsabai was burnt. Therefore, the informant himself came to Kannad along with his relatives and went to the house of accused no.1, and there he came to know that Mhalsabai died because of burn. The informant suspected that the accused in furtherance of their common intention have killed his daughter Mhalsabai. He lodged complaint at Kannad Police Station, on 27th June, 1997, at about 5.00 p.m. and on the basis of it, an offence was registered as Crime No.76/1997 for the offence punishable under Sections 302, 498A, 306 r/w.34 of the IPC.

5. It is further the case of the prosecution that, after the incident, the dead body of deceased Mhalsabai was sent for postmortem examination. The panchnama of the spot of incident was also prepared in presence of panchas, and after proper investigation, the chargesheet was submitted against the accused persons in the Court of Judicial Magistrate First Class, Kannad. Considering the charges leveled against the accused persons, the learned Judicial Magistrate First Class has committed the case to the Court of Session for trial according to law.

6. The trial Court framed charge for the offences punishable under Sections 498A, 306 and 302 r/w. 34 of the Indian Penal Code. The accused pleaded not guilty and claimed to be tried. Their defence is of total denial.

7. In order to substantiate the charge, the prosecution has examined as many as 9 witnesses i.e. complainant Baburao Punjaba Gavali at Exh.19 as PW1, PW2 Ashok Laxman Jadhav at Exh.21, PW3 Vithal Ramrao Shirse at Exh.24, PW4 Ramesh Baburao Gavali at Exh. 25, PW5 Sahebrao Gahinaji Sonwane at Exh.26, PW6 Dr.Anil Shankarrao Boralkar at Exh.28, PW7 Somnath Khanderao Gavli at Exh.33, PW8 Dr.Rajesh Sudam Gangurde at Exh.36 and lastly the Investigating Officer Hanmant Wakle at Exh.39. Besides this, the prosecution has also relied on inquest panchnama, panchnama of seizure of the clothes, postmortem examination notes etc.

8. After fullfledged trial, the trial Court acquitted all the accused of the offences

punishable under Sections 498A, 306 and 302 r/w. 34 of the I.P. Code. Hence this Appeal filed by the appellant - State.

9. Learned APP appearing for appellant- State submits that the marriage of deceased Mhalsabai was solemnized with accused no.1 Kailas Walmik Gore on 9th May, 1993, and the alleged incident had taken place on 27th June, 1997. Therefore, the death of Mhalsabai occurred within 7 years from the date of marriage, and therefore, presumption under Section 113A of the Evidence Act would apply to the facts of the present case. It is submitted that the medical evidence shows that, there were 100% burns, and Mhalsabai died at the spot of incident. Since the incident had taken place in the house of the accused, the accused persons were obliged to offer explanation under which circumstances Mhalsabai died. It is submitted that, A.D. was promptly registered. The spot panchnama was carried out on the same day, and incriminating material has been seized from the house of the accused. It is submitted that, the evidence of the prosecution witnesses about illtreatment given by the accused on the ground that, Mhalsabai did not conceive a child, has been stated by the witnesses. Accused no.1 Kailas performed second marriage on 24th June, 1997, with daughter of Chandrabaga [accused no.3] namely Jaishree [accused no.2] at Kalimath, and the incident had happened on 27th June, 1997. Therefore, within the proximity of such incident, due to the second marriage performed by accused no.1 Kailas with accused no.2 Jaishree, an incident has taken place. It is submitted that, all the accused shared common intention to illtreat and harass the deceased Mhalsabai on the ground that, she did not conceive a child. Therefore, learned APP submits that, an appeal deserves to be allowed.

10. On the other hand, learned counsel appearing for respondents-accused invites our attention to the findings recorded by the trial Court, and submits that the view taken by the trial Court is a plausible, and findings recorded are in consonance with the evidence brought on record. There is no perversity in the findings recorded by the trial Court. It is submitted that, Mhalsabai persuaded accused no.1 Kailas to perform second marriage. Prior to the incident, an immovable property i.e. three rooms were given to Mhalsabai by a registered document. The evidence of the prosecution witnesses about the alleged period of illtreatment and harassment is totally inconsistent. The medical evidence would clearly show that the medical treatment was given for fertility as the Mhalsabai did not conceive a child. It is submitted that, the evidence of Investigating Officer clearly shows that the door of the room where the incident had taken place was locked from inside. The door was broke open. The prosecution has not brought on record any evidence, which would show that, the accused persons were present at the time of alleged incident in the said house or even nearby the said house wherein the incident had taken place. It is submitted that, the parents of accused no.1 Kailas are residing at Andhaner, and not at the place of incident. They have been falsely implicated in the alleged offences. It is submitted that, Baburao Punjaba Gavli [PW1] in his evidence stated that, consent was given for second marriage of accused no.1 with accused no.2 Jaishree. It has come on

record that, accused no.1 performed second marriage with consent of Mhalsabai. Therefore, there was no reason for the alleged commission of murder of Mhalsabai by the accused. It is submitted that, the prosecution has not brought on record the evidence, which would demonstrate that, within the proximity of the date of alleged incident there was positive acts on the part of the accused by which there was instigation or abetment or intentional aiding in commission of suicide by Mhalsabai. It is submitted that the accused never intended that, Mhalsabai should commit suicide. Therefore, he submits that the appeal may be dismissed thereby confirming the findings of acquittal recorded by the trial Court.

11. We have given careful consideration to the submissions of the learned APP appearing for appellant-State, and the learned counsel appearing for the respondents - accused. With their able assistance, we have carefully perused the entire evidence brought on record. The prosecution has examined Baburao Punjaba Gavli as PW1. In his evidence he stated that, marriage of Mhalsabai with accused no.1 took place on 9th May, 1993, at Deolana. After 11/2 years of the marriage, accused started illtreating her on account of demand. He informed the said fact to his relatives, and also told the accused not to illtreat Mhalsabai. However, accused nos.4 to 6 started illtreating her immediately after 6 months of marriage. That time also he told accused Kailas that, he will extend necessary financial help to accused, but they should not give an illtreatment or harassment to Mhalsabai. However, the accused were insisting to allow them to perform second marriage of accused no.1. Because of pressure extended and insistence by the accused, they allowed accused no.1 for contracting second marriage just prior to 15 days of the incident. He had been to the house of his daughter two months prior to the incident, and found some injuries on her hands, because of electric shock given by the accused. He went to the father of accused no.1 and maternal uncle of accused no.1, Kashinath Dapke with his other two relatives. All of them requested accused not to give any illtreatment. Even it was told to the accused that, in case illtreatment is not stopped by them, the complaint would be filed against them with the Police. He further stated that, Mhalsabai came to Wadgaon prior to 11/2 months of the incident. Since she was not feeling well, he took her to the Hospital of Dr.Boralkar. Then Doctor told them that, the tablets which were shown to him are useful for abortion, and advised not to further consume the said tablets. Thereafter, he decided not to send Mhalsabai to the matrimonial house. However, on one day brother of the accused no.1 namely Vilas and maternal uncle namely Kachru Dube came to his house. Then he called some persons from the village, and in their presence it was decided to send her at matrimonial place. Then three rooms were given to Mhalsabai by executing registered document by the accused, and on the very day a written permission was given to accused no.1 for performing second marriage. Thereafter, deceased Mhalsabai was staying with accused no.1 at Kannad. Then he came to know that, on 24th June, 1997 accused no.1 performed second marriage with the daughter of Chandrabhagabai [accused no.3] at Kalimath. He further deposed that, On 27th June, 1997, accused killed Mhalsabai by putting her on fire. He came to

know from unknown person about the said incident. When he went to the place of an incident at about 12. 30 p.m., already the dead body was referred to P.M. examination. Then the Police prepared panchnama of the spot. Looking to the situation at the spot, he suspected that Mhalsabai was mercilessly beaten by the accused, and thereafter she was set on fire. Then he went to the Police Station and lodged the FIR.

12. During his cross examination, he stated that, it is not mentioned in his FIR that, after 11/2 years, the accused started illtreating to his daughter. Though it was stated to the Police that, illtreatment started after 11/2 years of the marriage, he cannot assign any reason as to why it is not mentioned in his complaint by the police. When he was confronted with his statement made in the FIR that, Mhalsabai was properly treated and maintained by the accused for the period of three years from the date of marriage; he replied that, the said version appearing in the FIR is not true. Therefore, his oral testimony before the Court in respect of the period of illtreatment and harassment at the hands of the accused, and stated in the FIR, is inconsistent, and there is considerable difference in two versions; one given in the FIR and another before the Court. He admitted in his evidence that, accused no.6 got married, and stayed with her husband at different place. He stated that, he did not state before the Police that, accused nos.4 to 6 were illtreating and harassing his daughter after 6 months of the marriage. He cannot state the date and month when he requested the accused not to illtreat Mhalsabai. He further stated in his cross examination that, he took Mhalsabai to Dr.Boralkar after two years of the marriage. She did not tell in his presence to Dr.Boralkar that, through over sight she was swallowed 12 to 13 tablets of Mala D. Thereafter, he did not take Mhalsabai to any Doctor. She was aborted at home. The said fact was stated by him in his complaint, however, he cannot assign any reason why the said fact is not mentioned in his complaint. He admitted in his cross examination that, they i.e. he himself and other family members have signed the consent deed giving consent for contracting second marriage by accused no.1. He did inform the accused that the marriage will be attended by them and clothes would be offered by him to accused. After execution of the consent deed, Mhalsabai went to accused no.1 at matrimonial home. He further stated that, he did not state in his complaint that, he saw Mhalsabai in burning condition. He cannot assign any reason as to why the said fact is not mentioned in his complaint. It appears that, suggestion was given to him that, accused took Mhalsabai to 4-5 Doctors for treatment as she was not conceiving a child. He also admitted that, Mhalsabai was suffering from allergy, and therefore, she was taken for treatment to the various Doctor by the accused. He was telling Mhalsabai that, one day she will begotten a child. He stated that, he had gone through the contents of consent deed allowing accused no.1 to perform second marriage, which was dictated by him. He further stated that, he does not know whether Mhalsabai was insisting accused no.1 to perform second marriage, since she was not able to conceive a child. He further admitted that, after marriage Mhalsabai used to come to his house with accused.

13. If the evidence of Baburao Gavli [PW1] is considered in its entirety, it suffers from serious omissions and improvements. The period of alleged illtreatment and harassment stated by him is substantially different than stated in the FIR. He admitted that, they have given consent for performing second marriage by accused no.1 Kailas with accused no.2 Jaishree. The accused have also executed registered document in favour of Mhalsabai giving her premises consisting of three rooms. Therefore, there was no reason for the accused persons to kill Mhalsabai by setting her on fire.

14. The prosecution did examine Vithal Ramrao Shirse as PW3. He stated that, he is a reporter of Daily Lokmat. On the date of incident, he had gone to Kannad in Shivnagar area to see his friend Sanjay. But Sanjay did not meet him as he had gone to Aurangabad. After talking with the wife of Sanjay, he was to go back, however at that time, he heard hue and cry from the house of the accused no.1, Kailas. He further stated that, somebody was saying that, there was shortcircuit of electricity supply, and due to that, there is fire. He entered into the house of accused no.1, and threw carpet on the person of Mhalsabai and extinguished the fire. Thereafter, the parents of the accused came at the spot of incident. Upon careful perusal of his deposition, he has nowhere stated the presence of the accused at the relevant time, either at the place of incident or nearby the house where Mhalsabai was used to reside.

15. The prosecution further examined Ramesh Baburao Gawali [PW4] and Sahebrao Gahinaji Sonwane [PW5] to prove illtreatment and harassment at the hands of the accused to Mhalsabai. However, if the evidence of Baburao Gavli [PW1], Ramesh Gawali [PW4] and Sahebrao Sonwane [PW5] is considered conjointly, it suffers from contradictions, omissions and also from exaggeration. It differs on the point of alleged period of illtreatment and harassment.

16. The prosecution examined Dr.Anil Bhaskarrao Boralkar [PW6], who examined deceased Mhalsabai. The prosecution also examined Somnath Khanderao Gavli, cousin of deceased, on the point of illtreatment and harassment. The prosecution further examined Dr.Rajesh Gangurde [PW8], who conducted postmortem, and also the Investigating Officer, namely Hanmant Wakade, who investigated the crime.

17. Hanmant Wakade [PW9] stated in his deposition that, on 27th June, 1997, one Police Head Constable Rathod registered an offence as A.D., and the said was handed over to PW9 for further investigation. PW9 visited the spot of incident and drew the panchnama in presence of two panchas. Seven Articles, which were lying at the spot of incident, were seized under the panchnama in presence of panchas. Then he drew inquest panchnama over the dead body in presence of panchas. Then the dead body was referred for postmortem examination. During the course of enquiry of A.D., he recorded statements of 7 witnesses. Thereafter, the father of the deceased gave FIR. On the basis of the said FIR, an offence was registered as Crime No. 76/1997 for the offence punishable under Section 498A, 302, r/w. 34 of the IPC. Then the statements of

the witnesses were recorded on the very day. The manner in which further investigation was carried out has been stated by him. After investigation, he filed chargesheet. During his cross examination, he stated that, he reached at the spot of incident at about 11.00 to 11.30 a.m., nobody was present in the room where the incident took place. When he reached at the place of incident, the door of the room was closed. First he drew the panchnama of the spot of incident. Some mark of violence were found on the door from outside. Further, the inner latch was also broke as the screw was lying there. A carpet was found below the dead body, and one sari was covered on the said body. He further stated that, he recorded the statement of one Mistri, and he stated that, he gave a blow of spade on the door to open the same and accordingly door was opened. PW9 further recorded the statement of Kachru Dapke. He also recorded the statements of persons residing in the said vicinity. It can be gathered from his evidence that, at the relevant time the accused persons were not present at the spot of incident or nearby the spot of incident. Secondly, the latch of the door was lying inside the room. He recorded the statement of one Mistri, who stated that, he gave a blow of spade on the door, and then the door was broke open, and Mhalsabai was found alone in the burnt condition in the said room. Therefore, in absence of any cogent evidence on record showing the presence of the accused at the spot or nearby the spot, the charge against the accused that they set Mhalsabai on fire, and killed her cannot sustain.

18. If the evidence of PW1, PW4, PW5 and PW7 is considered in its totality, it does not inspire confidence about what type of illtreatment and harassment was given by the accused persons to Mhalsabai, and further, time stated by these witnesses of alleged harassment and illtreatment is also different. Admittedly, no any complaint or FIR was lodged by PW1 or any relative of Mhalsabai with the Police Station about the alleged illtreatment and harassment prior to the date of alleged incident. It appears from the evidence of PW1 that, the consent was given by them for performing second marriage by accused no.1 Kailas with accused no.2 Jaishree, and therefore, there was no reason for the accused to kill Mhalsabai, or for aiding or abetting or instigating Mhalsabai with an intention that, she should commit suicide. There are no positive acts brought on record by the prosecution within the proximity of the alleged commission of suicide by Mhalsabai, which would connect them with the alleged commission of offence so as to prove offence punishable under Section 306 of the IPC. In order to prove the charge for the offence punishable under Section 306 of the IPC, the prosecution was obliged to bring on record evidence showing that, within the proximity of alleged incident, there was instigation or intentional aiding or abetment or conspiracy, which led to commission of suicide by Mhalsabai, and Mhalsabai had no any option but to commit suicide.

19. The Supreme Court in the case of S.S.Cheena Vs. Vijay Kumar Mahajan and another¹, in para 25 observed that, the abetment involves 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. The intention of the legislature and the ratio of the cases decided by this Court is clear that in order to convict a person under Section 306 of the I.P. Code 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 that act must have been intended to push the deceased into such a position that he committed suicide.

20. The defence taken by the accused of false implication appears to be probable. Accused no.1 in his defence stated that, Mhalsabai herself encouraged him to get married for second time, and also persuaded accused no.2 for getting married with accused no.1 Kailas. Mhalsabai has also attended second marriage of accused no.1. Just one day before the incident, Mhalsabai went to village Shivner.

21. The trial Court upon appreciation of the entire evidence brought on record found that, the prosecution has not proved the charge against the accused. The trial Court has made in depth scrutiny of the evidence, and to that effect there is discussion from para 11 to 16 of the impugned judgment. Upon independent scrutiny of the evidence, we are of the opinion that, the findings recorded by the trial Court are in consonance with the evidence brought on record. There is no perversity as such. The view taken by the trial Court is plausible, and therefore, no interference is warranted in the impugned order of acquittal. Hence the appeal stands dismissed. Bail bonds, if any, shall stand cancelled.