



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 29TH DAY OF JUNE, 2022

BEFORE

THE HON'BLE MR.JUSTICE MOHAMMAD NAWAZ

CRIMINAL APPEAL No.2045 OF 2018

BETWEEN:

NAZRULLA KHAN @ NAZRULLA,

... APPELLANT

[BY SRI. SHIVARAJ N. ARAI, ADVOCATE]

AND:

THE STATE OF KARNATAKA
BY SHIVAMOGGA MAHILA POLICE STATION,
SHIVAMOGGA - 577 201.

(REPRESENTED BY STATE PUBLIC PROSECUTOR,
HIGH COURT BUILDING,
BENGALURU - 560 001.)

... RESPONDENT

[BY SRI. R.D. RENUKARADHYA, HCGP]

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THIS CRIMINAL APPEAL IS FILED UNDER SECTION 374(2) OF CR.P.C., PRAYING TO SET ASIDE THE JUDGMENT AND ORDER OF CONVICTION AND SENTENCE DATED 28/29.09.2018 PASSED BY THE 2ND ADDITIONAL DISTRICT AND SESSIONS JUDGE, SHIVAMOGGA, IN SESSIONS CASE NO.107/2017 (CONVICTED FOR OFFENCES PUNISHABLE UNDER SECTIONS 498(A) AND 304-B OF IPC) AND ACQUIT THE APPELLANT/ACCUSED OF THE CHARGES LEVELED AGAINST HIM.

THIS CRIMINAL APPEAL COMING ON FOR DICTATING JUDGMENT THROUGH VIDEO CONFERENCE/PHYSICAL HEARING, THIS DAY, THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

The appellant being aggrieved by the Judgment and Order dated 28/29.09.2018, passed by the II Additional District and Sessions Judge, Shivamogga, in S.C. No.107/2017, convicting and sentencing him for offence punishable under Section 498-A and 304-B of IPC, has preferred this appeal.

2. I have heard the learned counsel for appellant/accused and the learned High Court Government Pleader for respondent/State and perused the material on record.

3. Charges were framed against the appellant for offence punishable under Sections 498-A and 304-B of IPC and alternatively under Section 302 of IPC. The learned Sessions Judge vide impugned Judgment and Order, found the accused not guilty for offence punishable under Section 302 of IPC, however, held him guilty for the other charged offences.

For the offence punishable under Section 498-A of IPC, the accused was sentenced to undergo simple

imprisonment for a term of 2 years and to pay a fine of ₹5,000/-, in default of payment of fine, to undergo simple imprisonment for 2 months.

For the offence punishable under Section 304-B of IPC, the accused was sentenced to undergo rigorous imprisonment for a term of 7 years.

4. Brief facts of the prosecution case are that, the marriage of the victim/Afsana Banu was performed with the accused about 6 years prior to the date of incident. The accused was addicted to alcohol and he was subjecting the victim to cruelty, both physical and mental. He used to demand money from her to be brought from her parental home. On 26.11.2015 at about 11:00 p.m., the accused came home consuming alcohol, assaulted the victim and demanded to bring ₹25,000/- from her parental home. He then told her that she should die and only then he can live happily. It is the further case of prosecution that the accused poured kerosene on the victim and lit fire, due to which, she sustained severe burn injuries and while

undergoing treatment at Mc.Gann Hospital, Shivamogga, she died on 11.12.2015 at about 1:45 p.m.

5. As already noted supra, insofar as offence punishable under Section 302 of IPC is concerned, the accused was found not guilty and he was acquitted of the said offence. The trial Court has held that the prosecution has utterly failed to prove the ingredients of offence punishable under Section 302 of IPC. The said finding has become final.

6. The incident took place on 26.11.2015 at about 11:00 p.m. in the house situated at 1st Cross, New Mandli, Shivamogga, where the deceased and accused were living together. P.W.4 is the owner of the said house. In her evidence, P.W.4 has deposed that in the said house the accused was residing with his wife and two children since two months. On the date of incident at about 12.00 in the midnight, she heard some quarrelling sound and therefore, she came out of her house and saw the accused going away from the house. Further, she saw his wife had

sustained burn injuries and someone had doused the fire. Thereafter she was taken to hospital.

7. The deceased was taken to Mc.Gann Hospital, Shivamogga, immediately after the incident. On receiving the MLC intimation, P.W.10 viz, Head Constable went to the hospital and after confirming from P.W.18-Doctor, about her condition to give statement, he recorded her statement as per Ex.P9. Thereafter, First Information Report-Ex.P10 was forwarded to the jurisdictional Court.

8. In Ex.P9, the victim has stated that she was residing with her husband and two children in a rented house since 2 months. Her husband is doing coolie work and he was always coming home drunk and giving her physical and mental torture. He was not providing any ration to the house. On 26.11.2015 at 11:00 p.m., her husband came to the house in an intoxicated condition and started abusing her and when she asked him as to why he is not giving household expenses and always coming home drunk, he assaulted on her back with his hands and when she told him that their elder daughter is not keeping well

and therefore he should not quarrel and should sleep quietly, again he assaulted her in front of her children and then told her that she should die and only then he can live peacefully. Being depressed, she poured kerosene on herself and set fire. When she screamed, neighbours came and put off the fire and one Wasim-P.W.5 and others shifted her to the hospital in an ambulance.

9. Ex.P9 is recorded by P.W.10-Head Constable between 1:00 a.m. and 2:00 a.m. on 27.11.2015 and after registering the case, he sent intimation to the Taluka Executive Magistrate, to record the dying declaration of the victim.

10. Ex.P17 is the dying declaration of the victim, recorded by the Taluka Executive Magistrate i.e, P.W.14 on 27.11.2015 at about 12:10 p.m. In his evidence, P.W.14 has deposed that he recorded the statement of the victim in a question and answer format and when he enquired, the victim told that her husband i.e., the accused is responsible for the incident. The victim told him that her husband came home in an intoxicated condition and told

her to bring money from her parental home and when she refused, he poured kerosene on her body and lit fire and thereafter ran away from the house.

11. As per Ex.P17, recorded by P.W.14, the accused was telling the victim to bring money from her parental home and on many occasions, the deceased brought ₹5,000/-, ₹10,000/- and ₹20,000/- and prior to the incident in question, the accused demanded her to bring a sum of ₹20,000/-. It is stated that the accused committed the offence for the purpose of dowry.

12. P.W.6 is the Woman PSI, working at Shivamogga Women's Police Station. She has stated that on 27.11.2015, after taking over the investigation, she visited the hospital to enquire about the victim's condition and requested the Medical Officer to certify as to whether the victim is in a position to give her statement and thereafter recorded one more statement of the victim as per Ex.P5. She has stated that the said statement was recorded by the Head Constable viz, Lakshmi, as per Ex.P5. According to the said statement, on 26.11.2015 at about

11:30 p.m., the accused stating that he need money for his expenses and for his drinking habits, demanded ₹25,000/- and picked up quarrel with the victim and assaulted her as well as her elder daughter and when the victim said that her daughter is not keeping well, the accused saying that she should go and die, poured kerosene and set her on fire.

13. It is relevant to see that P.W.6 who is said to have recorded the statement of the victim as per Ex.P5 through one Lakshmi, Head Constable, in her cross-examination has stated that at the time of recording the statement, none of the relatives of the victim were present and only after the statement was recorded, the victim's mother came to the spot and at that time, victim's statement was completely recorded. Contrary to the same, in Ex.P5, it is clearly mentioned that the said statement was recorded in the presence of the doctor as well as victim's mother.

14. In Ex.P17 recorded by P.W.14 and Ex.P5 recorded by P.W.6, it is stated that the accused poured kerosene on the victim and set her on fire after demanding

money. However, the said fact of pouring kerosene and setting fire by the accused is not stated in Ex.P9 recorded by P.W.10 on the basis of which, the case was registered against the accused. Further, Ex.P11 came into existence at the earliest point of time i.e., on 27.11.2015 at about 12:30 a.m., when the victim was admitted to the burns ward of Mc.Gann Hospital, Shivamogga, wherein history furnished is 'burns by self pouring kerosene at around 12:30 a.m., on 27.11.2015 near new Mandli, Shivamogga'. It is also relevant to see that in Ex.P9 which is recorded by P.W.10 after confirming the fit condition of the victim to give her statement from doctor-P.W.8, there is no mention of any demand of dowry by the accused. From Exs.P9 and 11, it can be clearly seen that it was the deceased who poured kerosene on herself and lit fire and it is not alleged that the accused demanded money or he poured kerosene and set fire to her.

15. P.W.9 is the Doctor who conducted the Post-Mortem examination. The Post-Mortem Report is marked as Ex.P8. According to Post-Mortem Report, the death is due

to septicemia as a result of burn injuries sustained. The doctor has opined that the victim has sustained about 70 to 75% burn injuries. The same is not seriously disputed.

16. From the above evidence on record, the prosecution has been able to establish that the marriage of the deceased with the accused took place about 5 to 6 years prior to the date of incident and the accused was addicted to drinking habits and he was subjecting the deceased to physical and mental cruelty. On 26.11.2015 at about 11:00 p.m., he came home in an intoxicated condition and started quarrelling with her and also hit her with hands. On the same night, the victim poured kerosene on herself and set fire and later died in the hospital, while undergoing treatment, on 11.12.2015 at about 1:45 p.m.

17. The learned counsel for the appellant has contended that there are multiple dying declarations which are not corroborated with each other and the allegation that accused was demanding dowry and subjecting the victim to cruelty for the purpose of dowry is not

established. He submits that it is not the case of prosecution that at the time of marriage the accused had demanded and accepted dowry. He contends, the couple were residing separately in a rented house since two months prior to the date of incident and there is no incident of assault or quarrel which took place, for the purpose of dowry, at any point of time earlier. He contends that P.W.4-the owner of the house would have spoken about any such cruelty or harassment as she is none other than the owner of the house residing nearby. He contends that there is no consistency with regard to the accused telling the deceased to go and die and even otherwise, if any such word has been uttered in a spur of moment in a quarrel, then mens rea cannot be attributed to the accused. He therefore contends that the trial court having rightly acquitted the accused of the offence punishable under section 302 of IPC was not justified in convicting him for the other charged offences.

18. The learned High Court Government Pleader has contended that the prosecution has adduced sufficient

evidence to show that the accused was constantly harassing the deceased both physically and mentally subjecting her to cruelty in connection with dowry. He submits that on various occasions, the deceased had brought money from her parental home and not being satisfied, the accused quarreled with her on the intervening night of 26/27.11.2015 demanding her to bring another sum of ₹25,000/-. He submits that there is sufficient evidence to show that soon before her death the deceased was subjected to cruelty in connection with dowry. Therefore submits that the trial court was justified in convicting the accused for the offences punishable under sections 498A and 304B of IPC. He relied on a decision of the Hon'ble Apex Court in the case of **Lakhan vs. State of Madhya Pradesh** reported in **2011 CRI.L.J. (Supp) 629** to contend that a dying declaration recorded by a competent Magistrate would stand on a much higher footing and conviction can be based solely on it, without any further corroboration.

19. The trial court has come to the conclusion that the death of the victim has taken place naturally due to the

reasons of burn injuries within seven years of the marriage and therefore the presumption as to dowry death can be drawn in favour of the prosecution. It is further observed that the prosecution has proved the ingredients of Sections 498A and 304B of IPC. The trial Court has also taken into consideration the evidence of P.W.1 i.e., Panchwitness to spot Mahazar-Ex.P1 and observed that he has categorically deposed in his examination-in-chief about the topographical situation of the spot and falling of kerosene and kerosene smell at the spot and half burnt clothes of the victim etc., one match stick box, nighty of the victim, T-shirt of the child and half burnt hair of the victim etc., marked as M.Os.1 to 5. The trial Court has also taken into consideration the videographed statement of the victim which was recorded as per Ex.P5, the VCD marked as Ex.P15.

20. It is no doubt true that the incident has taken place within seven years from the date of marriage. Insofar as Ex.P1-spot Mahazar is concerned, from where M.Os.1 to 5 are recovered, there is no dispute that the victim

sustained burn injuries on 26.11.2015 at about 11:00 p.m. and subsequently she died on 11.12.2015 at about 1:45 p.m. while undergoing treatment in the hospital. Insofar as Ex.P15 the VCD is concerned, the same is marked through P.W.13 viz, the Dy.S.P. who filed the additional charge-sheet. P.W.6 has stated that while recording the statement of the victim as per Ex.P5, the same was videographed. However, as per Ex.P5, it was the accused who tried to pour kerosene and set fire to the victim. Admittedly, the trial Court has not accepted the case of prosecution in so far as the accused pouring kerosene and setting fire to the victim. Both from Exs.P9 and 11 it can be clearly gathered that it was the victim who herself poured kerosene and set fire to herself. Insofar as subjecting the deceased to cruelty soon before her death in connection with dowry is concerned, in Ex.P9 namely the statement of the victim recorded by P.W.10 after obtaining certification from the doctor about her fit condition to give statement, on the basis of which a case was registered against the accused, it is nowhere mentioned that the accused was demanding

money and before her death she was subjected to cruelty for the purpose of dowry.

21. The prosecution has examined the brother of the victim as P.W.2. In his evidence he has stated that only for about two months after the marriage the accused was looking after his sister properly and thereafter he was giving physical and mental harassment demanding money from her. He has stated that the accused was addicted to drinking habits and since he was demanding money, they gave ₹5,000/-, ₹10,000/- and ₹20,000/- on several occasions and after sometime he was again giving trouble to his sister. He has stated that a panchayath was held and in the said panchayath the accused assured that he will not give trouble to his sister. He has further stated that on 26.11.2015 at about 11:00 p.m., the accused demanded ₹25,000/- from the victim and when she refused, he poured kerosene and set fire to her. According to him, the same was informed to him by his sister.

22. In **Lakhan vs. State of Madhya Pradesh** (supra), it is held that, in case there are multiple dying

decelerations and there are inconsistencies between them, generally, the dying declaration recorded by a higher officer like a Magistrate can be relied upon, provided that there is no circumstances giving rise to any suspicion about its truthfulness. In case there are circumstances wherein the declaration had been made, not voluntarily and even otherwise, it is not supported by the other evidence, the Court has to scrutinize the facts of an individual case very carefully and take a decision as to which of the declarations is worth reliance.

23. In the case of **Amol Singh vs. State of Madhya Pradesh** reported in **(2008)5 SCC 468**, the Hon'ble Apex Court, placing reliance upon a Judgment in **Kundula Bala Subrahmanyam and another vs. State of Andhra Pradesh** reported in **(1993)2 SCC 684**, held that it is not the plurality of dying declaration but the reality thereto that adds weight to the prosecution case. If a dying declaration is found to be voluntary, reliable and made in a fit mental condition, it can be relied upon without any corroboration. If there is more than one dying

declaration, they should be consistent. In case of inconsistencies between two or more dying declarations made by the deceased, the Court has to examine the nature of inconsistencies, namely, whether they are material or not and in such a situation, the Court has to examine the multiple dying declarations in the light of the various surrounding facts and circumstances.

24. As already noted, there is discrepancy in the multiple dying declarations insofar as the accused pouring kerosene and setting fire to the victim. The case of the prosecution in that regard has been disbelieved by the trial Court. Further, even insofar as the accused demanding money from the victim, there is discrepancy. In Ex.P9, on the basis of which law was set into motion, there is no allegation of dowry demand by the accused. Though P.W.2 has stated that there was a panchayath held but, there is no material placed as to when the said panchayath was held and none of the panchayathdars have been examined to show that the accused was demanding money from the deceased.

25. According to P.W.3, the accused was addicted to alcohol and he was demanding money from the victim and giving her physical and mental torture. According to him, it was informed to him by the parents of the victim. However, the parents of the victim are not examined. P.W.3 is only a hearsay witness.

26. In Ex.P5 it is stated that the accused demanded the victim to get a sum of ₹25,000/- and picked up quarrel with her. The said statement reveal that it was recorded in the presence of her mother. It is not stated in Ex.P5 that on various occasions the accused received a sum of ₹5,000/-, ₹10,000/- and ₹20,000/- whereas in Ex.P17 it is stated that on various occasions the victim had brought the said amount and gave it to the accused. Further, in Ex.P5, it is stated that the accused demanded ₹25,000/- prior to the incident, whereas in Ex.P17, it is stated that the accused demanded a sum of ₹20,000/-. There is discrepancy with regard to the amount demanded by the accused soon before the incident. Hence, the dying

declaration with regard to the amount demanded by the accused does not inspire confidence of the Court.

27. The first and foremost statement of the victim which is recorded as per Ex.P9 between 1:00-2:00 a.m., on 27.11.2015 by P.W.10, immediately after the incident, which is recorded after confirming the physical and mental condition of the patient to give such statement, does not spell out any cruelty meted to the deceased for the purpose of dowry. According to Ex.P9, the accused was addicted to alcohol and he was giving physical and mental torture to the deceased and he was not bringing ration to the house. On 26.11.2015 at about 11:00 p.m. he came to the house in an intoxicated condition and started abusing the victim. She told him that he is always coming home drunk and not giving any household expenses. Enraged by the same he assaulted on her back. When the deceased told him that his elder daughter is not keeping well and he should sleep quietly, again he assaulted her in front of their children and told her that she should go and die only then he can live

peacefully. Being depressed, she poured kerosene and set fire to herself.

28. The Hon'ble Apex Court in the case of **Chitresh Kumar Chopra vs. State [Government of NCT of Delhi]** reported in **(2009)16 SCC 605**, has held that the words uttered on spur of the moment or in a quarrel, without something more cannot be taken to have been uttered with mens rea. To constitute "instigation", a person who instigates another has to 'goad' or 'urge forward' the latter with intention to provoke, incite or encourage the doing of an act by the latter.

29. In the case on hand, the evidence on record falls short to attract the ingredients of abetment. Further the prosecution has failed to establish that soon before her death, the deceased was subjected to cruelty for the purpose of dowry. Hence, the findings recorded by the trial Court for convicting the accused for the offence punishable under Section 304B of IPC is not sustainable in law. However, the evidence and material on record is sufficient to hold that the accused has committed an offence

punishable under Section 498A of IPC. Hence, the following:

ORDER

Appeal is partly allowed.

The Judgment and Order dated 28/29.09.2018 passed by the II Additional District and Sessions Court, Shivamoga in S.C.No.107/2017 insofar as convicting and sentencing the accused for offence punishable under Section 304B of IPC is hereby set aside.

The conviction and sentence passed against the appellant/accused for the offence punishable under Section 498A of IPC is confirmed.

If the accused has already undergone the sentence imposed against him for the offence punishable under Section 498A of IPC and paid the fine amount, he shall be released, unless required in any other case.

**Sd/-
JUDGE**

Ksm*/HB