

**Baban Vs. State of Maharashtra**

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**SooperKanoon Citation :** [sooperkanoon.com/367699](http://sooperkanoon.com/367699)

**Court :** Mumbai

**Decided On :** Jul-11-2001

**Reported in :** 2002BomCR(Cri)76; II(2002)DMC233

**Judge :** J.N. Patel and ;P.V. Hardas, JJ.

**Acts :** [Indian Penal Code \(IPC\), 1860](#) - Sections 302 and 498A

**Appeal No. :** Criminal Appeal No. 452 of 1995

**Appellant :** Baban

**Respondent :** State of Maharashtra

**Advocate for Def. :** K.S. Dhote, A.P.P.

**Advocate for Pet/Ap. :** M.R. Daga, Adv.

**Disposition :** Appeal allowed

**Judgement :**

**P.V. Hardas, J.**

1. The present appeal has been filed by the appellant/original accused in Session Case No. 110 of 1994, challenging his conviction and sentence passed by the Joint District and Sessions Judge, Chandrapur, convicting him for an offence punishable under Section 498A of the Indian Penal Code and Section 302 of

Indian Penal Code, and sentencing him to suffer R.I. for one year and fine of Rs. 1,000/-, in default to suffer R.I. for six months and imprisonment for life and fine of Rs. 2,000/-, in default to suffer R.I. for six months, respectively.

2. A reference to the facts relating to the conviction of the appellant for the aforesaid offences is necessary. The appellant, who is convicted for having committed murder of his wife Nita, was married to her about 7 or 8 years back. According to the prosecution, after the birth of the eldest son, the appellant who was unemployed, got addicted to liquor and in an inebriated condition, used to assault his wife principally on account of demand for money made by the deceased wife for meeting the household expenses.

3. According to the prosecution, things continued in this manner and ultimately on 3.2.1994 at about 4 p.m. in the residential house of the accused situated in Somnathpura in Rajura Tahsil, District Chandrapur, the appellant is alleged to have quarreled with the deceased and had asked his son P.W. 2 Deepak to fetch a match-box from the shop and after Deepak had brought the match-box, the appellant is alleged to have poured kerosene on the deceased and set her ablaze. The prosecution further alleges that the appellant thereafter wrapped a blanket around the deceased and extinguished the flame. On the pretext of informing the relatives, the appellant is alleged to have left his residential house. P.W. 9 Gaurabai Atram, who was the neighbour of the deceased, reached the house of the appellant while the accused was extinguishing the flame. P.W. 10 Shantabai, another neighbour of the deceased, had taken the deceased to the hospital.

4. Since the deceased had suffered burns, the doctor at Rajura had advised that the deceased be shifted to the General Hospital at Chandrapur. The deceased, accordingly, was admitted in the General Hospital at Chandrapur. P.W. 11 - PSI Raghunath Fuge, who was on patrolling duty, received a message from the Rajura Police Station, informing him about the admission of the said lady in the Rajura Hospital. P.W. 11, accordingly, rushed to the Rajura Hospital, but was informed that the deceased had been shifted to Chandrapur Hospital, and he, therefore, proceeded to Chandrapur Hospital. PSI Fuge then recorded the statement of Nita, the deceased, and sent his report to the PSI Rajura. On the basis of the statement

of the deceased, an offence under Sections 307 and 506 of the Indian Penal Code came to be registered.

5. During investigation, P.W. 5 Sudhakar Rotkar, Naib Tahsildar, recorded the dying declaration of the deceased. The original dying declaration of the deceased was sent in a sealed envelope to the police. It is unfortunate that when the case came up for trial, the original dying declaration had been misplaced by the police and what was tendered in evidence, was a Xerox copy signed by P.W. 5 Sudhakar Rotkar, which the Trial Court rightly refused to accept and, therefore, came to be marked as Article 11. During the investigation, accused was also referred for medical examination and the injury certificate of the accused is at Exh. 16. P.W. 1 Dr. Ramchandra Jakkipelli, who had examined the appellant on 9.2.1994, had found three superficial wounds. According to P.W. 1, the age of the injuries was more than two days, but less than 5 to 6 days. P.W. 1 had opined that these injuries were possible by burn.

6. After the death of Nita on 14.2.1994, the inquest panchanama Exh. 11 came to be drawn. Post-mortem was conducted by Dr. Amar Poddar and his post-mortem report is at Exh. 32. Another piece of circumstantial evidence on which the prosecution relies heavily, is the seizure of the clothes of the deceased and the appellants, on which kerosene was detected by the Chemical Analyser.

7. The trial Court framed charge against the appellant for offence punishable under Sections 498A and 302 of the Indian Penal Code. The appellant abjured his guilt and claimed to be tried. In respect of the offence under Section 498A of the Indian Penal Code, the prosecution examined P.W. 3 Bhima, father of the deceased Nita, and P.W. 4 Ganpat, the brother of deceased Nita. In respect of offence under Section 302 of the Indian Penal Code, the prosecution examined P.W. 2 Deepak, son of the appellant and the deceased Nita, P.W. 8 Dadaji Dhandare, who had recorded the statement of the deceased, P.W. 5 Sudhakar Rotkar, Naib Tahsildar, who recorded the dying declaration Article 11, P.W. 9 Gaurabai and P.W. 10 Shantabai, neighbours of deceased Nita, who had rushed to her house on seeing smoke coming out of the house of the deceased and of course, P.W. 11 Raghunath Fuge, the Investigating Officer.

8. For offence under Section 498A of the Indian Penal Code, the Trial Court found that on the basis of the evidence of P.W. 3 and P.W. 4, the prosecution had proved that the appellant had treated his wife deceased Nita with cruelty and was demanding money to be fetched by her from her father. On the basis of this, therefore, the Trial Court convicted the appellant for the offence under Section 498A of the Indian Penal Code. In respect of offence under Section 302 of the Indian Penal Code, the Trial Court relied on the testimony of, (i) P.W. 2 Deepak, a child witness; (ii) dying declaration at Article 11 and dying declaration at Exh. 40; (iii) the report of the Chemical Analyser at Exh. 32 which showed the presence of kerosene on the clothes of deceased Nita and the clothes of the appellant and (iv) the oral dying declaration made by the deceased Nita to P.W. 3.

9. With the assistance of Mr. M.R. Daga, the learned Counsel appearing for the appellant, and Mr. K.S. Dhote, the learned A.P.P. appearing for the State, we have gone through the entire record comprising of the exhibited documents and testimonies of the witnesses. At the outset, we agree with the submissions advanced by Mr. M.R. Daga, that the offence under Section 498A of the Indian Penal Code has not been proved by the prosecution. The evidence of P.W. 3 Bhima and P.W. 4 Ganpat is extremely vague and ingredients of Section 498A have not been proved by the prosecution. On the material aspect P.W. 3 Bhima, father of the deceased, has made improvements when he states that he had not informed the police that after the birth of P.W. 2 Deepak, the appellant began ill-treating and beating deceased Nita, and that P.W. 3 used to give grains to Nita whenever the deceased was in need. P.W. 3 Bhima also states that the deceased, on Inquiry, had told him that the appellant had burnt her. In the cross-examination, he admits that he had not lodged any report on 4.2.1994 when the deceased is alleged to have made an oral declaration to him. We feel it highly unsafe to rely on Bhima (P.W. 3) for the purpose of conviction under Section 498A of the Indian Penal Code, or for the purpose of relying on the oral dying declaration alleged to have been made by the deceased. The evidence of P.W. 4 Ganpat, brother of deceased, according to us is wholly insufficient for proving the offence under Section 498A of I.P.C. Again vague and omnibus allegations are made of ill-treatment by the appellant, beating of the deceased under intoxication by the appellant. P.W. 4 Ganpat had also produced two letters, Articles 9 and 10, alleged

to have been written by the deceased Nita. The Trial Court found that the prosecution had not been able to prove that these were the letters sent by deceased Nita to P.W. 4 Ganpat and accordingly no reliance was placed on these two letters.

10. After giving our anxious consideration to the evidence against the offence under Section 498A, I.P.C. we are made unable to agree with the reasoning given by the Trial Court and the appellant will, therefore, have to be acquitted of the offence punishable under Section 498A of I.P.C.

11. Now in respect of the offence punishable under Section 302/I.P.C. Mr. Dhote, the learned A.P.P. for the State, has submitted that Exh. 40, the First Information Report, in which the statement of the deceased Nita is reproduced, in unequivocal terms referred to the act of the appellant in setting the deceased ablaze. Before advertng to Exh. 40, it will be useful to make a reference to evidence of P.W. 8 Dadaji Dhandare, who is alleged to have recorded the statement P.W. 8 Dadaji, in clearest possible terms, has admitted that he had not obtained any endorsement of the Medical Officer that deceased Nita was in a fit condition to give her statement. He also admits that he had not taken any endorsement from any Medical Officer of the ward in which deceased Nita was admitted, before the deceased had made a statement to him. Apart from these lacunas, we find further infirmity in accepting this statement Exh. 40 and the infirmity is that before recording the statement, P.W. 8 had found the mother of the deceased Nita present with her. This assumes great significance in view of the fact that P.W. 10 Shantabai, who had accompanied the deceased to the hospital, admits in cross-examination that when deceased Nita was admitted in the hospital at Rajura, the doctor had questioned the deceased regarding her injuries and the deceased had stated that she caught fire because of the sudden flame in the oven. This admission of P.W. 10 Shantabai, stands further corroborated by Exh. 42, which is a wireless message sent from Police Inspector, Rajura to Police Inspector, Chandrapur City, requesting them to record the dying declaration as the deceased had stated .that she had sustained burns while cooking food. In view of this oral dying declaration, which is earliest in the point of time, which was made to the Medical Officer by deceased Nita, the averments in Exh. 40 that the oral dying

declaration had been made because of threat given by the appellant, assume importance as the mother of the deceased Nita was present when P.W. 8 Dadaji went to record her dying declaration. It is quite possible, therefore, according to us that Exh. 40 may be a creation because of tutoring of deceased Nita and for the reasons stated above, we feel it highly unsafe to accept this piece of evidence for sustaining the conviction for offence under Section 302 of I.P.C. It is also extremely doubtful whether the deceased was in a fit mental condition when Exh. 40 was made as the prosecution has not examined the Medical Officer who was attending to deceased Nita in the hospital.

12. The learned trial Judge has relied on Article 11, the dying declaration recorded by P.W. 5 Sudhakar Rotkar. As we have pointed out earlier, Article 11 is the xerox copy which was produced by P.W. 5 Sudhakar Rotkar. The Investigating Officer P.W. 11 Raghunath Fuge makes a vague statement that the original dying declaration was not found in the Police Station. Even otherwise, the Trial Court has not found it fit to exhibit Article 11 and consequently, the contents of Article 11 could not have been read in evidence. The next circumstance relied by the learned trial judge is the evidence of P.W. 2 Deepak, who is the son of the appellant and the deceased. P.W. 2 claims to be an eye-witness and states that on the day of the incident, he was at home. His father had come in an intoxicated condition and was assaulting his mother, deceased Nita. The appellant had asked P.W. 2 Deepak to fetch a match-box and after P.W. 2 Deepak had given the match-box to the appellant, the appellant had poured kerosene on the deceased and set her ablaze. In the cross-examination, the child witness P.W. 2 Deepak admits that he had come to the Court along with his maternal grand-father. In para 6 of his deposition, he admits that his grand-mother and grand-father had told him to give evidence against his father and that his grand-father had told him to state that his father (the appellant) beat his mother and had burnt her.

13. A child witness is certainly a competent witness to depose before the Court. The Court would be justified in convicting an accused on the basis of the evidence of a child witness. If the Court finds that the child witness has the capacity of understanding and gives truthful answers, a conviction could be based on the evidence of such child witness. The rule of prudence, now reopened into rule of

law, is to seek corroboration to the evidence of child witness before the evidence of child witness is made a foundation for conviction. It is to be always remembered that a child witness is susceptible to being tutored. Because of tutoring, the child witness is so much impressed that he begins to believe that what is tutored to him is the truth. The Court has, therefore, to be extremely cautious while accepting the evidence of the child witness.

14. In this case, we have absolutely no difficulty in rejecting the evidence of P.W. 2 Deepak for the reason that he admits that he had been tutored. Apart from this, P.W. 9 Gaurabai does not show presence of P.W. 2 Deepak in the house at the time when the deceased is alleged to have been set ablaze. In fact, P.W. 9 Gaurabai says that when she had gone to the house of deceased Nita, at that time, Deepak was in the house of one Jitendra. As if these two circumstances are not enough to justify the rejection of the testimony of P.W. 2 Deepak, we have another circumstance and that is the extraordinary delay in recording the statement of P.W. 2 Deepak. The incident is alleged to have occurred on 3.2.1994, while the statement of P.W. 2 Deepak came to be recorded by the Investigating Officer on 11.2.1994. This delay has gone unexplained by the prosecution and, therefore, submission of Mr. M.R. Daga, the learned Counsel for the appellant that version given by P.W. 2 Deepak is not a true version as possibility that he had been tutored to give such version could not be ruled out, appears to be justified.

15. We are left with the last circumstance i.e. finding of traces of kerosene on the clothes of the appellant and that of the deceased. The C.A. report at Exh. 32 does show the presence of kerosene on the clothes of the appellant and the deceased. According to us, this is not substantive evidence. This could, at the most, be used as a corroborative link to corroborate either the evidence of P.W. 2 Deepak or the dying declaration Exh. 40 and Article 11. Since we have held that P.W. 2 Deepak cannot be relied upon as also the dying declaration cannot be accepted, according to us, this lone circumstance is by itself insufficient to convict the appellant for the offence under Section 302 of the Indian Penal Code.

16. In the result, therefore, we allow the appeal and quash and set aside the conviction of the appellant for the offences punishable under Sections 498A and

302 of the Indian Penal Code, recorded by the Additional Sessions Judge, Chandrapur, in Sessions Case No. 110 of 1994 and acquit him of the aforesaid charges. The appellant be set at liberty forthwith and amount deposited if any, be refunded to the appellant.

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