

(2016) 10 BOM CK 0038

Bombay High Court (Nagpur Bench)

Case No: Criminal Appeal No. 60 of 2002

Tulshiram s/o Wadguji Kawade

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision: Oct. 17, 2016

Acts Referred:

- Evidence Act, 1872 - Section 3
- Penal Code, 1860 (IPC) - Section 306

Citation: (2016) 3 AIRBomRCri 843 : (2017) 1 BomCR(Cri) 712 : (2016) 6 MhLJCri 504

Hon'ble Judges: V.M. Deshpande, J.

Bench: Single Bench

Advocate: Mr. M.P. Khajanchi, Advocate, for the Appellants; Mrs. K.R. Deshpande, A.P.P, for the Respondent

Final Decision: Allowed

Judgement

V.M. Deshpande, J. - Being aggrieved by judgment and order of conviction passed by learned 2nd Ad hoc Additional Sessions Judge, Chandrapur in Sessions Case No. 59/1998 dated 20.12.2001 by which each of the appellant was convicted for the offence punishable under Sections 306 read with Section 34 of the Indian Penal Code and was ordered to suffer rigorous imprisonment for three years and to pay a fine of Rs. 1,000/- by each of them and in default to suffer rigorous imprisonment for one month. They were also convicted for the offence punishable under Section 498-A read with Section 34 of the IPC and on that ground the sentence is sufferance of one year rigorous imprisonment for each of them and to pay a fine of Rs. 500/- each and in default to suffer rigorous imprisonment for 15 days, the appellants are before this Court. The appellant nos. 1 and 2 are father and mother in law of the deceased Nita. The appellant no. 3 is husband of the deceased.

The appellants were charged by the learned Judge of the trial Court that they, in furtherance of their common intention, subjected the deceased Nita to cruelty by

wilful conduct which was of such a nature as was likely to drive her to commit suicide and also harassed her mentally and physically by demanding Rs. 50,000/- to her and thereby committed an offence punishable under Section 498-A read with Section 34 of the IPC.

They were also charged that on 16.03.1998, the deceased Nita committed suicide at Ghuggus by hanging herself and the appellants, in furtherance of their common intention, abetted her to commit suicide by subjecting her to humiliation and cruelty within the meaning of Section 498-A of the IPC and thereby committed an offence punishable under Section 498-A read with Section 34 of the IPC.

2. I have heard Mr. M.P. Khajanchi, learned counsel for the appellants and Mrs. K.R. Deshpande, learned A.P.P. for the State. Both of them took me through the record and proceedings of the sessions case in detail.

3. The marriage between the appellant no. 3 and the deceased in the year 1997 is not in dispute. Dr. Narayan Daware (PW2) has performed autopsy over the dead body of Nita when the same was brought to General Hospital, Chandrapur on 17.3.1998. He proved the post-mortem notes (Exh.-22). According to the evidence of the Doctor, the deceased died due to hanging resulting into injury to vital organs like brain, heart and lungs due to strangulation and shock.

4. It is not the defence that the death has occurred due to any accident. Similarly, the prosecution has not charged the appellants that they have committed homicidal death of Nita nor they were put to on trial for the offence punishable under Section 304-B of the IPC.

In that view of the matter, it will be seen as to whether there is sufficient evidence available on record to affirm their respective convictions as imposed upon them by the Court below.

5. The prosecution has examined in all 13 witnesses. Whereas the appellants also examined one defence witness. According to the written statement which the appellants had filed before the Court below at the time of their examination under Section 313 of Code of Criminal Procedure and which is available on record at Exh.-50, Nita was not happy with her marriage with appellant no. 3. According to their defence, her marriage was performed with appellant no. 3 by her parents against her wish and she was not ready to reside in their house.

6. In order to prove the guilt, the prosecution has examined Bapurao Lohakare (PW1), father of the deceased, Raju Lohakare (PW3) brother of the deceased, Kamalbai Lohakare (PW4) mother of the deceased, Vimlabai Bhongale (PW6) neighbour of the parents of the deceased, Diksha Pazare (PW7) sister of the deceased, Ulhas Gawande (PW10) husband of another sister of the deceased.

Naresh Moon (PW9), Sk. Layeeb s/o Sk. Gani (PW11), Sakharam Shiwarkar (PW12) are the panch witnesses. Sou. Kavita Tipale (PW13), who is neighbour of the appellant,

has not supported the prosecution.

Sadhuji Nagrale (DW1) was mediator in settlement of marriage between appellant no. 3 and the deceased. The Investigating Officer is not examined in the case.

7. According to the learned counsel for the appellants, the entire trial stands vitiated for non examination of the Investigating Officer. He also submitted that in the present case, the FIR is not proved by the prosecution and on that count also, the prosecution stood vitiated.

8. In my view, the submission of the learned counsel for the appellants that the criminal trial is per se vitiated for non examination of the Investigating Officer is rather an adventurous submission. Merely because the Investigating Officer is not examined, that by itself the entire trial does not get vitiated. The prejudice likely to be suffered by an accused depends on facts of each case and there is no straight-jacket formula that for non examination of the Investigating Officer the trial stands vitiated. This view of mine is duly fortified by the law laid down by Their Lordships of the Hon"ble Apex Court in **Behari Prasad etc. etc. v. State of Bihar ; AIR 1996 SC 2905**. In that view of the matter, I reject the submission advanced by the learned counsel in that behalf.

9. Another submission of the learned counsel for the appellants is that in the present case, the FIR was lodged by the police officer himself and he was not examined by the prosecution during trial, resulting into the fact that the FIR remained to be proved and therefore the prosecution must fail.

10. The FIR is not a substantive piece of evidence. It is used for the purpose of corroboration or contradiction. In paragraph 79 of reported case in **Krishna Mochi and others v. State of Bihar ; AIR 2002 SC 1965**, Their Lordships of the Apex Court has ruled as under :

"79. It has been further submitted that the informant Satendra Kumar Sharma has not been examined as such. First information Report cannot be used as substantive piece of evidence inasmuch as on this ground as well the appellants are entitled to an order of acquittal. The submission is totally misconceived. Even if the first information report is not proved, it would not be a ground for acquittal, but the case would depend upon the evidence led by prosecution. Therefore, non-examination of the information cannot in any manner affect the prosecution case."

In view of the above, the submissions of the learned counsel for the appellants must fail.

11. That leaves this Court, being a last Court in respect of the finding of fact is concerned, to re appreciate the evidence brought on record by the prosecution to reach to the conclusion as to whether the prosecution was able to prove the guilt of the appellants.

12. From the evidence of father, mother, brother, sister and brother in law of the deceased, it is crystal clear that all of them were present in the matrimonial house of the deceased at Ghuggus after they received information about the suicide. The evidence of Bapurao (PW1) shows that when the relatives of the deceased reached to the place of the appellants that time the police personnels were present there.

In the present case, admittedly no oral or written report was lodged by any of the prosecution witnesses who were examined by the police. Their evidence shows that their statements were recorded after 3-4 days of the incident. The statement of Vimalbai (PW6) was recorded after 39 days. None of these closely related prosecution witnesses deposed from the witness box that an attempt was made on the part of the Investigating Officer to record their statements immediately, however, Since they were in grief and sorrow, they were unable to give their statements. Resultantly, it appears that an opportunity was available to those relatives of the deceased to lodge a complaint or disclose about the ill treatment and demands to the police. For the reasons best known to them, they chose to remain silent.

13. According to these prosecution witnesses, the deceased had been to her parental house at the time of Rakshabandhan, Pola, Bhaubij and Mahashivratri festivals and when she visited, she disclosed that she is subjected to cruelty at the hands of the appellants on account of demand of Rs. 50,000/- to purchase a Trax.

14. The disclosure of ill treatment by the deceased at the time of Rakshabandhan festival is stated by Raju (PW3). He is not corroborated on that count either by Bapurao Lohakare (PW1) or by Kamalbai (PW4) or even Diksha (PW7). When the evidence of Raju (PW3) was tested in cross-examination, it is brought on record that the deceased had told about the ill treatment to him in presence of his father and mother. However, the version of Raju about the disclosure of ill treatment at the time of Rakshabandhan goes uncorroborated.

15. Bapurao (PW1) has admitted that Sadhuji (DW1) was mediator. He and his wife Kamalbai (PW4) have admitted in their evidence that there was no demand of whatsoever in nature from the appellants at the time of marriage. Not only Kamalbai (PW4) did admit in her evidence that when the deceased came for the first time on Mandavparatni after 2-3 days of marriage and also at the time of Rakshabandhan, she did not inform anything about the ill treatment.

According to the prosecution witness, when the deceased had been to their house at the time of Pola festival, when she was brought by Bapurao from her matrimonial house, it was informed to them by the deceased about the ill treatment and demand of Rs. 50,000/-. Their evidence shows that though they claimed from the witness box that it was disclosed to them, however, they admit in their respective depositions that this fact was not stated by them to police when their statements were recorded.

When the deceased had been to her parental place for Bhaubij festival that time Bapurao (PW1) was away at New Delhi and therefore his evidence about the ill treatment being disclosed to her mother-Kamalbai (PW4), would be the hearsay evidence.

16. Kamalbai (PW4) though claimed that whenever she used to go to Nita's house at Ghuggus, she used to inform that appellant no. 3 assaults her. However, in the cross-examination it is brought on record that she had been to Nita's place at Ghuggus only once i.e. after her death. Further, she has admitted that this portion is also not appearing in her police statement.

17. The learned A.P.P. for the State has fairly stated that the evidence in respect of the ill treatment and demand as claimed by the prosecution witnesses is not appearing in their police statement. In that view of the matter, non examination of the Investigating Officer has caused serious prejudice to the appellants since they were refrained from proving the omissions in order to test veracity of these prosecution witnesses. In that sense, Court is required to draw adverse inference against the prosecution.

18. The quality of evidence as available on record, in my view, was not properly considered and/or the prosecution case was not correctly evaluated by the learned Judge of the Court below while reaching to the conclusion that the prosecution has proved its case in respect of the offence punishable under Section 498-A of the IPC.

19. Before holding the accused guilty of an offence under Section 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 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 IPC is not sustainable. This is settled principle of law laid down by the various pronouncements by the Hon'ble Apex Court.

20. Record shows that initially an accidental death was registered vide AD No. 11/98 under Section 174 of the Code of Criminal Procedure as it could be seen from the inquest panchanama Exh.-27 and spot panchanama Exh.-36. Exh.-28 is panchanama in respect of the writing on the left hand of the deceased. Kumudini (PW5) a pancha witness, has proved Exh.-27 and 28, the writing which was noticed at the time of inquest on the left hand of the deceased, which reads as under:

"I am committing suicide to get rid off the ill treatment meted out to me at the hands of both father in law and mother in law for the demand of dowry."

From the aforesaid, it is clear that there are no allegations against Yashvant-appellant no. 3, husband of the deceased Nita.

21. The deceased was studied up to B.A. as could be seen from the evidence of Bapurao (PW1). No efforts are taken by the prosecuting agency for comparing the handwriting on the left hand of the deceased with the admitted hand writing of the deceased in spite of the fact that Exh.-28 shows that the photograph of the said hand writing on the left hand was taken by the photographer. In my view, merely because there is hand writing on the left hand of the deceased, that by itself does not permit this Court to jump to a conclusion that it was the hand writing of the deceased herself.

22. Raju (PW3) denied the suggestion given to him that prior to the marriage of the deceased with appellant no. 3, her marriage was fixed at other place and it was fixed with his brother in law i.e. the brother of his wife and it was broken. However, the evidence of Raju stands contradicted by the evidence of Bapurao (PW1)-his father. The relevant portion is reproduced herein below.

"I have only one son. He is married in the year 1990. His wife is from Shagnapur. Engagement ceremony of Nita had taken place with brother of the wife of my son. Nita had also accepted him for marriage. However, that marriage could not be performed. I had not performed marriage of Nita with brother of my daughter in law as there should not be exchange of daughters in the family in marriage."

Thus, from the evidence of Bapurao (PW1), father of the deceased, it is established that prior to the marriage of appellant no. 3, marriage of Nita was fixed with brother in law of Raju (PW3) and the said marriage was also acceptable to the deceased. However, as disclosed by Bapurao (PW1) in his evidence, the said was not performed.

23. The evidence of Diksha (PW7) married sister of the deceased shows that her marriage was also performed in a family residing at Ghuggus. The relevant portion, which is brought in her evidence, is as under :

"Now I am residing with Fulzele at Wani. My father had performed my marriage and the marriage of Nita against her wishes."

From the aforesaid, it is crystal clear that the marriage of the deceased was against her wish. Therefore, the defence of the appellants, as submitted in Exh.-50 is probalised.

24. In view of the aforesaid, I am of the considered view that the appellants alone cannot be held responsible for the suicide committed by the deceased. That leads me to pass the following order.

The judgment and order dated 20.12.2001 passed by 2nd Ad hoc Additional Sessions Judge, Chandrapur in Sessions Case No. 59/1998 is quashed and set aside.

The appellants are acquitted of the offence punishable under Sections 306, 498-A read with Section 34 of the Indian Penal Code.

Bail bonds of the appellants stand cancelled. The fine amount paid by the appellants shall be refunded to them.