(2010) 03 BOM CK 0179

Bombay High Court (Aurangabad Bench)

Case No: Criminal Appeal No. 344 of 2009

Ganesh Kahite		APPELLANT
	Vs	
The State of Maharashtra		RESPONDENT

Date of Decision: March 9, 2010

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 294, 313
- Evidence Act, 1872 - Section 113B
- Penal Code, 1860 (IPC) - Section 302, 304B, 498A

Hon'ble Judges: P.R. Borkar, J

Bench: Single Bench

Advocate: Joydeep Chatterji, for the Appellant; K.M. Suryawanshi, Assistant Public Prosecutor, for the Respondent

Final Decision: Dismissed

Judgement

P.R. Borkar, J.

This is an appeal filed by original accused No. 1 being aggrieved by the order passed by the learned Additional Sessions Judge-2, Aurangabad, in Sessions Case No. 154 of 2008 decided on 19.3.2009, whereby present appellant is convicted of the offences punishable u/s 304B and 498A of the Indian Penal Code. For offence u/s 304B of IPC, the appellant is sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs. 5,000/- and for offence u/s 498A IPC, no separate sentence is awarded. Original accused Nos. 2 and 3 are acquitted of both the offences.

2. Briefly stated, the prosecution case is that that PW-1 Tanhabai (Exh.18), mother of deceased Sangeeta, lodged complaint on 14.3.2008 at Police Station, Karmad, stating that Sangeeta was one of her daughters and she was given in marriage to present appellant. The marriage was performed on 14.5.2006 at village Kern-Jalgaon, Taluka and District Aurangabad. After the marriage, for one month Sangeeta was treated well, but thereafter on trifle matters, she was abused and

beaten by husband-appellant. It was his complaint that in the marriage, he was paid very meagre dowry and, therefore, Sangeeta should bring Rs. 50,000/- from her parents for purchasing a motorcycle. The appellant also boasted that he had killed one boy and threatened Sangeeta that if she did not bring Rs. 50,000/- from her parents, he would kill her as he had killed the boy. Sangeeta used to tell about the demand, ill-treatment and threats, to her parents whenever she visited them. However, the parents used to console her and send her back. In June 2007, Sangeeta came to her parents and started crying by saying that original accused Nos. 2 and 3, who were the sisters of appellant, used to visit the house of appellant after frequency of 8-10 days and instigate him to beat Sangeeta. Both accused Nos. 2 and 3 had been telling Sangeeta that if she brought Rs. 50,000/- from her parents, there would not be trouble to her. The appellant had then come to parents when Sangeeta was residing with them and requested to send her back, but at the same time he demanded Rs. 3000/- which were paid to him. Two months thereafter, elder maternal uncle of the appellant, by name Devising Bainade telephonically informed the parents of Sangeeta that Sangeeta was severely beaten by her husband and, therefore, they should take her back. The complainant (PW-2) therefore, went to village Feran-Jalgaon where Sangeeta was residing and noticed that there were weal marks on the person of Sangeeta. The complainant, therefore, took Sangeeta to doctor at village Shekata and treated her. Sangeeta was taken to her parental house where she resided for fifteen days. Sangeeta told her mother that for non satisfaction of demand of money, she was severely beaten by appellant. The appellant was saying that since his maternal uncle Laxman Bainade was working as Police at Aurangabad, he (appellant) could get acquittal even if he causes danger to her life. After fifteen days from the stay of Sangeeta with her parents, Bharatthe brother-in-law of the appellant, came to the parents of Sangeeta and assured that there would not be ill-treatment to Sangeeta and therefore they should send her to the house of her husband. Accordingly, Sangeeta was sent to Feran-Jalgaon. On 10.3.2008 both, Sangeeta and the appellant, had come to the temple at Mhaismal. At that time the appellant told PW-1 Tanhabai that in the marriage, they had paid very meagre dowry and therefore they should pay Rs. 50,000/- to him. However, Tanhabai told that they did not have money and after getting money, they would pay to him. Appellant, however, said that such an excuse had been given for two years. He expressed his unhappiness. On 13.3.2008 Sangeeta and the appellant had come to Faren-Jalgaon. On that day at about 6.00 p.m., one Bajrang Charande telephonically informed the complainant that Sangeeta had become unconscious and asked the complainant to come to Baba Petrol Pump at Aurangabad. Accordingly, parents of Sangeeta with relatives came to Aurangabad and then went to Govt. hospital, Aurangabad, where they were told that Sangeeta was dead. They saw the dead body of Sangeeta and noticed that there was smell of poison from her nostile; there were injuries to her legs and chin.

3. After lodging above complaint, police registered the offence and carried out further investigation. Inquest of dead body was drawn. The dead body was subjected to autopsy. Viscera was sent to Chemical Analyzer. Before lodging complaint on 14.3.2008, on 13.3.2008 at about 9.10 a.m. A.D. was registered at Karmad Police Station on the MLC letter received from the Government Hospital, Aurangabad, regarding death of Sangeeta. Police had also drawn spot panchanama. On information given by the landlady of the house in which the appellant and Sangeeta were residing, it was noted that Sangeeta had been seen hanging with sari to a ceiling fan. Thereby suspicion was created that it was a case of suicide by hanging. After completion of investigation, charge sheet was sent to the Sessions Court. The charge was framed against appellant and other two accused. The prosecution, in all, examined four witnesses and relying upon their evidence and documents, the order of conviction and sentence is passed which is challenged in this appeal.

4. In order to prove the demand of Rs. 50,000/- and consequential ill-treatment due to non satisfaction of the demand, there is evidence of PW-1 Tanhabai (Exh.18) and PW-3 Narsing (Exh.28) who are the parents of deceased Sangeeta. Both have stated consistently as per complaint (Exh.19) which is reproduced above.

5. Shri Joydeep Chatterji, learned Counsel for the appellant took me through entire evidence on record. After considering the judgment of the trial court and the evidence of parents of Sangeeta, I am satisfied that the trial court has rightly believed both of them. Their evidence is natural and inspires confidence. PW-1 Tanhabai stated in paragraph 3 of her deposition that when they went to the hospital, Sangeeta was dead; there was smell of poison from her mouth; there were injuries around her neck, palm, thighs, legs. On enquiry by them, they were told that Sangeeta was found hanging and therefore she was immediately brought to the hospital. The complaint is given on the very next day and, therefore, it cannot be said that the complaint was filed belatedly. We find some omissions in her cross examination to the effect that on telephonic message, Bajrang Parande told them to come to Baba Petrol Pump, Aurangabad and accordingly they came near Baba Petrol Pump and from there they again made phone call to said Bajrang Charande who told them to come to Ghati Hospital. Similarly, another omission is that after Sangeeta was admitted in Sant Eknath Hospital, telephone call was made by her to PW-1 Tanhabai to bring money to Baba Petrol Pump. These omissions can hardly be said to be so material.

6. The inquest panchanama, which is admitted at Exhibit 30, shows that froth had come from the mouth and nostrils of Sangeeta. there were also injuries on chin, so also tenderness on neck, back and leg.

7. So far as PW-3 Narsing is concerned, he was also consistent in his deposition with his wife Tanhabai. There are certain omissions in his statements. He had not stated before police that when Bharat had come to their house to take back Sangeeta, they

were not willing to send her or that in June-2007 Sangeeta was accompanied by the appellant. It is not stated that Sangeeta and Ganesh thereafter came to demand money and that Sangeeta said that if money was not given, the appellant would kill her or that the appellant had become unhappy when he was told that money would be paid later on. These are not material omissions. Evidence is consistent and confidence inspiring and, therefore, both the witnesses were rightly believed by the learned Sessions Judge.

8. So far as cause of death is concerned, evidence of PW-2 Dr. Mugaddimath at Exhibit 25. Dr. Mugaddimath deposed that he and Dr. S.H. Chaudhari carried out postmortem between 10.30 am to 11.30 a.m. on 14.3.2008. During external examination, they found evidence of dried reddish white froth collected around the nostrils and around mouth. According to them, probable cause of death was "suspected poisoning". Viscera was preserved. PW-2 Dr. Mugaddimath in para 2 of his examination in chief deposed to following effect:

On internal examination, we found evidence of reddish brown froth in lumen of trachea mucosa of trachea congested, petechial hemorrhages seen in the lumen. Right and left lungs congested and odematous. On dissection, dark brownish red fluid ozzing out scanty. So far as pericardium, heart with weight, we found whitish patches seen over epicardium, soft to touch. So far as bucal cavity, teeth and tongue and pharynx, epiglotttis area congested with few petechial were seen. About stomach and its contents, we found 20 cc of reddish brown scanty indistinguishable pulpy material, no abnormal smell of the same perceived. Mulsosa was congested. Streaks of sub-mocosal hemorrhages seen all over the surface of mucosa. Rest of the organs were congested and oedematours.

Dr. Mugaddimath proved post mortem report at Exhibit 26. He thereafter referred to histo-pathological report, the original of which is proved at Exhibit 27. He came to a conclusion that death was due to poisoning. I may reproduce the findings of microscopic examination from histopathology report.

Microscopic Exam. M568 to M 572/08. Sections from lung show bronchiols. alveoli and blood vessels. bronchiols show normal morphology. There is diffuse interstitial odema. Very few focal alveoli show odema fluid, plura appears normal. Focal peribronchial carbon deposition seen. Capillaries are conjested.

Thus, Dr. Mugaddimath has affirmed that the cause of death was poisoning. He also asserted that no injury was found around the neck so as to suggest that the death was by strangulation. That fact appears to have been corroborated by the finding in the post mortem report and histo-pathological report. We do not find any corroboration to defence theory that death was due to hanging. Various observations noted in the post-mortem notes (Exh.26) only negative said theory.

9. It was argued before this Court and also before the trial court that the C.A. report of viscera did not reveal any poison and, therefore, it must not be a case of death by

poisoning, but death due to hanging. The spot panchanama (Exhibit 29) is admitted by accused u/s 294 of Cr.P.C. and, therefore, it is read in evidence and it shows that the place of offence was house in which the appellant was residing with his wife at village Feran-Jalgaon in the land of one Meerabai Bainade. Said Meerabai had shown the place to the police. At the place, there was a ceiling fan fixed on steel angle of the roof. Meerabai stated that Sangeeta had been seen hanging to fan with a cloth like sari and, therefore, that cloth was cut. Sangeeta was unconscious. At the time of panchanama, there were two pieces of sari with which Sangeeta was said to have hanged herself. Those pieces of sari were attached. Meerabai is not examined as a defence witness. Her statement appearing in the panchanama is no evidence. It is worth to note that accused or members of his family who had taken Sangeeta to civil hospital, have not filed any report to the police. They did not give any information about the circumstances in which Sangeeta was found and was admitted in the hospital to any one. They have taken defence of toal denial during evidence or their statements u/s 313 of Cr.P.C. The appellant-accused or other accused persons have not come out with any positive case. They simply raised some doubt and wanted to get benefit of doubt. Ordinarily, the appellant-accused himself having brought Sangeeta to the hospital and when he was accompanied by others, some of them ought to have reported the matter to the police. At least someone from them should have been examined in defence. The circumstances in which the victim was found unconscious were within the special knowledge of the appellant and his relatives. It is also worth noting that generally, poison is administered in secrecy and there may not be direct evidence on that aspect every time. In this case, there was no occasion for recording statement of Sangeeta as she was unconscious when brought to the hospital. We find this in the report of the doctor which report was treated as A.D. report. If really, Sangeeta had been found to have committed suicide by hanging and if it was not the case of dowry death or homicidal death, the appellant and his relatives would not have failed to approach police and report the circumstances in which Sangeeta died. Even in his statement u/s 313 of Cr.P.C., the appellant does not say anything. So, all this conduct speaks volume.

10. In this case, learned A.P.P. Shri K.M. Suryawanshi relied upon some judgments which were also relied upon by the trial court. The first case relied upon by the trial court and learned A.P.P. is Maonhar Kisan Maraskolhe v. State of Maharashtra 2001 ALL MR (Cri.) 1618. In paragraph 16, following observations are made:

16. Mr. Daga, learned Counsel for the appellant has laid much emphasis on the findings of the Chemical Analyzer, who found no recognisable poison detected in the viscera, liver, spleen and kidney of the deceased. No doubt that the Chemical Analyser''s work is very important as usually his findings are final. But in a given case, even though a person may die due to poisoning, poison may not be detected in viscera. Dr. Tank, in his evidence, has stated that according to his opinion, it is not necessary that poison should be detected in viscera and he is right and his opinion also finds support from Modi''s Medical Jurisprudence & Toxicology, 22nd Edition by

Butterworths and particularly while dealing with the subject in Section 2 of his Book on Toxicology at page 22, the author has observed:

It is possible that a person may die from the effects of a poison, and yet, none may be found in the body after death if the whole of the poison has disappeared from the lungs by evaporation, or has been removed from the stomach and intestines by vomiting and purging, and after absorption has been detoxified, conjugated and eliminated from the system by the kidneys and other channels. Certain vegetable poison may not be detected in the viscera, as they have no reliable tests, while some organic poisons, especially the alkaloids and glucosides, may, by oxidation during life or by putrefaction after death, be split up into other substances which have no characteristic reactions sufficient for their identification. Modi saw cases in which there were definite signs of death from poisoning, although the Chemical Examiner failed to detect the poison in the viscera preserved for chemical analysis. It has, therefore, been wisely held by Christison that in cases where a poison has not been detected on chemical analysis, the judge, in deciding a charge of poisoning, should weigh in evidence the symtomps, postmortem appearances and the moral evidence.

11. The trial court also referred to the case of State of Karnataka Vs. M.V. Manjunathegowda and Another, . In that case, it was proved that the deceased was subjected to cruelty and harassment in connection with demand of dowry by husband. For certain reasons, the High Court disbelieved the evidence and acquitted the accused of the offence punishable u/s 302 of I.P.C., but the Supreme Court held that the circumstances were such that the offence u/s 304B is proved. In paragraph 20, the Supreme Court observed thus;

20. The aforesaid legal position, as it stands now, is that in order to establish the offence u/s 304B IPC the prosecution is obliged to prove that the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances and such death occurs within 7 years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of husband. Such harassment and cruelty must be in connection with any demand for dowry.

In paragraph 17, it is held that When above said circumstances are proved, presumption u/s 113B of the Evidence Act would act and the presumption is rebutable and the onus to rebut shifts on the accused. As observed on paragraph 22, the defence was of total denial and, therefore, it was held that in absence of any evidence in rebutal, the presumption remains unrebutted. Under the circumstances, the conviction in said matter u/s 304B is held to be well founded.

12. In present case, so far as the report of the Chemical Analyser is concerned, I may refer to the case of Dr. Anant Lagu v. State of Bombay AIR SC 500, and more particularly paragraph 66 of the judgment.

66. The reason for all this is obvious. Lambert in his book, "The Medico-Legal Post Mortem in India" (pp. 96, 99-100) has stated that the pathologist''s part in the diagnosis of poisoning is secondary, and has further observed that several poisons particularly of the synthetic hypnotics and vegetable alkaloids groups do not leave any characteristic signs which can be noticed on post-mortem examination. See Modi''s Medical Jurisprudence and Toxicology 13th Edition, pages 450-451 and Taylor''s Principles and Practice of Medical Jurisprudence Volume II, page 229. The same is stated by Otto Saphir in his book "Autopsy" at pp.71 and 72. In Dreisbach''s Handbook of Poisons, 1955, it is stated that pathological findings in death from narcotic analgesics are not characteristic. He goes further and says that even the laboratory findings are non-contributory. The poison of the pathologist who conducts a post-mortem examination has been summed up by Modi in Medical Jurisprudence and Toxicology, 13th Edn., p.447 as follows;

In order to make a probable guess of the poison and to look for its characteristic post-mortem appearances, it is advisable that a medical officer, before commencing a post mortem examination on the body of a suspected case of poisoning, should read the police report and endeavour to get as much information as possible from the relatives of the deceased regarding the quality & quantity of the poison administered, the character of the symptoms with reference to their onset & the time that elapsed between the taking of the poison and the development of the first symptoms, the duration of the illness, nature of the treatment adopted, and the time of death. He will find that in most cases the account supplied by the police and the relatives is very meager, or incorrect and misleading. His task is, therefore, very difficult, especially when many of the poisons except corrosives and irritants do not show any characteristic post-mortem signs and when bodies are in an advanced state of decomposition....

Similarly, Gonzales in Legal Medicine and Toxicology states at p. 629:

The question of whether or not a negative toxicologic examination is consistent with death by poison can be answered affirmatively, as many persons overcome by carbon monoxide die after twenty-four hours, at which time the gas cannot be determined in the blood by chemical tests. Likewise, the organs of individuals who have been poisoned by phosphorus may not contain the toxic substance responsible for death if they have managed to survive its effect for several days.

Many conditions seriously interfere with the toxicologic examination, such as post-mortem decomposition....

In paragraph 67, it is further observed;

67. We need not multiply authorities, because every book on toxicology begins with a statement of such a fact. Of course, there is a chemical test for almost every poison, but it is impossible to expect a search for every poison. Even in chemical analysis, the chemical analyser may be unsuccessful for various reasons. Taylor in

his Principles and Practice of Medical Jurisprudence, (Vol. II, p. 228) gives three possible explanations for negative findings, viz. (1) the case may have been of disease only; (2) the poison may have been eliminated by vomiting or other means or neutralised or metabolised; and (3) the analysis may have been faultily performed.

13. So, in present case, merely because C.A. report regarding viscera did not disclose any poison will not caste any doubt on the evidence of PW-2 Dr. Mugaddimath who substantiated his findings regarding death due to poisoning by cogent reasons.

14. In the circumstances, this is not a case wherein any interference in the order of conviction is called for. Learned Advocate Shri Joydeep Chatterji for the appellant prayed for showing leniency. However, having regard to the facts and circumstances particularly when colour was being given to death due to poisoning, of it being a suicide by hanging, no leniency deserves to be shown. Death is shrouded in very suspicious circumstances. All ingredients of dowry death punishable u/s 304B I.P. Code are fully established beyond doubt. The number of dowry deaths and deaths of newly married girls are not reducing in spite of stringent provisions of law and, therefore, this is a case requiring deterent punishment.

15. Hence, Appeal stands dismissed and the order of conviction and sentence passed by the learned Additional Sessions Judge-2, Aurangabad, in Sessions Case No. 154 of 2008 decided on 19.3.2009, is hereby confirmed.