

(2018) 01 BOM CK 0243

Bombay High Court (Nagpur Bench)

Case No: 797 of 2008

The State of
Maharashtra

APPELLANT

Vs

Manohar Gunwant
Gourkar & Ors

RESPONDENT

Date of Decision: Jan. 6, 2018

Acts Referred:

- Code of Criminal Procedure, 1973, Section 174 - Police to enquire and report on suicide, etc
- Indian Penal Code, 1860, Section 34, Section 498A, Section 306, Section 304B - Acts done by several persons in furtherance of common intention - Husband or relative of husband of a woman subjecting her to cruelty - Abetment of Suicide - Dowry death
- Evidence Act, 1872, Section 113A - Presumption as to abetment of suicide by a married woman

Hon'ble Judges: Rohit B. Deo

Bench: Division Bench

Advocate: N.R. Patil, Darasingh Sandhu

Judgement

1. The State is in appeal challenging the judgment and order dated 26.8.2008 rendered by the Assistant Sessions Judge Nagpur - 3, in Sessions Trial 485 of 2007, by and under which, the respondents - accused are acquitted of offence punishable under sections 498A, 306 and 304B read with section 34 of the Indian Penal Code (IPC).

2. Heard Shri N.R. Patil, the learned Public Prosecutor for the appellant / State and Shri. Darasingh Sandhu, the learned counsel for the respondents - accused.

3. The case of the prosecution as is unfolded during the trial is thus: Deceased Preeti, the

daughter of (PW 2) Madhukar Dhande and accused 1 Manohar Gourkar were in love and entered into matrimonial alliance on 20.5.2004. Accused 1 Manohar is a timber vendor. Preeti started residing with accused 1 and other accused at her matrimonial house situated at Nandanwan colony, Nagpur. Preeti and accused 1 were blessed with two daughters.

Preeti was well treated for 15 days and thereafter the accused started subjecting her to mental harassment and assault to coerce her to bring Rs.50,000/from PW 2 Madhukar to start a business. Preeti used to narrate the harassment to her father PW 2 who used to assuage her feelings and send her to the matrimonial home for cohabitation with accused 1. The accused 1 also used to visit his father in law PW 2 and used to issue threat to kill Preeti. Despite the harassment, both mental and physical and threat, PW 2 used to send Preeti to her matrimonial home for cohabitation.

On 21.6.2007 at 5.00 pm Gunvantrao Gourkar (accused 2 - who expired during the pendency of the appeal) informed PW 2 telephonically that Preeti has committed suicide. PW 2 went to the matrimonial home of Preeti alongwith his brother Rupchand Dhande and one Ramuji Makde. PW 2 then lodged the report at Sakardara Police Station on 22.6.2007.

In the interregnum, acting on the report of accused 2 Gunvant which was received by Sakardara Police Station at 5.00 pm on 21.6.2007, accidental death inquiry under section 174 of the Code of Criminal Procedure was registered, autopsy was conducted on the dead body of Preeti which revealed that the death is due to "hanging".

On the basis of report dated 22.6.2007 lodged by PW 2 Madhukar offence punishable under sections 498, 306 and 304B read with section 34 of IPC was registered, investigation ensued, spot panchanama was drawn, statements of witnesses were recorded and on completion of the investigation, charge sheet was submitted in the court of Judicial Magistrate First Class - Corporation Court 1, Nagpur who committed the case to the Sessions Court for trial. The learned Sessions Judge framed charge (Exh 2) for the offence punishable under section 498A, 306, 304B read with section 34 of the IPC, the accused abjured guilt and claimed to be tried in accordance with law. The defence is of total denial. The defence is also that Preeti was not treated well by her step-mother.

4. Concededly, the death has occurred within 7 years of the marriage in circumstances which are not normal. If the prosecution is successful in establishing that soon prior to her death Preeti was subjected to cruelty for or in connection with a dowry demand, it is axiomatic that the statutory presumption under section 113B of the Indian Evidence Act

will be activated. The presumption under section 113B of Evidence Act is a presumption of law and the Court is obligated to invoke the presumption if the ingredients of section 304B of the IPC are proved. In contradistinction with the statutory presumption under section 113B of the Indian Evidence Act, the statutory presumption under section 113A of Indian Evidence Act may be drawn, subject to attending circumstances and the employment of the expression "may presume" in section 113A of the Indian Evidence Act in contradistinction with the expression "shall presume" in section 113B of the Indian Evidence Act brings to the fore the legislative intent that the Court is not obligated to draw the presumption under section 113A of the Indian Evidence Act and the discretion must be exercised subject to the attending circumstances. However, if the prosecution establishes that the married woman was subjected to cruelty within the meaning of section 498A of the IPC explanation (a) or (b) that the death has occurred within 7 years of the marriage, having regard to the attending circumstances the Court may presume that the accused abetted the suicide. It must also be borne in mind, that although neither section 304B of IPC nor section 113B of the Indian Evidence Act explains or defines cruelty in contradistinction with section 113A of the Indian Evidence Act which defines cruelty to mean cruelty within the meaning of section 498A of IPC, it is judicially recognized that the cruelty envisaged by section 304B of IPC and section 113B of the Indian Evidence Act is the cruelty statutorily defined under section 498A of the IPC. Reference may be made to the judgment of the Apex Court in Smt. Shanti and another v. State of Haryana, AIR 1991 Supreme Court 1226, relevant observations of which judgment read thus:

" 6. Now we shall consider the question as to whether the acquittal of the appellants of the offence punishable under S. 498A makes any difference. The submission of the learned counsel is that the acquittal under S. 498A, IPC would lead to the effect that the cruelty on the part of the accused is not established. We see no force in this submission. The High Court only held that S. 304D and S.498A IPC, are mutually exclusive and that when once the cruelty envisaged in S. 498A IPC culminates in dowry death of the victim, S. 304B alone is attracted and in that view of the matter the appellants were acquitted under S.498A IPC. It can therefore be seen that the High Court did not hold that the prosecution has not established cruelty on the part of the appellants but on the other hand the High Court considered the entire evidence and held that the element of cruelty which is also an essential of S. 304B IPC has been established. Therefore the mere acquittal of the appellants under S.498A IPC in these circumstances makes no difference for the purpose of this case. However, we want to point out that this view of the High Court is not correct and sections 304b and 498A cannot be held to be mutually exclusive. These provisions deal with two distinct offences. It is true that "cruelty" is a common essential to both the sections and that has to be proved. The Explanation to Section 498A gives the meaning of "cruelty". In S.304B there is no such explanation about the meaning of "cruelty" but having regard to the

common background to these offences we have to take that the meaning of "cruelty or harassment" will be the same as we find in the explanation to S.498A under which "cruelty" by itself amounts to an offence and is punishable. Under Section 304B as already noted, it is the "dowry death" that is punishable and such death should have occurred within seven years of the marriage. No such period is mentioned in S.498A and the husband or his relative would be liable for subjecting the woman to "cruelty" any time after the marriage. Further it must also be borne in mind that a person charged and acquitted under S. 304B can be convicted u/ S.498A without charge being there, if such a case is made out. But from the point of view of practice and procedure and to avoid technical defects it is necessary in such cases to frame charges under both the sections and if the case is established they can be convicted under both the sections but no separate sentence need be awarded under S. 498A in view of the substantive sentence being awarded for the major offence under S.304B.

(Emphasis supplied)

5. The pivotal issue is whether the prosecution has established beyond reasonable doubt that the deceased Preeti was subjected to cruelty within the meaning of explanation (a) or (b) to section 498A of IPC.

6. Be it noted, that this Court would ordinarily be slow in interfering with a judgment of acquittal. The presumption of innocence is only strengthened by acquittal. The interference in a judgment of acquittal would be warranted only if the findings recorded are perverse, or judgment is vitiated by any serious error of law or fact or procedure occasioning miscarriage of justice or any admissible evidence is shut out from consideration or any inadmissible evidence is considered. It would be apposite to refer to the following observations of the Apex Court in Chandrappa and others Vs. State of Karnataka, (2007)4 SCC 415 .

"42. From the above decisions, in our considered view, the following general principles regarding powers of appellate Court while dealing with an appeal against an order of acquittal emerge;

(1) An appellate Court has full power to review, reappraise and reconsider the evidence upon which the order of acquittal is founded;

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate Court on the evidence before it may reach its own conclusion, both on questions of fact and of law;

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate Court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasize the reluctance of an appellate Court to interfere with acquittal than to curtail the power of the Court to review the evidence and to come to its own conclusion.

(4) An appellate Court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court".

7. The cruelty for the purpose of section 498A of IPC is statutorily defined thus:

"498A. Husband or relative of husband of a woman subjecting her to cruelty - Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. Explanation - For the purpose of this section, "cruelty" means

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.)"

The Court must be conscious of the settled position that conduct which may constitute cruelty under a matrimonial law or which may be a matrimonial offence may not constitute cruelties for the purpose of section 498A of IPC. The conduct should be willful, which expression brings into play the intent, and should be such that may cause danger to life, limb or health, physical or emotional or to cause grave injury or which may drive the woman to commit suicide. Explanation (b) of section 498A of IPC takes within its harassment with a view to coerce the women or any person related to her to meet an unlawful demand for any property or valuable security.

8. PW 1 Lata Ikhar is a relative of the complainant PW 2. She states that at the time of marriage, jewelry and other gift were given to accused by PW 2 Madhukar Dhande. She has not supported the prosecution. Strangely, she is not declared hostile and her testimony must ordinarily bind the prosecution. PW 1 has denied that Preeti came to her house and narrated that her husband used to beat her under the influence of liquor. She has denied that Preeti narrated to her the illtreatment and harassment. However, she has proved spot panchanama Exh 14.

9. PW 2 Madhukar Dhande is the informant. He states that at the time of marriage, which was not an arranged marriage, several articles were gifted to accused 1. Accused 1 is residing with his parents, two brothers Yashvant (accused 4) and Sudhir (accused 6) and their respective wives Vanita (accused 5) and Archana (accused 7). Preeti was blessed with two daughters Dolly and Neha. PW 2 has deposed that Preeti was treated well for 15 to 20 days and after that accused 1 started abusing and beating her under the influence of liquor. Accused 1 was not earning and the family expenses were born by the father of accused 1. (deceased accused 2). He states that accused 1 demanded Rs 50,000/for business, Rs. 25,000/was paid to accused 1, the illtreatment, however, continued. He has deposed that Preeti was harassed and illtreated by (accused 1) and her mother in law (accused 3). The expenses of the second delivery were borne by Ranju Timande. Since second girl child was born, the accused were annoyed and started harassing Preeti, is the deposition. He has deposed that when he saw the dead body of Preeti hanging, he observed the dead body and inspected the room. He suspected murder. He has proved report Exh. 19 and the printed First Information Report Exh. 20.

In the cross examination, it is elicited that prior to marriage with accused 1, Preeti had married one Vijay Malewar and the marriage was dissolved in 2002. It is elicited that accused 1 was also a divorcee when he married Preeti. It is elicited that after the death of his wife Pushpa in 2001, PW 2 Madhukar married one Lalita after six months from the death of the first wife Pushpa. He admits that the house of the accused is larger and consists of 7 rooms. The suggestion that the brothers of accused 1 reside separately and are separate business is denied. In the cross examination, it is brought on record that every statement of significance is an omission qua the oral report. The statement that accused 1 demanded Rs. 50,000/and Rs. 25,000/was paid by PW 2, is an omission. The statement that Preeti used to visit PW 2 as and when she needed help, is an omission. The statement that Raju Timande borne the expanses of second delivery, is an omission. The statement that the accused were annoyed due to the health of the second birth child and started harassing Preeti, is also an omission.

10. PW 2 denies that the relation between his second wife and daughter Preeti were strained. He denies the suggestion that after marriage, Preeti did not visit his house. It is elicited that age of the second wife is 32 years as on the date of recording of the evidence. He denies the suggestion that Preeti was unhappy as accused 2 married a young woman. It is elicited that the death anniversary of Preeti's mother was 2 to 3 days prior to the incident. PW 2 denies the suggestion that since death anniversary was not observed, Preeti was unhappy.

11. PW 3 Shankar Dhande, is the elder brother of PW 2 Madhukar. He has deposed that after inspecting the room in which Preeti's body was hanging, he suspected that she was murdered. He claims to have inspected the body in mortuary and having noticed blood stains on the body. PW 3 did not support the prosecution on the aspect of harassment or cruelty and was declared hostile. Nothing is elicited in the cross examination of PW 3 to assist the prosecution.

12. PW 4 Yashodabai Chandekar is the sister of PW 2 - Madhukar. She states that after two months of the marriage, Preeti conveyed to her that accused 1 was consuming liquor and beating her. The rest of the accused were instigating accused 1. She states that once she noticed signs of beating on the hands and legs of Preeti. She then states that she sought the intervention of Preeti's mother in law and the response was that even if Preeti was beaten, her voice should not be heard by any outsider. She has deposed that Rs 50,000/was demanded by the accused for the purpose of business, who were paid Rs. 50,000/and the harassment continued and increased. She has deposed that after some days of the delivery of the girl child, Preeti was mercilessly beaten by accused in March 2007. She states that she saw accused 1 beating Preeti in the month of April 2007 when she went to the house of the accused to invite him for the wedding of her son. She then states that on 3.5.2007 when accused 1 and Preeti came to her house, Preeti took her inside the room and showed signs of beating on her body. She states that accused was

habituated to consumption of liquor and used to illtreat Preeti at the instigation of family members. She speaks of having seen bloodstains on the body and the floor of the room in which Preeti's body was found hanging.

13. In the crossexamination, she states that she visited the matrimonial house of Preeti on thirty occasions and that too alone. Her brother PW 2 did not accompany her, is the version. She states that Preeti visited her ten times. She admits that after six months of the marriage, the accused separated in mess and in residence. She is not aware whether all the accused are having independent business or joint family. The statement of PW 4 is recorded belatedly on 11.7.2007. However, she denies the suggestion that she did not inform anybody about the incidents narrated in the statement.

14. PW 5 Lata is the niece of PW 2 Madhukar Dhande who did not support the prosecution. She was declared hostile and cross examined by the learned APP. Nothing is elicited in her crossexamination to take the case of the prosecution any further.

15. PW 6 Indubai is a neighbour of PW 2 Madhukar. She has spoken of demand of Rs. 25,000/made by accused 1, which according to her was narrated by Preeti. She states that she was informed by Preeti that the accused were not treating her properly. She states that she is referring to her husband and inlaws. The statement that Preeti disclosed that Rs. 25,000/was demanded by accused 1 is brought on record as an omission. Her statement is also recorded belated on 16.7.2007. PW 7 Ramu is a close relative of PW 2 Madhukar. He further did not support the prosecution. Nothing is elicited in the crossexamination on behalf of the prosecution, to assist the prosecution.

16. PW 8 Bhaskar Kshirsagar is the Investigating Officer. Strangely, the omissions which are brought on record have not been proved through the evidence of the Investigating Officer. However, it is brought on record that the statement of witnesses other than PW 2 are recorded 4.7.2007 onwards. The explanation for the delay in recording the statement is that the Investigating Officer was busy in gathering evidence from the accused persons that the general duties assigned by the Police Station. The Investigating Officer states that he recorded statement of the witnesses as and when they appeared before the Investigating Officer. He states that since the witnesses came late, he recorded their statements on the relevant dates.

17. In all fairness to the learned Additional Public Prosecutor, it is not even argued before me that the death was homicidal. Indeed, the case of the prosecution is that the death is suicidal. The death has indeed not occurred in normal circumstances.

18. In order to prove that Preeti was subjected to cruelty, the prosecution is relying on the evidence of PW 2 Madhukar, PW 4 Yashodabai and PW 6 Indubai. Be it noted, that three near relatives including the brother of PW 2 have not supported on the aspect of illtreatment or harassment to which Preeti was allegedly subjected. The evidence of PW 2

who is complainant is marred by omissions and improvements visavis the oral report. The only statement in the oral report is that after 15 days of the marriage, the accused started harassing and assaulted Preeti to coerce her to bring Rs.50,000/from PW 2 to start business and that the accused used to accompany Preeti to the house of PW 1 and used to threaten to kill her. In the evidence, PW 2 claims to have given Rs 25,000/to accused 1. The statement that accused 1 used to abuse and beat Preeti under the influence of liquor is conspicuous by its absence, in the report. The statement that since Preeti delivered second child, the accused were annoyed and started harassing Preeti, is again an improvement. The evidence of PW 2 on demand is vague. No particulars are disclosed. The details are not forthcoming. The evidence on demand is inconsistent with the evidence of PW 6 and PW 2 who states that Rs. 25,000/was demanded. When was the amount demanded, is not spoken of.

19. The evidence of PW 4 Yashodabai is not confidence inspiring at all. It is unfortunate that the defence has not proved the omissions brought on record. However, an endeavor to exaggerate, and over implicate the accused is obvious. The fact that her statement was recorded belatedly on 16.7.2007 for which no explanation is forthcoming, per se, must put the Court on guard. Her testimony that she visited Preeti alone on thirty occasions is difficult to believe. No other witness has spoken of the various instances referred to in the evidence of PW 4 Yashodabai. The prosecution has not brought on record any special relationship or bond which Preeti may have had with PW 4 Yashodabai. It is highly improbable that Preeti would have disclosed the graphic details of the harassment and illtreatment only to her paternal aunt. The reasons recorded by the learned Sessions Judge to disbelieve PW 4 are unexceptionable. The veracity and credibility of PW 4 is suspect. Her statement that she noticed bloodstains on Diwan and on the floor of the room in which Preeti was found hanging is not even the version of PW 2 or any other prosecution witness who reached the scene of the incident.

20. In so far as PW 6 is concerned, the only statement is that Preeti narrated that her husband accused 1 was demanded Rs. 25,000/from her father and accused 1 and his parents were not treating Preeti properly. Her testimony does not take the case of the prosecution any further.

21. The learned counsel for the accused Shri Darasingh Sandhu invited my attention to the following observations of the Apex Court in Sharad Birdhichand Sarda vs. State of Maharashtra, AIR 1994 SC 1622:

"In view of the close relationship and affection any person in the position of the witness would naturally have atendency to exaggerate or add facts which may not have been stated to them at all. This is human pychology and no one can help it. Not that this is done consciously but even unconsciously the love and affection for the deceased would create a pychological hatred against the supposed murderer,

the court has to examine the evidence of interested witnesses with very great care and caution. Even if the witnesses were speaking a part of the truth or perhaps the whole of it they would be guided by a spirit of revenge or nemesis against the accused person and in this process certain facts which may not or could not have been stated may be imagined to have been stated unconsciously by the witnesses in order to see that the offender is punished. This is human psychology and no one can help it."

The learned counsel for the accused is right in submitting, that it is not rare that due to trauma suffered, the relatives of the deceased indulge in false implication or other implication due to perceived grievance that the accused are somehow or the other responsible for the death of their near and dear one. While the medical evidence on record irrefutably proves that Preeti committed suicide, it is difficult to hold that she was subjected to cruelty. The defence suggested that she was unhappy because PW 2 married a young women after the death of his first wife, Preeti's mother. Preeti was unhappy since the death anniversary of her mother was not observed, is the suggestion. It is difficult to come to any conclusion, either way, with any decree of certainty, as to what drove Preeti to take the extreme step. The judicial mind ought not to venture into the risky arena of speculations, surmises or conjunctures. However, in the teeth of the evidence on record, the learned Sessions Judge is justified in recording a finding that the prosecution has failed to prove beyond reasonable doubt that deceased Preeti was subjected to cruelty within the meaning of section 498A of IPC. There is no evidence that any of the accused instigated Preeti to commit suicide. Such acts or conduct willful in nature, which would inevitably drive Preeti to commit suicide, are not proved.

I do not see any infirmity in the acquittal of accused for offence punishable under sections 498A, 306 and 304B read with section 34 of IPC.

(i) The appeal is sans merit and is rejected.

(ii) The bail bonds of the accused shall stand discharged.