
(2018) 01 BOM CK 0220
In the Bombay High Court
Case No : 46 of 2010

Anandrao Tukaram Gudape

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 04-01-2018

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 464](#) - Effect of omission to frame, or absence of, or error in, charge
[Indian Penal Code, 1860](#), [Section 302](#),
[Section 498A](#) - Punishment for murder - Husband or relative of husband of a woman subjecting her to cruelty

Citation : (2018) 01 BOM CK 0220

Hon'ble Judges : Rohit B. Deo

Bench : Single Bench

Advocate : N.A. Vyawahare, Mayuri Deshmukh

Final Decision : Allowed

Judgement

1. The appellant seeks to assail the judgment an order dated 22.12.2009, delivered by the Additional Sessions Judge, Pusad, in Sessions Case 12 of 1999, by and under which the appellant (hereinafter referred to as "the accused") is convicted for offence punishable under section 498A of the Indian Penal Code ("IPC" for short) and is sentenced to suffer rigorous imprisonment for one year and to payment of fine of Rs. 1,000/.

2. Heard Shri N.A. Vyawahare, the learned counsel for the accused and Smt. Mayuri Deshmukh, the learned Additional Public Prosecutor for the State.

3. The accused faced trial for having committed offence punishable under section 302 of IPC by intentionally and knowingly causing the death of Sau. Pushpa. The learned Sessions Judge while acquitting the accused of the said charge, was pleased to convict the accused for offence punishable under section 498A of IPC on the premise that section 498A of IPC is a minor offence in relation to an offence under section 302 of IPC.

4. The accused was serving with the Health Department as "doctor for Influenza". He entered into matrimonial alliance with deceased Pushpa in 1983. The accused and deceased Pushpa gave birth to three children, one of whom is examined in the trial as DW 1.

5. The gist of the prosecution case is that the accused was posted in village Paradh in the year 1998 and alongwith Pushpa and children was residing in a rented accommodation in the village. The accused developed intimacy with one Mankarna who was residing in the neighbourhood. The accused used to illtreat Pushpa and physically abuse her under the influence of liquor. The illicit relationship was the cause of quarrels between accused and Pushpa.

6. The accused came home in evening of 5.10.1998 in an inebriated condition. He assaulted deceased Pushpa with waist belt berating her for having quarreled with Mankarna. The accused then poured kerosene on deceased Pushpa and set her afire. Deceased Pushpa was admitted to Rural Hospital Pusad fromwhere she was shifted to the Government Hospital Yavatmal. Deceased Pushpa insisted that her parent shift her to Chandrapur. She was then shifted to Government Hospital Chandrapur.

7. The Executive Magistrate recorded the dying declaration of deceased Pushpa on 27.10.1998 on the basis of which offence punishable under section 307 of IPC was registered against the accused. Investigations ensued, spot panchanama was drawn and on 4.11.1998, the Investigating Officer seized one kerosene can with some kerosene from the house of the accused. The statement of the deceased Pushpa was recorded by the Investigating Officer at Government Hospital, Chandrapur on 14.11.1998. Statements of other witnesses were recorded. Deceased Pushpa expired on 5.12.1998 and offence under section 302 of IPC was registered against the accused.

8. The learned Sessions Judge, to whom the Judicial Magistrate First Class committed the case, framed charge for offence under section 302 of IPC. The accused abjured guilt and claimed to be tried in accordance with law. The defence of the accused, as is discernible from the trend and tenor of the cross examination and the evidence of DW 1 is that deceased Pushpa was accidentally burnt.

9. PW 1 - Shobha is the mother of deceased Pushpa. She states that when she visited Government Hospital Yavatmal on being informed by Pushpa's nephew of the incident, she noticed marks of beating on her back. She inquired from Pushpa about the incident and Pushpa was maintaining silence since accused and her inlaws were present. PW 1 states that she was asked by Pushpa to shift her to Chandrapur. PW 1 states that after Pushpa was shifted to the Chandrapur Hospital she disclosed that there were frequent quarrels between the accused and Pushpa due to the illicit relationship of the accused with Mankarna. PW 1 states that Pushpa disclosed that accused bolted the door of the house from inside, poured kerosene on her person and set her ablaze. She has further

deposed that Pushpa also disclosed that accused used to assault her with leather belt. In the cross-examination, the statement that accused ill-treated Pushpa is brought on record as an omission. The statement that PW 1 asked Pushpa about the incident when she was admitted in Government Hospital Yavatmal is again an omission. The statement that PW 1 had noticed marks of beating on Pushpa's back is again an omission. The statement that the accused and in-laws of Pushpa were present at Government Hospital Yavatmal is shown to be an omission. PW 2 - Bibichand Aade, the panch witness to spot panchanama did not support the prosecution. However, PW 2 admits that spot panchanama was drawn in his presence and he has signed the same after reading the contents thereof.

10. PW 3 - Ulhas Rathod is also a panch witness to the spot panchanama who did not support the prosecution and was cross-examined by the learned Additional Public Prosecutor. PW 3 admits to have signed the spot panchanama but denies the suggestion that the contents were read over to panch witnesses. PW 4 - Najir Ahmad is one of the Investigating Officers who proves the spot panchanama Exh. 46 and the seizure of the kerosene can Exh. 47. PW 4 states that he recorded the dying declaration of the deceased on 14.11.1998 at Government Hospital Chandrapur. PW 4 proves the dying declaration Exh. 71. PW 4 has deposed that Pushpa stated that the accused poured kerosene on her person and set her ablaze after assaulting her with leather belt. PW 4 has deposed that Pushpa stated before him that on 5.10.1998, the accused beat her with leather belt since she had quarreled with Mankarna with whom the accused had illicit relations. In the cross-examination, it is extracted that PW 4 did not request the doctor to examine Pushpa and to certify that she was in fit condition to give statement.

11. PW 5 - Dr. Sunil Sanghai has deposed that at the request of the Executive Magistrate he examined the deceased Pushpa on 27.10.1998 and found her to be in fit condition to give the statement. PW 5 proves the certificate Exh. 56. PW 5 further deposes that he examined the patient again after completion of the

recording of the dying declaration and found her to be fully conscious, alert and oriented and accordingly issued second certificate Exh. 57. PW 6 - API Ashok Chaudhari is the officer who took over the investigation from Head Constable Najir Ahmad - PW 4.

12. PW 7 - Machchindar Pekade is the Executive Magistrate who recorded the dying declaration of the deceased Pushpa on 27.10.1998 when she was admitted to Government Hospital, Chandrapur.

13. DW 1 - Laxmi, the daughter of the accused and the deceased Pushpa has deposed that when the incident occurred, the accused along with Laxmi and two brothers had gone for evening walk. They were informed by someone that her mother Pushpa accidentally suffered burns. The deposition is that the accused and other people admitted the deceased to the hospital and her mother disclosed to DW 1 Laxmi that while cooking food she accidentally suffered burns.

14. I have closely scrutinized the evidence on record and the judgment

impugned. The learned Sessions Judge has recorded

a finding that the dying declarations on record can not be believed to the extent they purport to state that the accused poured kerosene on Pushpa and set her ablaze. However, in the view of the learned Sessions Judge, that portion of the dying declaration which states that the accused had illicit relationship with Mankarna and physically assaulted the deceased Pushpa can be accepted as trustworthy. On this premise although, the accused was not charged under section 498A of IPC, while acquitting the accused of charge under section 302 of IPC, the learned Sessions Judge was pleased to convict the accused under section 498A of IPC.

15. The only evidence, other than the dying declarations on record, is that of Pushpa's mother Shobha - PW 1. She has deposed that the accused was with Pushpa at the hospital only for four days. Pushpa was admitted at the Government Hospital Yavatmal for 13 days or thereabout. PW 1 states that after accused left the hospital, Pushpa was insisting that she be shifted to Chandrapur Hospital and expressed apprehension that if she is not shifted from Yavatmal Hospital, she will be killed. PW 1 has also deposed that it was disclosed by Pushpa that the accused threatened to kill Pushpa by injecting poison. The failure of PW 1

to inform the police about the serious threats, and that too the accused having long left the hospital, renders her testimony vulnerable. PW 1 has deposed that it was only after being shifted to Chandrapur Hospital, that Pushpa disclosed that the accused attempted to murder her by pouring kerosene and setting her ablaze. The 161 statement of PW 1 appears to have been recorded belatedly on 22.10.1998. The testimony of PW 1 is marred by significant omissions which are duly proved and is even otherwise not confidence inspiring. The two dying declarations on record dated 27.10.1998 and 14.11.1998 Exh. 57 and Exh. 71 are respectively recorded by Executive Magistrate PW 7 and by PW 4. Be it noted that the incident occurred on 5.10.1998. There is absolutely no explanation forthcoming from the prosecution as to why no attempt was made to record the dying declaration of the deceased Pushpa till 27.10.1998. It is not even the version of the prosecution that from 10.5.1998 to 27.10.1998 deceased Pushpa was not in fit condition to make the dying declaration. It is not even the case of the prosecution that either the accused or his family members were in the hospital for the entire period of Pushpa's treatment at Yavatmal Government Hospital. Even according to PW 1 the accused was in the hospital for four days from 5.10.1998 and thereafter it was PW 1 who was looking after

Pushpa. It was only after Pushpa was shifted to Chandrapur Government Hospital that the two dying declarations are recorded on 27.10.1998 and 14.11.1998.

16. The possibility that the dying declaration is not truthful and is tutored is a real possibility. The learned Sessions Judge has disbelieved the dying declarations to the extent the accused is inculpated of having poured kerosene

on the person of Pushpa and set her ablaze. The evidence that it was the accused who admitted Pushpa to the hospital and was with her at least for four days and the evidence of Laxmi - DW 1 has persuaded the Sessions Judge to disbelieve the dying declarations to the extent the accused is stated to have attempted to murder Pushpa.

I am not persuaded to agree with the learned Sessions Judge that the portion of the dying declaration which attributes physical assault to the accused due to illicit relationship could be accepted, as implicitly reliable and trustworthy. It would be unsafe and hazardous to base the conviction on a dying declaration which is found to be unreliable and not believable to the extent the deceased inculpated the accused of attempting to murder her. The inordinate and unexplained delay in recording

the dying declaration, which I have noted were recorded only after deceased was shifted by her mother to Chandrapur and the fact that a grave allegation in the dying declaration is found to be unreliable would render the entire dying declaration suspect.

17. Even if that portion of dying declaration relied upon by the learned Sessions Judge at a face value, it is difficult to hold that the prosecution has proved offence punishable under section 498A of IPC.

18. It is trite law that not every illtreatment constitutes cruelty within the meaning of section 498A of IPC. A conduct which may constitute a matrimonial offence may not necessarily constitute cruelty within the meaning of explanation (a) or (b) of section 498A of IPC. It is evident that sub section (b) of section 498A of IPC is not attracted.

19. Before I conclude, I am impelled to observe that the learned Sessions Judge has erroneously assumed that section 498A of IPC is a minor offence in relation to section 302 of IPC. The test to determine whether an offence is a minor offence in relation to the other is not the severity of the punishment prescribed. However, although the assumption of the learned Sessions Judge

which is presumably predicated on the basis of section 222 of Code of Criminal Procedure is not correct in law, import and implication of section 464 of the Code of Criminal Procedure would need consideration and the conviction would be rendered illegal only if the accused is in a position to demonstrate that the failure to frame charge under section 498A of IPC has caused prejudice or miscarriage of justice. Section 464 of the Code of Criminal Procedure reads thus: 464. Effect of omission to frame, or absence of, or error in, charge - (1) No finding sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby. (2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may, (a) in

the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge; (b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit; Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall

quash the conviction.

20. In *Sangaraboina Sreenu Vs. State of Andhra Pradesh*, (1997) 5 SCC 348 the Hon"ble Apex Court acquitted the accused holding that section 306 of IPC is not a minor offence in relation to section 302 of IPC. In *Lakhijit Singh & Another Vs. State of Punjab*, 1994 Supp(1) SCC 173 the Hon"ble Apex Court held that although the charge is only under section 302 of IPC accused can be convicted for offence punishable under section 302 of IPC. The apparent conflict between the two judgments was resolved by a three judges judgments of the Hon"ble Apex Court in *Dalbir Singh Vs. State of Uttar Pradesh*, (2004)5 SCC 334 which is followed by the Hon"ble Apex Court in *Virendra Kumar Vs. State of Uttar Pradesh*, (2007) 9 SCC 211. It would be apposite to reproduce the following enunciation of law in *Dalbir Singh Vs. State of Uttar Pradesh*:

" 13. In *Sangaraboina Sreenu v. State of A.P.* the judgment is a very short one, of just two paragraphs. In the first paragraph it is mentioned that the trial Court convicted the accused under Section 302 IPC on the charge that he poured kerosene on the body of his wife and set her on fire but the High Court set aside the said conviction and convicted the accused under Section 306 IPC. Paragraph 2 of the judgment which contains the whole reasoning for allowing the appeal reads as under : (SCC p. 348)

"2. This appeal must succeed for the simple reason that having acquitted the appellant of the charge under Section 302 IPC which was the only charge framed against him the High Court could not have convicted him of the offence under Section 306 IPC. It is true that Section 222 Cr.P.C. entitles a court to convict a person of an offence which is minor in comparison to the one for which he is tried but Section 306 IPC cannot be said to be a minor offence in relation to an offence under Section 302 IPC within the meaning of Section 222 Cr. P.C. for the two offences are of distinct and different categories. While the basic constituent of an offence under Section 302 IPC is homicidal death, those of Section 306 IPC are suicidal death and abetment thereof."

14. Here the Court proceeded to examine the question that if the accused has been charged under Section 302 IPC and the said charge is not established by evidence, would it be possible to convict him under Section 306 IPC having regard to Section 222 Cr.P.C? Subsection(1) of Section 222 lays down that when a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and

such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it. Subsection (2) of the same Section lays down that when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it. Section 222 Cr.P.C. is in the nature of a general provision which empowers the Court to convict for a minor offence even though charge has been framed for a major offence. Illustrations (a) and (b) to the said Section also make the position clear. However, there is a separate chapter in the Code of Criminal Procedure, namely Chapter XXXV which deals with Irregular Proceedings and their effect. This chapter enumerates various kinds of irregularities which have the effect of either vitiating or not vitiating the proceedings. Section 464 of the Code deals with the effect of omission to frame, or absence of, or error in, charge. Subsection (1) of this Section provides that no finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned

thereby. This clearly shows that any error, omission or irregularity in the charge including any misjoinder of charges shall not result in invalidating the conviction or order of a competent Court unless the appellate or revisional Court comes to the conclusion that a failure of justice has in fact been occasioned thereby. In *Lakhjit Singh* though Section 464 Cr.P.C. has not been specifically referred to but the Court altered the conviction from section 302 to section 306 IPC having regard to the principles underlying in the said Section. In *Sangaraboina Sreenu* the Court completely ignored to consider the provisions of Section 464 Cr.P.C. and keeping in view Section 222 Cr.P.C. alone, the conviction of the appellant therein under Section 306 IPC was set aside.

15. In *Willie (William) Slaney v. State of M.P.*, a Constitution Bench examined the question of absence of charge in considerable detail. The observations made in paras 6 and 7, which are of general application, are being reproduced below : (AIR P. 121)

"6. Before we proceed to set out our answer and examine the provisions of the Code, we will pause to observe that the Code is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along with certain well-established and well-understood lines that accord with our notions of natural justice. If he does, if he is tried by a competent court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is "substantial" compliance with the outward forms of the law, mere mistakes in procedure, mere

inconsequential errors and omissions in the trial are regarded as venal by the Code and the trial is not vitiated unless the accused can show substantial prejudice. That, broadly speaking, is the basic principle on which the Code is based.

7. Now here, as in all procedural laws, certain things are regarded as vital. Disregard of a provision of that nature is fatal to the trial and at once invalidates the conviction. Others

are not vital and whatever the irregularity they can be cured; and in that event the conviction must stand unless the Court is satisfied that there was prejudice. Some of these matters are dealt with by the Code and wherever that is the case full effect must be given to its provisions."

After analysing the provisions of Sections 225, 232, 535 and 537 of the Code of Criminal Procedure, 1898 which correspond to Sections 215, 464(2), 464 and 465 of the 1973 Code, the Court held as under in para 44 of the Report :(AIR p. 128)

"44. Now, as we have said, sections 225, 232, 535 and 537(a) between them, cover every conceivable type of error and irregularity referable to a charge that can possibly arise, ranging from cases in which there is a conviction with no charge at all from start to finish down to cases in which there is a charge but with errors, irregularities and omissions in it. The Code is emphatic that "whatever" the irregularity it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in a labyrinth of unsubstantial technicalities. Broad vision is required, a nice balancing of the rights of the State and the protection of society in general against protection from harassment to the individual and the risks of unjust conviction.

Every reasonable presumption must be made in favour of an accused person; he must be given the benefit of every reasonable doubt. The same broad principles of justice and fair play must be brought to bear when determining a matter of prejudice as in adjudging guilt. But when all is said and done what we are concerned to see is whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself.

If all these elements are there and no prejudice is shown the conviction must stand whatever the irregularities whether

traceable to the charge or to a want of one."

16. This question was again examined by a three Judge Bench in Gurbachan Singh v. State of Punjab in which it was held as under :(AIR p.626, para 7)

"[I]n judging a question of prejudice, as of guilt, Courts must act with a broad vision and look to the substance and not to technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself."

17. There are a catena of decisions of this Court on the same lines and it is not necessary to burden this judgment by making reference to each one of them. Therefore, in view of Section 464 Cr.P.C., it is possible for the appellate or revisional Court to convict an accused for an offence for which no charge was framed unless the Court is of the opinion that a failure of justice would in fact occasion. In order to judge whether a failure of justice has been occasioned, it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he is being convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself. We are, therefore, of the opinion that Sangarabonia Sreenu was not correctly decided as it purports to lay down as a principle of law that where the accused is charged under Section 302 IPC, he cannot be convicted for the offence under Section 306 IPC".

21. The submission of Shri N.A. Vyawahare, the learned counsel for the accused that a person charged only with section 302 of IPC would ipso facto be prejudiced if he is ultimately convicted for offence under section 498A of IPC, does raise serious issues the answer to which does not lie in any ritualistic or cut and dried formula. The test in a sense would be whether the

accused was put on notice of the ingredients constituting the offence under section 498A of IPC. However, in view of the finding recorded that the offence punishable under section 498A of IPC is not established, I do not find it necessary to record a decisive finding on the submission canvased.

22. The judgment and order impugned is set aside.

23. The accused is acquitted of the offence punishable under Sections 498A of the Indian Penal Code.

24. The bail bond of the accused shall stand discharged. Fine paid by the accused, if any, be refunded.

25. The appeal is allowed.