

(1997) 10 BOM CK 0003
In the Bombay High Court
Case No : Criminal Appeal No. 55 of 1994

Ashruba Gena Gite and another

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 10-10-1997

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 174
Dowry Prohibition Act, 1961 — Section 2
Evidence Act, 1872 — Section 113, 3, 59
Penal Code, 1860 (IPC) — Section 304, 34

Citation : (1998) 5 BomCR 233

Hon'ble Judges : D.D. Sinha, J;A.D. Mane, J

Bench : Division Bench

Advocate : R.N. Dhorde, for the Appellant; S.V. Chillarge, Assistant Public Prosecutor, for the Respondent

Judgement

A.D. Mane, J.—This appeal is directed against the judgment and order dated 20-1-1994 in a case of dowry death. The first appellant is the husband of deceased Indubai. The second appellant is the mother of the appellant No. 1. They were tried for offence punishable under sections 498-A and 304-B of the Indian Penal Code. The trial Court convicted both the appellants and sentenced each of them to undergo R.I. for two years u/s 498-A of the I.P.C. and further R.I. for seven years u/s 304-B of the I.P.C.

2. In order to appreciate the complicity of the accused in respect of the crime in question, it is necessary to consider few relevant facts, which have resulted in prosecution of the appellants for the offences charged. The marriage between appellant No. 1 and deceased Indubai took place on 4-3-1991. P.W. 3 Hanuman, who is a brother of deceased Indubai spent Rs. 10,000/- as a dowry in the marriage. Soon after the marriage, deceased Indubai went to her matrimonial home but she had twice visited her mother's place at Kharda for festivals, such as Ashad and Nag-panchami. It was alleged that during her stay with her mother P.W. 5 Janabai, deceased Indubai disclosed to her mother as well as to her

brother P.W. 3 Hanuman that the appellants were asking her to bring Rs. 14,000/- to satisfy the repayment of the amount raised on loan for the purpose of marriage of appellant No. 1. It was further disclosed that on that account Indubai was subjected to cruelty, in the sense that she was beaten by the appellant No. 1 and that she was not given proper food.

3. The prosecution version is that P.W. 5 Janabai as well as her son P.W. 3 Hanuman advised Indubai to tell the appellants that they have already spent some amount for the marriage and it would be not possible for them to meet with the demand soon, but they would pay the amount subsequently. On such promise, Indubai was sent to her matrimonial home whenever she had visited her mother's place.

4. The incident, however, took place on 1-9-1991. On that day in the evening, dead body of Indubai was noticed hanging from Umbar tree in the field which is situated nearby the house of the appellants. The information about the suicide by Indubai was received both by P.Ws. 3 and 5 and they along with other relations went to Kharda. They had reached by about 6 p.m. when police had already arrived at. P.W. 7 A.S.I. R.B. Nimbalkar, who was attached to out post at Kharda under Jamkhed Police Station received that information at Jamkhed Police Station when he happened to be there for other work. It appears that Jamkhed Police Station had received a telephone from P.W. 2 Shivaji Haribhau of Kharda informing that his sister had committed suicide by hanging. Station diary entry was made at 3.15 and P.W. 7 Nimbalkar was asked to verify. P.W. 7 therefore, returned to Kharda Police out post. He went to the place of incident along with Shivaji and 2/3 Constables. He reached there at about 4.15 p.m. He made inquest (Exh. 12) on the dead body after releasing it from the tree. P.W. 7 immediately sent the dead body for post mortem examination. Post mortem examination was conducted by Dr. Eknath Bhimrao Mundhe as per post mortem notes Exh. 23. Thereafter he received the report (Ex. 29) from Shivaji in writing, on the basis of which A.D. case was registered at Sr. No. 34/91, u/s 174 of the Code of Criminal Procedure at 7.05 p.m. In course of inquiry into the A.D. case, he again went to the spot on 2-9-1991 with panchas and prepared the spot panchnama (Ex. 19). He obtained advance certificate about the death of deceased Indubai. It has been alleged that the brother of P.W. 3 lodged his first information report (Exh. 22) in the police station, inter alia alleging that his sister committed suicide on account of ill-treatment meted out to her by the appellants on her failure to bring Rs. 14,000/- to pay the amount of loan incurred by them in the marriage. On the basis of the complaint, crime at C.R. No. 179/1991 was registered on 2-9-1991 at about 3.15 p.m.

5. The investigation was conducted by RW. 7 R.B. Nimbalkar. During his investigation, he recorded statements of various witnesses including P.W. 5, RW. 6 Shantabai, elder sister of deceased Indubai and others.

6. The charge was framed against the appellants of the offences punishable under sections 304-B, 498-A read with section 34 of the Indian Penal Code. The

present appellants denied the same and pleaded not guilty. Their defence appears to be that Indubai committed suicide out of frustration as she did not like a village life when she was accustomed to urban life.

7. Mr. Dhorde, the learned Counsel appearing for the appellants submits that admittedly, according to the prosecution, deceased committed suicide. Moreover, medical opinion on the basis of post mortem notes (Exh. 14) clearly supports that Indubai committed suicide by hanging. It is, therefore, submitted that despite the demand for dowry, the offence would not attract the mischief of section 304-B of the I.P.C. Since it is the positive case of the prosecution that deceased Indubai committed suicide, it cannot be construed that her death was otherwise than under normal circumstances. The learned Counsel, no doubt, further urged that the evidence adduced by the prosecution in regard to the demand of dowry of Rs. 14,000/- is a concocted story.

8. We feel it proper to consider the aims and objects of section 304-B of the Indian Penal Code before we appreciate the evidence of the prosecution on record and consider the arguments advanced by the learned Counsel for the appellants as well as the learned A.R.R appearing for the State. Section 304-B of the Indian Penal Code contemplates that :--

"1. Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances, within seven 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 her husband for or in connection with any demand for dowry, such death shall be called "dowry death" and such husband or relative shall be deemed to have caused her death.

Explanation--

For the purposes of this sub-section "dowry death" shall have the same meaning as in section 2 of the Dowry (Prohibition) Act, 1961.

(ii) Whosoever commits dowry death, shall be punished with imprisonment for a term which shall not be less than seven years, but which may extend to imprisonment for life."

9. After taking into consideration the provisions of section 304-B of the Indian Penal Code, it is imperative for the prosecution to prove the following essential ingredients before the criminal liability in respect of the said offence can be fastened on the appellants. Those are:---

(i) the death of a woman should be caused by burns or bodily injury or otherwise than under normal circumstances;

(ii) such death should be occurred within seven years of her marriage;

(iii) she should have been subjected to cruelty or harassment by her husband or any relative of her husband;

(iv) such cruelty or harassment should be for or in connection with the demand of dowry.

10. At the same time, it is also necessary for us to take into consideration the purport of section 113-A of the Evidence Act and we are also required to find out whether in the instant case, on the basis of the evidence adduced by the prosecution, the said presumption is attracted or not. After considering the provisions of section 113-A of the Evidence Act, we are of the opinion that the evidence adduced by the prosecution must show that soon before the death such woman has been subjected to cruelty or harassment or in connection with any demand for dowry, then only the Court shall presume that such person has committed the dowry death.

11. The learned Trial Judge believed the evidence of P.W.3 Hanuman, P.W.5 Janabai and P.W.6 Shantabai in particular in upholding the prosecution version that the appellants had demanded Rs. 14,000/- to be brought by deceased Indubai from her brother so as to pay the amount of loan obtained by them for the purpose of marriage of the appellant No. 1. The learned trial Judge also accepted the evidence of these witnesses who have stated that Indubai had disclosed to them that she was subjected not only to mental cruelty but physical harassment. One of the arguments advanced before the learned trial Judge was that admittedly Indubai committed suicide. Therefore, at the most the charge u/s 306 of the I.P.C. would have been tenable in the facts and circumstances of the case. But since no charge u/s 306 of the I.P.C. was framed against the appellants, the appellants were entitled for acquittal in-as-much as section 304-B of the I.P.C. was not made out. The learned trial Judge dispelled this argument relying on a decision reported in case of Smt Shanti and Another Vs. State of Haryana, . In the opinion of the learned trial Judge considering the facts of the present case Indubai's death is obviously a dowry death and under such circumstances Indubai's death is occurred otherwise than in normal circumstances and, therefore, provision of section 304-B of the I.P.C. would be attracted.

12. In the instant case, the prosecution has examined in all seven prosecution witnesses in order to prove the charge against the appellants. However, the material prosecution evidence is of P.W. 3 Hanuman (Ex. 21), P.W. 5 Janabai (Ex. 26) and P.W.6 Shantabai (Ex. 27). In order to find out whether in the instant case, the prosecution has succeeded in discharging its burden for proving the charge framed against the appellants for the offences punishable under sections 304-B and 498-A read with section 34 of the Indian Penal Code, it will be appropriate to carefully scrutinize the evidence of these material prosecution witnesses, as referred above.

13. The deceased Indubai was the sister of P.W. 3 Hanuman. In the examination in chief, this witness has stated that he had paid Rs. 10,000/- as dowry to the appellant No. 1 in the marriage and also gave Bormal weighing 7 Gms., a gold nose ring weighing about 1 1/4 Gms., a pair of gold Dorla weighing about 5 Gms.

This witness has further stated that on 29th July, 1991 he had gone to his native place Kharda, where his mother Janabai at the relevant time was residing, at that time this witness has asked deceased Indubai about her well being. It has come in the evidence of this witness that at that time deceased Indubai told him that her husband i.e. appellant No. 1 and her mother in law i.e. appellant No. 2 were asking Indubai to bring Rs. 14,000/- from her parents as they were indebted due to her marriage with the appellant No. 1. Indubai also told [his witness that both the appellants used to beat her and she was also not given proper meal. This witness has further stated in his examination in chief that on 31-7-1991, the appellant No. 1 along with his brothers Nandu and Eknath had gone to the residence of his mother Janabai at Kharda to bring back deceased Indubai with them at Gite Wasti. This witness was present at that time and he told present appellant No. 1 and his brothers not to illtreat or harass the deceased Indubai on account of demand of money. The deceased Indubai had gone along with the appellant No. 1 and his brothers to her matrimonial house.

It has come in the examination in chief of this witness that on 1-9-1991, at about 3.30 p.m. he received the telephonic message that his sister i.e. deceased Indubai hanged herself by means of a rope on the tree. This witness, therefore, on the same day i.e. on 1-9-1991 proceeded from Ahmednagar to Kharda by Bus and reached village Kharda at about 7 p.m. At that time, he had noticed a police vehicle in front of the out post, Kharda and came to know from the police that dead body of Indubai was brought by police in the said vehicle for taking the same to Jamkhed for post mortem examination. This witness also went to Jamkhed in the said vehicle. The dead body of deceased Indubai was handed over to the Medical Officer for the purposes of post mortem examination. This witness has specifically stated in his examination in chief that he has lodged the complaint on 2-9-1991 at about 1 A.M., which is Exh. P/22.

14. It has come in the cross-examination of this witness that the last rites and funeral of deceased Indubai took place on 2-9-1991 at about 1.00 p.m. This witness has specifically stated in the cross-examination that he did not go to the Police Station, Jamkhed after 1 p.m. i.e. after funeral of Indubai. He has also specifically stated that he did not lodge a complaint with the police after the funeral of Indubai. However, the first information report Exh. P/22 shows that same was lodged by this witness on 2-9-1991, at about 15.15 hours. If that is so, then it creates doubt about its authenticity.

15. The ocular testimony of this witness would show that neither appellant No. 1 nor appellant No. 2 had demanded Rs. 14,000/- on account of dowry as amount of dowry from this witness. It is pertinent to note that though the appellant No. 1 on 31-7-1991 along with his brothers had gone to the house of the mother of deceased Indubai for the purposes of bringing her back to her matrimonial house and though the appellant No. 1 personally met this witness, there is nothing in the evidence to show that appellant No. 1 demanded Rs. 14,000/- towards the amount of dowry from this witness. Except bare statement of this witness that

he was informed by deceased Indubai that the appellants No. 1 and 2 were insisting her to bring Rs. 14,000/- from her parents, and that too only after this witness had asked about the well being of deceased Indubai, creates a serious doubt about such demand of Rs. 14,000/- being made by the appellants No. 1 and 2.

16. Janabai, widow of Ramrao Gopalghare is the mother of the deceased Indubai and is examined by the prosecution as P.W. 5. The evidence of this witness shows that she was not present at the time of settlement of dowry in respect of deceased Indubai with the appellant No. 1. There are material omissions in the testimony of this witness such as, deceased Indubai and appellant No. 1 came to her residence at Kharda for three days in Ashad of 1991. The appellant No. 1 asked her to pay Rs. 14,000/- as a debt of his marriage. Hanuman (P.W. 3) came to her village Kharda and on seeing him deceased Indubai started weeping and Indubai told her and Hanuman (P.W. 3) that appellant No. 1 was insisting Indubai to bring Rs. 14,000/- from her brother to repay the loan of the marriage. She did not tell the police while recording her statement that when she had gone to Gite Wasti to bring deceased Indubai for Nagpanchami festival, appellant No. 2 demanded money from her that deceased Indubai would be allowed to go only after the money was paid. The evidence of this witness in the light of the material omissions creates serious doubt about the demand of Rs. 14,000/- being made either by the appellant No. 1 or by the appellant No. 2.

17. Since it is difficult for us to accept the prosecution case in respect of demand of Rs. 14,000/- by the appellants No. 1 and 2 on the basis of the evidence of P.W. 3 Hanuman and RW. 5 Janabai, it creates serious doubt as to whether deceased Indubai had really disclosed to Shantabai (P.W. 6) that the appellant No. 1 insisted Indubai to bring Rs. 14,000/- from her brother.

18. The totality of the prosecution evidence, in our opinion, does not establish that either appellant No. 1 or appellant No. 2 had treated deceased Indubai with cruelty or harassment for or in connection with the demand of dowry. In the instant case, the prosecution has only succeeded in proving the fact that death of Indubai had occurred within seven years of her marriage. The case of the prosecution is that deceased Indubai has committed suicide. Neither the first information report nor the evidence of any of the prosecution witnesses does not even remotely indicate that the death of deceased Indubai was not suicidal one. Similarly, the medical evidence clearly shows that the cause of death of Indubai was due to shock due to asphyxia due to hanging leading to cardio respiratory failure. The medical evidence, therefore, completely corroborates the theory of suicide as put forth by the prosecution. Merely because deceased Indubai has committed suicide by hanging herself from the tree and her death has occurred within seven years of her marriage, in our opinion, will not be sufficient to prove the case for the offence punishable u/s 304-B of the Indian Penal Code, since the evidence in respect of demand of Rs. 14,000/- as an amount of dowry as well as the deceased Indubai was subjected to cruelty or harassment by the appellant

for or in connection with the demand for dowry has not been proved by the prosecution, the presumption u/s 113-A of the Indian Evidence Act, in the instant case, is not attracted. In order to attract the presumption u/s 113-A of the Evidence Act, the evidence must show that soon before the death such woman has been subjected to cruelty and harassment or for, or in connection with any demand of dowry, then only the Court shall presume that such person has committed the dowry death. In the instant case, as stated above, since the prosecution failed to prove that deceased Indubai was subjected to cruelty or harassment soon before her death for or in connection with demand of dowry of Rs. 14,000/- in our opinion the presumption u/s 113-A of the Evidence Act is not attracted and, therefore, appreciation done by the Judge of the trial Court and the finding arrived at for convicting the appellants for the offence u/s 304-B of the Indian Penal Code is not just and proper and same is also not sustainable in law.

19. The appellants in the instant case are also charged for the offence punishable u/s 498-A of the Indian Penal Code. The careful scrutiny of evidence of P.W. 3 Hanuman, P.W. 5 Janabai and P.W. 6 Shantabai would show that soon after the marriage of deceased Indubai with the appellant No. 1, the appellant No. 1 treated Indubai with cruelty and she was subjected to harassment. The evidence of these prosecution witnesses would show that the deceased Indubai has disclosed long before her death, to these witnesses about the harassment and cruelty meted out to her by the appellant No. 1 and, therefore, in our opinion, the prosecution has proved that the deceased Indubai was subjected to cruelty within the meaning of section 498-A of the Indian Penal Code. We, therefore, accept that part of the prosecution evidence to uphold the conviction of appellant No. 1 for the offence punishable u/s 498-A of the Indian Penal Code.

20. There is, however, no clear evidence as against appellant No. 2 even for the offence u/s 498-A of the Indian Penal Code. The appellant No. 2 is, therefore, entitled to be acquitted.

21. The appellant No. 1 has already undergone sentence of more than three years, though the trial Court has sentenced him to suffer R.I. for two years u/s 498-A of the Indian Penal Code. Therefore, the appellant No. 1 is entitled to be set at free. In the result, we pass the following order....

The appeal of appellant No. 2 is hereby allowed. The conviction and sentence of the appellant No. 2 under sections 304-B and 498-A of the I.P.C. is hereby set aside and appellant No. 2 is hereby acquitted. Fine, if paid any, be refunded to her.

The appeal of appellant No. 1 is hereby partly allowed. The conviction and sentence imposed on him u/s 304-B of the I.P.C. is hereby set aside and he is acquitted for the offence punishable u/s 304-B of the Indian Penal Code. The conviction of the appellant No. 1 u/s 498-A of the I.P.C. is hereby confirmed. Since he has already undergone the sentence, he should not be in jail for this

offence and be set at liberty forthwith if not required in any other offence.

22. Appeal partly allowed.