

(2015) 07 BOM CK 0099
In the Bombay High Court
Case No : Criminal Appeal No. 180 of 2011

Baban Rajaram Jagtap

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 07-07-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 302, 307, 498-A, 506

Citation : (2015) ALLMR(Cri) 4802

Hon'ble Judges : P.V. Hardas, J; A.S. Gadkari, J

Bench : Division Bench

Advocate : Daulat G. Khamkar, for the Appellant; V.R. Bhonsale, APP, Advocates for the Respondent

Final Decision : Allowed

Judgement

P.V. Hardas, J—The appellant, who stands convicted for offence punishable under Sections 498-A, 302 and 307 of the Indian Penal Code and sentenced to suffer RI for two years and to pay fine of Rs. 500/-, in default of which to undergo further RI for three months, imprisonment for life and to pay fine of Rs. 1000/-, in default of which to undergo further RI for six months and RI for ten years and to pay fine of Rs. 1000/-, in default of which to undergo further RI for six months, with a direction that the substantive sentences shall run concurrently and accused would be entitled for set off, by the Additional Sessions Judge, Pune, by judgment dated 28/01/2011, in Sessions Case No. 825 of 2008, by this appeal challenges his conviction and sentence.

2. Facts, as are necessary for the decision of this appeal, may briefly be stated thus :-

PW 9 - PSI Pravin Khanapure, who was attached to the Loni Kalbhor Police Station, received the report of Dr. Sahebrao Shinde regarding accidental death of one lady. On receipt of the said report, PW 9 - PSI Khanapure, along with the

police staff, reached the Nobal Hospital and thereafter took the dead body of deceased Chetna to the Sassoon Hospital. In the presence of panchas, an inquest panchanama of the dead body of deceased Chetna was drawn at Exh. 46. During investigation of the said accidental death, PW 2 - Shivaji, father of deceased Chetna, lodged his report at Exh. 16. On the basis of the report at Exh. 16, an offence vide Crime No. 243 of 2008 was registered against the appellant. The investigation of the said crime was entrusted to PW 9 - PSI Khanapure.

He accordingly arrested the appellant on 15/7/2008. The appellant was thereafter medically examined. On 16/7/2008, PW 9 - PSI Khanapure drew the scene of the incident panchanama in the presence of the panchas at Exh. 26. He recorded the statements of witnesses and seized the clothes of the appellant under seizure memo at Exh. 48. The clothes of deceased Chetna were seized under seizure memo at Exh. 47. The viscera was referred to the Chemical Analyzer under requisition at Exh. 62. On 18/7/2008, during custodial interrogation, the appellant expressed his willingness to point out the place where a stone was lying. A memorandum was accordingly drawn at Exh. 52. The appellant led the police and the panchas to a well and produced a stone from near the well from an open ground. The said stone was seized in the presence of panchas under a seizure memo. On 18/7/2008, statement of PW 1 - Awadi was recorded. Statements of witnesses under Section 164 of Cr.P.C. were also recorded. Call details between the appellant and PW 7 - Rajendra were obtained. Further to the completion of investigation, a charge-sheet against the appellant was filed.

Postmortem on the dead body of deceased Chetna was performed by PW 4 - Dr. Ajay Tawre, who noticed the following external injuries on the dead body of deceased Chetna :-

- (i) Abrasion over upper half of abdomen. Left lateral size 4 x 3 cm. brown black in colour.
- (ii) Abrasion over left elbow 2 x 1 cm. Brown black in colour.

On internal examination, he noticed white froth in the trachea with lungs congested, oedematous voluminous. On cut section of the lungs, white froth was seen. He accordingly opined that deceased had died due to asphyxia due to drowning. The postmortem report is at Exh. 24. He further opined that the injuries were ante-mortem and were possible if the deceased had been assaulted. The age of the injuries was with 24 hours. The provisional death certificate is at Exh. 25.

3. On the case being committed to the Court of Sessions, trial court vide Exh. 2 framed charge against the appellant for offence punishable under Sections 498-A, 302, 307 and 506 of the IPC. The appellant denied his guilt and claimed to be tried. Prosecution in support of its case examined 10 witnesses. The defence of the appellant was of denial. The trial court, upon appreciation of the evidence, convicted and sentenced the appellant as afore-stated.

4. We have heard Mr. Daulat Khamkar, learned counsel for the appellant and the learned APP on behalf of the respondent - State and in order to effectively deal with the submissions advanced before us by the learned counsel for the parties, it would be useful to refer to the evidence of the prosecution witnesses.

5. Prosecution has examined PW 2 - Shivaji, father of deceased Chetna, who deposes that Chetna was married to the appellant about six years prior to the incident. Chetna gave birth to PW 1 - Awadi. According to PW 2 - Shivaji, the appellant was ill-treating and assaulting deceased Chetna as he was suspecting her character. The appellant was also threatening that he would kill her by pouring kerosene and setting her ablaze. The appellant then demanded Rs. 50,000/- for purchasing a truck. According to PW 2 - Shivaji, he had paid amount of Rs. 50,000/- to the appellant, but the behaviour of the appellant did not improve.

PW 2 - Shivaji further deposes that about 10 to 12 days prior to the incident, he had gone to the house of Chetna and Chetna had informed him that the appellant had assaulted her on the previous night. In respect of the incident, Shivaji deposes that on 15/7/2008 the appellant informed PW 7 - Rajendra that he had thrown Chetna in the well. Shivaji, PW 7 - Rajendra and the other relatives went to the house of Chetna. They learnt that Chetna had been shifted to the Noyal Hospital. On going to the Noyal Hospital, they noticed the dead body of Chetna. The dead body was thereafter shifted to the Sassoon Hospital. After the funeral was performed, PW 2 - Shivaji lodged his report at Exh. 16.

6. In cross-examination, he has admitted that after Chetna gave birth to PW 1 - Awadi, the appellant and his relatives used to visit his house for meeting Chetna. He has further admitted that near the house of the appellant at a distance of about 8 ft. a well is situated. He has also admitted that the well does not have a parapet wall. He has admitted as true that there was no tap water facility in the area where the appellant was residing and water was being provided to the residents of the locality by a tanker. He has admitted that after two years of the marriage, he realized that life of Chetna was in danger and that he should not permit Chetna go reside with the appellant even for a single day. He has admitted that he was not opposing Chetna going to the house of the appellant after her delivery. He has admitted that the other family members had also not opposed Chetna to go to the house of the appellant after the delivery. He has admitted that he had not lodged any complaint about the harassment prior to the death of Chetna. An omission has been elicited that he had not stated in his report about the appellant demanding Rs. 50,000/-.

7. Prosecution has examined PW 7 - Rajendra, brother of deceased Chetna, who deposes that the appellant used to assault Chetna. In respect of the incident, he deposes that on 15/7/2008 the accused had telephoned him at about 2 p.m. and had informed him that he had pushed Chetna in the well. According to him, even PW 1 - Awadi had informed PW 7 - Rajendra that the appellant had thrown Chetna in the well. In cross-examination, he has admitted that his statement was

recorded after two days of the incident. He has denied the suggestion that the appellant had informed him that Chetna had accidentally fallen in the well.

In respect of the evidence of these two witnesses, the learned counsel for the appellant has urged before us that no reliance can be placed on the evidence of the witnesses in respect of the ill-treatment as also the extra judicial confession. The learned APP has supported the findings arrived at by the trial court.

8. In the FIR, an omission has been elicited that PW 2 - Shivaji had not referred to any demand for Rs. 50,000/-. Moreover, the FIR was lodged after funeral of Chetna was performed. The extra judicial confession was not immediately informed to the police and in our opinion, in the absence of any other corroborative evidence, the extra judicial confession of the accused cannot be made the basis for sustaining the conviction. An extra judicial confession can be easily introduced in the evidence, particularly if there is a delay in recording of the statement. Statement of PW 7 - Rajendra was recorded two days after death of Chetna and, therefore, in our opinion, implicit reliance cannot be placed on the extra judicial confession. The allegations in respect of the assault are extremely vague and an offence punishable under Section 498-A of the IPC cannot be said to have been proved beyond reasonable doubt.

9. In respect of the offence punishable under Section 302 of the IPC, prosecution has examined PW 1 - Awadi, who deposes that the appellant had thrown deceased in the well and the appellant was also about to throw PW 1 - Awadi in the well, but one Kranti saved her. PW 1 - Awadi was aged about 2 1/2 to 2 3/4 years at the time of her evidence. Her age was about 1 1/2 years at the time of the incident. In cross-examination, she has admitted that her grandfather had asked her to state that the appellant had thrown deceased Chetna in the well. In the light of the fact that PW 1 - Awadi was a child witness, who was aged about 1 1/2 years at the time of the incident and the fact that she was tutored, the trial court has chosen not to place any reliance on the evidence of PW 1 - Awadi. Prosecution has also examined PW 6 - Kranti, who deposes that on the day of the incident, she was present in the house and on hearing the cries, came out of the house and noticed PW 1 - Awadi and the appellant sitting near the well and crying. According to her as PW 1 - Awadi was crying, she took her and came to her house. She then states that the appellant was about to throw PW 1 - Awadi in the well. In cross-examination, she has admitted as true that the appellant was crying near the well that his wife had died. She then admitted as correct that police had asked her to state before the court that the appellant was throwing Awadi in the well. PW 6 - Kranti is also a minor and in the light of the fact that she had been tutored to depose, the trial court has chosen not to place any reliance on the evidence of PW 6 - Kranti.

10. Prosecution has relied on the evidence of PW 3 - Amol, who deposes that on the day of the incident, he was present at his house and at about 1.30 to 2 p.m. he heard the sound of something falling in the well and thereafter had heard the commotion. He, therefore, came out of the house and noticed the appellant and

his daughter present near the well. According to Amol, the appellant had said that since his wife had died, he would also die and throw his daughter in the well. According to Amol, he took Awadi with him and slapped the appellant. He thereafter handed over Awadi to PW 6 - Kranti. In cross-examination, he has admitted as true that there was no parapet wall to the well. He has also admitted that well was not a constructed well. An omission has been elicited that he had not stated in his previous statement that the appellant was saying that since his wife had died, he would also die and throw his daughter in the well. An omission has been duly proved at paragraph 8 in the evidence of PW 9 - PSI Khanapure.

11. Thus, in the light of the omission which has been duly proved, prosecution, in our opinion, has utterly failed in establishing that the appellant had attempted to commit murder of PW 1 - Awadi. There is no evidence whatsoever that the appellant had thrown his wife Chetna in the well. There is also no evidence that the appellant had assaulted Chetna with a stone. The injuries sustained by Chetna, according to PW 4 - Dr. Tawre, were a day old. In cross-examination, Dr. Tawre has admitted that the injuries could be caused by a person accidentally coming in contact of hard and rough surface.

12. The trial court has also not placed any reliance on the recovery of the stone under Section 27 of the Indian Evidence Act as per para 36 of the judgment. Accidental fall of Chetna in the well which had no parapet wall and which was not a constructed well also cannot be ruled out. Thus, the evidence of the prosecution does not prove beyond reasonable doubt the offence with which the appellant/accused was charged. The appellant, in our opinion, therefore, is entitled to be given the benefit of doubt.

13. Accordingly, Criminal Appeal is allowed and the conviction and sentence of the appellant is hereby quashed and set aside and the appellant is acquitted of the offence with which he was charged and convicted. Fine, if paid by the appellant, be refunded to him. Since the appellant is in jail, he be released forthwith, if not required in any other case.