

(2017) 02 KAR CK 0084
In the Karnataka High Court
Case No : Criminal Appeal No. 2550 of 2013

Bhimshi Yallappa Bandiwaddar

APPELLANT

Vs

State of Karnataka

RESPONDENT

Date of Decision : 07-02-2017

Acts Referred:

Penal Code, 1860 (IPC) — Section 201, Section 302, Section 34, Section 498A

Citation : (2017) 2 AirKarR 251

Hon'ble Judges : Anand Byrareddy and K. Somashekar, JJ.

Bench : Division Bench

Advocate : Sri K.L. Patil, Advocate, for the Appellant; Sri V.M. Banakar, Additional State Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Anand Byrareddy, J.— Heard the learned counsel for the appellants and the learned Additional State Public Prosecutor.

2. The appellants are accused Nos.1, 2 and 4. Accused No.3 was a juvenile and therefore he was prosecuted before the Juvenile Justice Board. Therefore, he is not in appeal before this Court. The accused having been convicted for the offences punishable under Section 498A, 302 and 201 read with Section 34 of the Indian Penal Code, 1860(hereinafter referred to as the "IPC" for brevity) and has imposed a sentence of life imprisonment upon the accused for the offence punishable under Section 302 and a fine of Rs. 5,000/- each and further simple imprisonment for a period of two years, each, for the offence punishable under Section 498A and also imposed a fine of Rs. 2,000/- each, and further simple imprisonment for a period of two years for the commission of the offence punishable under Section 201 read with Section 34 apart from fine of Rs. 2,000/- each. It is that which is under challenge in the present appeal.

3. It was the case of the prosecution that accused No. 1-Bhimshi was said to have married the deceased Laxmi @ Huligevva in the year 2006 and she was the

second wife whom he had married, during the life time of his first wife-Laxmi who is arrayed as accused No.4. Accused No.2 is the mother of accused No. 1 and accused No.3 is the brother of accused No. 1. It transpires that the deceased Huligevva was subjected to physical and mental cruelty throughout her matrimonial life and that on 16.09.2008, all the accused together had assaulted the deceased with a common intention to commit her murder and thereafter had taken her dead body and tied her infant child, about 13 months old, to her abdomen with a cloth and then had thrown the dead body of Huligevva along with the child into an abandoned well and it is in this fashion that they had committed her murder and made it seem like suicide. It is on receiving; information about the incident that PW-1-Mallavva Maruti Salotagi-the complainant who was residing at Modikoppa Village, along with her son and daughters had come to the village at Hulkund and had lodged a complaint alleging the aforesaid circumstance. And that it was noticed by the material kept on the bank of the well, namely, clothes meant for washing, a bar of soap, brush and tumbler indicating that she had come there to wash the clothes and had fallen into the well. However, it was alleged in the complaint that the deceased was subjected to cruelty both physically and mentally for a long time and at the time of her death, she was pregnant with yet another child by 4 months and she was being tortured on the allegations of not being a good cook nor capable of doing agricultural work and that she was spending her time gossiping with neighbours and not attending to the family and in this manner she was being tortured and ultimately had been killed by all the accused. On these allegations, the proceedings had been initiated against the accused and ultimately, they stood trial and pleaded not guilty and claimed to be tried. The prosecution had examined 25 witnesses as PW.1 to PW.25 and had marked several exhibits and material objects.

4. On the basis of the same, the Court below had framed the following points for consideration:

1. Whether the prosecution has proved that A-1 Bhimshi, A-2 Lakkavva, A-3 Huligeppa respectively being hubby, mother-in-law, brother-in-law of deceased Smt. Laxmi @ Huligevva and A-4 Laxmi being first wife of A-1 Bhimshi all together after the marriage of deceased Smt. Laxmi @ Huligevva with A-1 Bhimshi and prior to 16.09.2008 at Hulkund subjected her to physical, mental cruelty thereby committed the offence punishable under Section 498(A) read with Section 34 of the Indian Penal Code?

2. Whether the prosecution has further proved that on 16.09.2008 at 9.00 a.m. at Hulkund all the accused with a common intention to commit murder of deceased Smt. Laxmi @ Huligevva assaulted her the thereby caused her death and took the dead body near Hanuman temple and tied her 13 months old female baby with a cloth and threw them into a well thereby also caused the death of deceased female baby-Vidya and thus committed the offence punishable under Section 302 read with Section 34 of the Indian Penal Code?

3. Whether the prosecution has further proved that the accused after committing murder of deceased Smt Laxmi @ Huligevva threw her body along with female baby Vidya in a well with an intention to screening themselves from legal punishment thereby caused the evidence of offence to disappear and committed the offence punishable under Section 201 read with Section 34 of Indian Penal Code?

4. What order?

The court below has answered the above points in the affirmative and has convicted and sentenced the accused as aforesaid. It is that which is under challenge in this appeal.

5. The learned counsel for the appellants would contend that all the witnesses examined by the prosecution, namely, PW.13, PW.14, PW.15 and PW.16 who are all neighbours of the accused had been treated as hostile witnesses and they did not support the case of the prosecution. Insofar as the panch witnesses 7 in number, it is also noticed by the court below that PWs.7, 9, 10, 11 and 12 had all turned hostile to the case of the prosecution and have not supported the case of the prosecution and had been cross-examined by the public prosecutor without any fruitful purpose being achieved. Therefore, the Court has straightaway concluded that the evidence tendered by PWs.7 to 16 would not have any bearing on the case of the prosecution at all and even PW-8 had partly turned hostile. He had conducted the inquest panchanama but he had not indicated that the deceased had suffered any injuries ante mortem and therefore he was also treated as a hostile witness. PW-5 one Laxmi who was another panch witness had stated that both the child and mother had been tied with the rope which was evident from the ligature marks left on the back of the deceased Huligevva and the Court below has held that the evidence tendered by PW-5 would have to be given due credence. Insofar as the police personnel who had tendered evidence, which was of a formal nature, did not advance the case of the prosecution that the accused had committed the murder of the deceased and her child. PW-18 was the medical practitioner who had conducted the postmortem of the dead bodies and he has noticed that there was blood oozing both from her mouth and nose and certain wounds were found over right and left eye and that Huligevva was pregnant by 8 weeks and in his opinion the cause of death was due to vaso-vagal shock and insofar as the infant was concerned, she was also found with blood oozing from her mouth and with a ligature mark on her back commencing from right thigh and the cause of death was asphyxia as a result of drowning and it is stated so in his postmortem report and further since death of Huligevva was caused by means of vaso-vagal shock, there would be no injuries caused. Therefore, the primary contention against the accused of having committed the murder of Huligevva and thereafter having dumped her body along with her infant child into a well, to make it seem like suicide was not established by the prosecution. In the absence of any direct evidence or any eyewitnesses to the incident. The mere allegation of the complainant and other family members

being stressed to hold that the appellants had ill-treated Huligevva over a long period of time and thereafter had committed her murder is not established. The learned counsel, therefore, takes us through the material evidence to point out that the reasoning of the Court below in the face of a large number of witnesses having turned hostile and not having supported the case of the prosecution, particularly the neighbours who were in the best position to speak about the alleged ill-treatment being meted out to the deceased having also turned hostile, the only evidence was that of the complainant and other members of the family of the deceased who were intent on ensuring that the accused be punished on the allegation of the murder and other offences. The Court below has, further, opined that even from the examination-in-chief of PWs. 1 and 2 it was evident that the dead bodies were found lying in muddy water which was hardly about 1? feet deep in the well and if the depth of water was only so much it was impossible for a person to fall into it and drown. Even if the deceased had accidentally slipped and fallen into the well, it is she would have fallen alone into the well and not the child as well and the court has wondered as to why the child was tied to the waist of the deceased Huligevva and further that when the death was an unnatural one and having occurred within 7 years from the date of her marriage, the presumption to be drawn by the Court was that she had died on account of the harassment of her husband and relatives of her husband and also has referred to Section 106 of the Evidence Act where the accused is required to prove that he could account for his conduct and presence elsewhere and therefore was not in a position to be accused of murder. And further the court has also opined that since Huligevva was the second wife of the deceased even during the life time of the first wife, was bound to lead to friction and naturally would have lead to mental harassment of the deceased and on that presumption as opined that it was established beyond reasonable doubt of the prosecution that the accused had committed the murder of the deceased as alleged in the compliant. This the learned counsel for the appellants would submit was a misconception and is not based on any factual foundation but are merely surmises of the Court below which had lead to the serious miscarriage of justice in the appellants being visited with the severe punishment of life imprisonment without the basic ingredients of an offence punishable under Section 302 of IPC being established. Hence, seeks that the judgment be set aside, on the face of it.

6. The learned Additional State Public Prosecutor, on the other hand, seeks to justify the judgment.

7. On a careful perusal of the record and the rival contentions as well as the judgment of the Court below, it is evident, that the independent witnesses, who are cited as prosecution witnesses, have all turned hostile. There are no direct eyewitnesses to the alleged acts of the accused. The fact that there was a homicidal death of Huligevva and her child is not in dispute. On the question whether she was murdered prior to being dumped into the well as alleged, would require the prosecution to establish that there ante mortem injuries found on the body of the deceased. According to the post mortem report there are no such

injuries found and if the death was solely on account of asphyxia and if it was established that the deceased was neither throttled nor strangled prior to being dumped in the well, the presumption would be that she had committed suicide by falling into the well with her child tied to her waist. Therefore, it cannot be said that the offence punishable under Section 302 was established. Even assuming that the accused had subjected Huligevva to such mental and physical cruelty which had driven her to commit suicide, it would then be necessary to examine whether Section 498A of IPC would be attracted.

8. From a plain reading of Section 498A it is evident that the Section is attracted only if a wife is subjected to cruelty by her husband or the relatives of her husband. In the instant case, it is not in dispute that Huligevva was the second wife, as it were, of accused No.1 and the second marriage had taken place during the subsistence of the first marriage in the year 2006 and therefore it was an invalid marriage and if on account of marriage being invalid, the so called wife cannot claim to be a legally wedded wife of a person. The question of Section 498A being attracted is remote. If in the eye of law, if, a second wife in an invalid marriage, cannot be considered as a wife, she cannot be so considered for any legal purpose. She cannot be considered as a wife even in crime. Therefore, the invocation of Section 498A was misplaced. Even assuming that she was under going such cruelty at the hands of the accused, the same has not been established by independent evidence, as the neighbours of the accused who had been named as prosecution witness, in a large number, have all turned hostile. The factum of such cruelty being meted out to the deceased has not been established. Consequently, we find that the Court below has not assigned proper reasons in coming to the conclusion that the charges against the accused have been established beyond all reasonable doubt and further there was no factual foundation for the court to presume certain aspects in concluding that the appellants had indeed committed the offence alleged. Consequently, we have no hesitation in allowing this appeal and set aside the judgment of the Court below.

9. Accordingly, the appeal is allowed. The judgment of the Court below is set aside. The appellants-accused Nos. 1, 2 and 4 are acquitted. The bail bonds furnished by accused Nos. 2 and 4 stand cancelled. Fine amount, if any, paid shall be refunded to the appellants. Accused No. 1 shall be set at liberty forthwith.

10. The operative portion of the Judgment shall be communicated to the Jail authorities of Central Jail, Belgaum, forthwith for immediate compliance.