
(1999) 04 BOM CK 0048
In the Bombay High Court
Case No : Criminal Appeal No. 633 of 1992

Dattatraya Kundlik Gund

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 16-04-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 161, 235, 313, 374
Evidence Act, 1872 — Section 113, 3, 59, 8, 9
Penal Code, 1860 (IPC) — Section 304

Citation : (1999) 4 BomCR 21 : (1999) 2 BOMLR 641 : (1999) 3 MhLj 149

Hon'ble Judges : Vishnu Sahai, J;Ranjana P. Desai, J

Bench : Division Bench

Advocate : P.N. Patil, for the Appellant; Ms. Usha Kejariwal, Assistant Public Prosecutor, for the Respondent

Judgement

Vishnu Sahai, J.—Through this appeal the appellant challenges the Judgment and Order dated 7th November, 1992 passed by the 4th Additional Sessions Judge, Solapur, in Sessions Case No. 89 of 1992, convicting and sentencing him in the manner stated hereinafter:

- i) u/s 306 I.P.C. to undergo 7 years rigorous imprisonment and to pay a fine of Rs. 1,000/- in default rigorous imprisonment for 1 year;
- ii) u/s 498A I.P.C. to undergo 3 years rigorous imprisonment and to pay a fine of Rs. 1,000/- in default rigorous imprisonment for 1 year; and
- iii) u/s 304B I.P.C. to undergo 5 years rigorous imprisonment and to pay a fine of Rs. 1,000/- in default rigorous imprisonment for 1 year;

The substantive sentences of the appellant were ordered to run concurrently.

We may mention that along with the appellant three other co-accused persons viz. Kundalik Narayan Gund, Tanaji Kundalik Gund and Anusaya Kundalik Gund; father, brother and mother respectively of the appellant were also tried, but they have been acquitted, vide the impugned judgment and the State of Maharashtra

has not challenged their acquittal by preferring an appeal u/s 378(1) Cr.P.C. We also feel it pertinent to mention that we cannot restrain ourselves from expressing our indignation about the lamentable ignorance on the part of the learned trial Judge regarding the sentence to be awarded for the offence u/s 304B I.P.C. The said section pertains to dowry death and provides that a person committing the offence of dowry death shall be punished with imprisonment for a term, which shall not be less than 7 years, but may extend to imprisonment for life. On the teeth of the said provision, the learned trial Judge committed an illegality in imposing a substantive sentence of only 5 years R.I. on the appellant for the offence u/s 304B I.P.C. Our first reaction was to issue a notice to the appellant to show cause as to why his sentence under the said count be not enhanced; but we desisted from doing this because nearly 7 years have passed since the judgment of conviction was passed by the trial Court and though the State of Maharashtra had a remedy to prefer an appeal for enhancement of sentence u/s 377(1) Cr.P.C. it has not availed of the same.

2. In short the prosecution case runs as under:-

The deceased Rajashri was the daughter of the informant Abhimanyu Prabhu Babar P.W. 2, a resident of village Pokharapur, taluka Mohol in the district of Solapur. On 22-1-1991 she was married to the appellant in village Parmeshwar, Pimpri. At the time of marriage the informant gave two pairs of clothes and Rs. 6001/- to the appellant in pursuance of an agreement between the parties. After the marriage Rajashri went to village Aundi and started living with the appellant, her father-in-law Kundalik Narayan Gund, her mother-in-law Anusaya Kundalik Gund and her brother-in-law Tanaji Kundalik Gund. On the occasion of Gudi Padava festival (which falls some times in the month of March) Rajashri came to the informant's house weeping. She told him and other members of the family that the appellant and the acquitted accused were demanding two tolas of gold and a television set and in order to pressurize her to fulfill the demand used to ill treat her. The informant asked Rajashri to bear. He brought back Rajashri to the house of the appellant.

Thereafter 15 to 20 days later when the informant went to the house of the appellant Rajashri complained to him that the appellant and the acquitted accused were ill-treating her since the demand of gold and a television set had not been met. She also told him that they never used to give her food and used to beat her. The informant advised the appellant and the acquitted accused to treat her properly and promised to fulfill their demand.

One month later the informant went to the house of the appellant and on that occasion Rajashri told him that on account of his failure to meet the demands of the appellant and others her ill-treatment was continuing at their hands. The informant again advised them to treat her properly and reiterated his promise to fulfill their demands.

On 25-7-1991 at about 10.30 to 11 p.m. when the informant was at his house

Rajashri's father-in-law Kundalik came and told him that Rajashri had slept inside the house by fixing the iron chain on the door from inside. Consequently the informant along with his father-in-law Sopan Patil, Subhadrabai P.W. 7, and Mandabai P.W. 8 and some others went to the house of appellant in village Aundi. They found the door latched from inside. When they failed to open the door they broke open the same. Thereafter they found the burnt corpse of Rajashri inside the room. They also found a tin of kerosene, match box, burnt clothes and some pieces of bangles lying there.

3. The evidence of the informant Abhimanyu Babar P.W. 2 shows that thereafter he went to Mohol Police Station and lodged his F.I.R. in the early morning of 26-7-1991 at 4 a.m. It was recorded by police constable Tatya Gore P.W. 6.

4. The investigation was conducted in the usual manner by P.S.I. Bhau Mahadeo P.W. 9 of Mohol Police Station. On 26-7-1991 he prepared the inquest panchanama of the corpse and spot panchanama of the place of the incident, wherefrom he recovered mangalsutra beads, match box, kerosene tin etc. The same day he recorded the statement of 7 witnesses. On 30-7-1991 he sent the seized phial of viscera to the chemical analyst at Pune through constable Bharat Shinde P.W. 5. On 16-8-1991 after completing the investigation he submitted the chargesheet.

5. Going backwards the autopsy on the corpse of deceased Rajashri was conducted on 26-9-1991 by Dr. Dhanapal Ainapure P.W. 3 who found on it the following ante mortem injuries:

- (1) 3rd degree burns over head and neck (9%)
- (2) 3rd degree burns on Rt upper limb (9%)
- (3) 3rd degree burns on left upper limb (9%)
- (4) 3rd degree burns on ant. part of chest and abdomen (18%)
- (5) 3rd degree burns on post part of the chest and 2nd to 3rd degree burns over back, both combined (18%)
- (6) 3rd degree burns on thighs anterior and 2nd to 3rd degree burns on posterior aspect, upper 2/3rd only of both thighs 2nd to 3rd degree on posterior aspect, upper 2/3rd only of both thighs (24%);
- (7) Perenal burn (1).

Dr. Ainapure preserved viscera and burnt skin for analysis. On receipt of viscera report the opined that Rajashri died on account of shock due to severe burns (88%) sustained by her.

6. The case was committed to the court of sessions in the usual manner where the appellant was charged on the counts on which the learned trial judge found him guilty. He pleaded not guilty to the charges and claimed to be tried.

7. During trial in all the prosecution examined 9 witnesses. There is no eye-witness of the incident and the main plank of the prosecution evidence on which the conviction of the appellant is founded comprises of the statement of the informant Abhimanyu Prabhu Babar P.W. 2, and those of Subhadrabai P.W. 7 and Mandabai P.W. 8.

8. The learned trial judge believed the sentenced him in the manner stated above. But to our dismay he acquitted the three co-accused who were tried along with the appellant, despite the fact that there was sufficient evidence against them. We feel disturbed that the State of Maharashtra has not challenged their acquittal by preferring an appeal u/s 378(1) Cr.P.C. In the absence of the same and in view of the embargo contained in section 401(3) Cr.P.C. which prohibits the High Court from converting a finding of acquittal into one of conviction in exercise of its revisional power we have been reduced to mute on lookers of their acquittal. We are constrained to observe that this is not the first occasion wherein in a deserving case the State of Maharashtra has not preferred an appeal against acquittal. There have been a galore of such occasions.

9. We have heard Mr. P.N. Patil for the appellant and Mrs. Usha Kejeriwal for the respondent. We have also perused the depositions of the prosecution witnesses; the material exhibits tendered and proved by the prosecution; the statement of the appellant recorded u/s 313 Cr.P.C.; and the impugned judgment. After utmost circumspection we are constrained to observe that in our view this appeal is devoid of substance and deserves to be dismissed.

10. As mentioned above the main plank of prosecution evidence on which the conviction of the appellant rests comprises of the evidence of Abhimanyu Prabhu Babar P.W. 2, his cousin brother's wife Subhadrabai P.W. 7 and his neighbour Mandabai P.W. 8.

We make no bones in observing that it would not be safe to accept the evidence of Subhadrabai and Mandabai. Both these witnesses in their substantive evidence stated that when on the occasion of Gudi Padava Rajashri came to the informant's house they invited her for tea and asked her as to how she was being treated at her in-law's house and she disclosed that they were demanding two tolas of gold and a television set from her parents and for their failure to meet the said demands were ill-treating her. However, to our dismay we find that when during cross-examination they were asked whether they had mentioned in their statements u/s 161 Cr.P.C. the aforesaid facts they replied in the negative. In our view since in their - statements under section. 161 Cr.P.C. they have not mentioned the said facts, and for the first time mentioned them in their statements in the trial Court, it would not be safe to accept their evidence.

11. This leaves us with the statement of Abhimanyu Prabhu Babar P.W. 2, the father of Rajashri. We are alive to the fact that being her father he is an interested witness and we should approach his evidence with caution. After exercising the utmost caution in evaluating his testimony we are of the view that

it inspires confidence.

In para 2 we have set out the prosecution case on the basis of recitals contained in his evidence and consequently do not intend reiterating them in detail. In short he stated that the marriage of Rajashri was performed with the appellant on 22-1-1991 and as per the terms of settlement he had given the appellant two pairs of clothes and Rs. 6001/- in cash. After the marriage she started living with the appellant, her in-laws and her brother-in-law in village Aundi. On 3 or 4 occasions when she visited her (the details have been furnished in para 2); she complained to him about the ill-treatment meted out to her by the appellant, her in-laws and her brother-in-law on account of non-fulfilment of their demand of two tolas of gold and a television set. The evidence of Abhimanyu shows that on two or three occasions he went to the house of the appellant and asked him, his parents and his brother to treat her nicely and promised them that he would fulfill their demands but their treatment towards Rajashri remained unchanged.

He stated that on 25-7-1991 Kundalik, the father-in-law of Rajashri came and informed him that Rajashri had slept inside the house and had latched the door of the room from inside. On the said information he along with his father-in-law Sopan Patil, Subhadrabai P.W, 7, Mandabai P.W. 8. and some others went to the appellant, house in village Aundi; broke open the door of the house; and discovered thereafter the burnt corpse of Rajashri.

12. We have gone through the statement of Abhimanyu meticulously and analytically. In our view it inspires confidence. It should be borne in mind that Abhimanyu Babar had no rancor or ill-will against the appellant who was his own son-in-law. In our view unless Rajashri on a number of occasions had mentioned about the ill-treatment meted out to her by the appellant, his parents and his brother on his (Abhimanyu's) failure to provide two lakhs of gold and a television set, he would not have falsely deposed about it.

13. It is pertinent to point out that assurance to the statement of Abhimanyu Baber is lent by the fact that in the F.I.R. of the incident, which was lodged very promptly at 4 a.m. on the morning of 26-1-1999, the details with respect to the demand of two tolas of gold and a television set by the appellant, his parents and his brother and their ill-treatment of her since Abhimanyu could not fulfill have been mentioned. Criminal Courts attach great importance to the prompt lodged F.I.R. because the same substantially rules out chances of improvements and embellishments in the prosecution case. In our view, the circumstance that in the F.I.R. the story of demand and ill-treatment of Rajashri has been mentioned by the informant Abhimanyu is an in-built guarantee about its genuineness.

14. It is true that Abhimanyu Babar is the solitary witness whose statement we are believing for the purposes of conviction. But the time honoured rule and a rule of great wisdom is that evidence is to be weighed and not counted. It is this rule which is incorporated in section 134 of the Indian Evidence Act which provides that "no particular number of witnesses shall in any case be required for

the proof of any fact".

It should be borne in mind that plurality of evidence is only a rule of prudence and may be necessary in the given facts of a case and not a inflexible requirement of law.

We make no bones in observing that in the instant case there is no need for seeking corroboration of the statement of Abhimanyu Babar which by itself is a sufficient and safe basis for sustaining the conviction of the appellant.

15. It would be pertinent to point out that a perusal of the statement of Abhimanyu Babar establishes beyond any shadow of doubt the commission of offences punishable under sections 306, 498A and 304B I.P.C. by the appellant. In our view the presumption contained in section 113A and 113B of the Indian Evidence Act would also be drawn against the appellant.

Section 113A of the Indian Evidence Act provides that if a woman commits suicide within 7 years from the date of her marriage and it is shown that within the said period she had been subjected to cruelty either by her husband or any relation of her husband, having regard to the circumstances of the case, the presumption would be that-her husband or relations had abetted the commission of her suicide.

Since in the instant case Rajashri committed suicide within 7 months of her marriage and there is evidence of her father Abhimanyu Babar P.W. 2, that she was subjected to cruelty by the appellant, his parents and brother during the said period the presumption u/s 113A of The Indian Evidence Act would be drawn in terms that the appellant abetted her suicide.

Section 113B of the Indian Evidence Act provides that if it is shown that soon before the death of a woman such woman has been subjected to cruelty or harassment for or in connection with any demand of dowry the presumption would be that the person who subjected her to cruelty or harassment had caused dowry death.

16. In the instant case the evidence of Abhimanyu Babar P.W. 2, is that within 7 months of her marriage Rajashri died and during this period she repeatedly told him that in order to pressurize the fulfilment of the demand of two tolas of gold and a television set the appellant, his parents and his brother were constantly harassing her and ill-treating her. In our view, on the basis of this evidence the presumption provided by section 113B of the Indian Evidence Act would be raised against the appellant.

17. Coming to the question of sentence we find that already leniency has been shown to the appellant by the trial Court which oblivious to the fact that the minimum substantive sentence for the offence u/s 304B I.P.C. was 7 years; only sentenced the appellant to undergo 5 years R.I. on the said count. In our view, considering the circumstance that during 7 months of marriage Rajashri was subjected to unabated cruelty, harassment and ill-treatment by the appellant, his

parents and his brother for the failure of her father to fulfill their demands of two tolas of gold and a television set the substantive sentence of 3 years R.I. and 7 years R.I. awarded to the appellant, for offences under sections 498A and 306 I.P.C. respectively, cannot be castigated as being excessive. Considering that such offences are rampant and on the rise these days a deterrent sentence has to be awarded so that others are deterred. A soft view in the matter of sentence in such offences would provide impetus to persons to commit such anti social offences.

18. Before parting with the judgment we would be failing in our fairness if we do not refer to some of the submissions canvassed by learned Counsel for the appellant Mr. P.N. Patil. He firstly urged that the story of demand of two tolas of gold and a television set is a figment of imagination of the informant Abhimanyu Prabhu Babar P.W. 2. In this connection he invited our attention to para 8 of his cross-examination where he was suggested that they were no T.V. sets in village Aundi and he replied that he did not know. On the basis of this suggestion it was sought to be canvassed that since there were no T.V. sets in the village there was no question of the appellant and members of his family demanding T.V. set. in our view from the reply of Abhimanyu Babar it cannot be construed that there were no T.V. sets in the village.

Mr. Patil secondly urged that there are some omissions in the F.I.R. and in the statement of Abhimanyu Babar recorded u/s 161 Cr.P.C. which belie the story of demand and harassment. We have perused the F.I.R. and we find that the details of demand and harassment furnished by Abhimanyu Babar in his substantive statement are also there in brief. It is true that in para 10 of his cross-examination Abhimanyu Babar has admitted that he had not mentioned to the police that 15 to 20 days after the date of Gudi Padava he had gone to the house of the appellant and that after Gudi Padava, Rajashri complained to him about the non-supply of food to her by the appellant and others but in our view these omissions cannot be termed as contradictions and do not affect the core of the statement of Abhimanyu Babar.

Mr. Patil thirdly urged that the deceased did not commit suicide on account of the ill-treatment meted out to her by the appellant, his parents and his brother for the failure of her father to arrange for two tolas of gold and a television set but because the appellant had a daughter and son from his first wife and she could not bear to live with them. It is true that the evidence of Abhimanyu Babar shows that after the marriage of Rajashri with the appellant he came to know that the appellant's first wife had committed suicide and he had a son and a daughter from her but in our view there is nothing to show that she committed suicide on that score and the story of demand and ill-treatment was a figment of imagination. We feel that had this been her reason for committing suicide she would have mentioned it to Abhimanyu Babar, her mother and family members.

Mr. Patil finally urged that since Abhimanyu Babar implicated co-accused Kundalik Narayan Gund, Tanaji Kundalik Gund and Anusaya Kundalik Gund; father, brother

and mother of the appellant respectively in his substantive statement and the said persons have been acquitted by the learned trial Judge and the State of Maharashtra has not impugned their acquittal it would not be proper for us to accept his solitary statement. We regret that we cannot accept this submission. We make no bones in observing that the acquittal of the said persons is indefensible. It is a pity that the State of Maharashtra has not preferred an appeal against their acquittal. But merely on this score the conviction of the appellant would not be vitiated. In this connection it would be pertinent to refer to the decision of the Apex Court reported in Brathi alias Sukhdev Singh Vs. State of Punjab, , where in paragraph 8 the Supreme Court observed thus:

"In the matter of appreciation of the evidence the powers of the Appellate Court are as wide as that of the trial Court. It has full power to review the whole evidence. It is entitled to go into the entire evidence and all relevant circumstances to arrive at its own conclusion about the guilt or innocence of the accused. In Sunder Singh's case 1962 Cri.L.J. 290 (supra), this Court has held that the provisions of section 423(1)(a) do not create a bar against the Appellate Court considering indirectly and incidentally a case against the person who was acquitted, if that becomes necessary when dealing with the case in the appeal presented on behalf of the other accused who are convicted. In considering the evidence as a whole, the Appellate Court may come to the conclusion that the evidence against the person acquitted was also good and need not have been discarded. When several persons are alleged to have committed an offence in furtherance of the common intention and all except one are acquitted,, it is open to the Appellate Court to find out on a reappraisal of the evidence that some of the accused persons have been wrongly acquitted, although it could not interfere with such acquitted in the absence of an appeal by the State Government. The effect of such a finding is not to reverse the order of acquittal into one of conviction or visit the acquitted person with criminal liability. The finding is relevant only in invoking against the convicted person his constructive criminality."

19. For the said reasons we confirm the convictions and sentences of the appellant on all the counts and dismiss this appeal. The appellant is on bail and shall be taken into custody forthwith to-serve out his sentence.

20. Appeal dismissed.