

(2015) 02 BOM CK 0287

In the Bombay High Court

Case No : Criminal Appeal No. 217 of 1995

Dattatraya Shivram Ghadage and Others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 05-02-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313

Dowry Prohibition Act, 1961 — Section 2

Evidence Act, 1872 — Section 113B

Penal Code, 1860 (IPC) — Section 304B, 304-B, 306, 34, 498A

Citation : (2015) 02 BOM CK 0287

Hon'ble Judges : Sadhana S. Jadhav, J

Bench : Single Bench

Advocate : S.L. Kamble, for the Appellant; P.P. Shinde, APP, Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

Sadhana S. Jadhav, J—The appellants herein are convicted for the offence punishable under Section 498A of Indian Penal Code and sentenced to suffer R.I. for two years and to pay fine of Rs. 500/- in default R.I. for three months, the appellants are also convicted for the offence punishable under Section 304B of IPC and sentenced to suffer R.I. for seven years. They are also convicted for the offence punishable under Section 306 of IPC and sentenced to suffer R.I. for five years and to pay fine of Rs. 500/- each in default R.I. for three months by III Addl. Sessions Judge, Satara, in Sessions Case No. 37 of 1992 vide judgment and order dated 6.5.1995. Hence, this appeal.

2. Such of the facts, necessary for the decision of this appeal, are as follows:--

"Appellant No. 1 herein happens to be the son of appellant No. 2. On 19.6.1987, appellant No. 2 got married to Sunanda daughter of Anandrao Dhas resident of Vadoli Nileshwar. The couple was blessed with a daughter. On 30.11.1990, Sunanda was admitted in the hospital by her husband with history of burns.

Sunanda succumbed to the burn injuries on 2.12.1990. The mother of Sunanda i.e. Shantabai Dhas lodged a report at the police station on 3.12.1990 alleging therein that at the time of marriage, certain gifts were not offered to the groom and his family members and, therefore, Sunanda was being harassed and ill-treated in her matrimonial home. That they had reported about it to the Police Patil and a compromise was arrived at between both the parties. For about six months the relations were smooth sailing. However, thereafter Sunanda was again being ill-treated and harassed on account of demand of a golden finger ring and partition in the ancestral land belonging to the grandmother of Sunanda. She has further alleged that 1-1/2 month prior to 30.11.1990, Sunanda had been to her maternal house. She had informed her mother about the demand made by her husband. They had then approached the Police Patil, who advised them that Sunanda should not be sent to her matrimonial house for a period of about one month. Thereafter, the complainant had summoned her sister Sonabai from Mumbai. Sonubai had insisted upon sending Sunanda to her matrimonial house. Thereafter, Sunanda was sent to the matrimonial house. On 30.11.1990 at about 10 a.m., one person from Village Vadoli Nileshwar informed the complainant that Sunanda had sustained burn injuries and is admitted in Krishna Hospital. The mother and other relatives reached the hospital at about 5.30 p.m. on the same day. They could not talk to Sunanda as she was admitted in Intensive Care Unit. Therefore, the complainant and her relatives returned to the village. On 2.12.1990, at about 9 p.m., two persons came on the motorcycle and informed the complainant that Sunanda has succumbed to the burn injuries. She has specifically alleged that being harassed and ill-treated by the husband and family members, her daughter must have committed suicide."

3. The case was committed to the Court of Sessions and registered as Sessions Case No. 37 of 1992. It is pertinent to note that the learned Sessions Judge had framed charges under Sections 498A, 304B and 306 read with Section 34 of IPC. The accused pleaded not guilty. The prosecution examined eight witnesses to bring home the guilt of the accused. The accused had examined one defence witness.

4. PW-1 Dr. Pandurang Pawar happens to be a doctor who was attached to Cottage Hospital at Karad. In the year 1990, he had performed autopsy on the dead body of Sunanda. He has opined that she has sustained 95% burn injuries which were ante-mortem. He has admitted in the cross-examination that the injuries sustained by Sunanda were serious in nature. He has proved the contents of the post-mortem notes which is at Exhibit 10 and also the provisional death certificate which is at Exhibit 11.

5. It is pertinent to note that the Investigating Officer had not bothered to collect the medical case papers of Sunanda even to ascertain about her state of mind or her health during 30.11.1990 to 2.12.1990 as it would be necessary evidence to ascertain as to whether Sunanda was in a position to make a statement when she was in the hospital. This would have relevance in view of the fact that the

mother of the deceased has specifically stated in the FIR that she could not talk to her daughter while she was admitted since she was in ICU.

6. PW-2 Dattatraya Patil has been examined by the prosecution as a panch for the spot panchnama. He has deposed before the Court that the scene of offence was shown by Balakrishna Ghadage. While conducting the spot panchnama, they had seized one kerosene stove. He has proved the contents of the spot panchnama which is at Exhibit 13. He has specifically deposed before the Court that he is well-acquainted with both the accused.

In the cross-examination, he has admitted that at the time of calling him to act as a panch, the police had informed him that one lady had received burn injuries and her dying declaration was received by the police and that the police wanted to record the panchnama of the place. It is pertinent to note that PW-2 has categorically stated before the Court that the house was of thatched roof. There was fuel wood lying in the house. No trace of kerosene was seen at the scene of offence. The flooring of the said house was ordinary. PW-2 happens to be closely associated with the family of the accused persons. According to him, relations between Sunanda and her husband and in-laws were cordial and that Sunanda had never complained against the accused with him. She used to work on his agricultural land twice or thrice in a month.

7. The learned APP submits that the scene of offence panchnama does not clearly indicate that it is a case of accidental burns. However, the prosecution has failed to bring evidence otherwise.

8. PW-3 Shakuntala Ghadage has also acted as panch for the inquest panchnama which is at Exhibit 15.

9. PW-4 Tukaram Pawar has acted as a panch for the seizure of two Inland letters and one marriage settlement list and marriage invitation card before the police. The said panchnama is at Exhibits 18, 19 and 20.

10. PW-5 Shantabai Ananda Dhas happens to be the unfortunate mother of deceased Sunanda. She has deposed before the Court that they had given gifts in the form of utensils and other material and golden ornaments to Sunanda at the time of her marriage. Sunanda was residing with her mother in the house of her grandparents even prior to her marriage since the relation between her parents inter-se was not very cordial. She has deposed before the Court in consonance with her first information report which is at Exhibit 22. PW-5 has categorically stated in her deposition before the Court that after delivery, she used to visit her maternal house with her infant child. On every occasion, she had disclosed to her mother that the accused No. 1 was demanding Rs. 10,000/- for constructing house. That he had threatened her that he would kill her by burning. Sunanda had disclosed to her mother that she was persistently being assaulted and ill-treated by her husband and mother-in-law. She did not wish to return to her matrimonial house. However, PW-5 had called upon her sister from Mumbai and she insisted upon them to send Sunanda to her matrimonial house.

After she was informed that Sunanda had sustained burns and is admitted in Krishna Hospital. She had soon thereafter rushed to the hospital along with Bhimrao and Uttam. Sunanda was in ICU. She was not allowed to see her and therefore they were constrained to return to their own village. According to her, on 3rd day of the incident Sunanda succumbed to the burn injuries. PW-5 has not been shattered in her cross-examination as far as the evidence of cruelty and ill-treatment is concerned. She has admitted in the cross-examination that appellant No. 1 used to go to Mumbai for work, but he insisted that after his departure to Mumbai, Sunanda should stay with his parents and shall not visit her maternal house and the said aspect was not liked by Sunanda.

11. The learned counsel for the appellants submits that PW-5 has stated in her cross-examination that they had never approached the police station to complain about the ill-treatment meted out to Sunanda. The learned APP submits that in matrimonial disputes, it cannot be expected that on every occasion, the wife would rush to the police station and lodge report against her husband since she has to cohabit in the same house for her lifetime and that she is also hopeful that the relations would return back to normalcy.

In the cross-examination, she has further reiterated that Sunanda was gifted with much more than what was decided at the time of marriage. Sunanda had informed her mother that upon non-fulfillment of demand, the accused No. 1 used to slap her. PW-5 has denied the suggestion that accused No. 1 was permanently residing at Mumbai and that there was no occasion for him to ill-treat Sunanda. PW-5 has further stated that her relations with her husband are not cordial as he is addicted to alcohol.

12. PW-6 Sonabai Salunkhe happens to be the maternal aunt of deceased Sundanda. She has specifically disclosed that she had tried to pacify relations between both the families. That it was upon her insistence that Sunanda had returned to her matrimonial house. That Sunanda used to leave her matrimonial house without informing the family members and that had enraged the appellants herein. PW-6 has categorically stated that Sunanda never left her matrimonial home without the permission of appellant No. 2 or appellant No. 1. That on one occasion, when she had gone to meet Sunanda to her matrimonial house, appellant No. 2 had refused to take her aunt as Sunanda had left the house without seeking permission from her in-laws. PW-6 has further stated that six months after the marriage of Sunanda, accused No. 1 had visited her house at Bombay and had threatened her to part with Rs. 10,000/- which should be paid by Shantabai. He had threatened that he would kill Sunanda if the demand is not fulfilled. The Inland letter, which is on record, is addressed by PW-6 to Subhadrabai i.e. her own mother. There is a reference to ill-treatment to Sunanda in the said letter.

13. PW-7 Jotiram Kisan Pawar happens to be the Police Patil of Village Vadoli Naleshwar. He has deposed before the Court that after ten months of marriage, Sunanda had returned to Village Vadoli Naleshwar. She had disclosed to PW-7

that she was assaulted 3 - 4 times by accused No. 1 i.e. her husband. She had also informed that she was being subjected to cruelty and ill-treatment at the hands of the present appellants. The Police Patil had decided to intervene and therefore they went to the house of one Shankarrao Ghadage who happens to be the paternal uncle of accused No. 1. The Police Patil had requested the accused No. 1 not to ill-treat Sunanda on account of demand of dowry as the financial condition of her mother was weak. The issues were reconciled and thereafter Sunanda was sent to her matrimonial house. The appellants had continued to abuse her and assault her since her mother could not fulfill the demand of golden chain, golden ring and Rs. 10,000/-.

It is elicited in the cross-examination that although the witness knew about the harassment and ill-treatment meted out to Sunanda, he had never complained to the police about the same.

14. PW-8 happens to be one Kasam Mulla, who is the panch before whom subsequent handwriting of appellant No. 1 was taken.

15. The accused has examined defence witness Mahiboob Imam Mulla, who was working as Supply Avval Karkun at Karad and was also empowered to record dying declaration in the capacity of an Executive Magistrate. He has deposed before the Court that on 30.11.1990, at about 8.m., he had been to Krishna Charitable Hospital for recording the dying declaration of Sunanda Ghadge on the basis of a requisition by police. He had recorded the dying declaration of Sunanda. According to him, it was recorded in the Intensive Care Unit of the hospital. The same was recorded after obtaining endorsement of a medical officer. According to him, the patient was conscious and able to give statement.

In the cross-examination, it is elicited that he visited the hospital for first two times and at that time, the patient was not conscious, but when he went for the third time, she was conscious. He has deposed that he had asked the patient about the incident. She replied the question. The patient was under fear when she was in the ICU. The said dying declaration is marked as Exhibit 39.

16. Upon perusal of the said dying declaration, this Court is of the opinion that the said dying declaration does not inspire confidence of the Court. The statement does not appear to be recorded in the language of the deponent. The said dying declaration does not bear the endorsement of the doctor certifying the fitness of state of mind. It cannot be believed that the Executive Magistrate could have recorded the statement in the ICU. There is nothing on record to indicate that the Executive Magistrate had visited three times intermittently to record the statement of the deceased. The prosecution has not placed on record the medical case papers to demonstrate that at about 8 p.m., Sunanda was conscious. The deposition of the defence witness itself shows that on the first two occasions, she was unconscious and therefore, it was incumbent upon the prosecution to show the time when she had regained consciousness. It prima facie appears that the said dying declaration was concocted. Moreover, there is no endorsement that

the statement was read over to the deponent and found to be true and correct. The Executive Magistrate has written in his handwriting that he had commenced recording of statement at 8.45 p.m. and concluded the same at 9 p.m. it appears that there is overwriting in the entire portion in the declaration recorded by the Executive Magistrate. The learned Sessions Judge has rightly not placed implicit reliance upon the said dying declaration. The fact that the patient was admitted in the hospital by the husband the possibility that the said statement was tutored, concocted or brought on record subsequently by winning over the investigating agency cannot be ruled out. Moreover, it is pertinent to note that all that the defence witness has proved is that he had recorded a statement. He has not deposed before the Court in respect of contents of the said statement and hence, it cannot be said that the Executive Magistrate has proved the contents of the dying declaration. It was but natural that no specific question was put to the accused under Section 313 of Cr.P.C. in respect of the contents of the said dying declaration. Hence, the same does not deserve to be relied upon.

17. Upon perusal of the evidence of PW-5, PW-6 and PW-7, it is amply clear that Sunanda was rather subjected to harassment, cruelty and ill-treatment at the hands of the present appellants. The shoddy investigation demonstrates the callousness of the investigating agency in the present case. Moreover, an alternative charge has been framed under Section 306 of IPC. As far as Section 304B of IPC is concerned, the prosecution has failed to prove that the appellants had made any demand for dowry in close proximity of the incident. The prosecution has not been able to categorically establish that the appellants are guilty of offence punishable under Section 304B of IPC or Section 306 of IPC as both the sections would run counter to each other. Section 306 of IPC would specifically require that the act of commission of suicide was abetted by the accused persons. In the present case, there is no evidence of abetment to commit suicide. As far as Section 304-B is concerned, it would be incumbent on the prosecution to prove that this is a case of dowry death. Section 304B contemplates:--

"304B. Dowry death - (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 purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

(2) Whoever 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."

In the present case, a presumption could have been drawn under Section 113B of the Indian Evidence Act since the victim had died in her matrimonial home within seven years of marriage of deceased. There is nothing on record to indicate that there was a demand of dowry.

18. Moreover, the appeal is being heard after 20 years. The learned counsel for the appellants submits that the appellant No. 1 has got remarried since the infant daughter of appellant No. 1 had to be taken care of and that the child could not have been left to the mercy of the parents of the deceased. In view of this, the appellants deserve benefit of doubt for the offences punishable under Sections 304B and 306 of IPC. The conviction of the offence punishable for the offence punishable under Section 498A of IPC is upheld and they are sentenced to the period already undergone.

ORDER

"(i) The appeal is partly allowed.

(ii) The appellants are acquitted of the offence punishable under Sections 304B and 306 of IPC by virtue of benefit of doubt.

(iii) The conviction of the appellants for the offence punishable under Section 498A of IPC is upheld. They are sentenced for the period already undergone.

(iv) Their bail bonds stand cancelled.

(v) The amount of fine deposited for the sentence under Sections 304B and 306 of IPC be refunded to the appellants."

Appeal is disposed of.