

(2018) 01 BOM CK 0159
In the Bombay High Court
Case No : 548 of 2004

Dinkar s/o Dnyandeo Parande

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 25-01-2018

Acts Referred:

Indian Penal Code, 1860, Section 34, Section 498A, Section 306 - Acts done by several persons in furtherance of common intention - Husband or relative of husband of a woman subjecting her to cruelty - Abetment of Suidde

Citation : (2018) 01 BOM CK 0159

Hon'ble Judges : Rohit B. Deo

Bench : Single Bench

Advocate : Ashish Girdekar, ?A.P. Tathod, V.P. Gangane

Judgement

1. The appellant seeks to assail the judgment and order dated 29.07.2004 rendered by the learned Adhoc Additional Sessions Judge, Washim in Sessions Trial 130/2002, by and under which, the appellant is convicted for offence punishable under section 498A of the Indian Penal Code ("IPC" for short) and is sentenced to suffer rigorous imprisonment for one year and to payment of fine of Rs.500/and is further convicted for offence punishable under section 306 of the IPC and is sentenced to suffer rigorous imprisonment for five years and to payment of fine of Rs.1500/. The appellant faced trial along with his mother Smt. Lilabai Parande, who is acquitted and his father Dnyandeo Parande who is convicted and sentenced to suffer imprisonment till rising of the court.

2. Heard Shri Ashish Girdekar, the learned Counsel for the appellant and Shri V.P. Gangane, the learned Additional Public Prosecutor for the respondentState.

3. The genesis of the prosecution lies in the oral report dated 01.11.2002 lodged by Prabhakar Ihare the brother of the deceased (P.W.1) the gist of which is thus: The marriage of the deceased Babibai was solemnized with the accused Dinkar 17 to 18 years prior to her unfortunate death. Babibai and accused are blessed

with a son from the wedlock. Babibai was treated well by the accused and his parents till the birth of the son. Thereafter, the accused and his parents started harassing Babibai for trivial reasons. A written consent was obtained from Babibai for the second marriage of the accused. The accused married one Asha during the subsistence of marriage with Babibai, ten years prior to the incident.

Babibai used to narrate to her family that she was harassed. In view of the harassment, Babibai and her sons started residing separately. The accused transferred two acres of agricultural land in the name of Babibai's son Rameshwar. However, the accused continued to cultivate the field and to reap the benefits thereof. Babibai was demanding the proceeds from the cultivation, for her maintenance. The accused refused to do so and used to abuse and taunt Babibai, she was beaten and harassed.

On 27.10.2002 the informant received a telephonic call conveying that Babibai was missing from home. He came to Pimpalkhuta, searched for her sister in vain and after halting for the night at Pimpalkhuta, he came to Mangrulpir on 20.10.2002. At Mangrulpir, he came to know that Babibai died due to drowning in the well in her village and went to Pimpalkhuta. The police formalities of recording of the panchnama were on going. The informant lodged report that his sister committed suicide due to the harassment suffered at the hands of the accused.

4. On the basis of the report, offence punishable under section 498A, 306 read with section 34 of IPC was registered, investigation ensued and upon completion thereof chargesheet was submitted in the court of Judicial Magistrate First Class, Mangrulpir who committed the proceedings to the Sessions Court. The learned Sessions Judge framed charge (Exh.13) for offence punishable under section 498A, 306 read with section 34 of the IPC. The accused pleaded not guilty and claimed to be tried. The defence is of total denial.

5. I have given my anxious consideration to the evidence on record, the submissions of Shri Girdekar, the learned counsel for the accused and Shri Gangane, the learned Additional Public Prosecutor for the respondent State and the reasons recorded by the learned Sessions Judge, and having done so, I am not persuaded to hold that the prosecution has proved the offence beyond reasonable doubt.

6. Before I proceed to discuss the evidence on cruelty, it is with some concern that I must record that the learned Sessions Judge has dismissed the submission that the prosecution did not prove that the possibility of accidental death is excluded, with disdain. The approach and appreciation of evidence by the learned Sessions Judge is not entirely satisfactory and the finding that accidental death is not a real possibility is in the realm of surmises and conjunctures. The spot panchnama reveals that when the body of Babibai was taken out from the well, along with body a rope and vessel ordinarily used for drawing water were also recovered. This significant aspect has not been considered much less appreciated

by the learned Sessions Judge. The spot panchnama does not reveal that the well was protected by a parapet wall. The possibility of accidental death could not have been brushed aside by the learned Sessions Judge in a perfunctory manner. I am of the considered opinion, that the prosecution failed to establish that the death was the suicidal and not accidental. It is trite law that the benefit of any alternate hypothesis which is reasonably discernible from record must necessarily be given to the accused.

7. Notwithstanding the finding recorded by me that accidental death is a real possibility, and arguendo, even if the death is assumed to be suicidal, I have no hesitation in recording a finding that the prosecution has not proved cruelty within the meaning of explanation (a) or explanation (b) of section 498A of the IPC and it is axiomatic that in the absence of such proof, the accused could not have been convicted either under section 498A or 306 of the IPC.

8. Section 498A of the IPC is the only section in chapter XXA introduced in the Indian Penal Code by the Criminal Amendment Act, 1983. Section 498A reads thus: 498A. Husband or relative of husband of a woman subjecting her to cruelty.. Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation.. For the purpose of this section, "cruelty" means

(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.

9. The cruelty which is envisaged under section 498A of IPC may not be cruelty contemplated by other statutory provisions. Conduct which may constitute matrimonial cruelty or offence may not necessarily constitute cruelty within the meaning of explanation (a) or (b) of section 498A of IPC. Explanation (b) is concededly not attracted since it is not even the case of the prosecution that Babibai was subjected to illtreatment or harassment in order to coerce her or her family to fulfill any illegal demand. In order to demonstrate that the conduct of the accused constitute cruelty within the meaning of explanation (a) the prosecution was obligated to prove (i) the conduct was wilful (ii) the wilful conduct was of such a nature as was likely to drive Babibai to commit suicide or (iii) the wilful conduct was of such a nature as is likely to cause grave injury or danger to life, limb or health (whether mental or physical) of Babibai.

10. It would be apposite to refer to the following observations of the Apex Court in Manju Ram Kalita v. State of Assam reported in 2009 (2) SLJ SC 1036 and in

particular on the observations of the Apex Court in paragraph 19, 20, 21 and 22, which read thus:

19. In *Smt. Raj Rani v. State (Delhi Administration)*; AIR 2000 SC 3559, this Court held that while considering the case of cruelty in the context to the provisions of Section 498A I.P.C., the court must examine that allegations/accusations must be of a very grave nature and should be proved beyond reasonable doubt.

20. In *Sushil Kumar Sharma vs. Union of India*, AIR 2005 SC 3100, this Court explained the distinction of cruelty as provided under Section 306 and 498A IPC observing that under Section 498A cruelty committed by the husband or his relation drive woman to commit suicide etc. while under Section 306 IPC, suicide is abated and intended. Therefore, there is a basic difference of the intention in application of the said provisions.

21. In *Girdhar Shankar Tawade v. State of Maharashtra*, AIR 2002 SC 2078; this Court held that "cruelty" has to be understood having a specific statutory meaning provided in Section 498A I.P.C. and there should be a case of continuous state of affairs of torture by one to another.

22. "Cruelty" for the purpose of Section 498A I.P.C. is to be established in the context of S. 498A IPC as it may be a different from other statutory provisions. It is to be determined/inferedby considering the conduct of the man, weighing the gravity or seriousness of his acts and to find out as to whether it is likely to drive the woman to commit suicide etc. It is to be established that the woman has been subjected to cruelty continuously/persistently or at least in close proximity of time of lodging the complaint. Petty quarrels cannot be termed as "cruelty" to attract the provisions of Section 498A IPC. Causing mental torture to the extent that it becomes unbearable may be termed as cruelty.

The cruelty, which is statutorily defined under section 498A must be as a willful conduct which is likely to drive the woman to commit suicide or which is likely to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman. The willful conduct must be persistent and/or continuous. The willful conduct, in order to constitute cruelty within the meaning of explanation (a) of section 498A must be, at least in close proximity of time to the incident. An aberration or stale incident, deplorable as the conduct or incident may be, would not constitute cruelty as is statutorily defined.

11. It would be relevant to refer to the enunciation of law by the Apex Court in *Girdhar Shankar Tawade v. State of Maharashtra* reported in AIR (2002) 5 SCC 177.

"3. The basic purport of the statutory provision is to avoid "cruelty" which stands defined by attributing a specific statutory meaning attached thereto as noticed hereinbefore. Two specific instances have been taken note of in order to ascribe a meaning to the word "cruelty" as is expressed by the legislature: whereas

Explanation (a) involves three specific situations viz. (i) to drive the woman to commit suicide or (ii) to cause grave injury or (iii) danger to life, limb or health, both mental and physical, and thus involving a physical torture or atrocity, in Explanation (b) there is absence of physical injury but the legislature thought it fit to include only coercive harassment which obviously as the legislative intent expressed is equally heinous to match the physical injury; whereas one is patent, the other one is latent but equally serious in terms of the provisions of the statute since the same would also embrace the attributes of "cruelty" in terms of Section 498A."

"17. As regards the core issue as to whether charges under Sections 306 and 498A of the Indian Penal Code are independent of each other and acquittal of one does not lead to acquittal on the other, as noticed earlier, there appears to be a long catena of cases in affirmation thereto and as such further dilation is not necessary neither are we inclined to do so, but in order to justify a conviction under the later provision there must be available on record some material and cogent evidence. Presently, we have on record two inconsistent versions of the brother and the cousin, as such no credence can be attributed thereupon the documentary evidence (namely, those three letters), in our view, falls short of the requirement of the statute: even on an assumption of the fact that there is no contradiction in the oral testimony available on record, the cousin goes to the unfortunate girl's in laws' place and requests the husband to treat her well at best some torture and a request to treat her well. This by itself would not bring home the charge under Section 498A.

Demand for dowry has not seen the light of day".

If the evidence of the prosecution is tested on the anvil of enunciation of law by the Apex Court, the conduct of the accused which is branded as cruelty by the prosecution, and which untenable contention of the prosecution found favour with the learned Sessions Judge, cannot constitute cruelty as is statutorily defined.

12. Concededly, the marriage was solemnized 17 to 18 years prior to the incident. The version of the prosecution is that till the birth of the son Babibai was treated well. Why was Babibai illtreated after the birth of the son, is left to speculation. It is however, not in dispute that after 7 to 8 years of marital life, the accused married a second time with Asha. The evidence that Babibai along with her son started residing separately, can take the case of the prosecution no further. Such a step is most natural and is not necessarily suggestive of illtreatment or harassment.

13. The illtreatment or harassment was allegedly meted out to Babibai since she demanded the fruits of cultivation of two acres agricultural land which according to the prosecution the accused transferred in favour of either Rameshwar or Babibai. It is not in dispute that the family owns five acres agricultural land which is not partitioned by metes and bounds. Accused Dnyandeo has five sons

including accused Dinkar. The prosecution has not produced any evidence to prove that as a fact two acres land was transferred, or indeed could have been transferred, in the name of either Rameshwar or Babibai. The prosecution story that two acres of land was transferred by the accused and since despite the transfer Babibai was deprived of the fruits of the agricultural land, has gaping holes. The evidence of the prosecution witnesses that since Babibai was insisting on share in the proceeds of the cultivation, she was illtreated, is of doubtful veracity.

14. In order to prove cruelty, the prosecution has examined Prabhakar Ihare P.W.1 who is the informant and the brother of the deceased, P.W.3 Shantabai Ihare the mother of the deceased and P.W.4 Subhash Ihare the cousin brother of the deceased. The evidence of the prosecution witnesses is absolutely vague and bereft of particulars. Neither P.W.1 nor P.W.3 nor P.W.4 have disclosed the month or the year in which the accused transferred two acres land to the deceased. The prosecution witnesses have not disclosed as to in which month or even year was the deceased subjected to cruelty. The evidence of the prosecution witnesses is sketchy and other than use of stereotyped expression like illtreatment, torture and harassment no specific instance of cruelty or the nature and extent of cruelty is spoken by any of the prosecution witnesses.

15. The evidence of P.W.1 Prabhakar and P.W.3 Shantabai is not consistent. P.W.3 Shantabai states that the accused did not deliver possession of two acres of agricultural land to Babibai and she was insisting that possession be handed over to her. However, there is not even whisper of the evidence of P.W.3 that Babibai was illtreated or harassed since she was insisting on possession. P.W.4 Subhash Ihare has a different story to tell. P.W.4 states that the accused transferred two acres agricultural land in the name of Rameshwar the son of Babibai and the accused were demanding the two acres land back from Babibai, which she was reluctant to do. P.W.4 states that since she was reluctant to give the land back to the accused but she was illtreated and tortured.

16. It must be noted that the time line of the events and instances is not forthcoming from the prosecution. When was the land was transferred is left to imagination. When was the deceased subjected to cruelty is again in the realm of conjectures and surmises and in order to ascertain the nature and extent of the illtreatment or harassment, all that is available on record are vague statements bereft of details that the deceased was harassed and illtreated.

17. In the teeth of evidence on record, the judgment and order impugned is manifestly erroneous.

18. The judgment and order impugned is set aside.

19. The father Dnyandeo Parande of the present appellant chose not to prefer an appeal presumably since he was sentenced only to imprisonment till rising of the court. In *Gurucharan Kumar vs. State of Rajasthan*, 2003 2 SCC 698 the Apex Court observes thus:

32. As noticed earlier the accused Parvin Kumar, husband of the accused Geetu has not preferred an appeal before this Court, on account of the fact that he has already served out the sentence imposed against him. However, though we cannot obliterate the sufferings of Parvin Kumar, we can certainly obliterate the stigma that attaches to him on account of his conviction for a heinous offence under Section 304B IPC. This Court has laid down a judicious principle that even in a case where one of the accused has not preferred an appeal, or even if his special leave petition is dismissed, in case relief is granted to the remaining accused and the case of the accused, who has either not appealed or whose special leave petition has been dismissed, stands on the same footing, he should not be denied the benefit which is extended to the other accused.

20. The accused Dinkar Parande and Dnyandeo Parande are acquitted of offence punishable under section 498A, 306 read with section 34 of IPC.

20. The bail bond of the accused shall stand discharged and fine paid, if any, shall be refunded.

21. The appeal is allowed.