

(2018) 01 BOM CK 0076
In the Bombay High Court
Case No : 526 of 2002

Gajanan Kisan Rohankar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 18-01-2018

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#) - Power to examine the accused
[Indian Penal Code, 1860](#), [Section 34](#), [Section 306](#), [Section 498-A](#) - Acts done by several persons in furtherance of common intention - Abetment of Suidde
[Evidence Act, 1872](#), [Section 32\(1\)](#), [Section 113-A](#) - Case in which statement of relevant fact by person who is dead or cannot be found, etc. is relevant

Citation : (2018) 01 BOM CK 0076

Hon'ble Judges : Rohit B. Deo

Bench : Division Bench

Advocate : Abhijeet A. Sambaray, ?S.V. Kolhe

Final Decision : Allowed

Judgement

1. The appellant Gajanan Kisan Rohankar and his father Kisan Motiram Rohankar are convicted for offences punishable under section 498-A, 306 read with section 34 of the Indian Penal Code (" IPC " for short) and are sentenced to suffer rigorous imprisonment for three years and five years and to payment of fine of Rs.100/- each respectively by the judgment and order dated 04.09.2002 passed by the Additional Sessions Judge, Yavatmal in Sessions Trial 53/1996. The appellant Kisan Motiram Rohankar has expired during the pendency of the trial.

2. Heard Shri Abhijeet Sambaray, the learned counsel for the appellant and Mrs. S.V. Kolhe, the learned Additional Public Prosecutor for the respondent/State.
3. Concededly, Kavita legally wedded wife of Gajanan suffered burn injuries on 05.10.1995 and expired at 02:45 a.m. on 06.10.1995 while undergoing treatment at the General Hospital, Yavatmal.
4. The dying declaration of Kavita Gajanan Rohankar was recorded by the Executive Magistrate Shri V.G. Poratkar at 00:30 hrs. on 06.10.1995. Neither the Executive Magistrate nor the Doctor who certified that Kavita was fit to give the statement is examined presumably since the defence admitted the dying declaration (Exh.20). The dying declaration is recorded in question and answer form and states that Kavita suffered accidental burns while preparing tea on the stove. Kavita shouted and the family members extinguished the fire. The relations are cordial, is the recital in the dying declaration Exh.20. The dying declaration bears the thumb impression of Kavita and the certificate of the Doctor that Kavita was in fit condition to record the statement.
5. Irrefutably, the death of Kavita occurred within four months of the marriage. It is axiomatic, that if the evidence on record is held sufficient to prove that the death is suicidal and further that the accused subjected Kavita to cruelty, presumption under section 113-A of the Evidence Act that the accused abetted the suicide can be drawn in the discretion of the court having regard to the attending circumstances.
6. The crucial question is whether the prosecution has established that the death is suicidal. The dying declaration which exculpates the accused and records that Kavita suffered accidental

burns is disbelieved by the learned Sessions Court. The finding recorded by the learned Sessions Judge is that the spot panchnama takes note of a ota (kitchen platform) 6 feet in length and that the empty can of kerosene was found under the said kitchen platform in open rack. The learned Sessions Judge concludes that in view of the contents of the spot panchnama it is difficult to accept that Kavita was preparing tea and suffered accidental burns. The other reason given by the learned Sessions Judge to disbelieve the dying declaration is that Kavita could not have suffered 100% burns due to an accident. In so far as the second reason given by the learned Sessions Judge for disbelieving the dying declaration, it is difficult to concur with the view of the learned Sessions Judge that 100% burn injuries would exclude the possibility of an accident. The learned Sessions Judge has relied on the contents of the spot panchnama to rule out an accident, but then, not a single incriminating circumstance emanating from the spot panchnama is put to the accused in the statement recorded under section 313 of the Criminal Procedure Code. Be it noted, that it is not a finding recorded, and indeed since neither the Executive Magistrate nor the Doctor was examined by the prosecution such a finding could not have been recorded, that Kavita was not in a fit condition to give the statement.

The observation of the learned Sessions Judge that Kavita was rushed to the hospital by the accused and neighbours and that her close relatives reached the hospital only after her death would suggest that according to the learned Sessions Judge the dying declaration is either tutored or otherwise recorded while Kavita was under the influence of the accused. I have already noted that the incriminating circumstances considered by the learned Sessions Judge for disbelieving the dying declaration were not put

to the accused in the statement recorded under section 313 of the Criminal Procedure Code. The contents of the spot panchnama on which the learned Sessions Judge heavily relies must be kept out of consideration since the incriminating material was not put to the accused in the 313 statement. Neither of the two other reasons recorded by the learned Sessions Judge to disbelieve the dying declaration is satisfactory. The finding that 100% burns rules out an accident is unsustainable. The fact that it was the accused and neighbours who admitted Kavita in the hospital per se is not suggestive of undue influence or tutoring.

7. In my opinion, the prosecution has failed to establish beyond reasonable doubt that the death of Kavita is suicidal. The evidence on record does not exclude accidental death. It is trite law that if an alternate hypothesis is reasonably discernible, the benefit of such alternate hypothesis must necessarily go to the accused.

8. Shri Sambaray, the learned counsel for the accused submits that the evidence on record is grossly adequate to bring home the charge under section 498-A of the IPC. The prosecution has failed to prove that the accused subjected Kavita to cruelty within the meaning of section 498-A (a) and (b) of the IPC . It is further contended, that if the death is not proved to be suicidal, the statements which are attributed to Kavita would not be admissible under section 32(1) of the Indian Evidence Act since qua offence punishable under section 498-A of IPC the cause of death or the circumstances leading to death would not be in issue.

9. The learned counsel would rely on the following observations in Bhairao Singh vs. State of Madhya Pradesh, 2010 ALL SCR 213:

"4. The legal position relating to the admissibility of evidence under section 32(1)

has come up for consideration before this court time and again. It is not necessary to multiply the authorities in this regard as reference to a three judge Bench decision of this court in *Sharad Birdhichand Sarda Vs. State of Maharashtra*, (1984)4 SCC 116 :[2009 ALL SCR(O.C.C.) 281], will suffice. Regarding the application of rule under section 32(1) Evidence Act, Fazal Ali, J. culled out the legal position as follows:

"(1) Section 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicide or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. In this respect as indicated above, the Indian Evidence Act, in view of the peculiar condition of our society and the diverse nature and character of our people, has thought it necessary to widen the sphere of Section 32 to avoid injustice".

"(2)The test of proximity cannot be too literally construed and practically reduced to a cut and dried formula of universal application so as to be confined in a straitjacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all

these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes place within a very short time of the marriage or the distance of time is not spread over more than 3-4 months the statement may be admissible under Section 32 ".

(3) The second part of clause (1) of Section 32 is yet another exception to the rule that in criminal law the evidence of a person who was not being subjected to or given an opportunity of being cross examined by the accused, would be valueless because the place of cross examination is taken by the solemnity and sanctity of oath for the simple reason that a person on the verge of death is not likely to make a false statement unless there is strong evidence to show that the statement was secured either by prompting or tutoring.

(4) It may be important to note that Section 32 does not speak of homicide alone but includes suicide also, hence all the circumstances which may be relevant to prove a case of homicide would be equally relevant to prove a case of suicide.

(5) Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, the said statement would clearly fall within the four corners of Section 32 and, therefore, admissible. The distance of time alone in

such cases would not make the statement irrelevant."

5. Varadarajan, J. on the other hand referred to the legal position stated by Woodroffe and Amir Ali in their Law of Evidence, (fourteenth edition) and Ratanlal Dhirajlal in their Law of Evidence (1982 Reprint). This is how A. Varadarajan, J. dealt with the admissibility of evidence under Section 32(1) :

"....The position of law relating to the admissibility of evidence under Section 32(1) is well settled. It is, therefore, not necessary to refer in detail to the decisions of this Court or of the Privy Council or our High Courts. It would suffice to extract what the learned authors Woodroffe and Amir Ali have stated in their Law of Evidence, Fourteenth Edn. and Ratanlal and Dhirajlal in their Law of Evidence (1982 Reprint). Those propositions are based mostly on decisions of courts for which reference has been given at the end. They are these: Woodroffe and Amir Ali's Law of Evidence, Fourteenth Edn.:

"Page 937: Hearsay is excluded because it is considered not sufficiently trustworthy. It is rejected because it lacks the sanction of the test applied to admissible evidence, namely, the oath and cross-examination. But where there are special circumstances which give a guarantee of trustworthiness to the testimony, it is admitted even though it comes from a second-hand source.

Page 941: What is relevant and admissible under clause (1) of this section (Section 32) is the statement actually made by the deceased as to the cause of his death or of the circumstances of the transaction which resulted in his death.

Page 945-946: A statement must be as to the cause of the declarant's death or as to any of the circumstances of the transaction which resulted in his death i.e. the cause and circumstances of the death and not previous or subsequent transaction, such independent transactions being excluded as not falling within the principle of necessity on which such evidence is received. When a person is not proved to have died as a result of injuries received in the incident in question, his statement cannot be said to be a statement as to the cause of his death or as to any of the circumstances which resulted in his death. (AIR 1964 SC 900.) Where

there is nothing to show that the injury to which a statement in the dying declaration relates was the cause of the injured person's death or that the circumstances under which it was received resulted in his death, the statement is not admissible under this clause. (ILR 1901 25 Bom.45.)

Page 947: Circumstances of the transaction resulting in his death: This clause refers to two kinds of statements: (i) when the statement is made by a person as to the cause of his death, or (ii) when the statement is made by a person as to any of the circumstances of the transaction which resulted in his death. The words `resulted in his death' do not mean `caused his death'. The expression `any of the circumstances of the transaction which resulted in his death' is wider in scope than the expression `the cause of his death'. The declarant need not

actually have been apprehending death. (AIR 1964 MP 30.)

Page 947: The expression "circumstances of the transaction" occurring in Section 32, clause (1) has been a source of perplexity to courts faced with the question as to what matters are admissible within the meaning of the expression. The decision of Their Lordships of the Privy Council in *Pakala Narayana Swami v. Emperor* (AIR 1939 PC 47) sets the limits of the matters that could legitimately be brought within the purview of that expression. Lord Atkin, who delivered the judgment of the Board, has, however, made it abundantly clear that, except in special circumstances no circumstance could be a circumstance of the transaction if it is not confined to either the time actually occupied by the transaction resulting in death or the scene in which the actual transaction resulting in death took place. The special circumstance permitted to transgress the time factor is, for example, a case of prolonged poisoning, while the special circumstance permitted to transgress the distance factor is, for example, a case of decoying with intent to murder....

But the circumstances must be circumstances of the transaction and they must have some proximate relation to the actual occurrence.

Page 948: "Circumstances of the transaction" is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes the evidence of all relevant factors. It is on the other hand narrower than "res gestae". Circumstances must have some proximate relation to the actual occurrence, though, as for instance, in the case of prolonged poisoning they may be related to dates at a considerable distance from the date of actual fatal dose.

Page 948: The Supreme Court in the case of *Shiv Kumar v. State of U.P.* {1966 Cri.App.R (SC) 281} has made similar observations that the circumstances must have some proximate relation to the actual occurrence, and that general expressions indicating fear or suspicion, whether of a particular individual or otherwise and not directly to the occasion of death will not be admissible.

Page 949: The clause does not permit the reception in evidence of all such statements of a dead person as may relate to matters having a bearing howsoever remote on the cause or the circumstances of his death. It is confined to only such statements as relate to matters so closely connected with the events which resulted in his death that may be said to relate to circumstances of the transaction which resulted in his death. [(1939) 66 IA 66.] "Circumstances of the transaction which resulted in his death" means only such facts or series of facts which have a direct or organic relation to death. Hence statement made by the deceased long before the incident of murder is not admissible.[1974 Cri LJ 1200 (MP).] *Law of Evidence by Ratanlal and Dhirajlal* (1982 Reprint)

Page 94: Circumstances of the transaction: General expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death are not admissible. [(1939) 66 IA 66] (18

Part 234.)

Page 95: Circumstances must have some proximate relation to the actual occurrence and must be of the transaction which resulted in the death of the declarant. The condition of the admissibility of the evidence is that the cause of the declarant's death comes into question. It is not necessary that the statement must be made after the transaction has taken place or that the person making it must be near death or that the "circumstance" can only include the acts

done when and where the death was caused....

Dying declarations are admissible under this clause."

"10. The only evidence to bring home charge under Section 498A, IPC, is that of PW-4 and PW-5. In their deposition PW-4 and PW-5 stated that their sister told them that accused was torturing her as he wanted that her brothers arrange a job for him or the house at Ganj Basoda is given to him or a cash of Rs.1 lac is given to enable him to do some business. They deposed that as and when their sister come to their house, she would tell them that accused used to insert cloth in her mouth and give beatings for dowry. The trial court as well as the High Court relied on the evidence of PW-4 and PW-5 and held that charge under Section 498A, IPC, against the accused was proved. Apart from the statement attributed to the deceased, none of the witnesses had spoken anything which they had seen directly insofar as torture and harassment to Ranjana Rani @ Raj Kumari was concerned".

"11. The moot question is: whether the statements attributed to the deceased could be used as evidence for

entering upon a finding that the accused subjected Ranjana Rani @ Raj Kumari to cruelty as contemplated under Section 498A, IPC . In our considered view, the evidence of PW-4 and PW-5 about what the deceased Ranjana Rani @ Raj Kumari had told them against the accused about the torture and harassment is inadmissible under Section 32(1) of the Evidence Act and such evidence cannot be looked into for any purpose. Except Section 32(1) of the Indian Evidence Act, there is no other provision under which the statement of a dead person can be looked into in evidence".

The statement of a dead person is admissible in law if the statement is as to the cause of death or as to any of the circumstance of the transactions which resulted in her death, in a case in which the cause of death comes into question. What has been deposed by PW-4 and PW-5 has no connection with any circumstance of transaction which resulted in her death. The death of Smt. Ranjana Rani @ Raj Kumari was neither homicidal nor suicidal; it was accidental. Since for an offence under Section 498A simpliciter, the question of death is not and cannot be an issue for consideration, we are afraid the evidence of PW-4 and PW-5 is hardly an evidence in law to establish such offence. In that situation Section 32(1) of the Evidence Act does not get attracted".

"12. We are fortified in our view by the decision of this Court in *Inder Pal vs. State of M.P.* (2001) 10 SCC 736, wherein this Court considered the matter thus:

"4. We will consider at first the contention as to whether there is any evidence against the appellant which can be used against him for entering upon a finding that he subjected Damyanti to cruelty as contemplated in Section 498-A IPC. PW 1 father of the deceased and PW 8 mother of the deceased have stated

that Damyanti had complained to them of her plight in the house of her husband and particularly about the conduct of the appellant. PW 4 sister of the deceased and PW 5 a relative of the deceased have also spoken more or less on the same line. Exhibit P-7 and Exhibit P-8 are letters said to have been written by Damyanti. In those two letters reference has been made to her life in the house of her in-laws and in one of the letters she said that her husband had subjected her to beating.

5. Apart from the statement attributed to the deceased none of the witnesses had spoken of anything which they had seen directly. The question is whether the statements attributed to the deceased could be used as evidence in this case including the contents of Exhibits P-7 and P-8 (letters).

6. Before deciding that question we have to point out that the High Court came to a conclusion that the allegation that she committed suicide was not substantiated. A dying declaration was recorded by the Executive Magistrate in which the deceased had stated that she got burns accidentally from a stove. If that be so, death could not be the result of either any harassment or any cruelty which she was subjected to. In this context we may point out that the State has not challenged the finding of the High Court that death of Damyanti was not due to commission of suicide".

7. Unless the statement of a dead person would fall within the purview of Section 32(1) of the Indian Evidence Act there is no other provision under which the same can be admitted in evidence. In order to make the statement of a dead person admissible in law (written or verbal) the statement must be as to the cause of her death or as to any of the circumstances of the transactions which resulted in her death, in cases in which the cause of death comes into question. By no stretch of imagination can the statements of Damyanti contained in Exhibit P-7 or Exhibit P-8 and those

quoted by the witnesses be connected with any circumstance of the transaction which resulted in her death. Even that apart, when we are dealing with an offence under Section 498-A IPC disjoined from the offence under Section 306, IPC the question of her death is not an issue for consideration and on that premise also Section 32(1) of the Evidence Act will stand at bay so far as these materials are concerned."

10. In my opinion, the prosecution has not established

that the death is suicidal. The evidence of the prosecution as regards cruelty must be tested keeping in mind the enunciation of law by the Apex Court in Bhairaon Singh vs. State of Madhya Pradesh, 2010 ALL SCR 213. The evidence of the prosecution witnesses on the basis of what was conveyed by Kavita must be treated as hear say and kept out of consideration.

11. P.W.1 Arun Mahajan is the maternal uncle of Kavita who has no personal knowledge of the ill-treatment. P.W.1 states that when he visited the house of the accused he was told by Kavita that everything is fine. P.W.1 then states that after a month when he met Kavita, it was conveyed that accused Gajanan used to abuse her under the influence of liquor. P.W.1 states that Kavita further narrated that accused used to level bad allegations against her. If the hear say evidence is excluded, the testimony of P.W.1 does not take the case of the prosecution any further.

12. P.W.2 Shashikala Junghare is the maternal aunt of the Kavita who has deposed that Kavita came to her house eight days after the marriage and narrated that the accused used to trouble her under the influence of liquor and were suspecting her character. Apart from the fact that the evidence is not admissible for the reasons recorded supra, the evidence is inconsistent with the evidence of P.W.1 to the extent P.W.2 states that it was after eight days of the marriage that Kavita narrated to her the ill-treatment.

13. P.W.3 Vimal Bhujade is the mother of the deceased Kavita. Her deposition is that after 2 to 3 months of the marriage it was conveyed by Kavita that accused used to suspect her character and beat her.

14. Concededly, none of the relatives has deposed to have directly witnessed the alleged cruelty. The evidence is hear say

and inadmissible. I am not persuaded to uphold the conviction of the accused under section 498-A, 306 read with section 34 of the IPC, since the prosecution has not proved beyond reasonable doubt that the death is suicidal or that deceased Kavita was subjected to cruelty within the meaning of explanation (a) and (b) of section 498-A of IPC.

15. The judgment and order impugned is set aside.

16. The accused is acquitted of offence punishable under section 498-A, 306 read with section 34 of IPC.

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

18. The appeal is allowed.