

(2016) 07 BOM CK 0068
In the Bombay High Court
Case No : Criminal Appeal No. 93 of 2014

Harish

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 05-07-2016

Acts Referred:

Evidence Act, 1872 — Section 3

Penal Code, 1860 (IPC) — Section 302, 304B, 498A

Citation : (2016) 2 AIRBomRCri 826 : (2016) ALLMRCri 5290 : (2017) 2 BomCR(Cri) 480

Hon'ble Judges : B.R. Gavai and V.M. Deshpande, JJ.

Bench : Division Bench

Final Decision : Partly Allowed

Judgement

B.R. Gavai, J.—The accused/appellant being aggrieved by their conviction and sentence for the offences punishable under Sections 498-A, 304B and Section 302 read with Section 34 of the Indian Penal Code vide judgment and order passed by the learned Additional Sessions Judge, Khamgaon dated 31.12.2013 in Sessions Trial No. 39/11, have approached this Court.

2. The prosecution case, in brief, is thus :- The deceased Usha was resident of Jaisalmer (Rajasthan). On 1.6.2009 she was married to accused no.1 Harish at Jaisalmer. Accused nos. 2 & 3 are parents of accused No.1. After marriage, deceased Usha started residing with the accused persons at Khamgaon. It is the prosecution case that though in the marriage, the parents of deceased Usha had given 8 tola gold, 50 total silver, clothes and other articles, the accused persons were always making a grievance that the other items like T.V., Washing Machine, etc. were not given. As such, the parents of Usha came to Khamgaon for purchasing the aforesaid articles and gave the same to accused persons.

3. It is further the prosecution case that after 2-3 months of the marriage, Usha had visited her parents' house at Jaisalmer. She had made a grievance that the accused used to ill-treat her saying that certain items were not given in the

marriage. After one month, Harish took her back. Thereafter again after a period of 2-3 months Usha informed her parents on telephone that the accused persons were demanding an amount of Rs.50,000/- and ill-treating her for money. As such, in November, 2009 Usha's father Dhanraj and his friend Banwari came to the house of accused and gave Rs.10,000/- to the accused Harish. It is the prosecution case that even thereafter the ill-treatment continued. It is the prosecution case that the accused even went to the extent of physically manhandling the deceased.

4. It is the further prosecution case that in February, 2010 Usha visited her parents' home. Again at that time she complained about the ill-treatment. In March, 2010 accused Harish went to fetch Usha. From there, accused Harish, Usha and her parents went to Kumbh Mela at Haridwar and then to Bikaner. At that time, Dhanraj gave an amount of Rs.20,000/- to accused Harish. From there, Usha and Harish came back to Khamgaon.

5. It is the further prosecution case that even after this, the ill-treatment continued and as such, on 4.6.2010 Usha's parents, sister Chanchal (PW.12) and Shrigopal ? husband of Chanchal came from Jaisalmer and other relatives Akash, Harish, Pramod and Jaideo came from Nagpur. They assembled in Prem Residency Hotel, Khamgaon. From there, they went to house of accused. Usha told her parents that accused persons used to beat her for balance amount of Rs.20,000/-. Usha's parents and relatives requested the accused not to beat Usha and assured to pay balance amount very soon.

6. It is the further prosecution case that in spite of that, the accused persons continued to ill-treat Usha. On 6.4.2011 Usha told her mother that 2-3 days earlier, her husband Harish accused no.1 and her mother-in-law accused no.3 beat her in a lane of her house and took her beating in the house. On 8.4.2011 accused Harish informed Usha's father Dhanraj that Usha had died. Dhanraj gave this message to Akash and Harish Purohit and requested them to go to Khamgaon and make enquiry about Usha's death.

7. On 9.4.2011 Akash, Harish and their friends came to Khamgaon and saw dead body of Usha in Government Hospital, Khamgaon. They saw injuries on the dead body of Usha and found that death was suspicious. Akash informed about the same to Dhanraj and as per his instructions, lodged report below Exh. 77 in Shivajinagar Police Station, Khamgaon. On the basis of the report, PSI Mapore registered Crime No. 22/11 under Sections 498-A & 304- B of the Indian Penal Code.

8. In the meantime, when on 8.4.2011 the deceased was taken to Government Hospital, Khamgaon by accused, Dr. Rajendra Chavan (PW.9) examined her at 4.40 p.m. and declared her brought dead. Accordingly, he issued memo below Exh. 84 to Police Station. On the basis of the said memo, A.D. No. 13/11 under Section 174 of Criminal Procedure Code came to be registered. The investigation was handed over to A.S.I. Kakade PW.15. He carried out the preliminary

investigation including spot panchnama, inquest panchnama, etc. and handed over the documents to P.I. Mohd. Jahir PW.14.

9. On the basis of the FIR registered, all the three accused, i.e. Harish ? husband of the deceased, and accused nos. 2 & 3 father-in-law and mother-in-law of the deceased came to be arrested. At the conclusion of investigation, a charge-sheet came to be filed against the accused in the Court of learned J.M.F.C., Khamgaon. Since the case was exclusively triable by the learned Sessions Judge, the same came to be committed to the learned Sessions Court, Khamgaon. The learned trial Judge framed the Charge below Exh. 39 for the offence punishable under Sections 498-A, 304- B and 302 read with Section 34 of the Indian Penal Code. They pleaded "not guilty" and claimed to be tried. At the conclusion of the trial, the learned trial Judge passed an order of conviction as aforesaid and sentenced all the three accused to suffer R.I. for three years and to pay a fine of Rs.500/- and in default to suffer R.I. for three months for the offence punishable under Section 498-A read with Section 34 and to suffer R.I. for seven years for the offence punishable under Section 304-B read with Section 34 of the Indian Penal Code. However, the accused nos. 2 & 3 were acquitted for the offence punishable under Section 302 and only the accused no.1 was convicted for the said offence and sentenced to suffer imprisonment for life and to pay a fine of Rs.500/- and in default to suffer R.I. for three months. Being aggrieved thereby, the present appeal has been filed.

10. Since none represented on behalf of the appellant, we have scrutinized the entire evidence available on record with the assistance of the learned Additional Public Prosecutor.

11. Shri M.J. Khan, the learned Additional Public Prosecutor for the respondent/ State, submits that the learned trial Judge has rightly recorded the order of conviction. It is submitted that the death of the deceased has occurred in the house which was inhabited by the present appellants. It is, therefore, submitted that in view of the provisions of Section 106 of the Indian Evidence Act, the onus would be on the present appellants to establish as to how the death of the deceased has occurred in their house.

12. In view of the evidence of PW.10 Dr. Anil Ramratan Sarode and the post-mortem report below Exh. 86, we find that no interference is warranted with the finding of the learned trial Judge that the death of the deceased is homicidal.

13. Undoubtedly, the present case is a case based on circumstantial evidence. The law with regard to conviction on the basis of circumstantial evidence is very well crystallized by Their Lordships of the Apex Court in the case of Sharad Birdhichand Sarda v. State of Maharashtra reported in (1984) 3 SCC 116. It will be appropriate to refer to paragraph nos. 153 & 154 of the said judgment, which read as under :-

"153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully

established :

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra* (1973) 2 SCC 793 : where the following observations were made : [SCC para 19, p. 807 : SCC (Cri) p. 1047]

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between "may be" and "must be" is long and divides vague conjectures from sure conclusions.

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

"154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

It could thus clearly be seen that as held by Their Lordships of the Apex Court, it is necessary for the prosecution to prove each and every circumstance beyond reasonable doubt. Not only that, the prosecution has to establish a chain of circumstances proved beyond reasonable doubt, which leads to no other conclusion than the guilt of the accused. It has been held that every possible hypothesis except the guilt of the accused has to be excluded. What is required to be established is that in all human probability, the act must have been done by the accused alone.

14. In the light of these principles, we will examine the material placed on record. We will first examine the case of the prosecution in so far as the offences punishable under Sections 498-A and 304-B of the Indian Penal Code are concerned, inasmuch as all the three accused have been found to be guilty for the said offences. For establishing the offence under Section 498-A, the prosecution will have to establish that the husband or the relative of the husband of a woman, subjects the woman to cruelty. Cruelty has been defined as 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 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. For establishing the offence under Section 304-B of the Indian Penal Code, the prosecution will have to firstly establish that 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. It will have to be further established that soon before the 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.

15. The evidence with regard to demand of dowry and the ill-treatment on the said count is mainly by the parents of the deceased and her relatives. However, merely because the said witnesses are related to deceased cannot be a ground to discard the testimony. If their evidence is found to be trust-worthy, reliable and cogent, conviction could be awarded on the basis of such a testimony. PW.13 Dhanraj is the father of the deceased. His evidence is below Exh. 91. He has deposed in his evidence that Usha was married to accused no.1 on 1.6.2009. In the marriage, he had given 8 tolas gold, 50 tola silver, clothes and household articles. After 20 to 22 days of marriage, he had purchased T.V., Washing Machine and steel almirah from Khamgaon and gave to the accused persons. He states that after 2 to 2? months of marriage, Usha visited his house. She stayed in his house for about one month. That time, she told that the accused persons used to ill-treat her because in the marriage, bed was not given. After one month, accused Harish came and took her. After 2 to 2? months of it, Usha told them on telephone that accused persons were beating her for Rs.50,000/-. Thereafter, in November, 2009 he and Banwari went to house of accused persons. That time, all accused were present in house. He gave Rs.10,000/- to Harish and told that remaining amount he shall arrange. He stated that in spite of this, accused used to beat and ill-treat her. In February, 2010 Usha had come to his house at Jaisalmer. Usha told them that accused persons were torturing her for money. In March, 2010 they went to Kumbh Mela along with accused Harish. He gave Rs.20,000/- to Harish. Usha and Harish returned back to Khamgaon. After 2 to 2? months, again Usha gave telephonic call. She informed that unless we bring money the accused persons may do wrong with her life. This fact was informed by telephone to his relatives at Nagpur and Jaisalmer. Thereafter he, his wife, daughter Chanchal and her husband came from Jaisalmer and Akash, Harish, Pramod and Jay came from Nagpur to Khamgaon. They stayed in Prem Residency Hotel, Khamgaon. All of them went to house of accused persons. Usha told them that for remaining amount of Rs.20,000/- accused persons were beating her. He requested the accused persons not to beat Usha and assured them that he would pay remaining amount of Rs.20,000/- very soon. He states that Usha phoned him on 6.4.2011 and told her mother that her husband Harish and mother-in-law beat her and took her from a lane in her

house by beating. He states that on 8.4.2011 at around 5 to 5.30 p.m. accused Harish told him on telephone that Usha had expired. He informed about the same to his relatives Akash and Harish at Nagpur and told them to go to Khamgaon and make enquiry as to how Usha died. On 9.4.2011 Akash and Harish informed that the death of Usha was suspicious. He, therefore, requested to lodge a report to Police Station.

16. PW. 13 Dhanraj has been thoroughly cross-examined. However, the perusal of cross-examination would reveal that there are material contradictions and omissions regarding the role of accused nos. 2 & 3. However, in spite of thorough cross-examination, his testimony in so far as the demand and ill-treatment by the accused no.1 Harish is concerned, the same has remained unshaken.

17. PW.8 Meena is the wife of PW.13 Dhanraj and the mother of the deceased. The perusal of her evidence would also reveal that her evidence corroborates the testimony of PW.13 Dhanraj in so far as the role of accused no.1 Harish is concerned.

18. PW.12 Chanchal is the sister of the deceased. Her evidence would also corroborate the evidence of PW.13 Dhanraj and PW.8 Meena in so far as the ill-treatment by the accused no.1 Harish is concerned.

19. PW.11 Manish is the maternal cousin of the deceased. He has also supported the testimony of the father and mother of the deceased.

20. PW.7 Banwari is the friend of PW.13 Dhanraj. He corroborates the version of PW.13 regarding going to Khamgaon to pay money to the accused. He has stated in his evidence that in his presence Dhanraj had given an amount of Rs.10,000/- to Harish.

21. PW.6 Akash is the first informant and also the cousin of the deceased. He has also deposed regarding the demand of money, ill-treatment to the deceased by accused no.1 and his going to Khamgaon along with PW.13 Dhanraj and the other relatives.

22. In that view of the matter, we find that the testimony of these witnesses establishes beyond reasonable doubt that the appellant/accused no.1 used to ill-treat the deceased on account of demand of dowry and non-fulfilment of the same. However, we find that the allegations in this respect against the accused nos. 2 & 3 are vague and general in nature. In that view of the matter, we find that though the conviction of the accused no.1 Harish for the offence punishable under Section 498-A of the Indian Penal Code deserves to be upheld, the prosecution has failed to prove the case beyond reasonable doubt against the accused nos. 2 & 3 and as such, they are entitled to be acquitted for the said charge.

23. In so far as the conviction under Section 304-B of Indian Penal Code is concerned, as already discussed herein above, though the prosecution has been in a position to establish the cruelty or harassment to the deceased soon before

her death, only in so far as accused no.1 is concerned and not against the accused nos. 2 & 3. Undisputedly, the death of the deceased has occurred within seven years of the marriage. In that view of the matter, we find that though the conviction for the offence punishable under Section 304-B of the Indian Penal Code deserves to be confirmed in so far as the accused no.1 Harish is concerned, the accused nos. 2 & 3 are entitled to be acquitted for the charge of the said offence.

24. That leaves us with the conviction of the accused for the offence punishable under Section 302 of the Indian Penal Code. The learned trial Judge has basically recorded the order of conviction against the accused no.1 on the basis of the judgment of the Apex Court in the case of Trimukh Kirkan v. State of Maharashtra reported in 2007 Cri. L.J. 20. No doubt that if a particular fact is within the special knowledge of an accused, in view of the provisions of Section 106 of the Indian Evidence Act, the onus would lie on such an accused to explain the same. However, that does not absolve the prosecution for discharging its burden to first establish the case beyond reasonable doubt. It will be appropriate to refer to paragraph no. 151 of the judgment of the Apex Court in Sharad Birdhichand Sarda v. State of Maharashtra (cited supra), which reads as under :-

"151. It is well settled that the prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. This is trite law and no decision has taken a contrary view. What some cases have held is only this : where various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the court. In other words, before using the additional link it must be proved that all the links in the chain are complete and do not suffer from any infirmity. It is not the law that where there is any infirmity or lacuna in the prosecution case, the same could be cured or supplied by a false defence or a plea which is not accepted by a court."

In the light of this guiding principle, let us examine the evidence as established by the prosecution. The cross-examination of PW.1 Pramod Purohit would itself show that it is not the accused alone who was residing in the company of the deceased. The perusal of the evidence of this witness would reveal that the accused No. 2 Shamsundar Chhangani has three sons including Harish. At the time of incident, accused Harish and his elder brother were married. They were all living jointly in the house of the accused. From the perusal of the entire evidence led on behalf of the prosecution, it cannot be said that the prosecution has proved beyond reasonable doubt that soon prior to the death of the deceased occurring, the accused no.1 Harish and the deceased were seen in the company of each other. On the contrary, the evidence of prosecution itself would show that apart from the present three accused, at least three other persons, i.e. the two brothers of the accused No.1 and the wife of one of the brothers were residing in the same house.

25. In so far as the judgment of the Apex Court in the case of Trimukh Kirkan

(cited supra) on which the learned trial Judge has relied is concerned, in the said case the appellants therein had created a scene to show that the death of the deceased was not by strangulation and had also claimed that she had died due to a snake bite. The said case was a case of no explanation regarding the injury caused by strangulation to the deceased and the case of making out a false case. However, in the present case, it is not the case of the accused not giving any explanation. The accused persons have examined three witnesses as defence witnesses. By now, it is a settled principle of law that merely because the witnesses are defence witnesses, their testimony should not be discarded. The defence witnesses are also entitled to the same treatment as that of the prosecution witnesses. In the light of this principle, we will have to examine the evidence of the defence witnesses.

26. DW.1 Murlidhar Madanlal Rathi, who is the employer of the accused no.1 states that the accused Harish was working in his shop since the year 2000. He used to come in the shop at around 9.45 to 10 a.m. and go back at around 6.30 p.m. He used to bring his tiffin with him and take lunch in the shop. He has further stated that he himself used to go home at around 11 a.m. and used to come back at about 12 noon to 12.30 p.m. leaving the shop in trust of accused Harish. He further states that on 8.4.2011 Harish had come to his shop as usual at around 9.45 to 10 a.m. At about 4 p.m. Harish received phone of his father. While talking on phone Harish was upset. Harish told him that his wife was taken to Government Hospital by his father. So he and Harish both went to Government Hospital, Khamgaon and they saw that Usha had died. After sometime, this witness had returned to his shop. It could further be seen that the witness has also brought cash book. He has identified the handwriting and deposed that the cash-book till 4 p.m. on 8.4.2011 was written in the handwriting of Harish. The same is also exhibited as Exh. 124. In the cross-examination, a specific suggestion is given to him by the learned A.P.P. that when he returned to shop at around 12 to 12.30 p.m. Harish was not in the shop. Specific suggestions given to this witness that Harish had left the shop have been denied by this witness. It could thus be seen that the oral testimony of this witness is also corroborated by the documents which are exhibited.

27. The perusal of evidence of DW.2 Pushpalata Nandkishor Purohit, who is the President of the community to which the deceased and appellant belonged would also show that in the house of accused no.2, accused nos. 2 & 3, their three sons and two daughters-in-law resided jointly. The name of the elder son is Bharat, middle son is Harish and younger son is Girish. The name of wife of Bharat is Vanita. She states that the date on which Usha died was the last day of Gangaur Utsav. On the last day of Gangaur Utsav all the women and girls of their community take procession for immersion of Gangaur. She states that it was decided that for immersion of Gangaur all the ladies of community would assemble in her house at 4 p.m. Vanita came to her house at around 4 p.m. and told that Usha was making preparation to come to her house. When Usha did not come for long time, she gave call to Usha. Usha did not give any reply. At the

same time, accused no.2 came from the shop. She told accused no.2 that Usha was not giving reply. Accused no.2 went in the room of Usha and gave her call. She went in room and saw that Usha was lying in the room on the floor. Accused no.2 sprinkled water on Usha. There was no movement. So, accused no.2 gave phone call to Harish and other relatives and called them. Thereafter they took Usha to Government Hospital. At that time, accused no.3 was present in a temple. After one hour, they got message that Usha was dead. This witness has also been thoroughly cross-examined. A specific suggestion was given that Vanita had gone to her parents' house prior to 3-4 months. However, the same is denied.

28. We find that in view of evidence of DW.1 which is duly corroborated by DW.2, it cannot be said that the defence of the appellant no.1 that he was not in the house between 9.45 a.m. till 4 p.m., i.e. when he came to know about the death of the deceased is not plausible.

29. As held by the Apex Court, what the prosecution is required to establish is that the circumstances concerned "must" or "should" and not "may be" established. The Apex Court has held that there is not only the grammatical but legal distinction between may be proved or must or should be proved. As has been held in catena of cases that however strong a suspicion be, the same cannot take the place of the proof beyond reasonable doubt. As already discussed herein above, the prosecution has utterly failed to lead any evidence to establish that shortly before the death of the deceased, it was only the accused no.1 who was in the company of the deceased. On the contrary, the evidence of the prosecution witnesses as well as the defence witnesses would establish that in addition to the three accused in the present case, the house was inhabited by at least three other persons. Not only that, the evidence of defence witnesses would reveal that the accused was in the shop and he came to know about the incident after he received a telephonic call from his father and thereafter went to the hospital. In that view of the matter, we find that the accused no.1 would be entitled to benefit of doubt and the conviction under Section 302 of the Indian Penal Code would not be tenable.

30. In the result, the Criminal Appeal is partly allowed. Accused Nos. 2 and 3 are acquitted of all the charges, charged with.

31. The conviction of accused No. 1 Harish for the offence punishable under Section 302 of the Indian Penal Code is set aside and he is acquitted of the charge for the said offence. The conviction of the appellant/accused No.1 for the offences punishable under Sections 498-A and 304-B of the Indian Penal Code is maintained and the sentence and fine imposed by the learned trial Judge for the said offences is maintained.

32. Rest of the order including the order directing the substantive sentences to run concurrently is maintained.

33. Bail bonds of accused/appellant nos. 2 & 3 shall stand cancelled.