
(2012) 07 BOM CK 0189
In the Bombay High Court
Case No : Criminal Appeal No. 53 of 2007

Hemant Kawadu Chauriwal	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 02-07-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 157
Penal Code, 1860 (IPC) — Section 302, 304B, 307, 34, 498A

Citation : (2012) BomCR(Cri) 727 : (2013) 3 Crimes 150

Hon'ble Judges : P.V. Hardas, J; M.L. Tahaliyani, J

Bench : Division Bench

Advocate : U.K. Kalsi, for the Appellant; M.K. Pathan, APP, for the Respondent

Final Decision : Allowed

Judgement

M.L. Tahaliyani, J.—These two appeals are being decided by the common judgment as they arise out of the conviction recorded by the learned Additional Sessions Judge, Pandharkawada (Kelapur) in Sessions Trial No. 64/2004. The appellant Hemant Kawadu Chauriwal in Criminal Appeal No. 53/2007 and the appellant Sau. Vachhalla Kawadu Chauriwal in Criminal Appeal No. 70/2007 were tried by the learned Additional Sessions Judge along with accused No. 2 Kawadu Ambar Chauriwal, accused No. 3 Vasanta Kawadu Chauriwal and accused No. 5 Sau Vanita Chandrakrushna Chauragade for the offences punishable under Sections 304B read with Section 34 and Section 498A read with Section 34 of the Indian Penal Code. The appellant Hemant in Appeal No. 53/2007 was also in alternative tried for the offence punishable u/s 302 of the Indian Penal Code. On conclusion of trial the appellants and other accused were acquitted of the offence punishable u/s 304B read with Section 34 of the Indian Penal Code. The original accused Nos. 2, 3 & 5 were also acquitted of the offence punishable u/s 498A read with Section 34 of the Indian Penal Code. The appellant Hemant in Appeal No. 53/2007 was found guilty of the offences punishable under Sections 302 and 498A of the Indian Penal Code. He was sentenced to suffer imprisonment for life

and to pay a fine of Rs. 1000/-, in default to suffer rigorous imprisonment for six months for the offence punishable u/s 302 of the Indian Penal Code. He was further sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs. 1,000/-, in default to suffer rigorous imprisonment for three months for the offence punishable u/s 498A of the Indian Penal Code. As far as accused No. 4 Sau. Vachhalla is concerned, she has been convicted for the offence punishable u/s 498A of the Indian Penal Code only and has been sentenced to suffer simple imprisonment for one year and to pay a fine of Rs. 1,000/-, in default to suffer further simple imprisonment for one month for the offence punishable u/s 498A of the Indian Penal Code. The appellant in Appeal No. 53/2007 will be referred to as "appellant No. 1" and appellant in Appeal No. 70/2007 will be referred to as "appellant No. 2" hereinafter.

2. The deceased Asha Hemant Chauriwal (hereinafter referred to as "deceased"), daughter of P.W.3-Devidas Atmaram Dohare and P.W.4-Sau. Chandrakala Devidas Dohare, was married to appellant No. 1 on 29th May, 2001. After the marriage, she went to stay with appellant No. 1 at Ghatanji. Appellant No. 1 was member of joint family of which appellant No. 2 and other accused were also members. Original accused No. 2 is father of appellant No. 1 and husband of appellant No. 2. Original accused No. 3 is brother of appellant No. 1 and original accused No. 5 is a sister of appellant No. 1.

3. It is alleged that after the marriage, the deceased was being subjected to mental and physical cruelty on the ground that she had not brought sufficient valuable articles in dowry. The deceased was not being given sufficient food to eat. She was being tortured every now and then on the ground that she did not know cooking and that the food cooked by her was not tasty enough. These facts she had been disclosing to her parents whenever she visited her parental house.

4. The incident in question had occurred on 20th June, 2004 at matrimonial home of the deceased. It is alleged that the appellants had poured kerosene on the deceased and had set her on fire. She was thereafter taken to Ghatanji Hospital for treatment. She was removed to Yavatmal Government Hospital for further treatment. In the meantime, the news was received by parents of the deceased. They also reached the hospital at Yavatmal. Police Officer from Yavatmal Police had requested the Naib Tahsildar Smt. Pushpalata Bharti (P.W.1) to record statement of the deceased at Yavatmal General Hospital. The request letter was handed over to the Naib-Tahsildar by a Police Constable. The Naib-Tahsildar reached the hospital. She took opinion of the Medical Officer with regard to the condition of the deceased and thereafter she recorded statement of the deceased. The deceased had allegedly stated before the Naib-Tahsildar (Executive Magistrate) that since her parents had not given sufficient dowry at the time of marriage, she was being physically assaulted. It was further stated by her that on 20th June, 2004 at about 8-00 a.m. appellant No. 1 had poured kerosene on her and set her on fire. Appellant No. 2 and other accused had abused her and had assaulted her. She had further stated that her husband

should be punished for crime committed by him. The statement of the deceased was recorded at about 5.45 p.m. on 20th June, 2004.

5. Since the incident had occurred at Ghatanji and the police of Ghatanji came to know about the incident, a Police Officer from Ghatanji Police Station had reached the spot and had drawn detail crime report, which includes the panchanama. The offence was registered at Ghatanji Police Station on 21st June, 2004 after receipt of the above stated dying declaration recorded by Executive Magistrate by Ghatanji Police Station from Yavatmal Police Station. The First Information Report was registered for the offences punishable under Sections 307 and 498A read with Section 34 of the Indian Penal Code. The deceased died on 22nd June, 2004. After the death of deceased Asha Hemant Chauriwal, the police started investigation for the offences punishable under Sections 302 and 304B of the Indian Penal Code also.

6. During the course of investigation, statements of parents of the deceased were recorded. Dead body was subjected to post-mortem examination. All the injuries on the deceased were found ante mortem. The deceased had sustained about 88% of burn injuries on various limbs from neck to lower limbs. The cause of death was stated to be septicemia as a result of 88% dermo epidermal infected burn injuries. After completion of investigation, charge-sheet was filed in the court of Magistrate.

7. The learned trial Judge framed charge against appellant No. 1 for the offences punishable under Sections 302, 304B and 498A read with Section 34 of the Indian Penal Code. As far as appellant No. 2 and other accused are concerned, the learned trial Judge had framed charge against them for the offences punishable under Sections 498A and 304B read with Section 34 of the Indian Penal Code. The appellants and the other accused had pleaded not guilty to the charge. The defence of the appellants and the other accused was that the deceased had committed suicide by pouring kerosene on herself. It was their case that the parents of the appellants had taken the deceased to the hospital for treatment after breaking open the door of the room where she had committed suicide.

8. The prosecution had examined in all six witnesses in support of its case. P.W.1- Pushpalata Bharti is the Executive Magistrate, who had recorded the statement of the deceased at Government Hospital, Yavatmal. P.W.2-Prakash is the Police Constable who had carried dying declaration of the deceased from Yavatmal to Ghatanji. P.W.3-Devidas and P.W.4- Chandrakala are the father and mother respectively of the deceased. P.W.5- Dr. Sarika Naik is the Medical Officer who had examined the deceased before recording of her dying declaration. P.W.6- Dipak Gotmare is the Police Officer, who had carried out the investigation. The Post-Mortem Report at Exh.97 was admitted to be true and correct by the appellants and the other accused.

9. As such the cause of death has not been disputed by the appellants. The

question before the trial Court was as to whether 88% burn injuries, which resulted into septicemia and ultimately caused death of the deceased, were caused by the appellants and the other accused. All the accused have been acquitted of the offence punishable u/s 304B read with Section 34 of the Indian Penal Code. However, the appellant No. 1 has been convicted of the offence punishable u/s 302 of the Indian Penal Code.

10. Before we examine the order of conviction for the offence punishable u/s 498A of the Indian Penal Code recorded against both the appellants, we propose to examine the judgment of the learned trial Court with regard to the conviction of appellant No. 1 for the offence punishable u/s 302 of the Indian Penal Code. The learned trial Court has believed the dying declaration (Exh.60) of the deceased and has come to the conclusion that appellant No. 1 had caused death of the deceased. To examine whether the finding given by the learned trial Court is right or wrong, it will be necessary to state in brief the evidence with regard to requisitioning the services of the Executive Magistrate and recording of dying declaration.

11. There is no dispute that the incident in question had occurred on 20th June, 2004. The deceased was admitted in Government Hospital at Yavatmal on the same day. Her statement was recorded by the P.W.1 Executive Magistrate on the same day. It is also not in dispute that the First Information Report was registered at Ghatanji Police Station on 21st June, 2004. It is also not in dispute that the deceased had died on 22nd June, 2004 and thereafter Section 302 of the Indian Penal Code was applied. The Investigating Officer P.W.6-Dipak Gotmare of Ghatanji Police Station had visited the spot immediately after the incident on 20th June, 2004. He however had not registered any offence after his return to the Police Station from the spot.

12. P.W.6-Dipak Gotmare has stated in his evidence that he had received information that Asha Hemant Chauriwal had set herself on fire. The circumstances involving recording of dying declaration and the dying declaration itself will have to be examined in the light of this statement of the Police Officer, who had received information of the incident, which was first in time.

13. P.W.1-Pushpalata, the Executive Magistrate, has stated that she had received the memo from the police for recording dying declaration and she had visited Ward No. 26 of Government Hospital. She had recorded statement of the deceased Asha Hemant Chauriwal. According to this witness, the Medical Officer had certified that the deceased was in a fit condition to make a statement. The memo received by this witness is produced at Exh.59. The Medical Officer, who had examined the deceased, has been examined as P.W.5. P.W.5-Dr. Sarika Naik has stated that at the request of P.W.1-Pushpalata, she had examined the deceased and had certified that the deceased was mentally competent to give her dying declaration. The memo received by P.W.1-Pushpalata is at Exh.59 and the certificate given by the Medical Officer is at Exh.96. In her statement, which was reduced to writing by P.W.1-Pushpalata, the deceased had stated before

P.W.1 that she was being tortured at her matrimonial home and they had been constantly demanding money from her. The deceased had also stated that on 20th June, 2004 she was set on fire by her husband. She also wanted her husband to be punished for the offence committed by him. In this regard, it is necessary to be stated here that the officer of Yavatmal Police, who had issued request letter to P.W.1-Pushpalata for recording statement of the deceased, has not been examined. The prosecution has also not examined the Police Constable who had carried request letter to P.W.1-Pushpalata. It is also not clear from the evidence of P.W.1-Pushpalata as to who had collected the dying declaration recorded by her at Exh.60. There is no evidence at what time the dying declaration was collected from P.W.1-Pushpalata and in whose custody it was lying before it reached Ghatanji Police Station where a First Information Report was registered on the basis of the dying declaration carried by P.W.2-Prakash. In fact, it was the duty of the learned trial Court to examine whether the statement made by the deceased was voluntary and true. The learned trial Court should have borne in mind that dying declaration has to be judged and appreciated in light of the surrounding circumstances.

14. In a latest judgment reported at Bhajju @ Karan Singh Vs. State of M.P., , the Hon"ble Supreme Court at Para No. 12 has stated as under :-

12. The law is well-settled that a dying declaration is admissible in evidence and the admissibility is founded on the principle of necessity. A dying declaration, if found reliable, can form the basis of a conviction. A Court of facts is not excluded from acting upon an uncorroborated dying declaration for finding conviction. The dying declaration, as a piece of evidence, stands on the same footing as any other piece of evidence. It has to be judged and appreciated in light of the surrounding circumstances and its weight determined by reference to the principle governing the weighing of evidence. If in a given case a particular dying declaration suffers from any infirmity, either of its own or as disclosed by the other evidence adduced in the case or the circumstances coming to its notice, the Court may, as a rule of prudence, look for corroboration and if the infirmities are such as would render a dying declaration so infirm that it pricks the conscience of the Court, the same may be refused to be accepted as forming basis of the conviction.

It is thus clear that the dying declaration can be basis for conviction without there being any corroboration. However, it is necessary that it must enjoy full confidence of the Court. To determine whether it enjoys full confidence of the Court or not, it is necessary to judge the dying declaration like any other piece of evidence. The Hon"ble Supreme Court has said that it is to be judged and appreciated in light of the surrounding circumstances and its weight determined by reference to the principle governing the weighing of evidence.

15. The Hon"ble Supreme Court in the matter of Sharda Vs. State of Rajasthan, has said at Para 34 as under :-

34. Though a dying declaration is entitled and is still recognized by law to be given greater weightage but it has also to be kept in mind that accused had no chance of cross-examination. Such a right of cross-examination is essential for eliciting the truth as an obligation of oath. This is the reason, generally, the court insists that the dying declaration should be such which inspires full confidence of the court of its correctness. The court has to be on guard that such statement of deceased was not as a result of either tutoring, prompting or product of imagination. The court must be further satisfied that deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the court is satisfied that the aforesaid requirement and also to the fact that declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It is not an absolute rule of law that the dying declaration cannot be form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

16. In the present case, the prosecution has not given any explanation as to why did they fail to examine the Police Officer, who had issued request letter to the Executive Magistrate for recording dying declaration and at the same time why the Police Constable, who had carried the request letter, has also not been examined. Non examination of these two witnesses by itself would not have been fatal to the prosecution case, had the other circumstances inspired confidence in our mind. It is stated by P.W.1-Pushpalata in her examination-in-chief that relatives of the deceased were present in Burn Ward and she had requested a constable to ask all the relatives to withdraw themselves from the Burn Ward. It has also come in the evidence of P.W.3-Devidas and P.W.4-Chandrakala that they had reached hospital before arrival of the Executive Magistrate. The presence of relatives by itself also is no reason to come to the conclusion that the person giving the statement was tutored. At the same time, it is to be borne in mind that primarily it is the duty of the prosecution to prove its case beyond all reasonable doubts. The court is not only under obligation to examine the dying declaration but it is also under obligation to examine the circumstances in which the dying declaration was recorded.

17. In the present case, Police Officer P.W.6-Dipak Gotmare has stated that he received information that deceased Asha Hemant Chauriwal had set herself on fire and he had reached the spot for drawing spot panchanama. The contents of dying declaration are contrary to the information received by police which was first in time. The prosecution has not been able to rule out the possibility of creating a false dying declaration at the instance of the relatives. We are fortified our view due to certain facts stated by P.W.6 in his cross-examination. P.W.6-Dipak Gotmare, Investigating Officer, has stated in the cross-examination that he had not seized burnt pieces of clothes from the spot of occurrence as those were not found there. He had also not collected sample of soil from the spot of occurrence. He did not find burnt pieces of clothes any where in the house. As such we had requested the learned Additional Public Prosecutor to let us know from the evidence as to exactly where the incident had occurred. After having

gone through the evidence and the crime report including panchanama, the learned Additional Public Prosecutor has not been able to tell us as to what was the location where the deceased had sustained burn injuries.

18. The appellants and accused had given explanation in their statements u/s 313 of the Code of Criminal Procedure, which appears to be probable. It is explained by the appellants and the other accused that the deceased had set herself on fire and had committed suicide. It is worth mentioning that P.W.2-Prakash, who was working as Head Constable at Yavatmal Police Headquarters, has stated that he was posted at City Police Station, Yavatmal. He had carried dying declaration of the deceased to Ghatanji Police Station on 21st June, 2004. He had lodged his report, which was recorded as First Information Report Exh.78 at Ghatanji Police Station. The statement of the deceased was recorded at about 5.45 p.m. on 20th June, 2004 at Yavatmal. The statement of the deceased was a statement within the meaning of Section 157 of the Evidence Act. It was not a confidential document. An offence could have been registered at Yavatmal Police Station by giving No."00/2004". In fact it is the practice in Maharashtra that whenever the First Information Report of cognizable offence is received by the Police Station with regard to the offence which had not occurred within the jurisdiction of the said police station, the First Information Report is recorded under "00" number of the particular year. The said First Information Report is later on transferred to the police Station having jurisdiction over the place of offence. As such there are a lot of mysterious circumstances which have remained unexplained. These unexplained circumstances create a reasonable doubt in our mind as to the correctness of the dying declaration. It need not be stated here that it is the duty of the Court to examine whether the dying declaration was voluntary and true. In the present case, we doubt as to whether the statement reduced to writing by P.W.1-Pushpalata produced at Exh.60 was statement of the deceased.

19. The evidence of parents of the deceased does not help in any manner as far as charge u/s 302 of the Indian Penal Code is concerned. The conviction recorded against appellant No. 1 was purely based on the dying declaration of the deceased. In view of our finding that there are many mysterious circumstances, which have remained unexplained and that the dying declaration of the deceased reduced to writing by P.W.1-Pushpalata does not appear to be genuine dying declaration, we are of the view that appellant No. 1 should have been acquitted of the offence punishable u/s 302 of the Indian Penal Code.

20. As far as charge u/s 498A read with Section 34 of the Indian Penal Code is concerned, the conviction is mainly based on the letters produced by the parents of the deceased before the Investigating Officer. P.W.3-Devidas has stated in his evidence that he had handed over letters received from the deceased. He has identified signature of the deceased. P.W.6-Dipak Gotmare, the Investigating Officer, in his evidence, has stated that he had seized letters under the panchanama Exh.63. The letters seized under the said panchanama were

exhibited at Exhs.82 to 90. However, there is no further investigation with regard to the letters. The admitted signatures of the deceased were not collected and opinion of the expert was not sought by the Investigating Officer. Even there does not appear to be attempt on the part of Investigating Officer to verify the genuineness of the letters. In the circumstances, in our opinion, the conviction recorded by the learned Additional Sessions Judge for the offence punishable u/s 498A read with Section 34 of the Indian Penal Code is also not sustainable. Though the Investigating Officer has stated in his evidence that he made efforts to collect natural handwriting of the deceased, but he could not do so, he has not explained as to what steps he had taken to get natural handwriting of the deceased. As such the learned trial Court should not have based conviction of the appellants for the offence punishable u/s 498A read with Section 34 of the Indian penal Code only on the basis of the letters produced by father of the deceased, which according to him were written to him by his daughter. The learned trial Court should have asked for better evidence or at least proof of the fact that the letters were in handwriting of the deceased. The investigation, in our opinion, was carried out very shabbily. Either there was sabotage or a false case has been prepared under the pressure of parents of the deceased. We are aware that the mistake on the part of the Investigating Officer should not by itself be a ground for acquittal. If the acceptable evidence is sufficient to record conviction, the mistakes committed by the Investigating Officer should not come in the way of convicting the accused of the offence proved against him. However, in the present case, the mistakes committed by the Investigating Officer, deliberately or negligently, have adversely affected the prosecution case to such an extent that we find it highly risky to sustain the conviction recorded by the learned trial Judge against the appellants. We have come to the conclusion that the judgment is not sustainable and it needs to be set aside. Both the appeals deserve to be allowed. Hence, we pass the following order.

- i) These criminal appeals are allowed and the conviction and sentence of the appellants is hereby quashed and set aside and the appellants are acquitted of the offences with which they were charged and convicted.
- ii) Fine if paid by the appellants be refunded to them.
- iii) Since the appellant Hemant Kawadu Chauriwal in Criminal Appeal No. 53 of 2007 is in Jail, he be released forthwith, if not required in any other offence.
- iv) Bail-bonds of the appellant Sau. Vachhalla Kawadu Chauriwal stand cancelled.