

(2017) 06 BOM CK 0125
In the Bombay High Court
Case No : 08 of 2003

Janardhan S/o Jagoji Uike

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 09-06-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#), [Section 174](#) - Power to examine the accused - Police to enquire and report on suicide, etc
[Indian Penal Code, 1860](#), [Section 306](#)

Citation : (2017) 06 BOM CK 0125

Hon'ble Judges : V. M. Deshpande

Bench : SINGLE BENCH

Advocate : R.B.Gaikwad, M.H.Deshmukh

Final Decision : Allowed

Judgement

1. By the present appeal appellant has challenged the judgment and order of conviction passed by Learned Adhoc Additional Sessions Judge, Yavatmal dated 20th December, 2002 in S.T.No.69/2000. By the said judgment the Court below convicted the appellant for the offence punishable under Section 498A and for that he was directed to suffer R.I. for 3 years and to pay fine of Rs. 500/and in default to undergo R.I. for 1 month. The appellant is further convicted for the offence punishable under Section 306 of the Indian Penal Code and on that count sentenced him for 5 years of Rigorous Imprisonment and fine of Rs. 1000/and in default Rigorous Imprisonment for 1 month. The Court below directed that these sentences shall run concurrently.

2. The facts giving rise to the present appeal are as under: Deceased is Shaila. She was a teacher. Appellant married with deceased on 07/05/1999. Appellant is also teacher by profession. Their marriage was a love marriage. At the time of marriage appellant was working at Chincholi and deceased was working at Shivshakti Kannaya School, Kalamb. The marriage took place at Kalamb where

the parents of the deceased were not residing. Deceased took loan from the credit society of her school and it was given to her father Vishnu Yadao Madavi(PW1) prior to her marriage. After marriage the couple till reopening of the school were residing at Babulgaon and thereafter they shifted to Kalamb. Couple alone were residing with each other.

3. A burning incident took place inside the house of the couple and deceased Shaila was admitted to the General Hospital at Yavatmal on 27/7/1999. After her burn a requisition on 27/7/1999 itself was given by the police station authority Yavatmal to the Executive Magistrate, Yavatmal for recording dying declaration of Shaila, the injured. The said is at Exh.17. In pursuance to the said requisition the Executive Magistrate Yavatmal reached to the hospital and he recorded her statement, dying declaration was recorded in the intervening night of 27/7/1999 and 28/7/1999. The dying declaration is at Exh.19. During the period of her treatment unfortunately Shaila succumbed to her burn injuries. The death report of hers is at Exh.20. Her death was informed to P.S.Yavatmal by the medical officer through ward boy . On receipt of the information about the death an accidental death under Section 174 of Cr.P.C. was registered vide A.D.No.0/99. The inquest was conducted on the dead body of Shaila by police station authority Yavatmal and inquest report is at Exh.23.

4. Gangaprasad Sarjuprasad Gautam (PW4) who was working as police station officer of P.S.Kalamb received the papers of A.D.No.0/99 alongwith other case papers including the dying declaration, inquest report etc. A crime was registered on 29/7/1999 vide Crime No.85/1999 for the offence punishable under Sections 498A r/w Section 34 and Section 302 of the Indian Penal Code. The said crime was registered on the basis of typed written complaint dated 29/7/1999 by Vishnu Yadao Madavi (PW1) against the appellant, his married sister Sou. Janabai Bhimrao Gajlekar and her husband Bhimrao Gajlekar. The said complaint as lodged by Vishnuji Madavi (PW1) is at Exh.43.

5. After reregistration of the crime investigating officer Gangaprasad (PW4) visited the spot of incident and prepared spot panchnama in presence of panchas as per the situation noticed on the spot (Exh.25). He also seized articles from the spot itself and seizure is mentioned in (Exh.25) itself. The investigating officer thereafter recorded the statements of various persons. He received postmortem report on 04/08/1999(Exh.35) . After receipt of postmortem report the investigating officer issued a letter to Medical Officer Yavatmal(Exh.31) and requested to give his opinion to the query raised by him in Exh.31. He also sent the seized articles for chemical analysis. After completion of other usual investigation final report was presented in the Court of J.M.F.C. at Kalamb. The Learned Magistrate noticed that the offence is exclusively triable by the Court of Session consequently he passed order and thereby committed the case to the Court of Session. After case reached to the Court of Session it was numbered as S.T. No.69/2000 and was allotted on the file of Adhoc Additional Sessions Judge,Yavatmal. The Learned Judge thereafter framed charge against the

appellant, his married sister Janabai and her husband Bhimrao for the offence punishable under Sections 498A and 306 r/w Section 34 of the Indian Penal Code. All the accused persons abjured their guilt and claimed for their trial. In order to bring home the guilt of the persons who were charged by the Court below prosecution examined four witnesses. Record shows that various documents which were filed by the prosecution were admitted by the defence. The accused persons were also examined by the Learned court below under Section 313 of Code of Criminal Procedure.

6. After appreciating the the prosecution case, Learned Judge of the Court below acquitted the original accused nos. 2 and 3 namely the husband of accused no.3 who is married sister of appellant from all the offences. However, Learned Judge convicted the appellant and sentenced him as mentioned in the opening paragraph of this judgment. Hence, this appeal.

7. I have heard Shri R.B.Gaikwad Learned Advocate for appellant and Smt. M.H.Deshmukh, Learned Additional Public Prosecutor for the State. Both the Learned counsels took me through the notes of evidence and all record of the sessions trial in detail. Both the Learned counsels submitted their respective arguments in support of their brief.

8. The evidence of prosecution case consists of three witnesses apart from prosecution witness no.4, the investigating officer. P.W.1 is Vishnu ,father of deceased whereas P.W.3 is Chintaman Madavi, uncle of deceased. P.W.2 is Sunita who is friend of deceased.

9. It is submission of the Learned counsel for the appellant that the evidence of these three witnesses required to be discarded since they are either close relatives or interested witnesses. This submission of the Learned counsel for the appellant in my view hardly requires a consideration since it is settled principle of law that merely because the witnesses are close relatives or they are interested in deceased that by itself their testimony does not earn any disqualification. However, at the same time, Court should require to scrutinize their evidence minutely and also by way of prudence to seek corroboration from other available evidence on record.

10. Postmortem report is at Exh.35. Column no.17 of the said postmortem report shows that body of Shaila suffered 99% burn injuries. The surgeon has given his opinion about the cause of death as "shock due to burns". Thus, it is crystal clear that the death of deceased Shaila was unnatural one and it was caused due to burn injuries.

11. It is the submission of Learned Additional Public Prosecutor Smt. Deshmukh that within a span of two months Shaila died unnatural death , therefore there is presumption in favour of the prosecution as envisaged under Section 113A of the Evidence Act. She therefore submitted that the judgment convicting the appellant be upheld.

12. In order to attract the provisions of Section 113A of Evidence Act it is the bounded duty of the prosecution firstly to establish with the help of cogent evidence that deceased was subjected to cruelty and harassment by her husband and his relatives. It must also prove that deceased was subject to cruelty as defined under Section 498A of Indian Penal Code. The death can be natural one or unnatural one. A unnatural death can be 1] either homicidal one, 2] suicidal and 3] accidental.

13. To the incident of burning in the present case there is no eye witness nor any immediate neighbours are examined by the prosecution that they have seen the deceased committed suicide due to harassment at the hands of appellant. There is nothing available on record to show the presence of the appellant at the time of incident in the house. The prosecution case is totally silent about his presence in the house. From the spot panchnama (Exh.25) it is clear that the couple was residing in a house known as " Matoshree Sadan" and the said house is owned by Dr. Sudhakar Balbudhe. Spot panchnama shows that the house consists of three blocks and in block situated on the southern side the couple used to reside. The said information which the investigating officer has noted in the spot panchnama was informed to him by one Shri Amart Sirsat. Thus, it is clear that the couple was not residing in any secluded place and thereby denying the opportunity to the prosecution to point out about the presence of appellant in the house at the time of incident.

14. Prior to her death Shaila was admitted to hospital at Yavatmal. Exh.17 is requisition given by police station authority Yavatmal to Executive Magistrate for recording dying declaration of Shaila. Consequently, Executive Magistrate attended the hospital and recorded her dying declaration which is available on record at Exh.19. These two documents were filed by the investigating officer along with the chargesheet. These documents thus are coming on record from the possession of the prosecution. During the course of trial these two documents were admitted by the defence and accordingly they were exhibited.

15. Exh.19 a dying declaration is in the question answer form. The said document shows that prior to recording her statement Executive Magistrate gave requisition to doctor and sought his opinion about the condition as to whether patient is in fit condition to give dying declaration or not and Exh.19 shows that there is an endorsement by the attending doctor that the patient is in fit condition to give dying declaration. The fact that she was in a position to give her statement is also corroborated by P.W.1, her father, as per his evidence when he reached to hospital that time deceased had a talk with him. Dying declaration as recorded by the Executive Magistrate shows that initially he asked the name of injured and thereafter when he asked about the incident she has stated that on 27/7/1999 at 7" O clock when she was boiling milk on the stove that time stove get flared and when she tried to remove the container of milk her saree came in contact with the flames and due to which she got burn injuries. She specifically told to the Executive Magistrate that at that particular point of time nobody was

present in the house.

16. Perusal of Exh.19 thus shows that deceased Shaila has completely absolved the appellant as a person responsible for burn. What she has stated in the said dying declaration that she received burn injuries accidentally. The said document filed on record by prosecution is totally silent about any harassment of whatsoever nature. This one piece of evidence available on record.

17. Another piece of evidence i.e. available on record is in the nature of testimony of prosecution witnesses nos. 1,2 and 3. The incident occurred on 27/7/1999. Shaila died on 28/7/1999. On 27/7/1999 Vishnu (PW1) approached to the P.S. Kalamb with a typed complaint (Exh.43). The said report shows that the deceased and the appellant who are the teachers were in love and both married against the wish of their relatives. The said report further states that the original accused nos. 2 and 3 were responsible for the marriage between deceased and appellant. It is further stated in the report that prior to marriage Shaila obtained a loan of Rs. 10,000/from her employer and that amount was given to the complainant and all the accused got this particular information and therefore they started harassing the deceased and demanded Rs. 10,000/from her. It is also stated in the report that that time and again she was severely beaten. As per the report she was harassed to very great extent and deceased informed to the complainant that she fears threat to her life from the appellant. The written complaint further goes to state that on 27/7/1999 he received information about the burning incident and therefore he and his wife Vimal both reached to the hospital that time she was alive. The written report further claims that it was informed to the complainant by deceased that it is the appellant who has poured kerosene on her person and she was set ablaze.

18. During the course of evidence when Vishnu was in the witness box he stated that when he reached to the hospital there he made inquiry with deceased Shaila and on his inquiry as per his claim she stated as under. "VERNACULAR MATTER OMITTED"

Thus, it is crystal clear that the oral dying declaration which the father of deceased is claiming is totally contradictory to claim which he has made in the report (Exh.43). Exh.43 is obviously filed after the oral dying declaration made by deceased to the author of the said document as claimed by him. It appears that Vishnu (PW1) is not only exaggerating the facts but appears to have a tendency to falsely implicate the appellant that too a very serious offence of commission of same.

19. According to evidence of Vishnu(PW1) and as per the F.I.R. Shaila was subjected to harassment to great extent and she received severe beatings. However, no prior complaint of any sort was either filed by Shaila or by Vishnu to the police authority.

20. Evidence of Vishnu (PW1) shows that firstly he sent one Sanjay Chandekar after marriage to fetch Shaila to her parental house, but appellant did not allow

deceased to visit his house with said Chandekar. To prove this particular fact Sanjay Candekar would have been best witness of the said incident. However, though he was cited as an witness in sessions trial for the reasons best known to the prosecution this witness was not examined.

21. It is further claim of the Vishnu(PW1) that thereafter he sent his daughter Pratibha for fetching Shaila. As per the evidence of Vishnu when Pratibha visited the house of Shaila that time Shaila and appellant had been to Shegaon and therefore his daughter Pratibha halted in the house of appellant and in the same night the couple returned from Shegaon. That time also, appellant refused permission to Shaila to go to her parental house. However, according to the father of deceased other two accused persons visited his house and they enjoyed his hospitality. It is further claim of the Vishnu(PW1) that again at the time of Akhadi, Pratibha was sent to Shaila to see how life of Shaila and Janardhan is going on. That time one Sulbha a friend of deceased Shaila was also accompanied to her house. It is the version of Vishnu(PW1) that when Pratibha returned to the house that time she informed that Shaila told her she is subjected to harassment and beating at the hands of appellant in connection of demand of Rs. 10,000/-. It is further version of Vishnu that his daughter Pratibha advised him that he should give the said amount to Shaila. From the aforesaid , it is clear that this part of evidence of Vishnu is inadmissible since it is a hearsay evidence. This incident could have been proved by Pratibha or Sulbha. None of these persons is examined by the prosecution which requires the Court to draw adverse inference against the prosecution.

22. It is further claim of Vishnu(PW1) that thereafter his brother Chintaman(PW3) visited the house of Shaila and that time also Shaila was not allowed to visit the house and he informed that he noticed that Shaila was beaten for Rs. 10,000/-

23. Chintaman(PW3) is examined by the prosecution. Perusal of his evidence shows that his entire evidence in respect of harassment and beating which he claims that it was done in his presence by the appellant and disclosed to him by Shaila about harassment when he was proceeding to the bus stand is an proved omission. After reading of his evidence even Additional Public Prosecutor has fairly stated that it is required to be discarded.

24. As per the evidence of these two brothers there was harassment and the appellant and other accused persons were not allowing Shaila to visit her parental house. From the evidence as adduced it is clear that at no point of time Vishnu had been to the place of incident to fetch his daughter. Every time according to him he sent other persons, however none of these persons are examined. Had really there was a dispute in between family then in that event there was no occasion for original accused nos. 2 and 3 to visit the house of Vishnu and there was no occasion for Vishnu to receive them for his hospitality. That shows that till the death of Shaila there was no dispute whatsoever in between these two families.

25. Another witness is P.W.3. Her name is Sunita. Her evidence shows that she is a friend of Shaila at the time of taking education. According to her evidence two days prior to the death she visited house of deceased and at that time deceased informed that she is at receiving end in connection with the amount of Rs. 10000/-. Her cross-examination shows the presence of the appellant at the time of disclosure of Shaila. She further admits that she had a talk with the appellant. Her evidence is totally silent that prior to the said meeting appellant was knowing this witness. In absence of such evidence it is really hard to believe that a newly married girl would complain about her husband in his presence with a person unknown to witness. Further her statement is recorded at belated stage. What is important to note from her evidence that for the reason best known to her she said not to disclose the fact of harassment to the parents of the deceased. Therefore, in my view evidence of this lady is hardly helpful to the prosecution.

26. In paragraph no.22 of the impugned judgment the Learned Judge has disbelieved the written dying declaration (Exh.19) which absolves the appellant for the following reason;

" It is pertinent to note in this case that neither prosecution nor defence examined Executive Magistrate who recorded dying declaration and medical officer who made endorsement on it. Therefore, for want of examination of the witnesses on dying declaration (Exh.19) it cannot be considered as as a full proof which are mentioned in the dying declaration (Exh.19)."

By such Learned Judge of the Court below shifted burden on the defence which is unknown to the criminal jurisprudence. Dying declaration(Exh.19) is coming on record from the possession of the prosecution. Said document is filed on record along with chargesheet. At no point of time the authenticity of the said document was disputed by the prosecution. Merely because the said document absolve the appellant and is not of supportive of the prosecution that cannot be the reason for Court to disbelieve such document. Therefore, in my view the approach on the part of the Learned Judge of Court below is not contrary to the established principle of law but perverse one.

27. Further spot panchnama (Exh.25) shows that when the house was visited by the investigating officer that time the house was in a locked condition and the panchnama further recites that the investigating officer procured the keys from Shri Amar Sirsat. Thereafter the house was open. The document shows that when he visited the kitchen that time, he noticed the container of milk. It would be useful to reproduce the relevant portion of the panchnama(Exh.25) as under: "VERNACULAR MATTER OMITTED"

As per Exh.19 a dying declaration by Shaila when she was trying to boil milk in a container on a stove she accidentally caught with fire, gets corroboration. Further from spot panchnama (Exh.25) It is clear that the house was in a locked condition and the keys were procured by the investigating from Shri Amar

Shirsat. That shows that there was no possibility of tampering of spot at the hands of the appellant.

28. As per the claim of the investigating officer after receipt of postmortem report (Exh.35) he gave a communication to the medical officer and sought his opinion on following: "VERNACULAR MATTER OMITTED"

The medical officer has given his opinion to the investigating officer and the same is at Exh.32. The said opinion is as under:

" Answer to your query is "yes possible"."

Thus, it is crystal clear that when an inquiry was made by the investigating officer as to whether there could be traces of kerosene and whether the injury of 99% is possible to that medical officer has answered in affirmative. In that view of the matter the injury suffered by the unfortunate lady to the extent of 99% is possible by the accident also.

29. Learned Additional Public Prosecutor submitted that in view of C.A. Report (Exh.33) which shows that traces of kerosene on the clothes of deceased it shows that she has committed suicide.

30. The prosecution has to prove its case by substantive evidence. The C.A. report is always a piece of corroborative evidence. Only on the basis of C.A. Report a conviction cannot be secured unless there exists substantive evidence. In the absence of any substantive evidence I am of the firm view that the said piece of evidence by itself cannot be pressed in to service to convict the appellant.

31. From the discussion in the preceding paragraphs it is clear that two versions are coming on record. One in favour of the prosecution in the nature of oral dying declaration made to the Vishnu (PW1) and Exh.19 dying declaration which absolve the appellant.

32. Though the oral dying declaration was made in the early hours of 28/7/1999 the report was lodged that too a typed report on 29/7/1999 at about 11.35 a.m. No explanation is given by the prosecution for belated lodging of F.I.R. It is a trait of law that when two versions are available on record then the benefit of doubt has to be extended in favour of the accused by accepting the evidence which absolves the accused. The re-appreciation of the entire prosecution case leads me to pass the following order.

O R D E R

i. Appeal is allowed.

ii. The judgment and order of conviction passed by Learned Adhoc Additional Sessions Judge, Yavatmal dated 20/12/2002 in S.T. No.69/2000 convicting the appellant for offence punishable under Sections 498A and 306 of Indian Penal Code is hereby quashed and set aside.

- iii. Appellant is acquitted from the offence punishable under Sections 498A and 306 of Indian Penal Code.
- iv. The bail bonds of appellant are cancelled.