
(1994) 08 BOM CK 0032
In the Bombay High Court
Case No : Criminal Appeal No. 1034 of 1987

Khemraj Hiralal Agarwal

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 05-08-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 306, 34, 498A

Citation : (1995) 1 BomCR 347 : (1995) CriLJ 2271

Hon'ble Judges : Vishnu Sahai, J

Bench : Single Bench

Advocate : Mrs. Anita Agarwal and S.G. Deshmukh, for the Appellant; B.R. Patil, Assistant Public Prosecutor, for the Respondent

Judgement

1. The appellant aggrieved by the order dated 30-11-1987 passed by the Additional Sessions Judge, Pune in Sessions Case No. 285 of 1987, convicting him under Sections 498-A and 306 IPC, and awarding him a composite sentence of 3 years R.I. and a fine of Rs. 2000/- in default of payment of fine, to further undergo 6 months R.I. has come up in appeal before me. Along with the appellant, his elder brother Omprakash Hiralal Agarwal was tried but, he was acquitted by the aforesaid order.

2. The prosecution case in brief is that informant Ashok Kumar Shridhar Agarwal PW 1 is a resident of Rajgurunagar and is the real brother of the deceased Pushpa. On 25-2-1982, Pushpa is alleged to have been married to the appellant who is a resident of village Lohagaon. The marriage is alleged to have taken place in Rajgurunagar. After the marriage, Pushpa along with her husband, her husband's elder brother (acquitted accused Omprakash Hiralal Agarwal) two younger brothers and parents started living in Lohagaon. It is alleged that till the birth of her first child "Amar" which took place on 18-12-1982, she was treated decently and thereafter, her existence became miserable. It is alleged that every now and then, she was asked to bring money from her parents' place and she

was also beaten by her husband. The acquitted accused is alleged to be instigating this ill-treatment of Pushpa. On 8-4-1985, the informant received a telegram sent by the appellant asking him to come immediately and on its receipt, the same day he, his elder brother Vinod and his brother-in-law Ramnarayan Uttamchand Agarwal P.W. 2 went to the house of the appellant at Lohagaon. On the informant's asking the appellant as to why he had been called, the appellant replied that he should ask this from his sister Pushpa. On the informant asking Pushpa, he was told by her that she was being beaten by the appellant. On account of this, the informant brought back Pushpa to his house in Rajgurunagar where she lived till 2-6-1986. On 2-6-1986, the appellant came to Rajgurunagar and promised the informant that Pushpa would not be ill-treated. Consequently, the informant permitted the appellant to take back Pushpa with him. As in September, every year, the informant used to celebrate the death anniversary of his father, so in September, 1986, he went to the house of the appellant, to invite Pushpa the appellant and his family members on the function of death anniversary of his father. It is alleged that on seeing the informant, Pushpa immediately started weeping. On the informant asking her as to why she was weeping, she replied that she was being blamed for committing theft and was also being ill-treated because, the informant could not satisfy the demands of her husband (appellant) Pushpa also told the informant that inasmuch as the appellant had suffered heavy losses in business, he desperately wanted money. She also said that since money had not been arranged, she was being beaten by stuffing cloth in her mouth. Same day, the informant is alleged to have returned. It is alleged that immediately after the informant left the house of the appellant, on a scooter, the appellant and the acquitted accused came and told him at Shivajinagar that Pushpa was of loose character and was in the habit of committing theft. They also told him that he should accompany them to Lohagaon but the informant refused, saying that he would come to Lohagaon next day. The same night, the informant reached Rajgurunagar and narrated all this to his brother-in-law Ramnarayan Uttamchand Agarwal PW 2, his brother Vinodkumar and one Sitaram Shrikrishna Agarwal PW 3. Next day, along with the aforesaid persons he came to Lohagaon and there told the appellant in the presence of his brother, (acquitted accused) and his father that if they could not maintain Pushpa, they should permit him to take her back. They promised that they would treat Pushpa well in future and that they should not take her back. After this assurance, all of them came back.

3. On 20-2-1987, one person alleging himself to be a resident of Lohagaon came and informed the informant that condition of his sister Pushpa and Pushpa's son "Amar" was serious. The informant naturally in the background of the previous happenings, smell something fishy and asked the person to tell him whether the condition of Pushpa and son "Amar" was only serious or something more had happened. Then, he was told that both of them had expired. The same night the informant, his brother-in-law Ramnarayan Agarwal PW 2, his brother Vinodkumar and his sister Indu came to Sasoon Hospital, Pune because, the corpses of

Pushpa and "Amar" were in the mortuary there. The police was also present there.

4. An FIR of the incident, according to the informant Ashok kumar Shridhar Agarwal PW 1 was lodged next morning i.e. morning of 21-2-1987 and on its basis, P.I. Sahabrao Pralhad Deshmukh PW 8 of Yerwada police station registered Crime No. 51 of 1987 u/s 498-A and 306 I.P.C. against the appellant and acquitted accused Omprakash Agarwal.

5. As the informant wanted fushpa's last rites to be performed by her husband, he allowed the appellant and his family members to take her dead body and that of "Amar". A perusal of the evidence of the informant shows that the dead bodies were handed to the appellant and his family members on 21-2-1987 at 1 p.m. By 5.30 p.m. same day, cremation was over. Thereafter, informant and others came back to Rajgurunagar.

6. It may be mentioned that the dead bodies of Pushpa and "Amar" were first sighted by one Prakash Eshwar Oval, PW 4 on 20-2-1987 at 10 a.m. lying in a well near Kasarwell. On seeing the dead bodies, he informed the police and with the help of fire brigade, the dead bodies were taken out and sent to the mortuary situate at Sasoon Hospital for autopsy.

7. The autopsy of the dead body of the deceased Pushpa was conducted on 20-2-1987 between 4.30 p.m. to 5.30 p.m. The autopsy surgeon found one external injury on her person that being an abrasion on the left elbow. The doctor did not give any opinion about the cause of death and preserved the viscera. After receiving the viscera report, he opined that Pushpa had died on account of asphyxia as a result of drowning. The autopsy of the dead body of "Amar" was also performed on 20-2-1987. No external injury was found on his person.

8. Investigation of the case was conducted by PI Sahebrao Deshmukh PW 8 of Yervada police station. He collected Exhibit 27, which is the FIR lodged at the Lohagaon police chowky on 20-2-1987 (Sic) at 7.45 a.m. by the appellant. He recorded statements u/s 161, Cr.P.C. of the informants brother Vinodkumar, brother-in-law Ramnarayan Uttamchand Agarwal and Jagannath Kashappa Hema in between 21-2-1987 and 23-2-1987. On 21-2-1987, he arrested the appellant and the acquitted accused Omprakash Agarwal. Ultimately, on 22-6-1987, he submitted a charge sheet against the appellant and the acquitted accused Omprakash Agarwal.

9. The case was committed to the Court of Session in the usual course. In the Trial Court, charges u/s 498-A I.P.C. and 306 I.P.C. were framed against the appellant to which the appellant pleaded not guilty, and charges u/s 498-A read with Section 34 I.P.C. and 306 read with Section 34 I.P.C. were framed against the acquitted accused Omprakash Agarwal. In the trial Court, as many as 8 witnesses were examined by the prosecution which also tendered and proved various Exhibits. In defence, no witness was examined. After appraising the

evidence adduced before him and hearing the counsel for both the sides, the learned Trial Judge acquitted Omprakash Agarwal and convicted and sentenced the appellant in the manner stated above.

10. I have heard Mrs. Anita Agarwal, learned counsel for the appellant and Mr. B. R. Patil, learned Additional Public Prosecutor for the State of Maharashtra at a considerable length. I have also perused the statements of the witnesses recorded in the trial Court and various exhibits tendered and proved by the prosecution in the trial Court. After giving my anxious consideration to the matter, I am of the opinion that this is a case in which the appellant deserves benefit of doubt.

11. I now propose giving my reasons for giving the appellant benefit of doubt. In the first place. I find that the FIR in the instant has been lodged after an inordinate delay for which the prosecution has been unable to offer any plausible explanation. According to the prosecution on the evening of 20-2-1987, the informant Ashok Agarwal PW 1 learnt about the death of Pushpa and Amar at Rajgurunagar and immediately proceeded to Sasoon Hospital Pune where the corpses were lying in the mortuary awaiting autopsy. In the statement in the trial Court, the informant has stated in Para 8 that he lodged the FIR on the morning of 21-2-1987. In my opinion, the informant should have lodged his FIR sometime on the night of 20-2-1987 because, the evidence is that the same night he came into contact with the police. At the fag end of para 1 of his statement recorded in the trial Court he has mentioned that same night (night of 20-2-1987) he found that police was present at the Sasoon hospital. In my opinion, as the informant had already smelt that there was something fishy about the deaths of Pushpa and Amar, he should have informed the police party who was present at the hospital. Again, I find that in para 8 the informant has said that same night, (night of 20-2-1987) two constables met him at the Sasoon Hospital who took him to police station Yerwada saying that he was called by the Inspector there. The informant admitted that he stayed at Police station, Yerwada for 10-20 minutes. In my opinion, there was nothing which could have prevented him from lodging the FIR at that time. At any rate, I am not prepared to accept the claims of the informant that FIR was lodged on the morning of 21-2-1987. A perusal of the FIR shows that in it, it has been mentioned that at the time of funeral ceremony of Pushpa and "Amar" both the sides were present. In the trial Court, in para 2 of his statement, the informant stated that funeral was over by 5.30 p.m. The fallout of the aforesaid evidence is that the FIR could only have been lodged after 5.30 p.m. on 21-2-1987 and not in the morning of 21-2-1987 as professed to by the informant. I am not prepared to accept the explanation of the informant that portion marked A in the FIR (portion in which he has mentioned that both the sides were present at the time of funeral ceremony) was already written by the police when he came to Sasoon Hospital. The reason for my not believing this is that the aforesaid portion (A) is neither in the beginning of the FIR nor at the end of the FIR. It is the last but, one para from the end of the FIR.

12. The aforesaid facts show that not only the FIR was inordinately belated but, that the informant has a scant regard for truth. In the decision reported in Marudanal Augusti Vs. State of Kerala, , the Apex Court has held thus (Para 1) -

"The entire fabric of the prosecution case would collapse if the FIR is held to be fabricated or brought into existence long after the occurrence and any number of witnesses could be added without there being anything to check the authenticity of their evidence."

In this connection, it is necessary to also refer to a case reported in Thulia Kali Vs. The State of Tamil Nadu, , wherein, the Apex Court has observed thus :-

Para 12 :

"First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be overestimated from the stand point of accused. The object of insisting upon prompt lodging of report to the police in respect of commission of offence is to obtain early information regarding the circumstance in which crime was committed, the names of the actual culprits and the part played by them as well as the names of eye witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity and danger creeps in of the introduction of coloured version exaggerated account or concocted story as a result of deliberation and consultation. It is therefore essential that the delay in the lodging of the first information report should be satisfactorily explained."

In the instant case, no plausible explanation has been forthcoming from the side of prosecution for the inordinate delay in the lodging of FIR.

That being so, submission of the counsel for appellant that delay in lodging of FIR was on account of the fact that false insinuations and accusation were being planned against the appellant and acquitted accused Omprakash Agarwal by the informant and his family members cannot be said to be without substance.

13. It is in the background of the fact that FIR has been lodged after an inordinate and unexplained delay and also the fact that the informant has scant regard for truth, that I have to assess the evidence of the informant Ashok Agarwal, PW 1 who is the main witness of the prosecution and that of his two relations Ramnarayan PW 2 and Sitaram PW 3. The contention of the learned counsel for the appellant is that all the aforesaid 3 witnesses are highly interested witnesses, inas much as Ashok Agarwal is the real brother of deceased Pushpa, Ramnarayan PW 2 is real brother-in-law of Ashok Agarwal and Sitaram is a relation of Ashok. Naturally, on account of their inter se close relationships, I will evaluate their testimony with caution.

14. The crucial, question is as to whether it would be safe to rely on the

testimony of Ashok Agarwal, Ramnarayan and Sitaram, PWs, 1, 2, and 3 respectively. I am constrained to observe that the testimony of Sitaram does not help the prosecution. He has neither deposed about any ill-treatment either by appellant or his family members being meted out to the deceased nor about any demand by them from the family member of the deceased. On the other hand, he has stated that Pushpa had told him that she was leading a happy life. His evidence instead of establishing the prosecution case demolishes it.

15. So far as the evidence of Ashok and Ramnarayan is concerned, it is hardly better. A perusal of the statement of Ashok Agarwal, PW 1 shows that economically he and his brother Vinod were very weak. They used to find it difficult to carry on their existence. A perusal of para 4 of his statement recorded in the Trial Court would give an insight into his and Vinod's economic condition. The aforesaid para reads thus :-

"I am running the hotel at Rajgurunagar since last 4 years. Before it, I was working with my brother-in-law Ramnarayan Agarwal of Rajgurunagar. He was providing me our maintenance charges. The premises of my hotel is 15 x 16 ft. I sell (Sic) chuda and tea there. The tailoring shop of my brother Vinodkumar admeasures about 5 x 5 ft. It is located at the distance of about 10-15 metres away from my hotel. He is having only one sewing machine."

In para 5, Ashok Agarwal has admitted that family of appellant used to help him. Para 5 of his statement was reads thus :-

"Once the father of the accused has given me Rs. 500/- by way of help. Till, I did not return that amount, I sent letters to him. Whenever, I was taken (SIC) for any work from the accused persons, they used to help me. The accused No. 2 used to supply me spices if I required."

16. The contention of Mrs. Anita Agarwal learned counsel for the appellant is that it is extremely improbable that the appellant and his family members in the teeth of the pitiful economic condition of the informant and his brother and on the face of the fact that they were helping them, would have demanded either any money from them or made any demands from them on account of non-fulfilment of which they would have ill-treated Pushpa. I find considerable merit in this submission. I have also mentioned that PW 3 Sitaram has not stated either about any demands from the side of the appellant or about any ill-treatment of Pushpa on account of non-fulfilment of the demand. On the converse, he has stated that Pushpa told him that she was living happily.

17. In the above state of evidence of Ashok Agarwal, PW 1 and Sitaram PW 2 it would be extremely unsafe, in the background of the fact that the FIR is inordinately belated and there is no documentary evidence either with regard to demand or with regard to ill-treatment of Pushpa to accept the statement of Ramnarayan PW 2 the brother-in-law of PW 1 Ashok Kumar Agarwal.

18. For the aforesaid reasons, in my opinion it cannot be said that the

prosecution allegations either with regard to ill-treatment of Pushpa by appellant or with regard to any demand by the appellant and his family members from the brothers of Pushpa have been established beyond reasonable doubt. As said earlier, there has been such an inordinate delay in the lodging of FIR that the possibility of false insinuations and false accusations being made therein cannot be ruled out.

19. In the result, this appeal succeeds. The conviction of appellant under Sections 498-A and 306, I.P.C. and the sentence awarded to him thereunder, is set aside. He is acquitted of the aforesaid offences. In case he has paid the fine, the same shall stand refunded to him. He is on bail. He need not surrender. His bail bonds stand cancelled and sureties discharged.

20. Appeal allowed.