
(2012) 11 BOM CK 0106
In the Bombay High Court
Case No : Criminal Appeal No. 526 of 1993

Madhukar Panditrao Waghmare

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 26-11-2012

Acts Referred:

Penal Code, 1860 (IPC) — Section 306, 323, 498A

Citation : (2013) ALLMR(Cri) 33

Hon'ble Judges : R.C. Chavan, J

Bench : Single Bench

Advocate : A.P. Mundargi instructed by Mr. Tushar Pimple, for the Appellant; P.P. Shinde, App for the State, for the Respondent

Judgement

R.C. Chavan, J.—This appeal is directed against the conviction of the appellant for the offences punishable under Sections 498A and 306 of the Indian Penal Code, by the learned Additional Sessions Judge. Kolhapur, and the sentence of rigorous imprisonment for 2 years and 3 years with fine of Rs. 500/- or in default rigorous imprisonment for one month each, imposed on the two counts respectively, by the learned Judge, on conclusion of trial of Sessions Case no. 254 of 1991. Facts which are material for deciding this appeal are as under:

The appellant had already been married and possibly was a widower when he married the victim about 7 years prior to the incident. There are two children born of the wedlock. On 8th April, 1991, in the morning there was quarrel between husband and wife leading to the appellant beating up victim with fists and kicks. The victim went to the kitchen, poured kerosene on her person and set herself on fire. The husband and the other in-laws extinguished the fire and took her to the hospital. The Executive Magistrate, recorded the dying declaration in the presence of the Medical Officer. The police recorded report whereupon an offence was registered. The victim succumbed to her injuries after few hours and the postmortem examination which was conducted in the early hours on 9th April, 1991 shows that the victim died of 90% burns. In the course

of investigation, police recorded statements of witnesses, performed necessary panchnama, seized the incriminating articles, sent them to the Forensic Science laboratory and arrested and eventually charge sheeted the appellant and his parents. The learned Chief Judicial Magistrate committed the case to the Court of Sessions. Learned III Additional Sessions Judge, to whom the case was made over, charged the appellant and his parents of the offences punishable under Sections 498A and 306 of the Indian Penal Code. They pleaded not guilty and therefore, were put on trial at which the prosecution examined in all 8 witnesses, in its attempt to bring home the guilt of the appellant and co-accused. After considering the prosecution evidence in the light of defence raised, the learned Additional Sessions Judge, acquitted the appellant's parents, but convicted and sentenced the appellant as aforementioned. Aggrieved thereby the appellant has preferred this appeal.

2. I have heard learned counsel for the appellant and the learned Additional Public Prosecutor for the state. With the help of both, I have gone through the evidence on record. There is no dispute that victim died as a result of 90% burns which she suffered. This can be seen from the notes of postmortem examination at Exh. 16. The evidence of P.W. 1 Nandkumar Thorat, panch at the panchnama of spot, is of no use. He turned hostile. P.W. 2 Tarabai the victim's mother, P.W. 3 Kamal victim's sister and P.W. 4 Rekha, neighbour had refused to support the prosecution. P.W. 5 the Executive Magistrate Shri. Yadav recorded dying declaration of the victim after the victim was certified by P.W. 6 Dr. Priyadarshini Ghodake, to be fit for being questioned. In this dying declaration the victim stated that on the incidental morning, there was quarrel between her and her husband as well as the other in laws. This quarrel was on account of some domestic differences. Her husband bet her up. She also stated that her in-laws abused her and the mother-in-law spits on seeing her. She stated that her husband on return from work on the some days and, after listening his parents, ill-treats her or states that he would send her to her parent's house. She also seem to have stated that she had been married to a widower. She then stated that at 9.00 a.m. she poured kerosene on her person and set herself on fire. She stated that her husband and in-laws tried to stop her. She also stated that her husband extinguished the fire and brought her to the hospital yet she concluded by stating that she had a grievance against husband and in-laws.

3. P.W. 7 Narayan Dongane also stated having recorded victim's report which is at Exh. 30 at about 1.30 p.m. on the same day, in which victim had made similar statement. The cross examinations of P.W. 5 Special Executive Magistrate and P.W. 6 Dr. Priyadarshini Ghodake does not indicate anything to cast a doubt about dying declaration recorded vide exh.25. Learned Senior counsel for the appellant, however, submitted that it is doubtful whether the victim was in a position to make such dying declaration since she had suffered 90% burns and died soon after the incident. He also pointed out that ordinarily when recording of dying declaration begins after the Medical Officer examining the victim and certifies her to be fit, such endorsement ought to appear at the top of the dying declaration.

However here, the endorsement of the Medical Officer is in the margin. He submits that this casts a doubt as to whether the Medical Officer had in fact examined the victim or not.

4. The learned Additional Public Prosecutor submitted that in cases where statements of victims who had suffered such severe burns are recorded, it may not be appropriate to expect that the Executive Magistrate or the Medical officer to be very meticulous about the place where such an endorsement should be made though it would have been ideal for the Medical officer to make endorsement on the top of the declaration. The cross examination of P.W. Nos. 5, 6 and 7 does not reveal anything to cast a doubt on the correctness of the dying declaration. As rightly held by the learned trial Judge the things narrated by the victim in dying declaration may correctly reflect as to what had happened on the incidental morning. There are no exaggerations and there are no additional allegations against the appellant or his parents. The victim has stated as a matter of fact as to what had happened on that morning. Therefore, it cannot be said that the learned Judge erred in relying on these dying declarations in order to find out whether the person tried before him could be convicted or not.

5. All the same, learned counsel for the appellant submitted that the conviction of the appellant for the offence punishable u/s 306 of the Indian Penal Code is thoroughly unwarranted since the dying declaration itself shows that the husband and in-laws had tried to prevent the victim from setting herself on fire. This would be inconsistent with their instigating or abetting the victim in commission of suicide. Though the learned APP has a disagreement it would not be possible to uphold the appellant's conviction for offence punishable u/s 306 of the Indian Penal Code in the face of victim's categorical statement that the appellant had stopped her from setting herself on fire.

6. The learned Senior Counsel for the appellant next submitted that the conviction of the appellant for the offence punishable u/s 498A of the Penal Code, is unsustainable. He submitted that the victim's statement that the appellant had stopped her from setting herself on fire, implies that the appellant was not instigating the victim to commit suicide. This would be inconsistent with the requirement of cruelty as defined u/s 498A of the Indian Penal Code. He submitted that for proving offence u/s 498A of the Code it had to be shown that the appellant was guilty of such willful conduct of such a nature as was likely to drive the victim to commit suicide. He submitted that that if the appellant had prevented the victim from setting herself on fire, the appellant could not be attributed requisite willful conduct as was likely to drive his wife to commit suicide. He submits that the consequences, namely that the victim did commit suicide, would not be determinative of what intent or will with which the appellant is supposed to have acted. Therefore, according to learned counsel, when the appellant is held not guilty of offence of abetting his wife to commit suicide, it would be impermissible to conclude that he intended by his acts to drive the victim to commit suicide. Learned counsel pointed out the meaning of

word "willful" from Concise Oxford dictionary as any intentional or deliberate act. He submitted that for attracting provisions of Section 498A of the Penal Code, it would be necessary for the prosecution to show that the conduct was intentional or deliberate and was of such a nature as was likely to drive the woman to commit suicide. Therefore, according to him, it is not enough to prove that the accused persons voluntarily caused any injury to victim. It had also to be shown that the voluntary act of causing injury was intended or at least contemplated to result in the consequence of victim committing suicide.

7. The learned APP on the other hand submitted that willful conduct which is contemplated, is conduct which may result in provocation to the victim that it is not necessary for the prosecution to prove as to what consequences of the action, the accused contemplated. She submitted that in this case the appellant did hit his wife and the wife committed suicide. Therefore, according to her, the learned trial Judge rightly convicted the appellant for offence punishable u/s 498A of the Indian penal Code.

8. I have considered the arguments by both learned counsel for the appellant and the learned Additional Public Prosecutor for the State. Considering the difficulties in the choice of exact expression, in cases of this type, I would first clarify that the observations made hereinafter are in the context of the particular facts of this case and cannot be read as amplifying definition of cruelty in Section 498A of the Penal Code in any other manner than what has been expressed by the Legislature. In this case the appellant had only hit the victim with fists and kicks. Deplorable though the action may be, question arises whether the appellant could be attributed any intention to provoke the victim to commit suicide.

9. Appellant's subsequent conduct in trying to prevent the victim from setting herself on fire immediately extinguishing fire, taking the victim to hospital would be inconsistent with his having harboured any intention or will or design to act in such a manner as would drive the victim to commit suicide. In view of this, the contention of the learned counsel for the appellant that the appellant could not have been held guilty of offence punishable u/s 498A of the Penal Code may also have to be upheld. This, however, does not imply that the appellant's conduct in hitting his wife should go unpunished. Learned Senior Counsel for the appellant submitted that the appellant has been sufficiently punished by having been suspended by his employer Union Bank of India and having been made to serve on the same pay which he was getting at the time of his arrest. He, therefore, submits that no further punishment need be imposed on the appellant on finding that the appellant could not have been convicted for the offences punishable under Sections 498A and 306 of the Indian Penal Code. In support of his submission, he placed reliance on the unreported judgment of Madras High Court, in Saravanaraj -vs.- State by Inspector of Police in Cri. A. No. 1685 of 2002. As rightly submitted by the learned Additional Public Prosecutor, the act of the appellant in causing injury to the victim would have to be punished, apart

from the punishment which the appellant may have departmentally suffered. Therefore, she submits that departmental action which the appellant has suffered would have no bearing on the appellant's being held guilty of offence punishable at least u/s 323 of the Indian Penal Code. There could be no dispute about this proposition. However, considering the fact that incident occurred in the year 1991 i.e. 21 years ago and the appellant has been living under the shadow of conviction for almost 19 years now, an exemplary sentence u/s 323 may not be called off. The following order will meet the ends of justice.

ORDER

The appeal is partly allowed. The conviction of the appellant for the offence punishable under Sections 306 and 498A of the Indian Penal Code and the sentences imposed are set aside. He is acquitted of those offences. However, he is held guilty for the offence punishable u/s 323 of the Indian Penal Code and sentenced to pay fine of Rs. 1,000/- or in default to suffer imprisonment for a period of one month. If the fine amount is not paid within a period of four weeks, the learned Judge may take steps to recover the fine or get sentence awarded in default executed.