
(2017) 09 BOM CK 0150
In the Bombay High Court
Case No : 410 of 2003

Manda w/o Narayan Paropte, & Anr.

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 05-09-2017

Acts Referred:

[Indian Penal Code, 1860](#), [Section 34](#), [Section 498A](#), [Section 306](#) - Acts done by several persons in furtherance of common intention - Husband or relative of husband of a woman

Citation : (2017) 09 BOM CK 0150

Hon'ble Judges : Swapna Joshi

Bench : SINGLE BENCH

Advocate : M.I. Dhattrak, S.B. Bissa

Judgement

1. This appeal has been directed against the judgment and order passed by the learned Additional Sessions Judge, Kelapur in Sessions Trial No.325 of 2002 (Old Case No.168 of 2001) delivered on 30-06-2003, whereby the learned trial Judge had convicted appellant no.1 (accused no.1 Manda (since dead)) and the appellant no.2 (accused no.2) under Section 498A r/w 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for two years and to pay a fine of Rs.500/each, in default to suffer imprisonment for six months. The appellants were further convicted for the offence punishable under Section 306 r/w 34 of the IPC and sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs. 500/each, in default to suffer imprisonment for six months. During the pendency of the appeal appellant no.1 Smt. Manda died on 22-02-2005 and the appeal against her abated vide order dated 14-06-2007.

2. I have heard Mr. M.I. Dhattrak, the learned Counsel for the appellant and Mr. S.B. Bissa, the learned Additional Public Prosecutor for the State.

3. The facts leading to prefer this appeal can be summarised as under : The appellant (accused no.2) was married with Jyoti on 24-05-2001. The victim was

daughter of Indrajeet Kubade (PW1). The appellant and the victim were related to each other. After the marriage Jyoti went to cohabit with her husband at Ralegaon. Her parental place was Katkhed. It is the case of the prosecution that, on the occasion of "Akhadi", the father of Jyoti (PW1) went to fetch Jyoti at Ralegaon. Jyoti accompanied her father and went to Katkhed. The appellant had a talk on telephone with Jyoti as well as PW1. It is the case of the prosecution that, the appellant told on phone to Jyoti that she had left his house without his consent and she should not return back to the matrimonial house. Therefore, on the next day at 9.00 am, PW1 along with Jyoti came to Ralegaon. The father of the appellant objected as to why Jyoti had come to their place. At about 5.00 pm, PW1 alone returned back to Ralegaon. PW1 then received a telephonic message that Jyoti was burnt and she was admitted in the hospital at Yavatmal. Therefore, PW1 rushed to the hospital. He noticed that Jyoti was completely burnt. On making enquiry with Jyoti, Jyoti informed him that due to the illtreatment at the hands of the appellant she got annoyed and set herself on fire in the compound of the house of the appellant. At the relevant time, APIKadu was attached to Ralegaon Police Station. It appears that he came to know about the said incident. Therefore, he attended the hospital and recorded the statement of Jyoti. On the basis of the said statement (PW5) APIKadu registered the offence under Section 498A r/w 34 of IPC. Thereafter, the Special Executive Magistrate recorded the statement of Jyoti on 24-06-2001 at about 4.30 pm i.e. on the same day. Jyoti succumbed to the injuries on 26-02-2001. The dead body of Jyoti was sent for autopsy. The cause of death revealed as "septicemia due to burn". It is noticed that Jyoti had received 87% burn injuries. After recording the statement of relatives of witnesses and conducting the investigation chargesheet was filed in the Court of JMFC, Kelapur. The learned trial Judge framed the charge. After conducting the trial and on analysis of the evidence, the learned trial Judge convicted the appellant/accused as aforesaid. The defence of the appellant was of total denial.

4. Mr. M.I. Dhattrak, the learned Counsel for the appellant vehemently argued that the dying declarations relied upon by the prosecution are shrouded with suspicious circumstances and serious infirmities and there is absolutely no evidence on record to show that deceased Jyoti was physically and mentally fit while making her dying declaration.

5. The Mr. S.B. Bissa, the learned APP contended that the learned trial Judge has rightly convicted the appellant on relying upon the dying declarations and the evidence of the father and the brother of the deceased.

6. In order to substantiate the rival contentions of both sides, it is necessary to go through the testimony of Indrajit (PW1), who is the father of deceased. According to PW1, the marriage of Jyoti took place with the appellant on 26-06-2001. He went to Ralegaon, to fetch Jyoti at Ralegaon on the occasion of "Akhadi". He took Jyoti to Katkhed. At that place Jyoti received a telephonic call from the appellant and the appellant said on phone that Jyoti had left her in laws

place without their permission and therefore it would be better if she would not return and if she returns back it would not make any difference to the the appellant as Jyoti had left her inlaws place without their permission. Therefore, on next day 9.00 am PW1 took Jyoti to Ralegaon. The father of the appellant asked PW1 as to why he had come here. PW1 stated that he had received the telephonic call from the appellant. He rushed there along with Jyoti at about 5.00 pm. PW1 returned back leaving Jyoti at her inlaws place at Ralegaon. Thereafter, PW1 received a telephonic message from Ralegaon through a boy that Jyoti was burnt and she was admitted in the hospital at Yavatmal. Therefore, PW1 rushed to the hospital at Yavatmal. On making enquiry with Jyoti, Jyoti told him that she got annoyed because of the appellant and his mother, therefore, in a fit of anger, she set herself on fire.

7. So far as the testimony of Hanumant (PW2) is concerned, he is the brother of Jyoti. PW2 stated that at the relevant time he was at Pulgaon. Jyoti informed him telephonically that the appellant abused her on phone. Jyoti did not tell anything in details. On receipt of the message about receiving burn injuries to Jyoti, PW2 went to the hospital. On interrogation with Jyoti as to how the incident occurred, immediately Jyoti did not tell him anything. However, after repeated enquiry Jyoti informed him that, because of continuous illtreatment by the appellant and his mother, she was fed up and has set herself on fire. During the cross examination PW2 admitted that the appellant was saying to Jyoti that since there was traffic on road, therefore it was not proper for her to stand at the door continuously. He also admitted that the appellant was saying that Jyoti was required to learn how to prepare cook. PW2 also admitted that the appellants being their nearest relative they were in visiting terms with each other on many occasions.

8. On careful testimony of the evidence of PW1 and PW2 it is not clear at what particular time they both reached to the hospital and had conversation with Jyoti. It is also not clear from their testimony as to whether at that particular time Jyoti was in conscious condition and she was physically and mentally fit to talk with PW1 and PW2. It is also not clear from the testimony of PW2 as to what was the continuous illtreatment given to Jyoti by the appellant. Similarly, the testimony of PW1 indicates that because of the appellant and his mother, Jyoti got annoyed and she set herself on fire. It is, however, not clear as to why Jyoti got annoyed and what was the reason for getting her annoyed so that she took such a drastic step of setting herself on fire. The testimony of PW1 and PW2 do not inspire confidence.

9. It is not disputed that Jyoti committed suicide. The dying declaration was recorded by PW3 who is the Special Judicial Magistrate. According to Sarfarajkhan (PW3) on 24-06-2001, he received the memo from concerned Police Station to record the statement of Jyoti (Exhibit48). Accordingly, he visited the hospital at Yavatmal. He reached the hospital at about 4.15 pm. He met with the doctor. He went along with the doctor near the patient. The doctor examined Jyoti physically and mentally and opined that the patient was in a fit condition to

give her statement. PW3 put questions to Jyoti as to how the incident occurred and the manner in which it occurred. On this Jyoti said always there used to be a quarrel with her mother in law. She further stated that when she was sitting on "ota", at that time her husband said she was not liked by him. Therefore, she got annoyed and she set herself on fire and committed suicide. PW3 recorded the dying declaration of Jyoti (Exhibit72). He started recording at 4.20 pm and ended within 10 minutes. PW3 admitted that he did not obtain the certificate of the doctor that Jyoti was mentally and physically fit to give her statement. It is noticed that no timing are mentioned in the dying declaration. It is not stated by PW3 as to when he started the recording of dying declaration of Jyoti and when he concluded it. PW3 obtained the thumb impression of the deceased and explained the contents of dying declaration to the patient. The testimony of PW3 does not reveal that the contents in the dying declaration were read over to the patient and the patient found it to be correct. The time is mentioned as 4.30 pm. The recording of D.D. commenced at 4.20 pm and concluded within 10 minutes. There is no endorsement of the Medical Officer on the dying declaration that he was present near the patient while recording her statement and all throughout the patient was physically and mentally fit to give her statement.

10. The meticulous scrutiny of the testimony of Dr. Umesh (PW4) the Medical Officer, who examined the patient shows that, before recording dying declaration, he found that she was mentally and physically fit and she was able to talk. Accordingly, he endorsed to that effect on the dying declaration (Exhibit72) and issued certificate (Exhibit 72A). PW4 stated that he informed to the Executive Magistrate that the patient is fit to give her statement. The Executive Magistrate put questions to Jyoti and recorded the answers in his presence and Jyoti accordingly answered the questions of the Executive Magistrate and accordingly he issued the certificate (Exhibit72B). During the cross examination PW4 stated that he had not specifically mentioned that the patient was mentally and physically fit to give her statement. On perusal of the certificate Exhibit72A, it is noted that, there is no mention in the said certificate that the Medical Officer was all throughout present while recording the statement of Jyoti and Jyoti was physically and mentally fit to give her statement. There is no evidence on record to show that Jyoti was physically and mentally fit to give her statement at the relevant time. It is significant to note that, PW3 has specifically stated that he had verified the case papers with regard to the treatment of Jyoti and some injections were injected to her.

11. As far as the dying declaration recorded by the Investigating Officer (PW5) is concerned, he has recorded the dying declaration of Jyoti (Exhibit76). According to PW5, he issued letter to the Medical Officer before recording the dying declaration and the Medical Officer informed him that the patient was in a fit condition to speak and thereafter he recorded the dying declaration. PW5 stated that the patient told him that her motherinlaw quarrels with her on the count of cooking food and husband was saying that she was disliked by him, he was insisting to give divorce to him and because of the said conduct she set herself

on fire. On careful scrutiny of dying declaration (Exhibit76) it is noticed that, there is no endorsement by the Medical Officer who has recorded the statement of Jyoti that she is mentally and physically fit to give her statement. Therefore, it is not clear as to whether Jyoti was mentally and physically fit to give her statement. In view thereof, the dying declaration (Exhibit 76) cannot be relied upon. The dying declarations recored by the Executive Magistrate as well as the Investigating Officer do not inspire confidence.

12. In this regard a useful reference can be made of the case Sanju alias Sanjay Singh Sengar v State of M.P. reported in (2002) 5 SCC 371 wherein a quarrel took place between the appellant and the deceased. The appellant said to the deceased "to go and die" and two days thereafter the deceased committed suicide. She made a suicide note. The Hon''ble apex Court observed that "to go and die" itself does not constitute the ingredient of instigation. The word "instigate" denotes incitement or urging to do some drastic or inadvisable action or to stimulate or incite. It is further held that the presence of mens rea is the necessary concomitant for instigation.

13. In the instant case the dying declaration (Exhibit72) depicts that there was quarrel between Jyoti and her motherinlaw. Jyoti was sitting on "ota". At that time her husband said that he did not like her and therefore she got annoyed and set herself ablaze. So far as the allegations against the motherinlaw are concerned, the motherinlaw is no more and the trial against her already stood abated. As regards the allegations against the appellant are concerned, the appellant simply stated that "he did not like her". This version in no manner indicate that the appellant instigated or abetted the deceased to commit suicide. As regards the dying declaration (Exhibit76) is concerned, it reveals that, Jyoti stated that on the earlier night at about 11 pm, her motherinlaw quarrelled with her on the count of cooking food and said as to why she was sitting outside. The said version is against the accused no.1. So far as the allegations against the appellant are concerned, Jyoti stated that her husband was saying that he did not like her, he was not taking food, he was not talking with her and he was taking divorce from her. Jyoti could not tolerate this and committed suicide by pouring kerosene on her body and set herself ablaze. On careful scrutiny of dying declaration (Exhibit76) it appears that, some different reasons are mentioned for committing suicide by Jyoti. According to Jyoti, her husband was saying that he did not like her, he was not taking food, he was not talking with her and he was asking for divorce from her. However as discussed above, the said statement cannot be relied upon as it is not clear as to while recording the said statement, Jyoti was mentally and physically fit to give her statement and so also the said statement does not in any manner indicate that the appellant instigated Jyoti to commit suicide.

14. In (2017) 1 SCC 433 in case of Gurcharan Singh v. State of Punjab, the Hon''ble apex Court has observed in para 21 as under :

" 21. It is thus manifest that the offence punishable is one of abetment of the

commission of suicide by any person, predicated existence of a live link or nexus between the two, abetment being the propelling causative factor. The basic ingredients of this provision are suicidal death and the abetment therefor, To constitute abetment, the intention and involvement of the accused to aid or instigate the commission of suicide is imperative. Any severance or absence of any of these constitutes would militate against this indictment. Remoteness of the culpable acts or omissions rooted in the intention of the accused to actualise the suicide would fall short as well of the offence of abetment essential to attract the punitive mandate of Section 306 IPC. Contiguity, continuity, culpability and complicity of the indictable acts or omission are the concomitant indices of abetment. Section 306 IPC, thus criminalises the sustained incitement for suicide."

15. No doubt Jyoti committed suicide within one month from her marriage. Section 113A of the Evidence Act, 1872 permits a presumption as to the abetment of suicide by a married woman by the husband or any relative of his, if it is proved that she had committed the act within a period of seven years from the date of her marriage and that her husband or such relative of his had subjected her to cruelty. Section 113A of the Evidence Act reads as under :

" 113A. Presumption as to abetment of suicide by a married woman. When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband had subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband."

In this regard, Section 498A of IPC reads as under :

" 498A. Husband or relative of husband of a woman subjecting her to cruelty. Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation. For the purposes of this section. "cruelty" , means

(a) any willful 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

(b) 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."

In the present case, there is absolutely no evidence on record to show that Jyoti was treated with cruelty by the appellant.

16. The Hon"ble apex Court in the case of S. S. Chheena vs. Vijay Kumar Mahajan and another, reported at 2010 Mh.L.J. Online (Cri.) (S.C.) 4 = (2010) 12 SCC 190, in para 25 observed that, the abetment involves mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. The intention the legislature and the ratio of the cases decided by this Court is clear that in order to convict a person under section 306 of the Indian penal Code there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and that act must have been intended to push the deceased into such a position that he committed suicide.

17. The intention of the legislature is that in order to convict a person under Section 306 IPC, there has to be a clear mens rea to commit a offence and that there ought to be an active or direct act leading the deceased to commit suicide, being left with no option.

18. This Court in the case of Sanjay Saosakde vs. The State of Maharashtra has, in similar circumstances held that dying declaration should be voluntary and should not be promoted and physical as well as mental fitness of maker is to be proved by the prosecution. It is further held that the prosecution has miserably failed to prove material aspect beyond reasonable doubt.

19. There is no continuous illtreatment meted out to the deceased by the appellant. In the present case it appears that the incident had taken place on a trifle issue, therefore, she committed suicide. There is no evidence on record with regard to the cruelty meted out at the hands of the appellant. Similarly, there is no evidence on record to show that the appellant instigated Jyoti to commit suicide. The judgment delivered by the learned trial Judge apparently appears to be illegal and perverse, in as much as the learned trial Judge has failed to consider that both the dying declarations do not indicate that the deceased was treated with cruelty and the appellant nos.1 and 2 instigated Jyoti or sustained incitement for suicide.

20. In view of above, it is held that the prosecution has failed to prove its case beyond reasonable doubt. In these circumstances, the benefit of doubt is to be given to the appellant. The learned trial Court has not properly evaluated the evidence led by prosecution. In view thereof, the judgment and order passed by the learned trial Judge needs to be set aside. Hence, the following order:

Order

(a) Criminal Appeal No.410 of 2003 is allowed.

(b) The judgment and order dated 30-06-2003 delivered by Additional Sessions Judge, Kelapur in Sessions Trial No.325 of 2002 (old) No. 168 of 2001) is quashed and set aside.

(c) The appellant is acquitted of the offences under Sections 498A r/w 34 and

306 r/w 34 of I.P.C.

(d) The bail bond furnished by the appellant stands cancelled.

(e) The fine amount, if any, deposited by the appellant be refund to him, if not withdrawn.

(f) Muddemal property be dealt with as directed by Trial Court after the appeal period is over.