

(2013) 01 BOM CK 0072

In the Bombay High Court

Case No : Criminal Appeal No. 415 of 1993

Manohar Rangnath Patil

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 16-01-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Dowry Prohibition Act, 1961 — Section 2
Evidence Act, 1872 — Section 113A, 113B, 4
Penal Code, 1860 (IPC) — Section 304B, 306, 313, 498A

Citation : (2013) ALLMR(Cri) 1235 : (2013) 3 DMC 487

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

Bench : Single Bench

Advocate : Samir A. Vaidya, for the Appellant; R.M. Gadhvi, Additional Public Prosecutor, for the Respondent

Judgement

R.C. Chavan, J.—This appeal is directed against the conviction of the appellant husband for offences punishable u/s 498A, 304-B and 306 of the Indian Penal Code and sentence of rigorous imprisonment for 3 years with fine of Rs. 500/- or in default rigorous imprisonment for one month, rigorous imprisonment for 7 years and rigorous imprisonment for three years with fine of Rs. 500/- or in default rigorous imprisonment for one month and rigorous imprisonment for three years with fine of Rs. 500/- or in default rigorous imprisonment for one month, respectively on each of the three counts, imposed upon the appellant by the learned Additional Sessions Judge, Greater Bombay, on conclusion of Sessions Case No. 707 of 1990. Facts which are material for deciding this appeal are as under:-

The victim was married to the appellant on 13th May, 1990. She went to reside at the house of the appellant. In the marriage there was demand of certain articles which included wrist watch. The demand of gold ring had been fulfilled. Wrist watch, however, had not been supplied. This led to ill-treatment to the victim at the hands of the appellant. Soon after marriage, on 29th May, 1990

when the victim came to her brother's house, for a function of birthday of brother's son, victim had conveyed her unhappiness and the demands of wrist watch, saree, electric fan and a sum of Rs. 10,000/-. Thereafter on 13th June, 1990 when the victim's sister and sister-in-law had gone to see the victim, they found that the victim had some burn injuries on her hands and finger and swelling on her face. The victim reported that these injuries were the result of ill-treatment meted out by the appellant when the victim's brother went to see the victim on 21st June, 1990, victim entreated to take her back to the parental house. However, since the appellant told the victim's brother to come after 10 days, victim's brother went back. On 25th June, 1990 the victim suffered severe burn injuries and was admitted to the Hospital. She succumbed to her injuries before her statement could be recorded. On a report by her brother, an offence was registered and investigation commenced. The police had caused inquest to be performed before the Coroner of Bombay. Autopsy had also been performed by the Autopsy Surgeon. Police performed panchnama of spot, recorded the statements of witnesses and on completion of investigation sent the charge-sheet to the Court of learned Metropolitan Magistrate 22nd Court at Andheri, who committed the case to the Court of Sessions at Mumbai. The learned Additional Sessions Judge to whom the case was made over, charged the appellant of offences punishable under Sections 498A, 306 and 304-B of the Indian Penal Code. Since the appellant pleaded not guilty, he was put on trial at which the prosecution examined in all four witnesses in its attempt to bring home guilt of the appellant. After considering the prosecution evidence, in the light of defence of absence of appellant's complicity in the death of his wife, the learned Judge convicted and sentenced the appellant as aforementioned. Aggrieved thereby the appellant is before this Court.

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.

3. PW 1 Ravindra victim's brother, who states about the victim's marriage performed on 13th May, 1990. He states that after the marriage the victim resided at the native place of appellant till 21st May, 1990 and came to Powai, Mumbai, her matrimonial home, on 22nd May, 1990. After a week, she came along with the appellant to PW 1's house for celebrating birthday of PW 2 Sunita's son. After birthday was over, PW 1's wife and sister conveyed that the appellant had demanded gifts and presents received in the marriage and had also claimed that PW 1 should purchase sarees for the victim. On 15th June, 1990, PW 2 Sunita and PW 1's wife went to the appellant's house. They noticed that the victim had swelling on the face and burn injuries on hands. The victim conveyed that these injuries were caused by the appellant, who has insisted on bringing the remaining presents given in the marriage like electric fans etc. The victim had told the wife of PW 1 not to question the appellant as this would result in further torture. Since PW 2 Sunita and Bharati the wife of PW 1 had suggested that Ravindra should see the victim as soon as possible. On 21st June, 1990

Ravindra went to the appellant's house. The appellant was present at the house. The victim started weeping and requested the witness to take her back immediately. The appellant is alleged to have told that since the wife of his brother was not keeping good health, victim should not be taken at that time. On 25th June, 1990 Ravindra received message that the victim was admitted to Rajawadi Hospital and therefore, he went there and found that the victim was dead. He claims to have gone to the police at about 2.00 a.m., but since none was there to receive his report, he lodged the report at 13.15 hrs on the next day which he proved at Exh. 6. The cross-examination of this witness is very short. As has been noted by the learned Additional Sessions Judge, in the cross-examination there is no whisper about the incident dated 21st June, 1990. There are two contradictions as to how the witness got to know about the demands made on 29th May, 1990. It seems that the witness had stated in his statement recorded u/s 161 of the Code of Criminal Procedure that the victim Kalpana had told him personally about this demand. However, in the evidence before the Court, witness stated that he had learnt it from his wife and sister. He also contradicted the portion in his statement to the effect that he told the victim that he had returned all the presents received and was not in a position to fulfill the demands. The crucial point is that there is no cross examination about the incident dated 21st June, 1990, as also what was reported to the witness by his wife and his sister PW 1 Sunita on 15th June, 1990.

4. PW 2 Sunita, victim's sister, too stated about interaction of victim on 29th May, 1990 i.e. the appellant's demanding wrist watch, electric fan, saree and a sum of Rs. 10,000/-. She states that on 15th June, 1990 she and Bharati went to see the victim and noticed swelling on victim's face as also signs of burning on left hand. On being asked about the same, victim told her that the accused had smashed her face on the kitchen platform and had branded her hand with burning match stick for failure to fulfill the demands. PW 2 Sunita further stated that as per victim's request she told PW 1 Ravindra to bring the victim back. In her cross examination she admitted that she had stated in her police statement that she had conveyed to PW 1 Ravindra the information which she received from victim Kalpana. She admitted that on 29.5.1990 when victim and appellant had come to her, she did not question the appellant about the complaints made by victim. She admitted that the appellant was living with his brother and sister-in-law one Asha Balu Patil whom she identified in the Court. It was argued that since Asha was very much in the house, she would know as to what happened in the house. She admitted that she did not tell the police that the victim had asked her to take the victim back to the parental home. However, she stated that she had asked the victim to come with her. But the victim, as well as the appellant, both stated to PW 2 Sunita to come later as the wife of appellant's brother was not well. It seems strange that something which the appellant is supposed to have told the victim's brother Ravindra is sought to be suggested to PW 2 Sunita. Sunita's evidence does not show that the appellant was present in the house when she met the victim on 15th June, 1990. Learned counsel for the

appellant wondered as to why Bharati, wife of PW 1 Ravindra, who had gone with PW 2 Sunita to victim's house, was not examined. This has been explained in the further examination in chief of PW 1 Ravindra. He stated that Bharati was in advanced stage of pregnancy and was at her parent's house at Nashik and, therefore could not be examined at the trial.

5. PW 3 API Gaikwad stated that he received a phone call from Rajawadi Hospital on 25th June, 1990 at about 12.30 p.m. that one Kalpana, a married woman, was admitted in the hospital for burn injuries. He stated that he made attempts to make enquiries but victim was not in a position to make a statement and therefore, though he was accompanied by Special Executive Magistrate, the dying declaration could not be recorded. He then went to the spot and performed panchnama of spot vide Exh. 8. On 26th June, 1990 he recorded report of PW 1 Ravindra and registered an offence.

6. Learned counsel for the appellant submitted that the articles referred in the panchnama at Exh. 8 were not produced before the Court. Since the question is not how the victim died, there is no significance in non production of the articles before the Court. The notes of post-mortem examination which are at Exh. 13 were admitted in the evidence by consent of the parties. These notes seem to have been recorded by the Autopsy Surgeon and tendered to the Coroner's Court which was the practice at that time. The Coroner must have enquired into the cause of death.

7. PW 4 Shivaji Shinde conducted rest of the investigation and filed charge-sheet. He stated that summonses were served on witnesses Pandurang Pawar, Milind Salvi, as also Asha Patil. Therefore, the allegation that prosecution deliberately withheld those witnesses would be inconsequential.

8. Learned counsel for the appellant submitted, first, that no independent witnesses or neighbours were examined. As rightly pointed out by the learned Additional Public Prosecutor, when the incident took place within four corners of the house, and within such a short time after the victim came to reside with the appellant, it is unlikely that the neighbours would know as to what was happening between the couple.

9. Learned APP pointed out that the victim had come to the house of appellant only on 22nd May, 1990 and was at the appellant's house for about one month and three days. Learned counsel for the appellant next submitted that only brother and sister had been examined and that there was no evidence to show that there were any unlawful demands. The learned APP points out that both the witnesses had deposed about the demands of wrist watch and gold ring and this was duly put up to the appellant in his statement u/s 313 of Code of Criminal Procedure in the form of question No. 3 and the appellant had admitted that it was true that he had demanded gold ring and wrist watch.

10. Learned counsel for the appellant submitted that the gold ring has been provided to the appellant and therefore, the demand of gold ring did not survive.

However, there is nothing in the cross examination to show that the demand of this wrist watch was in fact given up. Therefore, as rightly submitted by the learned APP prosecution story that there were unlawful demands which could have been the cause of harassment to the victim had not been ruled out. Learned counsel for the appellant next submitted that in fact the victim was married to the appellant against her will and that was cause for her displeasure. However, there is no whisper in the evidence to show that the victim had been married to the appellant against her will.

11. Learned counsel for the appellant submitted that the story of demand of Rs. 10,000/- which came in the evidence of P.W. 2 Sunita is exaggeration, since P.W. 1 does not state so. May be the demand of Rs. 10,000/- deposed to by PW 2 Sunita, is an exaggeration since PW 1 Ravindra does not state so and therefore, it could be said that to that extent Sunita was exaggerating. But that in itself need not result in rejection of her evidence outright. It may be seen that the appellant had admitted that he and victim had gone to the house of Ravindra on 29th May, 1990. He also admitted in his statement u/s 313 of Code of Criminal Procedure that the evidence regarding visit of PW 1 Sunita and Bharati on 15.6.1990 was correct. However, he denied that he had ill-treated his wife. Learned counsel for the appellant submitted that if the victim was indeed ill-treated, but there was no reason why immediate report was not given to the police. As rightly submitted by the learned APP that it would be impracticable to expect a newly married girl, or her relations, to rush to the police within a month of the marriage to complain about matrimonial discord and destroy all the prospects of the marriage continuing. Therefore, there is absolutely no reason to disbelieve the evidence of PW 1 Ravindra and PW 2 Sunita about the manner in which victim Kalpana was treated by the appellant.

12. Learned counsel for the appellant relied upon several judgments to support his contention that the evidence tendered falls far too short of the requirements for proving ingredients of section 498A, 306 and 304-B of the Indian Penal Code.

13. In State of West Bengal Vs. Orilal Jaiswal and another, , on which the learned counsel sought to rely in support of his contention that offence punishable u/s 306 IPC was not made out, the Hon'ble Supreme Court in para 17 held as under:-

17.....The bridal presents brought by her were branded as goods of inferior quality and she was asked to take the said articles back to her parental home. Such acts, to say the least, were very unkind and A newly married woman is bound to suffer a great mental pain and humiliation. Even if we do not take into consideration the demand for further dowry gifts since the case of such demand had not been indicated in the earlier statement made by the mother which was treated as F.I.R., there is no manner of doubt that the evidence of the mother which has been accepted by the learned Sessions Judge and in our view there is no reason to discard the same, clearly establishes that the deceased had been subjected to physical and mental torture all throughout. It is only unfortunate

that the accused I, the husband, instead of giving her solace against the humiliation and abuses hurled by the mother-in-law, either kept silent or expressed his inability to give good counseling to the mother and to protest against act of mental torture and humiliation. On the contrary, he also treated the wife with cruelty by telling her to take the bridal gifts back to her parental home and also by physically assaulting her. Such acts, in our view, were quite likely to destroy the normal frame of mind of the deceased and to drive her to frustration and mental agony and to end her life by committing suicide. Under explanation (a) of Section 498A I.P.C., "cruelty" means - any wilful conduct which is of such 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.

Though the Supreme Court gave benefit of doubt to the accused in respect of offence punishable u/s 306 IPC, it had upheld conviction for offence punishable u/s 498A IPC.

14. In *Satvir Singh and Others Vs. State of Punjab and Another*, , the Supreme Court considered the provisions of sections 304B, 306, 498A IPC, Section 2 of the Dowry Prohibition Act and presumptions under the Evidence Act. The Court held:-

22. It is not enough that harassment or cruelty was caused to the woman with a demand for dowry at some time, if Section 304B is to be invoked. But it should have happened "soon before her death". The said phrase, no doubt, is an elastic expression and can refer to a period either immediately before her death or within a few days or even a few weeks before it. But the proximity to her death is the pivot indicated by that expression. The legislative object in providing such a radius of time by employing the words "soon before her death" is to emphasis the idea that her death should, in all probabilities, have been the aftermath of such cruelty or harassment. In other words, there should be a perceptible nexus between her death and the dowry related harassment or cruelty inflicted on her. If the interval elapsed between the infliction of such harassment or cruelty and her death is wide the court would be in a position to gauge that in all probabilities the death would not have been the immediate cause of her death. It is hence for the court to decide, on the facts and circumstances of each case, whether the said interval in that particular case was sufficient to snuff its cord from the concept "soon before her death".

15. In *Ramesh Kumar Vs. State of Chhattisgarh*, , the Hon"ble Supreme Court in para 12, held as under in respect of presumptions u/s 113A of the Evidence Act.

12. This provision was introduced by Criminal Law (Second) Amendment Act, 1983 with effect from 26.12.1983 to meet a social demand to resolve difficulty of proof where helpless married women were eliminated by being forced to commit suicide by the husband or in-laws and incriminating evidence was usually available within the four-corners of the matrimonial home and hence was not

available to any one outside the occupants of the house. However, still it cannot be lost sight of that the presumption is intended to operate against the accused in the field of criminal law. Before the presumption may be raised, the foundation thereof must exist. A bare reading of Section 113A shows that to attract applicability of Section 113A, it must be shown that (i) the woman has committed suicide, (ii) such suicide has been committed within a period of seven years from the date of her marriage, (iii) the husband or his relatives, who are charged had subjected her to cruelty. On existence and availability of the abovesaid circumstances, the Court may presume that such suicide had been abetted by her husband or by such relatives of her husband. The Parliament has chosen to sound a note of caution. Firstly, the presumption is not mandatory, it is only permissive as the employment of expression "may presume" suggests. Secondly, the existence and availability of the abovesaid three circumstances shall not, like a formula, enable the presumption being drawn; before the presumption may be drawn the Court shall have to have regard to "all the other circumstances of the case". A consideration of all the other circumstances of the case may strengthen the presumption or may dictate the conscience of the Court to abstain from drawing the presumption. The expression-"the other circumstances of the case" used in Section 113A suggest the need to reach a cause and effect relationship between the cruelty and the suicide for the purpose of raising a presumption. Last but not the least the presumption is not an irrebuttable one. In spite of a presumption having been raised the evidence adduced in defence or the facts and circumstances otherwise available on record may destroy the presumption. The phrase "may presume" used in Section 113A is defined in Section 4 of the Evidence Act, which says- "whenever it is provided by this Act that Court may presume a fact, it may either regard such act as provided, unless and until it is disproved or may call for proof of it."

16. In *Sunil Bajaj Vs. State of M.P.*, , the Hon''ble Supreme Court, emphasized that,

6.....Hence, there is need for greater care and caution, that too having regard to the gravity of the punishment prescribed for the said offence, in scrutinizing the evidence and in arriving at the conclusion as to whether all the above mentioned ingredients of the offence are proved by the prosecution. In the case on hand, the learned counsel for the appellant could not dispute that the first two ingredients mentioned above are satisfied.

17. In *Gananath Pattnaik Vs. State of Orissa*, , the Hon''ble Supreme Court on facts held that offence punishable u/s 498-A was not made out.

18. In *State of Karnataka Vs. M.V. Manjunathgowda and Another*, , the Hon''ble Supreme Court, clarified the circumstances in which presumption u/s 113B of the Evidence Act will operate.

19. *Hira Lal and Others Vs. State (Govt. of NCT) Delhi*, , was decided on facts of that case and appreciation of evidence therein.

20. The learned counsel for the appellant also relied upon judgments in Sampath Kumar Vs. Inspector of Police, Krishnagiri, , the Rohtash Vs. State of Haryana, , Ramnaresh and Others Vs. State of Chhattisgarh, , as to the statement of accused u/s 313 of the Code of Criminal Procedure. I have gone through the same. The facts in these cases and the facts of the case at hand are totally different.

21. As rightly pointed out by the learned APP the facts of each case are different and therefore, the observations in the judgment in one case cannot be mechanically applied to the facts of another case, therefore, the principles laid down in above judgments will have to be borne in mind while deciding the case at hand but without mechanically following the same.

22. Even so learned counsel for the appellant submitted that there is nothing to show that victim was treated with cruelty as defined in Explanation 498 of the Indian Penal Code. Section 498A of the 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;

23. In my view there is enough evidence of PW Nos. 1 and 2 to show that there was a demand of wrist watch which remained to be fulfilled at the marriage. This demand has been admitted by the accused in his statement u/s 313 of the Code of Criminal Procedure and therefore, the fact that there was unlawful demand would provide foundation for the ill-treatment to the victim. The evidence would have to be appreciated in this context. The evidence of PW 2 Sunita who had personally seen victim in injured state on 15.6.1990, when the victim had told PW 2 Sunita about appellant's smashing her face on the kitchen platform or branding with her match stick, would be enough to prove "cruelty" as defined u/s 498A of the Act. Therefore, as far as conviction of the appellant for offence punishable u/s 498A, there is no doubt that the learned Judge has correctly come to such conclusion.

24. As to the offence punishable u/s 306 and 304-B of the Indian Penal Code, learned counsel for the appellant submitted that there is nothing to show that the victim had committed suicide and the prosecution story that because the victim had burn injuries, she had committed suicide amounted to surmises. Since there is no other theory of death suggested, and since victim had complained of her ill-treatment which she suffered at the hands of appellant, she must be held

to have committed suicide on 25th June, 1990 by setting herself on fire. Now question is whether the appellant abetted in the commission of suicide by the victim. Learned counsel for the appellant relying on the judgment in *M. Mohan Vs. The State* represented by The Deputy Superintendent of Police, , submitted that there is no such presumption about abetment. Learned APP pointed out that Section 113-A of the Evidence Act, enables a Court to draw presumption that husband abetted such suicide if it is proved that wife 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. She pointed out while drawing presumption u/s 113A of the Evidence Act, what is required to be proved is to show that the victim had been subjected to cruelty, as contrasted under Sub-section 113B of the Evidence Act. For drawing presumption u/s 113B of the Evidence Act as to dowry death, it is necessary to show that soon before the death, victim had been subjected to cruelty. She, therefore, submitted that since the evidence of PW 1 and 2 was clear and showed that on 15.6.1990 i.e. about 10 days of the incident, the victim had reported that the appellant had smashed her face on the kitchen platform and branded her hand with burning match stick which qualify as "cruelty", the presumption u/s 113A would have to be drawn and it would have to be presumed that it was the appellant who abetted such suicide.

25. Learned counsel for the appellant next submitted that the appellant was away from home at the time of incident and therefore, it could not be said that any act on the part of appellant triggered the commission of suicide by the victim. Whether the appellant was present at the time of commission of suicide is not material. The appellant himself stated in his statement u/s 313 that he came back and found the neighbours extinguishing the fire. Therefore, it was not that he was far away from the place of incident. The conclusion drawn by the learned trial Judge that the appellant abetted commission of suicide by the victim would also have to be upheld and the conviction of the appellant for the offence punishable u/s 306 IPC would have to be maintained.

26. This takes me to the question about appellant's complicity in the offence punishable u/s 304-B of the Indian Penal Code. There is no doubt that the evidence on record shows that the appellant had harassed the victim on account of unlawful demand. The evidence also shows that the victim had committed suicide by setting herself on fire within 7 years of her marriage. However, the question now is whether these facts would lead to the conclusion that the appellant is guilty of dowry death. For proving dowry death it is necessary for the prosecution to establish, apart from these facts, that "soon before" her death, woman had been subjected to cruelty by such person. The term "soon before" has been explained by the Hon"ble Supreme Court in several judgments. In *Kunhiabdulla and Another Vs. State of Kerala*, . The principle that emerges is that there is no fixed formula as to what constitutes "soon before" commission of suicide. However, it may be seen from the evidence on record that last instance of appellant's having ill-treated victim occurred on 15th June, 1990. The

evidence of PW 1 Ravindra about his visit to the victim on 21st June, 1990, does not show that the victim conveyed any fresh instance of assault to him on that day. Therefore, since there is no provision of law which would also warrant presumption to be drawn that the victim was subjected to cruelty "soon before" her death, as far as dowry death is concerned, conviction of the appellant cannot be sustained.

27. This takes me to the question of sentence. Learned counsel for the appellant submitted that the incident occurred 23 years ago. The appellant is leading his peaceful life since then and therefore, the appellant may not be asked to revisit the prison. He, submitted that the victim has been in jail for six months. Therefore, the sentence already undergone by the victim be awarded by increasing fine. Learned APP is right in submitting that this is a case of death of a woman within one month and some odd days of her marriage and therefore, reducing sentence would amount to showing misplaced sympathy.

28. In view of this, the appeal is partly allowed. The conviction of the appellant for offence punishable u/s 304-B and sentence of rigorous imprisonment for 7 years is set aside and the appellant is acquitted of the said offence. The conviction of the appellant for the offences punishable under Sections 498A and 306 IPC and sentences of rigorous imprisonment for three years with fine of Rs. 500/- or in default rigorous imprisonment for one month, on each of the two counts are maintained. The appellant shall surrender to his bail within a period of six weeks and on his failure to do so the learned Judge may have the appellant arrested and committed to prison to serve the sentence.