
(2017) 11 BOM CK 0132
In the Bombay High Court
Case No : 701 of 2002

Manohar s/o Jaideo Tembhare

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 15-11-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#), [Section 174](#), [Section 164](#) - Power to examine the accused - Police to enquire and report on suicide, etc - Recording of confes

Citation : (2017) 11 BOM CK 0132

Hon'ble Judges : Rohit B. Deo

Bench : SINGLE BENCH

Advocate : C.R. Thakur, A.V. Palshikar

Final Decision : Allowed

Judgement

1. The appellant seeks to assail judgment and order dated 05.12.2002 in Sessions Trial 458/1997 delivered by the 7th Assistant Sessions Judge, Nagpur, by and under which, the appellant (hereinafter referred to as "the accused") is convicted of offence punishable under section 498A of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for a period of two years and to payment of fine of Rs.500/and is further convicted for offence punishable under section 306 of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for a period of seven years and to payment of fine of Rs.500/.
2. Heard Shri C.R. Thakur, the learned counsel for the appellantaccused and Shri A.V. Palshikar, the learned Additional Public Prosecutor for the respondent/State.
3. The gist of the prosecution case, as is unfolded during the course of the trial, is thus: The marriage of deceased Aruna was solemnized with the accused in the year 1997.
4. Concededly, Aruna suffered burn injuries and expired while undergoing

treatment at Medical College Hospital, Nagpur on 10.05.1997 at 11:00 p.m.

5. The dying declaration could not be recorded since the Medical Officer declared that Aruna was not in a position to give a statement.

6. Initially, inquiry under section 174 of the Criminal Procedure Code, 1973 was initiated as the death was treated as accidental. However, Laxman Ramu Dhurve, the father of the deceased Aruna lodged a report on 15.05.1997 alleging that Aruna committed suicide since she was tortured by the accused. On the basis of the said report, offence under section 498A and 306 of the Indian Penal Code was registered against the accused. However, the accused was chargesheeted under section 498A and 302 of the Indian Penal Code in the Court of Judicial Magistrate First Class, Katol who committed the proceedings to the Sessions Court.

7. The learned Sessions Judge, framed charge under section 498A and 306 of the Indian Penal Code vide Exh.13, the accused abjured the guilt and claimed to be tried. The defence, as is obvious from the trend of the crossexamination and the statement recorded under section 313 of the Criminal Procedure Code is of false implication.

8. The prosecution examined 16 witnesses including P.W.1 and P.W.5 who are the mother and father respectively of the deceased Aruna, P.W.2 Sou. Kamalabai Varthe and P.W.3 Sou. Anjana Perteki the sisters of the deceased Aruna and P.W.8 Jagannath Dhurve who is the brother of the deceased Aruna. None of the members of the family of the deceased Aruna supported the prosecution and in view of a permission sought by the learned A.P.P. to put questions under section 154 of the Indian Evidence Act in the nature of crossexamination, the learned Sessions Judge was pleased to permit the crossexamination of the said witnesses by the learned A.P.P. However, nothing is elicited in the crossexamination to assist the prosecution. The prosecution witnesses who are related to Aruna have in unison stated that Aruna was treated well in the matrimonial home.

9. P.W.4 Sou. Panchfulla Nasre, who is an independent witness and a neighbour of the accused, also did not support the prosecution and nothing is elicited in her crossexamination to take the case of the prosecution any further. P.W.6 Chandu Kelzerkar who was then ASI attached to Police Station Katol has deposed that since according to the Medical Officer Aruna was unconscious and was not in a position to give statement, her dying declaration could not be recorded. P.W.7 Pralhad Madke who is also a neighbour of the accused, is a material witness from the perspective of the prosecution. The conviction, substantially if not entirely, rests on the evidence of two child witnesses Shraddha and Sweta who are examined as P.W.12 and P.W.13 respectively. The case of the prosecution is that the child witness Sweta came running to P.W.7 Pralhad Madke and disclosed that the accused had poured kerosene on the person of the deceased Aruna. However, in the examination in chief P.W.7 Pralhad Madke denies that Sweta came to him and revealed that the accused poured kerosene on the person of Aruna.

P.W.7 was treated as hostile witness and crossexamined by the learned A.P.P. In the crossexamination, P.W.7 admits to have stated before the Police that on the day of the incident Sweta Sawarkar, daughter of Ashok Sawarkar, came to him running and disclosed that accused poured kerosene on the person of deceased Aruna. Be it noted, that the statement of P.W.7 is recorded on 02.07.1997 presumably after recording the statements of P.W.12 and P.W.13. P.W.9 Rashid Rahemtulla, who is examined to prove that the accused used to illtreat Aruna, did not support the prosecution and nothing is brought on record in the crossexamination by the learned A.P.P. to assist the prosecution.

P.W.10 Rahemtulla Gafur Agwan, who was also examined to prove that Aruna was subjected to physical assault, did not support the prosecution and again nothing is elicited in the crossexamination to assist the prosecution. P.W.11 Naryan Daga was treated as hostile witness, was crossexamined and nothing substantial was elicited in the crossexamination to be of any assistance to the prosecution.

10. Let me now, come to the evidence of Shraddha Ashokrao Sawarkar and Sweta Ashokrao Sawarkar who are examined as P.W.12 and P.W.13 respectively and on whose testimonies, the conviction is substantially founded. Shraddha who was aged 13 years when the evidence was recorded on 12.07.2002, states that she and her sister Sweta were playing in the house in the noon of the day of the incident in the year 1997. The witness perceived smell of kerosene and she and her sister Sweta stood on the dining table and peeped in the house of the accused from a open space on the wall which separated the house of the accused and that of the father of the witness. She states that the accused poured kerosene on the person of Aruna, she and Sweta then went to the house of P.W.7 Pralhad Madke and disclosed that the accused poured kerosene on Aruna from the can and in response was told by Madke that the witness and her sister need not bother about the quarrel. The witness states that her statement was recorded on the next day and thereafter the Police did not record any other statement. The witness is suggested that the Police approached her after one and half month and told her that since there was a mistake in the earlier statement, her statement will have to be recorded again. She further denies the suggestion that in view of the strained relationship between her father and the accused on the issue of pending rent, she is falsely implicating the accused. P.W.13 Sweta Sawarkar states that she saw Aruna weeping in the house, the middle door of the house of the accused was closed and the son of the accused was knocking on the middle door from inside. The accused was present in the room in which Aruna was weeping. The accused poured kerosene from can on the person of Aruna and then she and her sister Shraddha narrated the incident to P.W.7 Madke. She denied that her statement is recorded on 02.07.1997. She has also denied the suggestion that the accused is falsely implicated in view of an altercation which occurred between the accused and her father. P.W.14 Saikh Asik Saudagar has not supported the prosecution. It is the case of the prosecution that the statement of the said witness was recorded by the Judicial

Magistrate First Class, Katol on 30.06.1997 under section 164 of the Criminal Procedure Code, 1973. P.W.15 Laxman Vairagade is examined to prove the statement of P.W.14 recorded under section 164 of the Criminal Procedure Code, 1973, which is marked as Exh.118. Samadin Shamshadin who is the Investigating Officer is examined as P.W.16. He admits that statements of P.W.12 Shraddha and P.W.13 Sweta were recorded on 02.07.1997. He states that the statements could not be recorded earlier as their guardian was not available till 02.07.1997. The explanation given by the Investigating Officer for not recording the statement of P.W.12 and P.W.13 within a reasonable period from the day of the incident is demonstrably false. A perusal of the spot panchnama Exh.85 which is recorded on 11.05.1997 reveals that the spot is shown by Ashok Sawarkar who is the father of P.W.12 and P.W.13. The evidence of P.W.12 and P.W.13 reveals that the Police made inquiries with them immediately after the incident. The record reveals that the statement of P.W.7 Madke to whom P.W.12 and P.W.13 allegedly made the disclosure that the accused poured kerosene on the person of Aruna is also recorded on 02.07.1997.

11. Be it noted, that on the basis of the report lodged by the father of the deceased Aruna on 15.05.1997, offence under section 498A and 306 of the Indian Penal Code was registered against the accused. However, presumably on the basis of the statement recorded on 02.07.1997, the Police submitted chargesheet under section 498A and 302 of the Indian Penal Code. The learned Sessions Judge was however, pleased to frame charge under section 498A and 306 of the Indian Penal Code. Concededly, the State did not challenge the refusal or failure to frame charge under section 302 of the Indian Penal Code. In the backdrop of the said events, the fact that the statements of P.W.12 and P.W.13 are recorded after 47 days of the incident assumes significance. I have already noted, that the explanation of the Investigating Officer that in view of the nonavailability of the guardian of P.W.12 and P.W.13, their statements could not be recorded earlier is, falsified by the fact that the guardianfather Ashok was the person who showed the spot to the Police when the spot panchnama was drawn on 11.05.1997. Concededly, it is neither the case of the prosecution nor a suggestion given to P.W.12 or P.W.13 or otherwise elicited from them that Ashok Sawarkar was not available to the Investigating Officer till 02.07.1997. Pertinently, the statement of P.W.7 Madke is also recorded on 02.07.1997, with the result, that there is no cogent or reliable material on record to suggest that Sweta and Shraddha disclosed the involvement of the accused immediately after they allegedly saw the accused pouring kerosene on the person of Aruna. I find it extremely hazardous to permit the conviction to rest on the evidence of P.W.12 and P.W.13, whose statements are recorded 47 days after incident of the occurrence.

12. It would be apposite to refer to the following observations in the judgment of the Hon''ble Supreme Court in Ganesh Bhavan Patel and another v. State of Maharashtra AIR 1979 SC 135 in paragraph 15 which reads thus:

"15. As noted by the Trial Court, one unusual feature which projects its shadow on the evidence of P. Ws. Welji, Pramila and Kuvarbai and casts a serious doubt about their being eyewitnesses of the occurrence is the undue delay on the part of the investigating officer in recording their statements. Although these witnesses were or could be available for examination when the investigating officer visited the scene of occurrence or soon thereafter, their statements under S. 161 Cr.P.C. were recorded on the following day. Welji (P. W. 3) was examined at 8 a.m. Pramila at 9.15 or 9.30 a.m. and Kuvarbai at 1 p.m. Delay of a few hours, simpliciter, in recording the statements of eyewitnesses may not, by itself, amount to a serious infirmity in the prosecution case. But it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eyewitnesses to be introduced. A catena of circumstances which lead such significance to this delay, exists in the instant case."

If the evidence of P.W.12 and P.W.13 is evaluated on the touchstone of the law enunciated by the Hon"ble Supreme Court, I would unhesitatingly exclude the evidence from consideration, and having done so and I am of the considered opinion that the offence against the accused under section 498A and 306 of the Indian Penal Code is not established much less beyond reasonable doubt.

13. The judgment and order impugned is set aside.

14. The accused is acquitted of offence punishable under section 498A and 306 of the Indian Penal Code.

15. The accused who is detained in Central Prison, Nagpur in view of order dated 06.11.2017 be released forthwith.

16. The appeal is allowed. The fine paid by the accused, if any, be refunded.