

(2013) 01 BOM CK 0255
In the Bombay High Court
Case No : Criminal Appeal No. 125 of 1993

Mohamed Umer Tahsildar Chaudhari and Others	APPELLANT
Vs	
State of Maharashtra and Another	RESPONDENT

Date of Decision : 04-01-2013

Acts Referred:

Dowry Prohibition Act, 1961 — Section 2, 4
Penal Code, 1860 (IPC) — Section 302, 304B, 498A

Citation : (2013) ALLMR(Cri) 523 : (2013) 3 BomCR(Cri) 752 : (2013) 2 Crimes 292

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

Bench : Single Bench

Advocate : A. Majeed Memon with Subhash Kanse, Ms. Katharina Joseph, Parvez Memon and Ravi Mishra, for the Appellant; R.M. Gadhvi, Additional Public Prosecutor for the State, for the Respondent

Final Decision : Allowed

Judgement

R.C. Chavan, J.—This appeal is directed against the conviction of the appellants, husband and parents in-law of the victim, for offences punishable u/s 498A of the Indian Penal Code (for short, "IPC") and Section 4 of the Dowry Prohibition Act, 1961 (for short, "DP Act") and sentence of imprisonment with fine imposed upon them by the learned Additional Sessions Judge for Greater Mumbai on conclusion of trial of Sessions Case No. 820 of 1989 before him. Facts which are material for deciding this appeal are as under:-

Victim Kulsumbanu, daughter of PWs-1 and 10 and sister of PW-6, was married to appellant No. 1 sometime in June, 1988. Both the parties are residents of Mumbai. The victim was staying with the appellants and used to frequently visit her parents' house. On 19-2-1989 appellant No. 1 Mohamed Umer is alleged to have left the victim near her parents' house and pretended as if she had gone away. The victim, however, told her parents that she had been dropped by her husband. Her parents persuaded her to go back to her matrimonial home and

reached her there in the afternoon. In the same night there seems to have been a telephonic talk where some demand of Rs. 50,000/- was made and it was conveyed that otherwise Kulsumbanu would suffer. The next morning, at about 6:00 a.m., Kulsumbanu suffered bum injuries. She was taken to a hospital where her statement was recorded, first by a police officer after obtaining permission from the doctor. He then summoned a Special Executive Magistrate to record her dying declaration. In both these dying declarations the victim stated that she had caught fire accidentally. The victim's parents claimed that she had confided to them that she was set on fire by the appellants and her sister-in-law, who was arrayed as accused No. 4. On the next day, i.e., 21-2-1989 the victim died. Thereafter, a report was made to the police by the victim's father whereupon an offence was registered. The victim's father also wrote a letter to the police authorities.

2. In the course of investigation the police performed inquest on the body of the victim and sent it for post-mortem examination. They performed panchnama of the spot, recorded statement of the witnesses and on completion of the investigation sent the charge-sheet to the Court of learned Metropolitan Magistrate, Andheri, who committed the case to the Court of Sessions at Mumbai.

3. The learned Additional Sessions Judge, to whom the case was made over, charged the appellants and accused No. 4 of offences punishable under Sections 498A, 302 and 304B of the IPC and Section 4 of the DP Act. Since the accused persons pleaded not guilty, they were put on trial at which the prosecution examined in all 16 witnesses in its attempt to bring home the guilt of the accused persons. After considering the prosecution evidence in the light of defence of false implication raised, the learned Judge acquitted all the accused persons of the offences punishable under Sections 302 and 304B of the IPC. He also acquitted accused No. 4 of all the offences, but he convicted the appellants of the offences punishable u/s 498A of the IPC and Section 4 of the DP Act. He sentenced appellant No. 1-husband to rigorous imprisonment for one year with fine of Rs. 500/- and rigorous imprisonment for six months with fine of Rs. 500/- for the offences punishable u/s 498A of the IPC and Section 4 of the DP Act respectively. The father-in-law was sentenced to suffer rigorous imprisonment for three months with fine of Rs. 500/- on each of the two counts and the mother-in-law was sentenced to suffer simple imprisonment till rising of the Court with fine of Rs. 1,000/- on each of the two counts. Aggrieved thereby, the appellants are before this Court.

4. I have heard the learned counsel for the appellants and the learned Additional Public Prosecutor (for short, "APP") for the State. With the help of both, I have gone through the evidence on record.

5. The learned trial Judge had rightly disbelieved the evidence of PW-1 Kitabulla, PW-6 Karimulla and PW-10 Beharunissa on the allegation that the victim was burnt to death by the appellants. In the face of the two dying declarations, the first, recorded by a police officer after getting requisite certificate from the

Medical Officer and the second by a Special Executive Magistrate specifically recording that the victim had accidentally caught fire, it would not have been possible for the trial Court to accept the interested words of PWs-1, 5 and 10 about the manner in which the incident allegedly took place. PW-14 PSI Koli had recorded the first dying declaration at Exhibit-54 and PW-11 Special Executive Magistrate Shri Jeron had recorded the second dying declaration at Exhibit-45. PW-8 Dr. Chitlani, who had treated the victim, had stated that the victim was fit to make a statement.

6. The learned counsel for the appellants pointed out that PW-1 Kitabulla, the father of the victim, had stated in his deposition in the Court that the victim had confided into him that the appellants had set the victim on fire. It appears from the evidence of PW-1 Kitabulla and PW-6 Karimulla that when they went to the hospital after hearing the news of the victim being admitted to hospital, PW-10 Beharunissa was not with them. Beharunissa seems to have gone to the hospital around 2:00-2:30 in the night, according to the evidence of PW-1 Kitabulla. Beharunissa, however, stated that around 6:00 p.m. when she went near the victim and asked the victim as to how she had sustained the injuries, the victim conveyed to her that she had been set on fire by the appellants and accused No. 4. She states that she returned home at about 3:00 a.m. PW-10 Beharunissa did not disclose the information which she had received to anyone because she claimed to have been overwhelmed by grief and because she was upset. The learned APP submitted that this is natural since a mother would be in a disturbed state of mind on seeing the daughter suffering agony nearing death. However, there is one aspect which exposes the story that Kitabulla and Beharunissa have come up with. If Kitabulla had really heard from his daughter that she had been set on fire by the appellants, there was no need for him to recite in his letter at Exhibit-14 that he was sure that kerosene was poured on her daughter and that it was not an accident. He had further stated in Exhibit-14 that when his daughter became conscious, his wife was not allowed to speak to her in the first instant. But when his wife was allowed to speak to the daughter, the daughter had told his wife that the appellants had poured kerosene on her person and burnt her. This would rule out any communication by the victim to Kitabulla and to that extent Kitabulla's deposition in the Court must amount to an incorrect statement. As already recorded, PW-10 Beharunissa claimed to have learnt of this from her daughter at 6:00 p.m., which does not appear probable because according to Kitabulla, and possibly even Karimulla, Beharunissa was not shown to have gone to the hospital at 6:00 p.m. Therefore, the evidence of these three witnesses was rightly rejected by the learned trial Judge as far as their allegation about murder or dowry death of the victim within seven years of marriage was concerned. In the face of this the question is, whether the learned Judge should have believed these witnesses on the question of cruelty, as defined in Section 498A of the IPC, or demand of dowry made punishable u/s 4 of the DP Act?

7. As rightly pointed out by the learned counsel for the appellants, till the previous day of the incident there is not even a whisper of any demand being

made. The evidence of PW-1 Kitabulla would show that the victim and her husband used to visit their house occasionally and appellant No. 1 used to demand money from the deceased. These demands were for sums of Rs. 50, Rs. 100/- or Rs. 500/-. But this story, too, has surfaced only in the evidence before the Court and does not seem to have been conveyed in the First Information Report or even in Exhibit-14. The story of demand of Rs. 50,000/-, on the previous night, is obviously an outcome of a thought given by the witnesses after the victim's death. Incidentally, it may be mentioned that PW-5 Mohamad Issak supports the witnesses on these demands but in his cross-examination it is seen that most of the things which have been stated in his cross-examination-in-chief were not to be found in his police statement. It is also worthy of note that the witness came up with the story that, after the incident appellant No. 1 had come to him requesting him that he should save appellant No. 1. He does not state that appellant No. 1 made any extra-judicial confession. He stated that appellant No. 1 only told him that the victim had burnt and then the witness claims to have accused him instantaneously that the victim had not burnt but appellant No. 1 had set her on fire. If this was the eagerness of PW-5 to accuse appellant No. 1, the moment appellant No. 1 reported that the victim had suffered burns, it would be impossible to rely on his word. He seems to have jumped to the conclusion that it was appellant No. 1 who had set the victim on fire, without even ascertaining the facts.

8. The evidence of the other witnesses, principally PW-2 Mubarak and PW-3 Javed, who are neighbours who support the prosecution, and PW-13 Mohiddin, another neighbour who does not support the prosecution, is unhelpful because they all state that they reached the spot after the incident and do not know as to what was happening in the appellants' house prior to the incident. PW-4 Noorbi is a lady who provides helps at burial and her evidence is not relevant. PW-7 Dr. Thenge had conducted the autopsy on the dead body, PW-12 Abdul witnessed the panchnama of the spot, PW-15 PSI More registered the offence and PW-16 PI Patil conducted the investigation.

9. To sum up, having disbelieved PWs-1, 6 and 10 on the manner in which the victim died, the learned trial Judge should not have believed their words about the alleged demands which have surfaced only after the death of the victim. He should have also seen that "dowry", as defined in Section 2 of the DP Act, requires it to be a property of valuable security given in connection with the marriage of the parties. Even if the allegations of PWs-1, 6 and 10 are taken at face value, they seem to be stray demands having nothing to do with the marriage. Considering this, the conviction of the appellants recorded by the learned trial Judge for offences punishable u/s 498A of the IPC and Section 4 of the DP Act cannot be sustained. The appeal is, therefore, allowed. The conviction of the appellants for the said offences is set aside. They are acquitted of the said offences. Fine, if paid, be refunded to the appellants. Their bail bonds stand cancelled and the sureties discharged.