
(2014) 04 BOM CK 0057
In the Bombay High Court
Case No : Criminal Appeal No. 41 8 of 2011

Pundlik

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 30-04-2014

Acts Referred:

Evidence Act, 1872 — Section 101, 105, 106, 4
Penal Code, 1860 (IPC) — Section 299, 300, 302, 498A, 77
Prevention of Corruption Act, 1988 — Section 4, 5

Citation : (2014) ALLMR(Cri) 2431

Hon'ble Judges : C.V. Bhadang, J;B.R. Gavai, J

Bench : Division Bench

Advocate : R.R. Shrivastava, Advocate for the Appellant; S.S. Jachak, A.P.P,
Advocate for the Respondent

Final Decision : Dismissed

Judgement

C.V. Bhadang, J.—Savita, wife of Pundlik Satav, died a violent death allegedly at the hands of her husband, who is the appellant-accused before us. The appellant is mainly coming with a plea based on Section 84 of Indian Penal Code (IPC) in assailing the judgment of conviction and sentence. The prosecution case may be briefly stated thus:

Now deceased Savita was married to the appellant about four years prior to the date of the incident. She was issue-less and said to be carrying a pregnancy at the time of incident. According to the prosecution, the appellant used to suspect the character of Savita and on account of that, there used to be frequent quarrels between them. It is also said that the appellant used to physically and mentally ill-treat her and was not allowing her to speak with any other person.

It is the prosecution case that the appellant and the deceased were staying together at village Wadner Bholji, taluka Nandura, district Butdhana. The maternal place of deceased Savita Is Matargaon Bk., Tq. Shegaon, district Buldhana.

On 19/6/2010 between 7.30 a.m. to 8.00 a.m., Mahadeo, the brother of the appellant telephonically informed P.W.-1 Vasanta Raut, who is the brother of the deceased that Savita has died and asking him to come to village Wadner Bholji. Thereupon, P.W.-1 Vasanta along with his brother Gajanan, parents and other relatives went to Wadner Bholji. At the house of the appellant, they found that dead body of Savita was lying in the kitchen. She was having injuries on her body including on the left side of the stomach and the intestine were protruding out. There was one sickle with blood stains and some pieces of broken bangles and broken mangalsutra lying near the dead body. P.W.-1 Vasanta lodged a report with Police Station, Nandura, on the basis of which an offence at Crime No. 88/2010 was registered against the appellant for the offence punishable u/s 498A and 302 of Indian Penal Code.

Police Inspector Anil Patil (P.W.-7) attached to Police Station, Nandura, had visited the spot at 8.30 a.m. He drew spot panchanama of the scene of occurrence and seized the articles lying there under a separate panchanama. The appellant was produced before him and he was arrested. The clothes of the appellant were seized. He drew inquest panchanama of the dead body and it was referred for postmortem examination. The seized articles were sent for the report of Chemical Analyser. He also recorded statements of the witnesses.

On arrest, the appellant was initially referred to Primary Health Center, Nandura where he was examined by P.W.-9 Dr. Laxminarayan Jaiswal, who found all vital parameters and symptoms normal. He suspected that the appellant was malingering i.e. pretending to be ill. The appellant was referred to Civil Hospital, Buldhana, where he was examined by P.W.-8 Dr. Shaloman Gurjar and he diagnosed the appellant with hysteria. It appears that the appellant was also referred to the Regional Mental Hospital at Nagpur where he was admitted on 26/6/2010 and remained there till 12/8/2010. At the time of discharge, as per the report of the Board of Visitors at Exh. 34, he was found fit for discharge and trial. On completion of the investigation, a charge-sheet came to be filed, which was committed to the Court of Sessions.

Learned Sessions Judge framed charge (Exh.4) for the offence punishable under Sections 498A and 302 of Indian Penal Code to which the appellant pleaded not guilty and claimed to be tried.

2. The prosecution examined in all nine witnesses at the trial and produced the record of the investigation. The appellant did not lead any evidence in defence. Learned Sessions Judge came to the conclusion that Savita died a homicidal death and it was the appellant, who intentionally caused her death by assaulting her by means of sickle (Article-1).

Learned Sessions Judge negatived the defence taken on behalf of the appellant, based on section 84 IPC and in the face of such a finding, the appellant came to be convicted for the offence punishable u/s 302 IPC and has been sentenced to suffer imprisonment for life and to pay a fine of Rs. 1,000/- and in default, to

suffer simple imprisonment for ten days. The appellant, however, has been acquitted for the offence punishable u/s 498A of IPC. Feeling aggrieved by the judgment of conviction and sentence, this appeal is filed.

3. We have heard Mr. Shrivastava, learned Advocate appearing for the appellant and Mrs. Jachak, learned Additional Public Prosecutor for the State. With the assistance of learned Counsel, we have scrutinised the entire evidence.

4. It is submitted by learned Counsel for the appellant that there is no evidence to show that the appellant was present in the house in the night intervening 18/6/2010 and 19/6/2010, i.e. immediately before the day on which Savita was found dead. He has submitted that in fact the prosecution witnesses have admitted that the accused was not present at the spot. It is, therefore, submitted that there is no evidence forthcoming that the appellant was the only person, who was present along with the deceased at the house. He further submitted that the case would not attract the provisions of Section 106 of the Evidence Act. He submitted that apparently there is no direct eye witness account of the incident available and the case essentially rests on circumstantial evidence. Learned Counsel would submit that no case is made out against the appellant. Alternatively, it is submitted that the appellant was mentally unsound and was unable to understand the consequences of his act. Learned Counsel has referred to the evidence of P.W.-8 Dr. Gurjar and in particular, the report at Exh.34 issued by the Board of Visitors at Regional Mental Hospital, Nagpur in which the appellant has been stated to be unfit for discharge and trial. Learned Counsel has also taken us through the evidence of P.W.-5 Nivrutti Satav, who is the brother of the appellant, who has admitted that the appellant was making gesticulation immediately after the incident and looked frantic. He, therefore, submitted that there is enough evidence to discharge the burden u/s 105 of the Evidence Act read with Section 84 IPC and the appellant be acquitted.

Learned Counsel for the appellant has placed reliance on the following decisions in support of his various submissions:

- (1) Dasari Siva Prasad Reddy Vs. The Public Prosecutor, High Court of A.P.,
- (2) Dahyabai Chhaganbhai Thakkar Vs. State of Gujrat-AIR 1984 SC 1563.
- (3) Shrikant Anandrao Bhosale Vs. State of Maharashtra,

5. On the contrary, it is submitted by learned Additional Public Prosecutor for the State that there is positive evidence on record that the appellant and the deceased were staying together and there was no other person staying with them. She submitted that the appellant was suspecting character of the deceased and as such it would be a strong motive, as the appellant had gone to the extent of disowning the paternity of pregnancy of the deceased and was claiming that the deceased was pregnant from somebody else. She submitted that now the appellant is trying to take shelter of Section 84 IPC to extricate himself from the charge of murder. Learned A.P.P. would submit that as per the

final report given on 12/8/2010, the appellant was found to be fit for discharge and trial. She has submitted that the material point of time, is the date and time of the commission of the offence and unless and until it is proved that at the time of the alleged commission of the offence, the appellant, by reason of insanity was unable to understand the consequences of his act, the benefit of Section 84 IPC cannot be extended. Learned A.P.P., therefore submitted that the appeal is devoid of any substance and it be dismissed.

6. Undoubtedly, this case rests on circumstantial evidence. It has, therefore, to be seen whether the various circumstances have been independently established and whether they would form a chain pointing to the guilt of the appellant. It is not in dispute that the appellant was married to the deceased about four years prior to the date of the incident and they were staying together at village Wadner Bholji and they were issue-less. P.W.-1 Vasant Raut has stated that the appellant and deceased Savita were only residing in their house. This part of the evidence is not at all challenged anywhere. The evidence of P.W.-5 Nivrutti Satao, who is brother of the appellant, would show that they were five brothers including the appellant. P.W.-5 has stated that the appellant used to reside separately in the village while he was residing at the outskirts of the village. The appellant was initially married with one Sindhubai and after there was a divorce, had married with Savita. There is, thus, enough evidence to show that the appellant and the deceased were the only persons staying together at village Wadner Bholji.

7. P.W.-4 Bhimrao Raut is maternal uncle of the deceased. He has stated that deceased Savita was his niece. She was married with the appellant prior to four years and had gone to cohabit with the appellant at Wadner Bholji. It is the evidence of this witness as also the evidence of P.W.-1 Vasant Raut that the appellant used to ill-treat and used to beat her and Savita used to narrate this when she used to visit her maternal house. This witness has also stated that Savita was not coming alone and the appellant was not allowing her to go anywhere. This witness lastly met Savita at the marriage of his niece on 01/6/2010, and the appellant had also attended the said marriage.

On that day. Savita complained about the ill-treatment. Savita was pregnant at that time. He tried to convince the appellant not to ill-treat Savita. This witness has thereafter deposed about the message received on the day of the incident and his visit to village Wadner Bholji. Thus, there is evidence available on record that the appellant and the deceased were staying together, the appellant was ill-treating Savita and was suspecting her character.

8. Learned Counsel for the appellant has invited our attention to a answer given by P.W.-I Vasant Raut and for the matter of that P.W.-4 Bhimrao Raut, who have admitted that when they had visited the spot, the accused was not present there. We do not find that this circumstance would be of any help to the case of the appellant. The material point of time would be the time in proximate part and not after the incident when these witnesses had visited the spot. The fact that the appellant was not present on the spot after the incident and when these

relatives had visited the spot, would not be sufficient to raise an inference that the appellant was not staying with the deceased. In fact, no such case has been set up anywhere that the appellant and the deceased were staying separately. Once this aspect is established that the appellant and the deceased were staying together, certainly the provisions of Section 106 of the Evidence Act would come into play and it would be for the appellant to prove it albeit on preponderance of probability to show as to under what circumstance the death of the deceased had occurred. We find that this burden has not at all been discharged. As noticed earlier, the appellant is mainly coming with a plea based on Section 84 of Indian Penal Code.

9. The forensic evidence in the form of Chemical Analyzer's report (Exh.48) would show that all the exhibits, except Exhs. 3 and 10 i.e. pieces of cement, concrete and sand and baniyan of the appellant were stained with blood group "A". It is true that the results of the blood group on Exh.1, i.e. the blood sample of the deceased was inconclusive. However, the fact remains that all the exhibits seized including the clothes of the deceased were having human blood stains of blood group "A". There is no evidence that the appellant had sustained any injury with possibility of the blood stains on his clothes. We find that the prosecution has established on the basis of the evidence led that it is the appellant, who has intentionally caused the death of the deceased by assaulting her by means of sickle (Article-1).

10. It would now be necessary to examine whether the case would fall under the Section 84 IPC. Section 84 IPC reads as under:-

Act of a person of unsound mind:-Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

As per Section 105 of the Evidence Act, the burden of proof that his case falls under any of the exception of IPC is on the accused. It is true that such a burden is not as heavy as that, which rests on the shoulder of the prosecution. Thus, while the prosecution is obliged to establish the case beyond reasonable doubt, the accused can discharge the burden on preponderance of probability.

11. The case of Dahyabai (supra) also involved the murder of wife by her husband, in which the appellant-accused, had set up a defence of insanity and the Hon"ble Apex Court, after taking survey of all the relevant provisions including Sections 299 and 84 of IPC and Section 105 read with Section 4 and Section 101 of the Evidence Act, has inter alia held that there is no conflict between general burden, which is always on the prosecution and which never shifts and the special burden that rests on the accused to make out his defence of insanity.

The Hon"ble Apex Court has noticed a passage from Halsbury's Laws of England in which it is stated that onus of establishing insanity is on the accused. The

burden of proof upon him is no higher than which rests upon a party to civil proceedings. The Hon'ble Apex Court has also taken a note of its earlier decision in the illustrated case of K.M. Nanavati Vs. State of Maharashtra, That case involved the defence based on Section 80 of IPC. The relevant observations can be reproduced as under:

The alleged conflict between the general burden which lies on the prosecution and the special burden imposed on the accused under S. 105 of the Evidence Act is more imaginary than real. Indeed, there is no conflict at all. There may arise three different situations; (1) A statute may throw the burden of proof of all or some of the ingredients of an offence on the accused: (see Ss. 4 and 5 of the Prevention of Corruption Act), (2) The special burden may not touch the ingredients of the offence, but only the protection given on the assumption of the proof of the said ingredients: (see Ss. 77, 78, 79, 81 and 88 of the Indian Penal Code), (3) It may relate to an exception, some of the many circumstances required to attract the exception, if proved, affecting the proof of all or some of the ingredients of the offence: (see S. 80 of the Indian Penal Code)... In the third case, though the burden lies on the accused to bring his case within the exception, the facts proved may not discharge the said burden but may affect the proof of the ingredients of the offence.

After giving an illustration, this Court proceeded to state:

That evidence may not be sufficient to prove all the ingredients of S. 90 of the Indian Penal Code, but may prove that the shooting was by accident or inadvertence, i.e., it was done without any intention or requisite state of mind, which is the essence of the offence, within the meaning of S. 300, Indian Penal Code, or at any rate may throw a reasonable doubt on the essential ingredients of the offence of murder..... In this view it might be said that the general burden to prove the ingredients of the offence, unless there is a specific statute to the contrary, is always on the prosecution, but the burden to prove the circumstances coming under the exceptions lies upon the accused.

In para 9 of the judgment, it has been held as under:

When a plea of legal insanity is set up. the court has to consider whether at the time of commission of the offence the accused. by reason of unsoundness of mind, was incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. The crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. Whether the accused was in such a state of mind as to be entitled to the benefit of S. 84 of the Indian Penal Code can only be established from the circumstances which preceded, attended and followed the crime.

(Emphasis supplied)

12. Thus, the material point of time would be the time of the commission of offence and it should be shown that on account of unsoundness of mind, the

appellant-accused was not able to understand the consequences of his act. The nature of the mental illness would also be the relevant factor, as it is not in every case of mental illness/insanity, that such an inference can be drawn. The matter would depend upon facts and circumstances of each case.

13. In the case of Shrikant Anandrao Bhosale Vs. State of Maharashtra, it has been reiterated that burden to prove the existence of circumstances for bringing the case within purview of Section 84 IPC lies on the appellant-accused and that burden is no higher than that rests upon a party to civil proceedings, i.e. preponderance of probabilities. Incidentally, the case of Shrikant Bhosale involved appellant suffering from paranoid schizophrenia and on the facts of that case, the defence was upheld and the appellant was acquitted.

In paragraph 19 of the judgment, the Hon"ble Apex Court has noticed the following circumstances which stood proved in that case:-

1. The appellant has a family history -his father was suffering from psychiatric illness.
2. Cause of ailment not known - heredity plays a part.
3. The appellant was being treated for unsoundness of mind since 1992 - diagnosed as suffering from paranoid schizophrenia.
4. Within a short span, soon after the incident from 27-6-1994 to 5-12-1994, he had to be taken for treatment of the ailment 25 times to hospital.
5. The appellant was under regular treatment for the mental ailment.
6. The weak motive of killing of the wife--being that she was opposing the idea of the appellant resigning the job of a police constable.
7. Killing in daylight--no attempt to hide or run away.

The case would be clearly distinguishable on facts.

14. Turning to the present case, there is enough evidence on record to show that the appellant was running a grocery shop in his house and the deceased was doing agricultural labour work. The appellant had attended the marriage at Matargaon on 01/6/2010, i.e. about nineteen days prior to the date of incident. There is also evidence of P.W.-4 Bhimrao Raut that the deceased used to visit her parents house along with her husband i.e. the appellant and used to return with him as the appellant was not allowing her to go alone. There is also evidence on record to show that Savita was carrying pregnancy, which would be evident from the evidence of P.W.-4 as well as the postmortem examination report at Exh.29. Learned Sessions Judge has considered some of these circumstances along with others to negate the defence based on Section 84 of Indian Penal Code.

15. The witnesses examined on behalf of the prosecution were suggested that the appellant was behaving erratically in as much as he was making sounds like that of barking of dog. P.W.-1 Vasant Raut has denied suggestion to that effect.

Although, P.W.-2 Vijay Hiralkar, who is panch witness has stated that the persons gathered there were saying that the appellant was making sounds of barking like dog, this part of the evidence, would be clearly heresay in nature. P.W.-4 has also denied that the appellant was behaving like insane person or was making sounds like that of barking dog.

16. Let us now see the medical evidence. The appellant was initially referred to Primary Health Centre, Nandura where he was examined by P.W.-9 Dr. Laxminarayan Jaiswal. On examination, he found that all the symptoms of the appellant were normal and he even suspected that the appellant was malingering. He referred the appellant to Civil Hospital, Buldana for expert opinion and further management. Exh. 54 is the certificate issued by this witness. P.W.-8 Dr. Shaloman Gurjar attached to Civil Hospital, Buldana as C.M.O. had examined the appellant on 19/6/2010. The appellant was under his observation till 10.30 a.m. of 20/6/2010. He found the appellant to be quiet, not responding to vocal commands and his general condition was fair and all the systemic examination was normal. When the appellant was again examined on 20/6/2010, he was found to be normal. The appellant was discharged on 20/6/2010 at 10.30 a.m. and the evidence shows that it was "on verbal opinion of R.M.O." that the appellant was diagnosed with hysteria. This witness states that in case of hysteria, patient expresses excessive and uncontrollable emotions like fear or panic.

One thing is clear that the so-called opinion of the R.M.O. was oral and even otherwise, it has to be shown that hysteria is such a disease in which the appellant would be unable to understand the consequences of his act. The only thing, which this witness has stated that in hysteria the patient suffers with emotions like fear of panic. That in our view would not come to the aid of the appellant.

The appellant was thereafter referred to the Regional Mental Hospital at Nagpur, where he was admitted from 26/6/2010 to 12/8/2010. Learned Counsel for the appellant has placed reliance on the report (Exh.34) of the Board of Visitors dated 15/7/2010 in which the opinion is that the appellant was found to be unfit for discharge and trial. Subsequently, there is yet another report of the same Board dated 12/8/2010 in which the appellant is found to be fit for discharge and trial.

We have given our anxious consideration to the material produced in the context of the defence as raised and we are unable to hold that there is anything on record to show even on the basis of preponderance of probability that the appellant on 19/6/2010 or immediately prior thereto was suffering from any mental illness of the nature or degree, which would bring his case under the exception as provided for u/s 84 of IPC. In the circumstances, we do not find that any exception can be taken to the finding recorded by learned Sessions Judge.

Consequently, the appeal is hereby dismissed.

The impugned judgment of conviction and sentence is hereby confirmed.

The fees of learned Counsel appointed to appear on behalf of appellant are quantified at Rs. 5,000/- (Rupees Five Thousand Only).