

(2012) 09 BOM CK 0049

In the Bombay High Court

Case No : Criminal Revision Application No. 241 of 2008

Sahebrao Mahajan

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 28-09-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 162, 164, 401(3)

Evidence Act, 1872 — Section 145, 27, 32

Penal Code, 1860 (IPC) — Section 302, 304B, 34, 498A

Citation : (2013) ALLMR(Cri) 1666

Hon'ble Judges : T.V. Nalawade, J

Bench : Single Bench

Advocate : R.N. Chavan holding for . Vijay Sharma, for the Appellant; N.B. Patil, APP for Respondent No. 1/State and Mr. K.C. Sant, Advocate for Respondent Nos. 2 to 6, for the Respondent

Final Decision : Dismissed

Judgement

T.V. Nalawade, J.—The revision is admitted. By consent, notice after admission of revision was made returnable forthwith and both the sides were heard for final disposal of the matter. The proceeding is filed against judgment and order of Sessions Case No. 153/2004, which was pending in the Court of Sessions Judge, Jalgaon. In the Trial Court, the present respondent Nos. 2 and 3 were charged for offence punishable u/s 302 R/w. 34 of I.P.C. All the accused, including respondent Nos. 2 and 3 were charged for offences punishable u/s 304B, 498A and 34 of I.P.C. All the accused are acquitted of these offences. Original complainant has filed the present proceedings. Heard the advocate for complainant, advocate for the accused and the learned A.P.P. The learned A.P.P. supported the original complainant. The original record is perused by this Court.

2. The deceased Suwarna was niece of the complainant. The father of the deceased was a real brother of the complainant and he had died 3-4 years prior to the date of incident. After the death of the father of the deceased, the mother

and brother of deceased had started living with the complainant in village Saver kheda, Tahsil Raver. The deceased was given in marriage to accused No. 2 about two years prior to the date of incident. The accused No. 3 is the real brother of accused No. 2. Accused Nos. 1 and 5 are parents of accused No. 2. These accused were living together in village Vivare, Tahsil Raver, District Jalgaon. Accused No. 6 is a son of elder brother of accused No. 1 and the house of accused No. 6 is situated adjacent to the house of accused No. 1. The deceased had cohabited with the accused No. 2 in the house where the accused Nos. 1 to 3 and 5 were living together. At the relevant time, the deceased had a daughter aged about 9 months. Initially Suresh Gaikwad was working as a labourer on yearly wages basis in the field of accused No. 1 and he was made accused No. 4, but he came to be discharged. Suresh Gaikwad is examined as a witness by prosecution.

3. It is contended that the family of accused No. 1 had purchased agricultural land and due to that the family was in need of money. It is contended that accused were asking the deceased to bring Rs. one lac from the complainant as they were in need of money. It is contended that accused No. 6 was instigating other accused to make such demand. At the relevant time, accused No. 6 was working as Dy. Superintendent of Police and he was posted in Buldhana district. The wife of the brother of accused No. 6 had died unnatural death and it is contended that accused No. 6 used to say that he would manage everything, if something happens to the deceased, if the demand is not met with. Allegations are made that deceased was mentally harassed by the accused. Due to the threats given and the conduct of the accused, the deceased had become frightened. She had disclosed about the ill-treatment, which she was receiving, to the complainant and other relatives. The last disclosure was made about one month prior to the date of incident, when the deceased had visited the house of the complainant. Complainant had then met accused and he had tried to convince them to behave well. He had expressed that he was not in a position to meet their demand.

4. The incident took place on 11.3.2004 after 12.00 noon. On that day, the accused No. 2 had taken the deceased and his daughter, aged about 9 months, on a motorcycle towards his agricultural land as he wanted to take them to temple of Lord Munjoba which is situated towards the side of the agricultural land. Suresh Gaikwad was present in the field. Accused No. 2 wanted to take his brother, accused No. 3 also to the temple, but the accused No. 3 had gone to other field. Accused No. 2 left the deceased and his daughter in his field and he went to other field to call accused No. 3. The deceased handed over her daughter to Suresh Gaikwad and then she sat under a tree situated in their field. Accused No. 2 returned with accused No. 3 after some time. It is contended that accused Nos. 2 and 3 virtually lifted the deceased and they threw her in to a nearby well. This incident was witnessed by Suresh Gaikwad. It is contended that accused Nos. 2 and 3 gave threat to Suresh and they warned him not to disclose the incident to anybody.

5. At about 1.00 to 1.30 p.m. a person from village Vivare informed to the complainant that Suwarna was missing. The village of complainant is situated hardly at the distance of 9 k.m. from village Vivare and so he rushed to village Vivare with his relatives. He reached Vivare village at about 2.00 p.m. Then he learnt that accused No. 2 had taken the deceased and his daughter towards field and since then the deceased was missing. The persons from village Vivare and village Savarkheda, the village of complainant, searched for Surwan. Ultimately they found the dead body of Suwarna in the well of Nago Choudhary. The accused No. 1 was working in a branch of District Bank and he was immediately called by the persons from village Vivare. He also searched for Suwarna. When the dead body was found, he gave A.D. report to Nimbhora Police Station. At about 6.00 p.m. A.D. No. 6/2004 was registered on the basis of this report. Police went to village Vivare and with the help of some persons, they took out the dead body from the well. The dead body was referred to Government Hospital for P.M. examination and the P.M. was conducted on the dead body between 8.00 p.m. and 9.45 p.m. The doctor, who conducted the P.M. examination on the dead body, gave opinion that the death took place due to drowning.

6. The complainant gave report to police at about 9.45 a.m. on 12.3.2004. He expressed suspicion against Suresh Gaikwad also, in addition to the husband and relatives of the husband. Crime at C.R. No. 13/2004 came to be registered for offences punishable under sections 304B, 498A and 34 of I.P.C. Suresh Gaikwad came to be formally arrested on 12.3.2004. Other accused also came to be arrested.

7. On 16.3.2004, Suresh Gaikwad, original accused No. 4, gave statement to police in presence of panch witnesses. This statement was recorded as "memorandum" and in the statement the incident was disclosed by Suresh. On 19.3.2004 the confessional statement of Suresh was recorded u/s 164 of Cr. P.C. Section 302 of I.P.C. was then added to the crime as against accused Nos. 2 and 3.

8. During investigation, the spot panchanamas came to be prepared and statements of witnesses came to be recorded. Chargesheet came to be filed for all the aforesaid offences. In the Trial Court, the prosecution examined six witnesses. The accused took the defence of total denial. The Trial Court has acquitted all the accused by holding that the prosecution failed to prove that it is a homicidal death. The Trial Court has held that the possibility that Suwarna accidentally fell in to the well cannot be ruled out. The Trial Court has not believed Suresh Gaikwad. Other witnesses, relatives of the deceased are also not believed in respect of the evidence given on ill-treatment.

9. The death took place due to drowning and the incident took place in the day time. The well is situated in the field of other farmer. In view of the nature of allegations, the evidence like spot panchanamas, map of scene of offence and the P.M. report need to be considered along with the evidence of Suresh

Gaikwad. The veracity of Suresh Gaikwad needs to be ascertained on the basis of this circumstantial evidence and other circumstances.

10. In the evidence of one Umakant Mahajan (PW 3), the spot Panchanama is proved as Exh. 76. This evidence shows that the well is situated in the field of Nago Choudhary. Nago Choudhary is dead and this land is with his brother and other relatives, whose names are taken by Suresh Gaikwad. The evidence shows that the temple of lord Munjoba is situated at the distance of 1 k.m. from the spot. It is on the eastern side of the spot. The evidence shows that the well had no parapet wall. The well had depth of 200 to 250 fts., but the water was at the level of 20 fts. from ground level. The well was constructed and one brick of the wall at the ground level was found in detached condition. On southern side of the well, there was heap of earth and the heap was found spread up to the distance of 20 fts. from the well. Between this heap of earth and the well, there was foot path from west to east. On western side of the well beyond one road, there was land of accused No. 1. The distance between the well and the land of accused No. 1 is not shown both in the spot Panchanama and in the map of scene of offence. In the spot Panchanama, the land of accused is shown towards southern side of the land of Nago Choudhary. From the contents of the spot Panchanama and the map of scene of offence, it is not possible to infer that the well is visible from any point from the field of accused No. 1. A Neem tree is shown to be situated at the distance of 25 fts. from the well in the land of Nago Choudhary. No other tree is shown either in the map of scene of offence or in the spot panchanamas.

11. Suresh Gaikwad (PW 2) has deposed that at about 12.00 noon he was sitting under the aforesaid tree. He has deposed that accused No. 2 came there with the deceased and his daughter on a motorcycle. He has deposed that the accused No. 2 left the field by saying that he would call his brother from other field and the deceased and her daughter were left near him. He has deposed that the deceased handed over her daughter to him and then she went towards Badam tree where she sat. It is already observed that no such tree is shown in the spot panchanamas and in the map of scene of offence. He has deposed that when he was sitting under Neem tree, which is shown on the southern side of the well, he heard a noise of falling of something. He has deposed that when he turned towards backside, he noticed that accused Nos. 2 and 3 pushed the deceased into a well. He has again deposed that accused Nos. 2 and 3 virtually lifted the deceased and they threw her in to the well. He has deposed that accused Nos. 2 and 3 gave threat to him and warned him not to disclose the incident to anybody. He has deposed that he then went to the house of accused and he handed over the daughter of deceased to accused No. 5 and then he went to home. He has deposed that police arrested him on the same day, in the evening. He has admitted his statement recorded u/s 164 of Cr. P.C. and it is at Exh. 72. He has admitted that another statement was recorded on 16.3.2004, which is described as "memorandum" and which is at Exh. 88 (proved for proof of contradictions).

12. As per the record, Suresh (PW 2) was put under the arrest on 12.3.2004. The previous statement of Suresh at Exh. 88 is titled as "memorandum". This document bears the signature of Suresh (PW 2) and this document shows that it is signed by two panch witnesses and also the police officer, who prepared the memorandum. Nothing was recovered on the basis of this statement, memorandum of Suresh (PW 2). In view of the contents of this document, it can be said that the document does not fall u/s 27 of the Evidence Act and it needs to be treated as a statement recorded u/s 161 of Cr. P.C. Suresh (PW 2) has admitted that such statement was recorded by police. Salve (PW 6), the Investigating Officer, has given evidence in respect of this document and the relevant portions are proved as contradiction in the evidence of PW 6. Though there is a signature of PW 2 on this document, in view of the object behind the provisions of section 162 of Cr. P.C., the statement can be used for the purpose mentioned in section 145 of the Evidence Act, for the purpose of contradicting Suresh. this Court holds that the different portions at Exh. 88 duly proved as contradictions after confronting Suresh with these portions, can be used to test the veracity of PW 2.

13. On 16.3.2004 Suresh (PW 2) had stated before police that after handing over the daughter to him, the deceased had started towards temple of Lord Munjoba. He had stated that she had started by foot path which passes by the side of well. He had stated that he had started walking towards a mango tree situated on the northern side. It needs to be mentioned that no such mango tree is mentioned in the spot panchanamas and in the map of scene of offence. He had stated before police that on that day he had heard sound of fall of somebody. He had stated before police that on that day he had seen accused Nos. 2 and 3, who came to him and they had made inquiry with him about the deceased as they had not seen the deceased near the temple. He had stated before police on 16.3.2004 that due to the conduct of accused Nos. 2 and 3 he had suspicion against them that they had thrown the deceased in to the well. He had stated before the police that at about 2.00 to 2.30 p.m., on the day of incident, he had told the parents of the deceased that he had heard the sound of falling somebody in to the well. Thus, in the statement of 16.3.2004, PW 2 had given different versions and he had not stated that he had seen accused Nos. 2 and 3 throwing the deceased in to the well.

14. The statement of PW 2 was recorded u/s 164 of Cr. P.C. on 19.3.2004. It can be said that the contents of statement u/s 164 are consistent with the substantive evidence given by the PW 2 on material points.

15. The evidence of PW 2 that he was taken in custody by police on 11.3.2004 in the evening, creates probability that there was suspicion against PW 2 himself even before the registration of the crime. Here it needs to be kept in mind that the A.D. report was given at about 6.00 p.m. on 11.3.2004 by accused No. 1 and it was given on the basis of information received from Suresh (PW 2). Thus, on 11.3.2004 Suresh Gaikwad was suspect for police and he was taken in custody.

This circumstance needs to be kept in mind at the time of appreciation of the evidence of Suresh Gaikwad.

16. It is brought on record that on 15.3.2004 Suresh (PW 2) while in custody had complained to J.M.F.C. that police had assaulted him on 14.3.2004. He was represented by an advocate and his advocate had moved an application before J.M.F.C. and even the request was made for medical treatment. This allegation of Suresh was not believed by J.M.F.C., but this circumstances cannot be ignored at the time of appreciation of the circumstance that Suresh gave statement u/s 164 of Cr. P.C. on 19.3.2004 to J.M.F.C. When the incident took place on 11.3.2004, it can be said that there is a probability that Suresh had the knowledge about something with regard to the incident, but he did not disclose anything to police till 16.4.2004 and he came forward to give statement u/s 164 of Cr. P.C. first time on 19.3.2004. In view of the delay caused and statement dated 16.3.2004, the statement u/s 164 of Cr. P.C. needs to be looked with doubt. Further, the contradictions on material points in relation to the statement at Exh. 88 are proved by the defence. In view of the circumstances and also the circumstances which are being discussed afterwards, this Court holds that the evidence of Suresh (PW 2) is not free from doubt. He changed his versions from time to time.

17. One Jagdish (PW 4), husband of elder sister of deceased, has tried to say that on 11.3.2004 Suresh (PW 2) had disclosed to him that accused Nos. 2 and 3 had pushed Suwarna in to the well. This witness gave statement to police on 15.3.2004. Further, in the statement given on 15.3.2004 this witness had not stated before police such disclosure was made by Suresh to him. This omission is duly proved by the defence in the evidence of Investigating Officer (PW 6). Further, no such evidence is given by Suresh. In view of these circumstances, there is no need to discuss more evidence of Jagdish (PW 4) on this point.

18. In the evidence of Dr. Gade (PW 5), P.M. report is proved as Exh. 81. It is not disputed that Suwarna died due to drowning. The medical evidence shows that four anti mortem injuries were noticed on the dead body and they were contemporary with the finding of death due to drowning. Those injuries were :-

- (i) Contused lacerated wound on right elbow joint posterior of the size of 1/2" x 1/2" x bone deep, oblique, clotted blood was noticed.
- (ii) Abrasion on left forearm posterior below elbow, 1.1/2" x 1/2" in size, dark brown in colour.
- (iii) Graze (abrasions) on right buttock. 6 x 4" in size, vertical in direction, dark brown in colour.
- (iv) Left eyelid blackened and swollen.

The first three injuries were found on posterior aspect. There was vertical graze (abrasion) over right buttock. The direction of the injury on buttock creates a probability that the deceased fell on back side and she slept towards downward direction. These injuries are not consistent with the version of Suresh that

Suwarna was either pushed or she was thrown in to the well. One injury was found on one eye, but such injury can be caused by fall also and nothing is said by Suresh about the assault, if any, made on the deceased by accused Nos. 2 and 3. No evidence that deceased shouted or offered resistance.

19. The evidence on record has created a probability that the deceased had not gone to that side in the past. Due to heap of earth on one side of the well and as the road was passing between the heap of earth and the well, the possibility of accidental fall of the deceased into the well cannot be ruled out. It can be said that the conduct of Suresh (PW 2) was also doubtful and due to that conduct, it can be said that other probability like some other incident took place and involvement of Suresh cannot be ruled out. Thus, the medical evidence and the evidence of spot Panchanama is consistent with the probability of accidental fall. This evidence creates doubt about the version of Suresh (PW 2). In view of these circumstances, the Trial Court has held that there is the possibility of accident fall. As it is a possible view, no interference is possible in the view taken by the Trial Court.

20. For proving the offence punishable u/s 498A and 304B of I.P.C., the prosecution was required to prove that there was ill-treatment, cruelty against the deceased and that was on account of illegal demand of money. The main allegation is that there was the harassment to force the demand. The case of the prosecution of demand of Rs. one lac from the accused for paying the price of land purchased by the accused is falsified by the sale deed, the copy of which was collected by the police during investigation. The evidence of Salve (PW 6), the Investigating Officer, shows that he collected the copy of sale deed which is at Exh. 94. This document shows that the transaction took place on 20.12.2002. The land was purchased in the name of accused No. 5, the wife of the accused No. 1, for consideration of Rs. 2.25 lacs. The document shows that the entire amount was received by the vendor prior to the date of transaction. To falsify this portion of sale deed and to show that some amount remained to be paid, it was necessary for the investigating agency to record the statement of vendor and then to give the substantive evidence of vendor. The absence of such evidence gives opportunity to the defence to say that no such amount was required. The evidence on record shows that accused No. 1 was employed in a branch of District Bank. There is no evidence on record to show that the accused were facing financial crunch. In view of the nature of evidence on record, it is not possible to believe that the accused were in need of money and so they were asking the deceased to bring Rs. one lac from the complainant.

21. The evidence of complainant, PW 1, does not show that at the time of settlement of the marriage, there was any demand of dowry or any amount was required to be given to the accused for the marriage. The father of deceased was already dead. These circumstances are not certainly in favour of the case of the prosecution. No evidence is given by the complainant to show that he had capacity to meet such demand. The complainant has given evidence that the

demand was made after purchase of the land i.e. after December 2002. The incident took place on 11.3.2004. In view of these circumstances, the case of the prosecution that the demand was made for purchase of the land does not appear to be probable in nature.

22. The so called evidence on cruelty given by prosecution is mostly in the form of disclosures allegedly made by the deceased to the prosecution witnesses. The evidence is given that the last disclosure was made about one month prior to the date of incident. No evidence is given by PW 1, complainant, that he had contacted accused and he had questioned them about the disclosure allegedly made by the deceased. The evidence of Jagdish (PW 4) is similar in nature. He has not given particulars as regards time, date, place, month etc. about the disclosures. Similarly, the evidence on ill-treatment given by PW 2 Suresh is very vague. this Court has already observed that Suresh cannot be believed on any point. As the prosecution has failed to prove that the death of Suwarna is suicidal in nature, in view of the provision of section 32 of the Evidence Act, the evidence given by the prosecution on alleged disclosures made by Suwarna is not admissible as dying declaration u/s 32 of Evidence Act. Thus, there is nothing wrong in the findings given by the Trial Court in respect of offences punishable u/s 304B and 498A of I.P.C. also.

23. For respondents, reliance was placed on two reported cases. In the case reported as Sheetala Prasad and Others Vs. Sri Kant and Another, , the Apex Court has discussed the extent of power of this Court u/s 401(3) of Cr. P.C. The Apex Court has observed that such power cannot be exercised lightly when invoked by private complainant against the order of acquittal. The Apex Court has made following observations :-

Without making the categories exhaustive, Revisional jurisdiction can be exercised by the High Court at the instance of private complainant (1) where the trial Court has wrongly shut out evidence which the prosecution wished to produce, (2) where the admissible evidence is wrongly brushed aside as inadmissible, (3) where the trial Court has no jurisdiction to try the case and has still acquitted the accused, (4) where the material evidence has been overlooked either by the trial Court or the appellate Court or the order is passed by considering irrelevant evidence and (5) where the acquittal is based on the compounding of the offence which is invalid under the law. By now, it is well settled that the Revisional jurisdiction, when invoked by a private complainant against an order of acquittal, cannot be exercised lightly and that it can be exercised only in exceptional cases where the interest of public justice require interference for correction of manifest illegality or the prevention of gross miscarriage of justice. In these cases, or cases of similar nature, retrial or rehearing of the appeal may be ordered.

24. In the case reported as 2008 Cri. L.J. SC 1627 [Johar and Ors. Vs. Mangal Prasad and Anr.] it is observed by the Apex Court that for interference in the decision of the Trial Court, the High Court is required to point out any error of

law on the part of the learned Trial Judge. It is observed that the High Court is expected to point out that any relevant evidence has been left out of its consideration by the Trial Court or irrelevant material has been taken into consideration. It is observed that if such things are absent, the High Court is not expected to enter in to the merits of the matter. In view of the observations made by the Apex Court in the cases cited supra, this Court holds that no ground is made out in the present case by the petitioner for interference. Thus, the view taken by the Trial Court is a possible view and the Revisional Court is not expected to interfere in the decision of the Trial Court. In view of this position of law and the facts and circumstances of the present case, this Court holds that no interference is possible in the decision of the Trial Court. So the revision stands dismissed.