
(2009) 04 BOM CK 0169
In the Bombay High Court
Case No : Criminal Appeal No. 339 of 2008

Satish Jawale

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 04-04-2009

Acts Referred:

Evidence Act, 1872 — Section 106

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

Citation : (2009) 04 BOM CK 0169

Hon'ble Judges : V.R. Kingaonkar, J

Bench : Single Bench

Advocate : S.S. Jadhav, for the Appellant; S.S. Autade, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

V.R. Kingaonkar, J.—Challenge in this appeal is to judgement rendered by learned Additional Sessions Judge, Ahmednagar, in Sessions Case No. 183/2007 whereby the appellant has been convicted for offence punishable u/s 498A and 304 of the I.P. Code and sentenced to suffer rigorous imprisonment for one (1) year and to pay fine of Rs. 250/-, in default to suffer rigorous imprisonment for three (3) months on the first count and rigorous imprisonment for seven and half (7 & 1/2) years and to pay fine of Rs. 1000/-, in default to suffer rigorous imprisonment for six (6) months on the second count.

2. The appellant is husband of deceased Poonam. She was a young woman aged about 22 years. Their marriage was performed about one and half (1 & 1/2) year prior to the incident wherein Poonam was caught by fire. She received burns in the noon of May 21st, 2007 at about 3 p.m. in the matrimonial home. She and the appellant were the only persons residing in the matrimonial home at the relevant time. There is no dispute about the fact that she succumbed to the burn injuries on May 30th, 2007 while under medical treatment at Civil Hospital, Ahmednagar. She had received 60% burn injuries during course of the incident

which occurred in the relevant noon. The appellant was employed as a waiter in a local hotel style as "Hotel Bagayatdar", situated at Jamkhed, which is a taluka place in Ahmednagar district.

3. The prosecution case, stated briefly, is that after about one (1) month of the marriage, the appellant and deceased Poonam started residing separately from other members of his family. He used to return home at late hours in the night in drunken condition. He used to beat her. She narrated to her parents about the matrimonial cruelty meted out to her. There was no improvement in his nature though a word of advice was given to him. She went to house of her parents and informed them about cruel treatment meted out to her by the appellant. Thereafter, for about six (6) months, she resided with her parents. Somewhere at the threshold of the year 2006, elder brother of the appellant, by name Sahadu, went to house of her parents and urged them to send her for cohabitation. He assured them that Poonam will not be subjected to any further ill-treatment at the hands of the appellant. On his pleading with them and assurance given by him, her parents sent Poonam to the matrimonial house for resumption of the cohabitation with the appellant. His conduct did not materially change. He continued to beat her. He used to suspect her fidelity. Her father visited matrimonial house of Poonam after few days of sending her to resume the cohabitation with the appellant. Her father tried to convince the appellant to discontinue the ill-treatment to Poonam. Thereafter, for some period, he did not ill-treat her. However, lateron, he again started giving her ill-treatment as before. Since some days before the incident, he was not attending the work at the hotel. On May 21st, 2007, while he was at home, Poonam urged him to attend the work. Thereupon, the appellant started giving her abuses and beat her by means of kicks and fists. She was fed up with his continuous harassment, ill-treatment and suspicion expressed about her character. She picked up a canister of kerosene with a view to threaten him and poured some kerosene on her person. The appellant, however, continued to abuse her by standing in her front. He told her why should she set on fire to herself, he would himself set the fire. He lighted a matchstick and threw the burning matchstick on her back side. Her saree was caught by fire. She screamed and went outside the house. There was none present nearby. The appellant then poured water on her person and extinguished the fire. He brought an autorickshaw and took her to private hospital of Dr. Munde. He left that private hospital immediately after she was admitted therein. Subsequently, her parents shifted her to the Government hospital. Her dying declaration was recorded by the Executive Magistrate. Assistant Sub Inspector (ASI) Aher recorded her statement about the incident as per her narration. He registered crime No. 48/2007 on basis of her statement. The investigation was geared up. In the meanwhile, injured Poonam died due to septicemic shock caused as a result of 60% burns. The appellant was arrested. He was charge-sheeted for the offences punishable u/s 498A and 302 of the I.P. Code on basis of the material collected during course of the investigation.

4. The appellant pleaded not guilty to the charge (Exh-11) framed against him.

He denied truth into the accusations about alleged matrimonial cruelty meted out to deceased Poonam. He also denied that he had set on fire to her person in the relevant noon. His defence before the trial Court was that she had received accidental burns while cooking. He contended that he was falsely involved in the criminal case on basis of suspicion.

5. At the trial, the prosecution examined in all eight (8) witnesses in support of its case. The prosecution also relied upon certain documents, particularly, the dying declarations of deceased Poonam. The appellant examined DW1 Dr. Munde to prove the defence that Poonam had received accidental burns. On appreciation of the evidence, the learned Sessions Judge came to the conclusion that deceased Poonam was subjected to matrimonial cruelty by the appellant during the relevant period. He held that the appellant caused her death though it was not so intended. Consequently, the learned Sessions Judge found the appellant guilty for offence punishable u/s 498A and 304 of the I.P. Code. He was accordingly convicted and sentenced as described hereinabove.

6. Mrs. Jadhav, learned Counsel for the appellant, would submit that the prosecution case could not be relied upon in view of discrepancies in the dying declarations of deceased Poonam. Mrs. Jadhav would submit that the dying declarations of Poonam could be outcome of her tutoring by the parents. She would submit that dying declarations recorded by the Executive Magistrate and the police officer are inherently discrepant with each other and, therefore, genesis of the incident cannot be vouched for. She argued that the charge of matrimonial cruelty is not proved by the prosecution. It is contended that version of DW Dr. Munde could not have been brushed aside by the learned Sessions Judge. It is further contended that the act of the appellant to extinguish the fire and shift injured Poonam to private hospital of Dr. Munde is indicative of his innocence. The learned Counsel urged, therefore, to allow the appeal and acquit the appellant. As against this, learned A.P.P. Mrs. Autade supports the impugned judgement.

7. Before I proceed to embark upon scrutiny of the prosecution evidence, let it be noted that deceased Poonam resided with the appellant hardly for about one year. In the short span of about one and half (1 & 1/2) years matrimonial life, she resided with him in a joint house alongwith other family members for about one (1) year and had resided with her parents for about six (6) months. The presence of the appellant in the matrimonial home during the relevant noon is writ large. He himself had taken her to the private hospital of Dr. Munde for the purpose of medical treatment. The ghastly incident occurred in the matrimonial home when the appellant and deceased Poonam were the only two (2) inmates present therein. He had not received any burn injury during course of the incident. He extinguished the fire. Nobody from neighbourhood came to the help of deceased Poonam while she was screaming for help after she was caught by fire.

8. The parents of deceased Poonam entered the witness box. The versions of

PW1 Sambhaji and PW2 Parvati is of similar nature. Their versions purport to show that only for about one (1) month after the marriage, the matrimonial life of Poonam was normal. It is the version of PW Sambhaji that after one month, the appellant started giving ill-treatment to Poonam. He used to abuse her, used to suspect her character and used to beat her under influence of liquor. His version reveals that as and when Poonam used to visit his house or he used to visit Jamkhed for attending the weekly bazaar, she used to narrate him about the matrimonial cruelty meted out at hands of the appellant. His version purports to show that he made attempt to convince the appellant to discontinue the matrimonial cruelty. His version reveals that for about one month thereafter, she was properly treated by the appellant. Thereafter, the matrimonial cruelty was resumed and, therefore, Poonam was brought to the parental home. She was with her parents for about six (6) months. This is a glaring fact. Had there been no cruelty at hands of the husband, ordinarily, the newly married young girl could not have been brought back by her parents to reside with them.

9. The versions of PW Sambhaji and PW Parvati would make it amply clear that after about six (6) months of her stay in their house, Poonam was sent for cohabitation with the appellant because his elder brother by name Sahadu assured that she would be given proper treatment. Their versions go to show that for about one month thereafter, the appellant did not ill-treat her. Thus, till about March, 2007, the appellant intermittently subjected deceased Poonam to matrimonial cruelty. He had stopped such cruelty for short duration of about a month or so in the meanwhile. The versions of PW Sambhaji and PW Parvati would make it amply clear that the appellant was a boozier and used to beat deceased Poonam during the period of consortium. They narrated as to how they learnt about admission of Poonam in the private hospital of Dr. Munde at Jamkhed and, therefore, had visited the said hospital.

10. According to PW Sambhaji and PW Parvati, Poonam had received burn injuries on her person and when contacted in the hospital, she narrated to them that in the relevant noon, the appellant assaulted her by means of fist and kick blows and, therefore, she poured kerosene on her person so as to threaten him. According to them, Poonam narrated to them that the appellant had set fire to her person by means of a burning matchstick. Thus, they narrated the oral dying declarations made to them by deceased Poonam.

11. There appears discrepancy about the narration of Poonam to her parents as regards nature of the incident. Though PW Sambhaji states that she narrated to him that the appellant gave fist and kick blows under influence of liquor, yet, it is not so stated by PW Parvati and she gives yet another reason. She states that the appellant was asked by Poonam as to why he had not gone for attending the work and thereupon, the latter started beating her by fist and kick blows and also started suspecting her character. Both of them, however, gave a common statement that Poonam had poured kerosene on her person whereas the appellant set her ablaze by means of a burning matchstick. They also made it

clear that Poonam narrated to them that it was the appellant who extinguished the fire on her person and took her to the hospital. It is admitted by PW Sambhaji that his nephew by name Lahu Yadav is a police constable attached to a Police Station in Beed district. He also admits that he, PW Parvati and other relatives were with Poonam after their arrival at Jamkhed until her death. They did not report the incident to the police. They admitted further that prior to the incident, Poonam had become pregnant. The appellant and his family members had taken Poonam to Tuljapur for pilgrimage. About a fortnight before the incident, her pregnancy was terminated in the hospital of Dr. Kashid. Though PW Parvati tried to suppress this fact, yet, such minor act of concealment does not otherwise impair her credibility.

12. It is significant to note that the parental home of deceased Poonam is at village Naigaon which is at a short distance from Jamkhed. It is but natural that her parents used to visit Jamkhed, which is a taluka place, to attend the weekly bazaar. The deceased also used to visit house of her parents because it is not far away from the matrimonial home. The fact that she had been brought by the parents and had stayed with them for about six (6) months would speak volume against the appellant. The young and newly married woman was unlikely to end her life without any substantial reason or rhyme. The versions of the parents of Poonam go to prove that she was subjected to matrimonial cruelty at hands of the appellant. The appellant used to abuse and beat her. The incident which occurred in the noon of May 21st, 2007, reveals that Poonam was fed up with the continuous matrimonial cruelty, bickerings and conduct of the appellant. The incident occurred at about 3 p.m., which was not ordinarily the time of cooking. Nor there is scintilla of evidence to infer that she was engaged in cooking at the relevant time. It is highly probable, therefore, that during course of the incident of fracas and while she was unable to bear the beating of the appellant, Poonam got poured kerosene on her person, may be with the intention to scare the appellant or by way of tantrum.

13. The very fact that she was required to take such a drastic step as a result of unbearable matrimonial cruelty, is sufficient to prove that the nature of cruelty was such that she was driven to the terminal point. She could have caused injury to her person or could have ended her life as a result of the cruelty. Needless to say, the necessary ingredients of Section 498A, as enumerated in Explanation (a) are duly proved in the circumstances of the present case. The conviction of the appellant for offence punishable u/s 498A of the I.P. Code is thus legal and proper.

14. The topography of the spot of incident is depicted in spot panchanama (Exh-20). This panchanama is duly corroborated by PW3 Dadarao. His version purports to show that on 22nd May, 2007, the police and panchas visited the residential premises of the appellant and prepared the spot panchanama. They noticed that the residential premises of the appellant are situated on upper floor of the house property. It is a single room admeasuring 10 x 12 feet. They noticed

a plastic canister of kerosene and matchbox lying in the room. The recitals of the spot panchanama would show that there was no stove found in the premises. The room is situated in the southwest corner of the house.

15. The testimony of PW4 Govind Kadam reveals that he was attached to Tahsil office, Jamkhed, as Naib Tahsildar. He received requisition at about 8.30 a.m. on 22nd May, 2007 to attend the work of recording dying declaration and, therefore, went to the Rural Hospital. His version purports to show that he contacted the Medical Officer and informed him the purpose of the visit. He and the Medical Officer then went to the burns ward where injured Poonam was admitted. His version reveals that the Medical Officer examined Poonam and opined that she was conscious and fit to give her statement. His version further reveals that he asked the persons standing around injured Poonam to go away. He introduced himself as Executive Magistrate to injured Poonam. He deposed that he verified whether Poonam was conversant with Marathi language and was able to read and write. He thereafter asked her as to how the incident occurred.

16. The version of PW Govind Kadam, the Executive Magistrate, lends corroboration to the recorded dying declaration (Exh-23). He stated that Poonam narrated to him that on 21st May, 2007 at about 2.30/3.00 p.m., the appellant had come to the house in drunken condition and had started beating her. She further narrated to him that the appellant used to frequently beat her under the influence of liquor. She narrated to him that so as to scare him, she herself poured the kerosene on her person and threatened him that she would ablaze herself. The appellant, however, set on fire to her person. She narrated to him that due to the fire, she received the burn injuries and only the appellant extinguished the fire. He obtained her thumb impression at the bottom of the dying declaration. Thus, he corroborates recitals of the dying declaration (Exh-23). The dying declaration bears endorsement of the Medical Officer to show that injured Poonam was medically fit to give her statement.

17. Cross-examination of PW Govind Kadam reveals that he could reach the Rural Hospital, Jamkhed within about 4/5 minutes. He admits that it was his first time to record the dying declaration of an injured witness. He gave the sealed envelope of the dying declaration at the Tahsil office. He admits that the dying declaration (Exh-23) does not bear any endorsement to show that the statement was read over to Poonam and she admitted the same to be correct and in accordance with her version. The witness appears to be candid enough to admit that he was inexperienced at the material time in the context of recording of the dying declarations. His version reveals that he had taken due care while recording the dying declaration by consulting the Medical Officer. He also verified personally as to whether injured Poonam was conversant with the vernacular and was able to give her statement. The fact that the dying declaration (Exh-24) does not bear endorsement to show that it was read over to injured Poonam is of no much consequence.

18. The intrinsic evidence appearing from the recorded dying declaration

(Exh-23) purports to show that the commencement of the recording was at about 9.05 a.m. and it was completed by 9.20 a.m. No doubt, the Medical Officer endorsed that she was able to give her statement and time of 9.55 a.m. is shown at the bottom of the said dying declaration. The learned advocate for the appellant would point out from the time shown at the bottom of the recorded dying declaration (Exh-30) that the Medical Officer endorsed another dying declaration at 9.25 a.m. It is argued by learned advocate Smt. Jadhav that both these dying declarations are suspicious as they appear to have been recorded at one and the same time and overlapping. She invited my attention to version of PW6 ASI Ahire who recorded another dying declaration (Exh-30).

19. The version of PW6 ASI Gulab Ahire reveals that on 22nd May, 2007, at about 8.25 a.m., he received the information from Rural Hospital, Jamkhed regarding admission of injured Poonam in the said hospital. The information letter (Exh-28) is corroborated by him. He immediately went to the Rural Hospital and contacted Medical Officer. He states that the Medical Officer examined injured Poonam and gave endorsement on the top of the relevant paper to the effect that she was able to give her statement. The dying declaration (Exh-30) bears such endorsement. It shows that at about 8.50 a.m., she was examined by the Medical Officer and was found in fit condition to give her statement. The version of PW ASI Ahire reveals that he thereafter recorded her dying declaration (Exh-30) as per her narration. She narrated to him that she was subjected to cruelty. She narrated to him that the appellant used to beat her in drunken condition. She narrated to him that the appellant used to suspect her character and, therefore, for about six (6) months, she was residing with her parents. She also narrated to him that after assurance given by the elder brother of the appellant, she was sent to reside with him. She further narrated to him that after about a week or so, he again suspected her character and ill-treated her. She narrated to him as to how the incident occurred. It appears that she did not give prelude to the episode. Her dying declaration (Exh-30) shows that the incident of assault had commenced when she urged him to go and attend the work because he had not gone to attend the work since many-a-days. She was thereupon abused and assaulted by means of kicks and fists. The dying declaration shows that she was fed up due to the consistent ill-treatment and suspicion expressed by him and, therefore, in order to scare him, she poured kerosene on her person. The dying declaration purports to show that she narrated to PW ASI Gulab Ahire that the appellant ablazed her. Nothing of much importance could be gathered from cross-examination of PW Gulab Ahire. His version indicates that PW Dr. Zagde was then the attending Medical Officer to whom he had contacted. The dying declaration (Exh-30) reveals that it was read over to the injured - Poonam and she admitted correctness thereof.

20. The core of both the dying declarations (Exh-23 and Exh-30) is identical except variation in the context of some details of the episode. The medical endorsement on both these dying declarations were given after completion of the recording. The dying declaration (Exh-30) was, however, commenced at 8.50

a.m. and it is more probable, therefore, that before the Executive Magistrate reached the hospital, the recording thereof was completed. It is important to note that the offence was registered on the basis of said dying declaration by Jamkhed Police Station at 10.45 a.m. Obviously, it is difficult to say that timing of both the dying declarations overlap each other. What appears from the recording is that the dying declaration (Exh-30) was recorded by PW ASI Gulab Ahire prior in time and later on, between 9.05 a.m. to 9.30 a.m., PW Govind Kadam, the Executive Magistrate, got recorded the second dying declaration. The apparent inaccuracy seems to have been committed by the Medical Officer while recording the time at bottom of both the dying declarations. However, it would not enure to the benefit of the defence. For, the core of these dying declarations has remained almost identical though the first dying declaration is more elaborate as regards the background facts.

21. At this juncture, I shall advert to version of PW8 Dr. Zagde. He attended the injured - Poonam who was admitted in the Rural Hospital, Jamkhed, at about 7 a.m. on 22nd May, 2007. He deposed that he immediately gave intimation to the police vide letter (Exh-28). His version purports to show that around 8.00/8.15 a.m., PW ASI Gulab Ahire visited the hospital. He examined injured Poonam and certified that she was able to give her statement. Thereafter, PW ASI Gulab Ahire recorded her statement in his presence. His version would make it amply clear that later on, PW Govind Kadam visited the Rural Hospital and got recorded the dying declaration of injured Poonam vide Exh-23. His version reveals that injured Poonam was found to have received 25% burns. He did not take any entry about arrival and visit of the police officer or the Executive Magistrate in the MLC register. Nor there is record about history of the burns. This is probable because earlier, she was admitted in private hospital of Dr. Munde. One cannot be oblivious of the fact that injured Poonam died on 30th May, 2007. The medical record shows that there was no bad prognosis during the initial period of her medical treatment and, therefore, mentally she was capable of giving her statement to the police officer as well as the Executive Magistrate.

22. The defence sought to rely on version of DW1 Dr. Munde. His version purports to show that injured Poonam was admitted in the hospital at about 3 p.m. on 21st May, 2007. On his inquiry, she narrated to him that due to accidental burns, she had received the injuries. He recorded that history in the case paper (Exh-42). It was found that she had sustained 48% burn injuries. Her statement was not recorded by police during the relevant evening. It cannot be ignored that the appellant himself had taken her to the hospital of Dr. Munde. How she was involved in an accident is not clarified by him. There is vague reference in the medical report (Exh-44) that at about 3.30 p.m. on 21st May, 2007, history of accidental burns was given. The source of information is not recorded. It is important to note that the bottom side observations in the medical report (Exh-44) make it amply clear that smell of kerosene over the body and clothes of injured Poonam was noticed. This is most important and glaring circumstance. It would rule out possibility of any fire due to blasting of stove or

accidental reason. The presence of kerosene on her person and clothes could not be due to ordinary accidental reason. Needless to say, either she herself had poured kerosene on her person or that it was sprinkled by anyone else. In the residential premises, when only the appellant and Poonam were the inmates at the material time, how she was accidentally doused by kerosene is not explicable.

23. The appellant had the personal knowledge about the cause of the burns received by Poonam. It was for him to explain what kind of accident had occurred and how her clothes were soaked with kerosene and her body emanated the smell of kerosene. This is a fit case in which Section 106 of the Evidence Act may be invoked. The appellant simply offered defence of denial. The burden of proof in such a case would be on the appellant to explain as to how was the deceased wife caught by fire due to so called accident. A mere vague reference in the medical history, which could have been given by him to DW Dr. Munde, is of no much avail in support of his defence.

24. The version of PW5 Dr. Shrikant Pathak corroborates the post mortem notes (Exh-26). His version reveals that on examination of the deadbody of injured Poonam, burn injuries on the right and left upper limbs, back, chest, head, neck and face were noticed. She died of 60% burns. There is no dispute about the cause of her death. The version of PW7 P.I. Bhaskar Pawar reveals the steps taken by him during course of the investigation. It is not necessary to elaborately discuss his evidence.

25. Mrs. Jadhav seeks to rely on "P. Mani v. State of Tamil Nadu" AIR 2006 SCW 1053. The Apex Court, in the given case, held that where the husband and wife were not last seen together inside a room, the presumption u/s 106 of the Evidence Act could have no application. It was a case in which the evidence revealed that the children were asked to go by the deceased (wife) and then she had bolted the room from inside. Lateron, smoke was found coming out from the room. The door had to be broken to enter the room. Therefore, in absence of the husband/accused, it was held that Section 106 could not be invoked. The fact situation in the present case is quite difficult. The appellant himself had extinguished the fire and taken injured Poonam to the private hospital of Dr. Munde. His presence in the residential premises, at the time of the alleged incident, is writ large. It is in the wake of the peculiar fact situation that burden would be on him to explain as to how she was caught by fire when both of them were the only persons inside the house.

26. Mrs. Jadhav invited my attention to dictum in "Shivaji s/o Tukaram Patdukhe v. State of Maharashtra" 2004 ALL MR (Cri) 3220. A Division Bench of this Court observed that when the dying declaration was not read over to injured and she had not admitted the contents thereof to be correct, it could not be made foundation for sustaining the conviction. That was not the sole reason, however, to set aside the conviction in the given case. The Division Bench noticed that relations between deceased Durgabai (wife) and the appellant were normal. There were no allegations of any ill-treatment by him. The dying declaration was

recorded belatedly. The present case stands on different footings. There are two dying declarations recorded one after another in the same morning. There are also oral dying declarations made to parents of deceased Poonam which categorically implicate the appellant as author of the burns caused to deceased Poonam. The learned advocate Mrs. Jadhav further seeks to rely on observations in "Chinnamma v. State of Kerala" AIR 2004 S.C. 2816. There are cases and cases. The fact situation in each case differs from another case. Unless there is semblance in the fact situation and ratio decidendi is squarely applicable, the assistance of the case law may not be availed.

27. It may be culled out from the proved facts that deceased Poonam was subjected to matrimonial cruelty by the appellant during the period of their consortium. He was not attending the work since few days before the incident. He used to harass and beat her in inebriated condition. She was fed up due to his continuous ill-treatment. It is proved that in the relevant noon, there took fracas between the spouses when she urged him to go and attend the work. He attributed ill-motives to her by suspecting her character and started beating her. The tolerance of Poonam was at the pick. She was fed up with the continuous ill-treatment and, therefore, got poured kerosene on her person in order to scare him. Instead, he laboured under impression that he was being challenged. He, therefore, flung a burning matchstick on her person. He later on realized the consequence and poured water on her person to extinguish the fire. He took her to the hospital. Needless to say, it was not his intention to cause her death though in the fit of anger, he set fire to her person. The incident occurred at spur of the moment and, therefore, the offence would fall within the meaning of Part-II of Section 304 of the I.P. Code.

28. For the reasons aforestated, I am of the opinion that the impugned judgement of conviction is legal and proper. The learned Sessions Judge should have, however, clarified that the conviction is rendered u/s 304 Part-II of the I.P. Code. With this modification, the appeal deserves to be dismissed.

29. In the result, the appeal is dismissed. The impugned judgement, rendered in Sessions case No. 183/2007, is confirmed, with clarification that the appellant is convicted for the offence punishable u/s 304 Part-II of the I.P. Code, in addition to conviction u/s 498A of the I.P. Code. The impugned order of sentence is maintained.