

(2005) 11 BOM CK 0059
In the Bombay High Court
Case No : Criminal A. No. 152 of 1996

Shankar Vishwanath Kolhe and Another APPELLANT
Vs
The State of Maharashtra RESPONDENT

Date of Decision : 23-11-2005

Acts Referred:

Penal Code, 1860 (IPC) — Section 306, 34

Citation : (2006) CriLJ 1534

Hon'ble Judges : A.H. Joshi, J

Bench : Single Bench

Advocate : Surekha G. Chincholkar, for G.N. Chincholkar, No. 1, for the Appellant; B.R. Khekaia, Addl. P.P., for the Respondent

Final Decision : Allowed

Judgement

A.H. Joshi, J.—The Appellants - accused were tried for an offence u/s 306, read with Section 34 of Indian Penal Code. While Accused No. 1 was sentenced to Rigorous Imprisonment for five years with a fine of Rs. 500.00, and, on failure to pay the same, Rigorous Imprisonment for two months, the Accused No. 2 was awarded a punishment of Rigorous Imprisonment for one year and a fine of Rs. 500.00, in default, Rigorous Imprisonment for two months.

2. Appellant No. 2 died during pendency of appeal, and appeal abated in regard to her.

3. The accused were charged for abetting suicide by deceased Vithabai, wife of Accused No. 1.

4. The conclusion that Vithabai died due to consuming poison is proved by medical evidence.

5. The Trial Court found that the death was suicidal on the basis of evidence of PWs 3 and 6, who are sons of Accused No. 1 and deceased Vithabai.

6. The germ of controversy is shown to be the vice of drinking, extravagance and

spend-thriftiness of Accused No. 1.

7. According to Ganesh (PW 3), in the evening immediately preceding, in the background of controversy relating to spending of proceeds of cotton crop sold by Accused No. 1, the Accused No. 1 had come to house at about 8-00 to 8-30 p.m., on that day. At about 9-00 p.m., two brothers of witness Ganesh came to the field and told him that Accused No. 1 had taken their mother -Vithabai inside the room by holding her neck and he beat her as well as them.

On coming to the home on receiving the information from PW 6, PW 3 found that Vithabai and Accused No. 1 were in the inner room, which was latched from outside. The accused No. 2 was sitting in front room which was latched from inside. The accused No. 2 did not open the door when knocked by the witness, and PW 3 peeped through the chink and hole of the door, and found that the grand-mother, i.e., Accused No. 2, had bolted the middle door from outside, and she was sitting there. PW 3 heard the voice of his father, saying "whether she takes or he should take.

According to the witnesses there was silence after these utterances by Accused No. 1. As found by the Trial Court, testimony of this witness was corroborated by PW 6.

8. In the next day morning, Vithabai came out, prepared tea, went to Police Patil, as she had become restless. She was accompanied by other witnesses. She did not reveal anything. When taken to hospital, she was already declared dead.

9. Upon marshalling of the evidence, what the learned Trial Judge had concluded can be seen from Para 22, which reads as follows: -

22. It is nowhere explained or even suggested by defence to why the accused No. 2 Garjabai did not open the door when actually the call was given by her small grand-sons. It is also not understood as to why the accused No. 1 Shankar pressed or insisted PW 6 and Ramesh to go to the field on the night of the incident? In fact the very conduct of accused No. 1 clearly goes to show his ill-intention. Had it been the fact that the accused No. 1 or accused No. 2 were not involved in the crime, then there was no point in asking the children to go to the field to sleep there only when actually it has come on record that there was also one servant present in the field. In addition PW 3 -Ganesh had also gone there. Under these circumstances, the fact that accused No. 1 insisted his two sons to go to the field to sleep, suggest and indicates that, he wanted to do certain serious act on that night and actually that has taken place. But it was fortunately witnessed by his own sons. Thus, from the evidence of these two witnesses, one can positively conclude that, it was their father who instigated or had created such a situation that their mother had to consume poison. It has come on record as earlier discussed that, the accused No. 1 was addicted to drinks. The deceased was rather fed up with the behaviour of the husband and on this ground there used to quarrels. It has come on record that on the night of the incident only accused Nos. 1 and 2 and deceased were present in the house. It is

also said that accused No. 1 insisted his wife either she should take the poison or he will take it. These are the circumstances and the other circumstances earlier referred by me were in my opinion sufficient for the deceased to think of committing suicide.

(quoted from para 22 at page Nos. 71 and 72 of the Appeal paper-book).

10. The learned Trial Judge found that Vithabai was a lady of perseverance, and it was quite natural that she did not reveal to anyone that she was instigated to consume poison, or that it was administered, or some such story. However, Trial Court found that the evidence of PW 3, as corroborated by evidence of PW 6, and this was sufficient enough to hold that Vithabai was instigated by the accused persons to consume poison and thereby commit suicide.

11. The Judgment of conviction and sentence, based on this appreciation of evidence, is a subject-matter of challenge in the present appeal.

12. Learned Advocate for the Appellants pressed in service following points: -

(1) Evidence of PWs 3 and 6 cannot be held sufficient to conclude the abatement of suicide by Vithabai and to base the finding of conviction.

(2) PW 3 had reasons to have a grudge against his father firstly because he was given to vices, and secondly he did not support him for his education and as such they were at bad terms.

(3) There are improvements in the testimony of PW 6, which though may not, in totality, falsify his evidence to corroborate the evidence of PW 3, but would certainly weaken its strength if the evidence of PW 3 itself is found to be based on weak foundation.

(4) Failure of Vithabai to reveal instigation or abatement, or administration of poison by accused while she had gone to Police Patil on foot, and was conscious all through on way while being taken to hospital has another facet than the one adopted by Trial Court, namely that normally a wife would not like to involve her husband, at the same time a troubled a wife would not spare the husband when it has come to her life and she was instigated to consume poison, more particularly when the husband did not support the family and was a man of burden to the family.

(5) The question arises as to what is the exact import of the testimony of PW 3, in so far as the instance immediately preceding the day of death of Vithabai, namely what has been heard by this witness, namely the words "whether you shall take, or whether I shall take", and whether these words do perse constitute abatement or instigation.

13. The cumulative effect of these points, according to learned Advocate for the Appellants, is that the prosecution has failed to prove specific acts or overt-acts by the accused by ocular or other primary evidence as to exactly what transpired immediately before Vithabai consumed poison, when and at what time she

consumed it and, therefore, abatement or instigation is not proved. According "to learned Advocate, the abatement was liable to be proved by positive primary evidence, which is not done in present case.

14. Learned Advocate for the Appellants placed reliance on the following Judgments in support of his contentions: -

- 1) Nathulal v. State of Madhya Pradesh APR 1966 SC 48.
- 2) State of Himachal Pradesh v. Bhawani Singh & another Crimes XI-1991 (3) 578,
- 3) Manish Kumar Sharma Vs. State of Rajasthan, ,
- 4) 1995 Supp (3) SCC 438 ,
- 5) Dilip Ramaji Kakde v. State of Maharashtra 2000 (1) Mh. LJ 549,
- 6) Sanju @ Sanjay Singh Sengar Vs. State of Madhya Pradesh, ,
- 7) Deepak Bharne and Others Vs. State of Maharashtra, , and
- 8) Hans Raj v. State of Haryana AIR 2004 SC 2790.

15. The Judgments in the cases of (1) Dilip Ramaji Kakde v. State of Maharashtra 2000 (1) Mh LJ 549, and (2) Deepak Bharne and Others Vs. State of Maharashtra, have no bearing on the issue involved.

The former is relied in order to demonstrate the effects of delay in lodgment of First Information Report. The circumstances of the present case do not ipso facto demonstrate any artificialness in the circumstances, leading to the delay and, therefore, any detailed discussion on this point is considered unnecessary.

The latter Judgment pertains to the proof of ill-treatment, leading to suicidal death. The present case is mainly based on abatement, and preceding ill-treatment, etc., is not a direct issue. It would therefore, be not necessary to deal with this judgment too.

16. Rest of the Judgments are relied upon in order to urge that the words, which PW 3 has stated to have been uttered by the accused No. 1, whether ipso facto constitute a proof of facts to demonstrate that the speech or actions of the accused do constitute abatement of commission of suicide by the deceased Vithabai.

17. Useful discussion is found in the reported Judgement in case of Manish Kumar Sharma Vs. State of Rajasthan, . The ratio therein can be followed with approval. The said Judgment is rendered by relying upon a Judgment reported in Nathulal Vs. State of Madhya Pradesh, , as to impressiveness of existence of mens rea in the acts which are set up as proved facts, to constitute those as abatement.

18. Their Lordships of Supreme Court held in AIR 1966 SC 143 that unless

statutorily excluded, presence of mens rea is inevitable. To quote in verbatim what their Lordships of Supreme Court held in the Judgment reported in Nathulal Vs. State of Madhya Pradesh, reads as follows:

The law on the subject is fairly well settled. It has come under judicial scrutiny of this Court on many occasions. It does not call for a detailed discussion. It is enough to restate the principles. Mens rea is an essential ingredient of a criminal offence. Doubtless a statute may exclude the element of mens rea, but it is sound rule of construction adopted in England and also accepted in India to construe a statutory provision creating an offence in conformity with the common law rather than against it unless the statute expressly or by necessary implication excluded mens rea.

19. In Manish Kumar Sharma Vs. State of Rajasthan, , Rajasthan High Court placed reliance on two of its earlier Judgments and one Judgment of Delhi High Court and adopted as ratio to lead to a conclusion which can be drawn as follows:

The Court, while dealing with the cases of suicide, has to consider that this mode of death is behavioural life-style and there are several causes for such a behaviour. There has to be a psychological departure or aggressive impulse or endangered by frustration or environmental condition and most of the cases analysed by psycho-analyst the persons who commit suicide, they are bound to have a history of psychiatric disturbances particularly, depression and schizophrenia. Therefore, the evidence has to be scanned thoroughly to arrive at the conclusion whether the cause of suicide was sociological psychological, biochemical or environmental. Unless that is one, it would be difficult to arrive at an inference about the cause of self-destruction.

20. Said High Court further observed the following :

(a) It needs to be further noted that a bare intention of the person, who is alleged to be abettor, or his object is to ensure the result, is, by itself, not sufficient. Positive acts on his part of encouragement and assistance given by him for commission of the act abetted to the person who has prepared himself to do the said act of self destruction are necessary.

(b) For the incitement to be complete, there must be some actual communication with a person to whom it is intended, which shall incite the person, so addressed, to complete the act which he is prepared to do. Unilateral acts of humiliation, torture or instigation by themselves do not complete and constitute the act of abatement.

(c) It ought to be proved that lest that the abettor did his act of incitement, the act which has made him responsible for the abatement, would not have come into existence.

21. This Court respectfully agrees with the view adopted by Rajasthan High Court in Manish Kumar Sharma Vs. State of Rajasthan, .

22. In the light of useful discussion quoted above, this Court finds that this Court will have to test on facts by applying ratio deduced by this Court to find out as to whether on the facts of the case, the accused is liable to be held guilty as found by the Trial Court.

It is seen from these Judgments on facts that Their Lordships of Supreme Court have found that the suicide was not a direct result. The ration which flows therefrom is that the prosecution will have to prove that the act of suicide is a fallout of cruelty meted out to the deceased by the accused.

23. It is seen from record that the picture portrayed by PW 3 is such that there is one room in which the Accused No. 1 and Vithabai were present. The said room was latched from outside by Accused No. 2 in which the former room had its opening so locked. The room in which in front of door of former room Accused No. 2 was sitting is, thus, first in row and door of this room which had an access was closed from inside. The discussion in the room which was second in sequence, in which according to prosecution Accused No. 1 and Vithabai were sitting, was, thus, at a considerable distance, and prosecution has not brought on record what exact distance it was and as to whether and how whatever was spoken by Accused No. 1 was audible to one standing outside the room which is first in row.

24. It is in this situation, PW 3 gives a version that he heard Accused No. 1 addressing Vithabai "whether I shall take or you shall take".

25. The prosecution wants the Court to believe that the words "whether you shall take or I shall take", which are seen in vernacular, only suggest that they refer to consuming of poison. The witness does not narrate whether this version was repeatedly uttered and what were the words prior or latter. An inference that offer by the husband that would he consume poison, or shall the wife consume it, could, in the given case, amount to incitement or appealing to the conscience of the wife to consume poison and prefer to die, instead of her witnessing the husband to consume poison and die. However, this alone cannot be considered to be the consequence of such utterances.

26. In the present case, the evidence, all that the witnesses allege is as follows:

The prosecution evidence does not lead to bring on record other evidence of facts preceding or after utterances of these words to push to a conclusion that these words have ignited to the decision of self-destruction of Vithabai. Therefore, the evidence, that has come on record, does not, in any manner, support the prosecution case that it is because of the cruelty that Vithabai was driven to commit suicide. This evidence proves words spoken and leaves it to the Court to draw an inference or conclusion revealing therefrom.

27. In this situation, effort of the prosecution to persuade on a proposition that the said utterances should be construed to lead to only inference that these utterances do constitute positive acts of abatement on the part of accused is,

therefore, difficult to subscribed to.

28. Finding of the learned Trial Judge holding that this evidence was sufficient to hold proof of abatement is thus found to be based on inadequate evidence and is not free from doubt.

29. In the facts and circumstances, this Court holds that the evidence on record is not sufficient to conclude proof of abatement.

30. In the result, appeal deserves to be allowed, and by allowing appeal, Judgment and order of conviction and sentence is set aside.