

(2014) 08 BOM CK 0158
In the Bombay High Court
Case No : Criminal Appeal No. 976 of 2012

Sitaram Nana Sarvade

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 20-08-2014

Acts Referred:

Evidence Act, 1872 — Section 32

Penal Code, 1860 (IPC) — Section 302, 304B, 307, 34, 498A

Citation : (2014) 4 Crimes 513

Hon'ble Judges : V.K. Tahilramani, J;A.R. Joshi, J

Bench : Division Bench

Advocate : Nitin Pradhan, S.D. Khot and Ameeta Kuttikrishnan Advocates,
Advocate for the Appellant; V.R. Bhonsale, APP, Advocate for the Respondent

Final Decision : Allowed

Judgement

A.R. Joshi, J.—Heard the rival contentions on this appeal preferred by both the appellants challenging the judgment and order of conviction in Sessions Case No. 34 of 2010. The judgment and order of conviction was passed on 30.5.2012 by 1st Ad hoc Additional Sessions Judge, Solapur thereby convicting both the appellants for the offence punishable u/s 302 R/w. Section 34 of IPC and sentencing them to suffer rigorous imprisonment for life and to pay fine of Rs. 1000/- each, in default of payment of fine, further rigorous imprisonment of three months each was imposed. Both the appellants/accused were acquitted of the offences punishable under Sections 498A, 304B, 504 and 506 R/w Section 34 of IPC. State Government did not file any appeal challenging the acquittal for the said offences. Both the appellants/accused have challenged their conviction for the offence punishable u/s 302 R/w. Section 34 of IPC. Presently, both the appellants are on bail granted by this Court during pendency of the appeal.

2. So far as the case as against the present appellants is concerned, certain factual position is required to be narrated in order to have proper perspective of the case and to ascertain what are the allegations/charges against the appellants.

3. The actual incident of setting the victim woman by name Laxmibai on fire occurred in the evening of 2.12.2009 apparently at the house of the present appellants. Present appellants are in-laws of the victim woman. The victim woman Laxmibai was the wife of one Raju, the son of the appellants. It was the third marriage of Raju. His first wife had abandoned him. Thereafter, he married second time with one woman who died due to burn injuries and in that matter, Raju was made an accused. He was convicted by the Sessions Court for the offence punishable u/s 302 of IPC but the said conviction was reversed by this Court in another appeal. It is the third marriage of said Raju with the victim Laxmibai. Apparently, said Raju has no noticeable avocation and was not earning his livelihood in the usual manner. He was in habit of demanding money from his father i.e. present appellant No. 1. Appellant No. 1 is an ex-serviceman and retired from military after 17 years of service. Thereafter, he took some another job with medical department of the State. From that job also, he retired and as such was getting pension from two jobs i.e. from the defence and also from the State medical department. Raju, the husband of the victim woman was asking for some part of the pension to be given for his livelihood and for his wife Laxmibai. There used to be some quarrel and apparently, in order to avoid more disputes, appellant No. 2 i.e. mother of said Raju had arranged for transfer of her owned landed property about 2.5 Acres in the name of said Raju and his wife Laxmibai. This factual position is substantiated by the evidence of PW 2 Asha who is the mother of the victim woman Laxmibai. Her evidence is of much significance as it relates to the alleged motive tried to be established by the prosecution as to demand of dowry to the extent of Rs. 50,000/- by the appellants from the victim woman Laxmibai.

4. As mentioned above, apparently, it was the case of the prosecution that both the appellants were demanding Rs. 50,000/- from the victim woman and on that count, they used to assault and torture her. For most of the times after the marriage with Raju, the victim woman stayed at some other place, however, about three years prior to the incident of burning, she and her husband Raju came to Modnimb and started residing in front of the house of the appellants. On the day of the incident, according to the victim woman, she was called by her mother-in-law i.e. appellant No. 2 for taking some milk to be given to the children of the victim woman. It happened at about 6.30 p.m. on 2.12.2009. That time the victim woman entered into the house of the appellant and instead of getting milk, kerosene was poured on her person by appellant No. 2 and appellant No. 1 was ready holding a matchbox and he ignited the matchstick and set the victim woman on fire. The saree that the victim woman was wearing caught fire and as such the victim woman raised hue and cry to rescue herself and in that process, ran out of the house of the appellants. Neighbours gathered and tried to extinguish the fire. According to the case of the prosecution and also according to the defence, appellant No. 1 also tried to extinguish the fire and tried to rescue his daughter-in-law but in vain. In that process, appellant No. 1 sustained some burn injuries on his arms. This factual position has been

substantiated by the medical papers which have been produced before the Court during the trial showing the burn injuries sustained by appellant/accused No. 1.

5. After the said incident of burning, the victim woman was taken first to Modnimb Primary Health Centre and was given immediate treatment, however, sensing that the burn injuries were to the extent of about 93% and the condition of the patient was serious, she was removed to the Civil Hospital at Solapur. At Civil Hospital, Solapur, life saving drugs were administered to her and according to the substantive evidence of PW 2 Asha, the mother of the victim, various medicines were administered to the victim and that also by way of tubes inserted from mouth/nose reaching upto the stomach. It was probably on account of 93% burn injuries of the victim.

6. According to the case of the prosecution, at the early hours of 3.12.2009, the police officer inquired with attending doctor i.e. PW 3 Dr. Vaishali regarding the condition of the victim woman and after the said attending doctor ascertained the condition of the woman, the police officer recorded the statement of the victim woman. The said statement is at Exh. 56 before the Court and it has been taken on record during the trial in view of the provisions of Section 32 of the Evidence Act. Apparently, this statement which is in the form of dying declaration implicated both the appellants/accused as the story has been given by the victim as to on the relevant evening of 2.12.2009, she was called by appellant/accused No. 2 to the house and then, kerosene was poured on her person by accused No. 2 and she was set on fire by appellant/accused No. 1. The said dying declaration of the victim woman was treated as F.I.R. and crime was registered mentioning the penal Sections as 307, 498A, 504 and 506 of IPC R/w. Section 34 of IPC. At this juncture, it must be mentioned that the said F.I.R. was lodged only at about 22.15 Hrs. on 3.12.2009. This time gap in between recording of the dying declaration and registration of the offence is much emphasized by the learned senior counsel for the appellants and it is submitted that this itself creates a doubt and concoction of the story on the part of the prosecution at the behest of the relatives and mainly the mother of the victim woman.

7. While under treatment in the hospital at Solapur, the victim woman succumbed to 93% burn injuries and the cause for death as apparent from the postmortem report is "shock and septicemia due to 93% burns". On the death of the victim, an offence u/s 302 of IPC was inserted in the charge sheet.

8. During the trial, total 12 prosecution witnesses were examined. Without going much into the details as to what each prosecution witness mentioned before the Court, suffice it to say that both the panch witnesses for the scene of offence panchanama, which is apparently at or in front of the house of the appellants, turned hostile. These witnesses are PW 6 Uttam Nalavade and PW 8 Sunil Taktode. As such, it must be mentioned that the actual scene of the incident of burning the victim and pouring kerosene on her person has not been established by the prosecution. This is important for the reason that had it been the scene of the offence at the house of the appellants, then definitely there was higher

burden on the appellants/accused to come with some sort of explanation as to how the victim woman sustained burn injuries. At this juncture, it must be mentioned that definitely it is the case of the prosecution that the victim woman along with her husband was not staying in the house of the appellants but they were staying in front of the house in some other premises about 6-7 houses beyond.

9. The main prosecution witnesses out of 12 witnesses are PW 2 Asha Kamble, the mother of the victim woman and PW 3 Dr. Vaishali Nannaware. So far as the substantive evidence of PW 2 Asha is concerned, she has deposed that her daughter i.e. the victim used to tell her regarding the demand of Rs. 50,000/- by the appellants towards dowry. On this aspect as to demand of dowry, it is argued on behalf of the appellants that even the exact date of marriage between the victim and Raju has not been brought on record and as such it cannot be ascertained that the death of the victim is within seven years of the marriage so as to attract some presumptions envisaged by the penal sections for which the appellants were charged. On this aspect, though this is not of much significance, suffice it to say that from the contents of the dying declaration given by the victim herself and from the substantive evidence of PW 2 Asha, it is apparent that the marriage took place about six years prior to the episode of burning. However, this aspect would not carry much importance if the case of the prosecution as to authenticity of the dying declaration given by the victim woman is shaken in view of the specific circumstances brought on record. So far as the substantive evidence of PW 2 Asha is concerned, again it must be mentioned that she had categorically admitted during her cross-examination that the victim was under treatment in the hospital and various tubes were inserted in her mouth/nose. At the cost of the repetition, it must be mentioned that this is significant to throw light on the actual condition of the victim at the time of the medical treatment and this is more so considering the percentage of burns i.e. 93% sustained by the victim. Again, during the cross-examination, PW 2 Asha had admitted that the landed property of about 2.5 Acres had already been transferred in the name of Raju and the victim woman and the said property was earlier belonged to appellant/accused No. 2. As such, cumulative effect of the substantive evidence of PW 2 Asha goes to show that there was no establishment of motive as alleged against the appellants so far as the demand of dowry of Rs. 50,000/- is concerned. On this aspect, in our considered view, the learned Sessions Judge had rightly come with conclusion as to non-establishment of said motive.

10. Now this leads us to go to only available material around which the case of the prosecution revolves and the said material is the dying declaration of the victim woman which is at Exh. 56. On this aspect, the substantive evidence of PW 3 Dr. Vaishali is of much importance. At the threshold, it must be mentioned that admittedly the medical papers of actual treatment given to the victim woman when she was under treatment at Solapur Hospital or for that matter at the Primary Health Center at Modnimb are not brought on record by the

prosecution. On this aspect, the learned senior counsel for the appellants brought our attention to the earlier two applications preferred by the accused persons during the trial which are at Exh. 12 and Exh. 44. Exh. 12 is the first application dated 18.10.2010 by which the accused persons asked for production of the medical papers as to the exact treatment given to the victim while she was hospitalized. The said application was vehemently opposed by the prosecution and it was submitted that the said application is premature and as and when need arises, the prosecution would produce the said documents. On that premise, the said application was rejected by the Sessions Court. Then, the matter was under evidence and two witnesses were already examined. Another application which was preferred at Exh. 44 on 17.9.2011 for similar prayers asking for medical papers was also opposed by the prosecution mentioning that the attending Doctor who was subsequently examined as PW 3 was yet to be examined. Again that application was also rejected by the Sessions Court, thus it is a factual position that the said medical papers were not brought before the Court even during the evidence of PW 3 Dr. Vaishali. In our considered view, this is definitely a mitigating circumstance to the case of the prosecution in order to establish whether the victim woman was in a condition to give her statement, well oriented and was able to understand it. Pointing out this factual aspect, it is submitted on behalf of the appellants that the prosecution has failed to establish that the victim woman was conscious enough to give the statement which can be considered a sole basis for the conviction. Needles to mention that if the dying declaration can be accepted as to its authenticity without there being any other corroboration, then, the conviction passed on said dying declaration may not be termed as illegal, however, when a reasonable doubt is created where the victim was in a position to give a statement and whether the said dying declaration can be accepted or not, then definitely there is need for corroboration to the contents of the dying declaration. In the present matter at hand, so far as the substantive evidence of these witnesses is concerned as to PW 1 Laxmibai, PW 2 Asha and PW 3 Dr. Vaishali, in our considered view, there is no such corroboration available, more so when on the another aspect as to the motive, the prosecution has failed to establish that there was a demand of dowry at the hands of the appellants. Again, needles to mention that when the case is based on circumstantial evidence, the motive plays vital role and it is required to be established by the prosecution beyond reasonable doubt. When this is the state of affairs of the main prosecution evidence, no much can be said on the another substantive evidence by way of PW 11 Vinod who is of the acquaintance of the victim woman. PW 11 Vinod has stated that he had overheard the victim stating that she was being harassed by the appellants for the demand of dowry to the extent of Rs. 50,000/- and she was burnt by her in-laws.

11. In view of above, the only evidence that of the dying declaration (Exh. 56) cannot be taken as a sole basis for the conviction of the appellants for the offence punishable u/s 302 read with Section 34 of IPC, more so for the failure of the prosecution to establish the motive and also to establish the actual place of

the incident of pouring of kerosene on the victim woman. In any event, it must be said that the prosecution has not reached that standard of proof which is required to establish the guilt of the appellants/accused for the offence punishable u/s 302 of IPC and in that event, benefit of doubt must go in favour of the appellants, hence, the order:-

ORDER

- i. Criminal Appeal is allowed.
- ii. The impugned Judgment and Order dated 30.5.2012 is quashed and set aside. Both the appellants/accused are acquitted of the offence punishable u/s 302 read with Section 34 of IPC. Their bail bounds stand cancelled.
- iii. Fine amount, if already paid, be refunded back to them.