

(2012) 07 BOM CK 0037
In the Bombay High Court
Case No : Criminal Appeal No. 69 of 1993

State of Maharashtra

APPELLANT

Vs

Baban Damodar Bari and Others

RESPONDENT

Date of Decision : 31-07-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 174
Dowry Prohibition Act, 1961 — Section 3
Penal Code, 1860 (IPC) — Section 201, 302, 34, 498A

Citation : (2013) 3 BomCR(Cri) 280 : (2013) 1 DMC 240

Hon'ble Judges : Shrihari P. Davare, J;A.S. Oka, J

Bench : Division Bench

Advocate : P.S. Hingorani, for the Appellant; Arvind J. Joshi, for the Respondent

Final Decision : Dismissed

Judgement

Shrihari P. Davare, J.—Heard the learned Counsel for the parties. By the present appeal, the appellant-State has taken exception to the judgment and order of acquittal rendered by the learned Second Additional Sessions Judge, Thane, in Sessions Case No. 691/91 on 16th. November, 1992, thereby acquitting the respondent Nos. 1 and 2 (Original accused Nos. 1 and 2) (hereinafter referred to as per their original status as "accused Nos. 1 and 2") for the offences punishable under Sections 498A, 302, 201 read with Section 34 of IPC and u/s 3 of Dowry Prohibition Act. It is to be noted that initially there were three accused who were acquitted by the impugned judgment but leave was granted against the respondent Nos. 1 and 2 only i.e. the original accused Nos. 1 and 2. Hence, the present appeal proceeded against them.

2. Brief facts of the prosecution case which gave rise to the present appeal are as follows:

(i) Deceased Kamal was the daughter of Vithal Khot i.e. P.W. 4 who married to accused No. 1 Baban on 4th. March, 1992. After the marriage, her name was changed as Babita and she was called as Babita. Accused No. 2 is the brother of

accused No. 1. It is the prosecution case that in the marriage, ornaments, money, clothes, utensils were given to Kamal by her father. Initially, she was treated properly at her matrimonial home for about seven months by the accused. However, thereafter, they started ill-treating her stating that she did not bring sufficient money and ornaments from her parents and that whatever was offered in the marriage was not befitting to their status in the society. It is alleged that whenever Kamal used to visit her parental house, she used to disclose before her brother and father that the accused persons were harassing her on account of sole unlawful demand of money and non-fulfilment thereof. However, she was pacified by them and was sent back to her matrimonial home with the assurance that they would give something after Diwali.

(ii) It is further alleged that in the month of August, Kamal @ Babita alone came to her parents house and made a complaint that after she was slept, all the three accused tried to throttle her neck by a piece of cloth. But since she resisted, she could escape from their clutches and came to her parents house. That time also, she was asked to cool down and was sent back. It is the case of the prosecution that on 22nd. September, 1991, the complainant Amrut Knot, who is the brother of the deceased, had been to the house of the accused to see brother of accused No. 1 who met with an accident. However, nobody from Kamal's house talked to him. Next day, Kamal came back to, her parents house and told that since last 4-5 days, nobody in her house spoke to her. However, again Kamal was pacified and was sent back to her matrimonial home. Thereafter on 4th. October, 1991, somebody from Kaloli Baripada i.e. the village of Kamal came to the house of the complainant at about 9.30 a.m. and informed that Kamal @ Babita died due to drowning. However, since Kamal was knowing swimming, suspicion of her condition was treated in the minds of her relatives. Hence, her parents, brothers and other relatives rushed to the village Kaloli Baripada. On next day, complaint (Exhibit 10) was lodged by her brother Amrut Khot with Wangaon police station and on the basis of the said complaint, an offence was registered against the accused under Sections 302, 498A, read with Section 34 of IPC. However, before the complaint was lodged, the accused No. 2, who was the Surpanch of the village, made a report on 4th. October, 1991 informing the police that Babita died due to drowning by accident and fresh accidental death entry No. 21/91 u/s 174 of Cr.P.C. was made.

(iii) It is also the case of the prosecution that P.W. 5 PSI Khamkar was attached to Wangaon police station at the relevant time who recorded the aforesaid ADR. Thereafter PW 5 PSI Khamkar went to village and visited the house of the accused at Kaloli Baripada and drew the inquest Panchnama (Exhibit 15) of the dead body of the victim and the dead body was sent to the Primary Health Centre, Chinchani, for post-mortem purpose. PW 2 Dr. Suresh Kadam, who was attached to Primary Health Centre, Chinchani as Medical Officer, conducted post-mortem on the said dead body on 4th. October, 1991 and prepared the post-mortem notes which are produced at Exhibit 32 and he drew conclusion in respect of cause of death of the victim that "may be asphyxia due to

strangulation". Moreover, PW 5 PSI Khamkar also visited the well, the place of incident, where her drowning had taken place and drew the spot Panchnama (Exhibit 37). He also recorded the statements of witnesses. As mentioned hereinabove, P.W. 1 Amrut Khot lodged the complaint on the next day i.e. 5th October, 1991 (Exhibit 10). The accused were arrested under the Panchnama (Exhibit 18). While in custody, the accused No. 1 Baban made a disclosure statement in presence of panchas on 13th October, 1991 that he would produce a saree from his house and the said statement was recorded under the memorandum panchnama (Exhibit 36/1). Further the accused No. 1 led the Panchas and police personnel to his house and produced a saree i.e. Article 10 which was seized under the recovery Panchnama. Moreover, house search of the accused No. 1 was conducted and in the said search, two documents (Articles 11 and 12) were detected and they were attached under the said Panchnama. Besides, viscera reserved after post-mortem was sent to CA office along with letter (Exhibit 27) and report thereof is produced at Exhibit 29. Moreover, these articles were also sent to GA office for examination purpose along with forwarding letter (Exhibit 28) and C A report thereof was received which is produced at Exhibit 38.

3. Accordingly, after completion of investigation, P.W. 5 PSI Khamkar filed the charge-sheet against the accused before the learned Judicial Magistrate, First Class, Dahanu, on 22nd. November, 1991. However, since the offence was exclusively triable by the Court of Session, the learned JMFC committed the case to the Court of Sessions, Thane. Thereafter, the learned Additional Sessions Judge, Thane, framed the charge against the accused persons on 27th. May, 1992 under Exhibit 3 for the offences punishable u/s 302 read with Section 34 of IPC and Section 498A read with Section 34 of IPC and Section 3 of Dowry Prohibition Act, 1961 and also for the offence punishable u/s 201 of IPC. However, the accused Nos. 1 and 2 pleaded not guilty to the said charges and claimed to be tried. To substantiate the said charges levelled against the accused, the prosecution examined as many as five witnesses as mentioned below:

P.W. 1 Amrut Vithal Khot -- brother of the deceased and complainant.

P.W. 2 Dr. Suresh Bhagu Kadam -- post-mortem Doctor.

P.W. 3 Bachhu Risha Parhad, Panch to the memorandum panchnama (Exhibit 36) and recovery Panchnama (Exhibit 36/1).

P.W. 4 Vithal Arjun Khot, father of the victim viz. Kamal @ Babita.

P.W. 5 Hanumant Dattu Khamkar, Investigating Officer.

4. The defence of the accused Nos. 1 and 2 is of total denial. They stated that they never demanded or expected anything called as dowry from the parents of victim and they treated her well with love and affection and she was happy with them. They denied that she was murdered by them. According to them, it was

the case of the accidental drowning. During the course of trial, on their behalf, it has also come on record that possibly, she might be having some sort of love affair with somebody of which accused had no knowledge. In short, the accused discarded the liability and the charges levelled against them and claimed to be innocent. However, they neither examined themselves on oath nor they examined any witness to support their case.

5. The learned APP for the appellant canvassed that the prosecution has adduced/produced incriminating legal evidence against accused Nos. 1 and 2 which connects them with the crime. He also submitted that the medical evidence of Dr. Suresh Kadam, P.W. 2 and post-mortem notes (Exhibit 32) categorically reflect that the victim Kamal @ Babita met with the homicidal death and her cause of death is given as "may be asphyxia due to strangulation" and Dr. Suresh Kadam (P.W. 2) emphatically stated that it was the case of strangulation and not the case of drowning. According to the prosecution, the testimony of P.W. 1 Amrut Khot i.e. brother of victim, and P.W. 4 Vithal Khot i.e. father of victim, established that the victim Kamal @ Babita was subjected to mental and physical cruelty due to non-fulfilment of unlawful demands by the accused, and there is no dispute that the accused persons are the authors of the homicidal death with by the victim Babita. It is further submitted that the evidence of discovery of saree at the instance of accused No. 1 is also incriminating against the accused persons and it is submitted that the alleged love letter (Exhibit 11) is of no consequence. Accordingly, the learned APP submitted that the learned Trial Court has committed gross error while acquitting the accused by impugned judgment and order dated 16th. November, 1992 and, therefore, urged that the present appeal be allowed and the accused be convicted and sentenced for the offences with which they were charged.

6. The learned Counsel for the accused Nos. 1 and 2 submitted that there are discrepancies, infirmities and deformities in the prosecution evidence. It is further submitted that there is more 24 hours delay in lodging the FIR which has not been explained by the prosecution and PW 1 has admitted in his cross-examination that the complaint was lodged on the next day of the incident that too after discussion with the relatives in respect of nature of the complaint and the contents thereof. Hence, it is submitted that the said complaint has been lodged after concoction, implicating the accused Nos. 1 and 2 in the alleged offence. It is further submitted that there is no correlation between the inquest panchnama and the post-mortem notes and even post-mortem notes disclose the cause of death of the victim as "may be asphyxia due to strangulation" and even the cause of death of the victim is under suspicion whether it was asphyxia due to strangulation or death was due to drowning. It is suggestively accidental death. He further submitted that the testimony of P.W. 1 Amrut Khot, who is the brother of the victim, and P.W. 4 Vithal Khot, father of the victim, an interested testimonies and the prosecution has not examined any independent witness to substantiate the charges levelled against the accused. Moreover, it is also pointed out that the saree (Article 10) which was allegedly recovered at the instance of

accused No. 1 was sent to C A office for examination purpose and C A report dated 14th. October, 1992 (Exhibit 38) discloses neither blood nor saliva was detected thereon and hence, the said corroborative piece of evidence does not connect the accused with the alleged crime. Accordingly, the learned Counsel for the respondents submitted that the prosecution has failed to prove and establish the charges levelled against the accused beyond reasonable doubt and the learned Trial Court has scrutinised and assessed the evidence in proper perspective and thereafter acquitted the accused, which is a possible view and the same does not appear to be perverse and even reasoning given therefore also cannot be faulted with and hence, he submitted that no interference was called for in the present appeal and urged, therefore, that the appeal may be dismissed.

7. We have perused the oral, documentary and medical evidence and also the evidence of Forensic, Science Laboratory carefully and also perused impugned judgment and order dated 16th November, 1992, as well as considered the submissions advanced by the learned Counsel for the parties anxiously.

8. At the outset, coming to the evidence of PW 1 Amrut Khot i.e. the complainant who deposed that deceased Kamal was his sister who married with the accused No. 1 Baban on 4th March, 1990. Accused No. 2 is the elder brother of accused No. 1. He also stated that in the marriage, two tolas gold was given by his father to bride Kamal. Initially, she was treated properly but thereafter the accused started ill-treating her stating that she did not bring anything from her parents and they were expecting the money from the complainant party. Hence, they subjected Babita to ill-treatment on various counts and when Babita used to visit her parental house, she used to disclose about the said ill-treatment meted out to her by the accused. He also narrated the incident of August 1991 which was disclosed by Babita to him that 3-4 days back when she was on cot, all the accused tried to press her neck and, therefore, she left her matrimonial home to save her life again. However, after 7-8 days thereafter, he took her to her matrimonial home by pacifying her, though there was an attempt to murder her by the accused. He further stated that at the time of Ganpati festival also, he brought her to parental house and thereafter again, she went back to her matrimonial home. On 4th October, 1991, somebody left the message with his mother that Kamal @ Babita died in the water in well in the village Kaloli, and, therefore, they reached the village Kaloli and her dead body was seen at the house of the accused. He also saw the well where the incident had occurred and noticed that there was arrangement of footsteps and iron pipe connected to the motor and there was water in the well upto 7-8 feet in the level. He also stated that Babita knew swimming and it was not natural death due to drowning and therefore, suspected that she was murdered by the accused for demand of money. Hence, he lodged the complaint with Wangaon police station (Exhibit 10).

9. However, he admitted that at point "A" there is overwriting in the complaint and the year March 1989 was written which should be written as March 1990. In

cross-examination, he also admitted that the dead body of his sister Kamal was not sent for post-mortem since the accused were waiting for arrival of the complainant party at their house. They all verified and examined the dead body and found no injuries. Then the body was sent at about 4 p.m. for post-mortem. After the post-mortem, the dead body of his sister was handed over to the accused for cremation which was done in the village of the accused. He also stated that he lodged the complaint on the next day. He further stated that nobody from their group had attended the funeral and they left for village before that. He also admitted that all the relatives had discussion regarding her death and then they decided to lodge the complaint. The nature of the complaint to be lodged was also decided by them. He himself, his parents and some relatives had discussion that what should be the contents of complaint to be lodged about her death. He was accompanied by his friends viz. Dilip Bari from Dahanu while lodging the complaint at the police station. He further stated that in his complaint (Exhibit 10), he did not see that there was any incident of beating to her at the hands of accused No. 1. He further stated that his sister Kamal and accused both performed Ganpati festival at their house together.

10. The testimony of P.W. 1. Amrut discloses that the marriage of his sister Kamal took place with accused No. 1 on 4th. March, 1990 and initially she was treated properly but thereafter she was subjected to mental and physical cruelty. An attempt was also made to commit her murder in August 1991. She was educated upto the 12th. Standard and was also knowing swimming. Therefore, they suspected about her death on 4th. October, 1991 by drowning in the well and also he noticed that there was arrangement of footsteps and iron pipe in the said well. However, P.W. 1 Amrut lodged the complaint on the next day i.e. 5th. October, 1991 and there was overwriting in the year in the contents of the said complaint, Moreover, it is also material to note that the dead body of Babita was not sent for post-mortem by the accused and they waited for arrival of the complainant party who verified and examined the dead body and found no injuries on the person. It is also pertinent to note that all the relatives of the complainant party and complainant had discussion about the death of Babita and then they decided to lodge the complaint and more particularly, the nature of the complaint and the contents of the complaint to be lodged. They also discussed even with two friends of PW 1 who also accompanied him to the police station for lodging the complaint. Hence, the complaint was lodged belatedly i.e. after more than 24 hours. The complaint was lodged on 5th. October, 1991 at 1300 hours. The prosecution had failed to give plausible explanation therefore. It is also apparent that the said complaint was lodged after due discussion and deliberations and hence, there is every possibility of concoction and implication of the accused in the alleged offence. Moreover, it is also important to note that the accused No. 1 and his wife Kamal performed Ganpati festival at the house of the complainant during Ganpati festival which also indicates the conduct of accused No. 1. Moreover, it is also significant to note that the contents of the complaint (Exhibit 10) are silent in respect of any incident of assault upon Babita

by the accused No. 1. Moreover, P.W. 1 Amrut is the brother of victim Kamal and due to aforesaid infirmities and lacuna, the possibility of implication of the accused in the alleged crime falsely cannot be ruled out.

11. That takes us to the testimony of P.W. 4 i.e. Vithal Khot, father of the victim who stated that his daughter Babita and accused No. 1 married on 4th. March, 1990 and he had given gold ornaments and utensils, etc, in the said marriage to her. He also narrated the occurrence of events given by P.W. 1 Amrut. He further stated that at his residence, accused No. 1 used to visit to his house and they were on good terms. He admitted that he never asked to either of the accused at any time as to why they expected money from them. It was an arranged marriage after the settlement between accused No. 1 and Babita and it was not against the wish of his daughter Babita. He denied that she had any love affair anytime before the marriage. He denied any writing of his daughter-Babita (letter-Article 11). He stated that the dead body of his daughter was not given to them for post-mortem, however, he was confronted to receipt (Exhibit 34) which bears his signature having received the dead body. Hence, he accepted that he received the dead body after post-mortem. He further stated that the funeral was done in the village of the accused. However, he did not wait for the same as his wife and others also did not wait.

12. The testimony of P.W. 4 Vithal Khot i.e. father of the victim is almost on the same lines of P.W. 1 Amrut i.e. brother of the victim. However, the said testimony reflects that his daughter Babita and accused No. 1 used to visit his house often till the incident and they were on good terms. Moreover, he never asked either to the accused at any time as to why they expected money from them. In the natural course of events, if there was unlawful demand of money by the accused to the victim to be brought by her from her parents, P.W. 4 Vithal i.e. father of the victim, would have certainly asked the accused why they expected money from them but it was not happened. Moreover, Kamal was educated upto 12th. standard and she married to accused No. 1 as per her wish after settlement. Moreover, the deposition of Vithal also indicates his conduct, initially he grumbled that the dead body of Babita was not given to him after post-mortem but when he was confronted with the receipt (Exhibit 34) which bore his signature, he accepted that he received the dead body of his daughter. Moreover, it is also curious to note that although the funeral of his daughter was performed in the village of the accused, father of the victim and his wife and others did not wait for the same and excuse given for the same that the truck driver was not willing to wait, therefore, they required to go back without waiting for funeral, is not digestible and said conduct of the P.W. 4 Vithal for not waiting for funeral of his daughter and also the conduct of other relatives speak for themselves.

13. Turning to the evidence of P.W. 3 Bachhu Parhad, Panch witness to the memorandum and recovery Panchnama wherein he stated that he had been to Wangaon police station on his own on 13th. October, 1991 and accused No. 1 was sitting in the police station. He stated that a saree of dead lady was at the

house. Accordingly, police personnel made writing in the police station i.e. the memorandum Panchnama (Exhibit 36). Thereafter, the accused led the Panchas and police personal to his house and produced a saree (Article 10) from his house which was seized along with other articles under the recovery. Panchnama (Exhibit 36/1). In cross-examination, he stated that search of the house of accused No. 1, was conducted in his presence and documents (Articles 11 and 12) were found in the cupboard. It has come on the record that the said saree was sent to CA office for examination purpose by the Investigating Officer (PW 5) PSI Khamkar along with forwarding letter (Exhibit 28) and the CA report thereof was received which is at Exhibit 31. However, the said CA report (Exhibit 38) discloses that neither blood nor saliva was detected on the said saree. Hence, seizure of saree at the instance of accused No. 1 and CA report thereof which are the corroborating pieces of evidence, cannot be of any aid and assistance to the case of the prosecution. Besides, it cannot be overlooked that although the accused No. 1 was arrested on 5th October, 1991, the said recovery of saree was made after about 8 days i.e. on 13th. October, 1991 and the prosecution has not given any convincing explanation for the said delay and the said unconvincing and unexplained delay also hampers the said recovery of saree at the instance of accused No. 1.

14. That takes us to the medical evidence of PW 2 Dr. Suresh Kadam who has deposed that in October 1991, he was attached to Primary Health Centre, Chinchani, as a Medical Officer, and received dead body of Mrs. Babita on 4th October, 1991 at about 4.30 p.m. for post-mortem purpose. Accordingly, he conducted the post-mortem between 5 p.m. and 6.45 p.m. He stated that it was a case of drowning. On external examination, he found that the body was well nourished and cold. Rigor mortis was present at lower extremity and absent at upper extremity. Her eyes were semi opened. Blood was coming in large amount from mouth and nostrils. Face was congested. Petechial haemorrhages present at conjunctive. On dissection of her neck below the level of thyroid cartilage he noticed following symptoms:

1. Subcutaneous areolar tissue was accchymosed and showing petechial haemorrhages in horizontal direction with encircled neck;
2. Vertical fracture of second and third tracial rings;
3. Platysma fibres toms;
4. Infra hyoid muscle fiber torn at level on infra thyroid cartilage region.

Above mentioned injuries were ante-mortem. Brain was congested. Petechial haemorrhages were seen at brain surface. Larynx, trachea and bronchi were noticed congested, contained blood stained froth. Right lung congested deeply, engaged and emphysematous, left lung as right lung. Her heart contained dark and dark red blood. Abdominal organs found congested as noted in para 21 of the post-mortem report.

He stated that he himself and Dr. Pardhe performed the post-mortem and both of them jointly concluded that cause of death of Mrs. Babita as may be asphyxia due to strangulation. The viscera was preserved for analysis. Accordingly, he produced post-mortem notes at Exhibit 32. He further stated that from the signs noted from the dead body, it was definite to say that it was a case of strangulation and not a case of drowning and death might have been caused between last 12 to 24 hours.

15. The said doctor was cross-examined at length and he stated that in case of death by drowning, complete submersion of the body in the water may not be there, but in case of sudden fall into the well, full of water there would be cardiac arrest. He also stated that if a person falls in the well and if he becomes unconscious, then he cannot swallow water in the act of drowning and in that case water will not be found in his stomach. He also agreed with the proposition that in few cases, death may occur from obstructive asphyxia which is known as dry drowning caused by sudden spasm of larynx. The dry drowning is specified as "A" drowning and other drowning is called as "Typical or wet drowning". He further stated that there were no visible external injuries on her dead body, more specifically no injury at the neck was present. Both the upper limbs as well as lower limbs were straight and extended as noted in Clause No. 16 of the post-mortem (Exhibit 32). However, he stated that it is not thereby to correct that these were the signs of no struggle at the time of death, no signs of struggle and resistance by the victim were noticed on her person at the time of post-mortem. He further stated that the injuries shown in Clause No. 17 of the post-mortem report were internal and not external or surface injuries though mentioned in Clause No. 17 of the post-mortem report. He further stated that these injuries are not possible in case of accidental fall from height on hard substance such as wooden plank and frontal neck part portion comes into contact of the same. He again stated that first two injuries mentioned in Clause No. 17 of the said report are not possible into above suggested fall but last two i.e. 3rd. and 4th. are possible in such fall. But in that case, they must be associated with external corresponding injuries. According to him, examination of stomach and both the intestines suggest that the food was digested. The bladder was always empty. Looking to the findings noted in Clause 21 of the postmortem report, death might have been caused around 5 a.m. or before that. He also stated that he knew accused No. 2 personally. Hence, suggestion was given to him that he issued false post-mortem report (Exhibit 32) which was denied by him. The question was permitted to be asked in re-examination-

Q : Could it be meant that the signs of no struggle suggest that strangulation was during sleep?

and the witness replied "Strangulation may be even in the sleep". In that case, there may not be signs of struggle from the side of the deceased. He was cross-examined after the said re-examination wherein he stated that in case a strangulation in sleep, the possibility of his awakening cannot be ruled out.

Against he. was asked if he awakes, would he show resistance. Thereupon, the Doctor replied that this is also possible. Considering the said medical evidence of Dr. Suresh Kadam (P.W. 2) and post-mortem notes (Exhibit 32), we have no hesitation to conclude that deceased Kamal @ Babita met with the homicidal death (unnatural).

16. It has also come in the evidence of P.W. 5 PSI Khamkar that after the dead body was sent to doctor for post-mortem, he wanted to record the statements of her parents and relatives but they told that they would give their statements on the next day as they were not in a proper mental state. It also reveals from his testimony that he recorded statements of other witnesses but the said independent witnesses were not examined by the prosecution to substantiate the charge levelled against the accused for the reasons best known to the prosecution since the testimonies of complainant P.W. 1 brother of victim Amrut Khot and PW 4 Vithal Khot, father of the victim, were the close relatives of the victim. Accordingly, the fact remains that the prosecution did not adduce any independent evidence. Moreover, it cannot be ignored that there are variances in the contents of ADR (Exhibit 14) dated 4th October, 1991 and the contents of the complaint dated 5th October, 1991, more particularly, in respect of the cause of death since ADR refers that victim Babita was succumbed to death due to drowning in be well whereas complaint discloses that she was done away to death by strangulation by a cloth and thereafter her dead body was thrown in the well.

17. In the circumstances, having comprehensive view of the matter and after taking the survey of entire ocular, documentary and medical evidence and also the report of the Forensic Science Laboratory, we are of the considered opinion that there are discrepancies, infirmities and deformities in the prosecution case which go to the root of the matter and diminish the credibility of the prosecution evidence and, therefore, the view adopted by the learned Trial Court after scrutinising and analysing the evidence on record while acquitting the accused Nos. 1 and 2 is a possible view and same does not appear to be perverse and also the reasoning adopted there for also does not appear to be erroneous, and hence, no interference therein is called for in the present appeal, and therefore, the present appeal deserves to be rejected. In the result-

(a) The appeal is dismissed.

(b) The judgment and order of acquittal dated 16th. November, 1992 rendered by the learned II Additional Sessions Judge, Thane, in Sessions Case No. 691 of 1991 stands confirmed and upheld.