

(2009) 01 BOM CK 0006

In the Bombay High Court

Case No : Criminal A. No. 680 of 1991

Sunil Bhiku Yadav and Others

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 07-01-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 386, 423(1)
Dowry Prohibition Act, 1961 — Section 2
Evidence Act, 1872 — Section 113, 113B, 114
Penal Code, 1860 (IPC) — Section 304B, 304B(1), 306, 34, 498A

Citation : (2009) CriLJ 4262 : (2010) 7 RCR(Criminal) 205

Hon'ble Judges : V.K. Tahilramani, J

Bench : Single Bench

Advocate : A.P. Mundargi and Ganesh Gole, for the Appellant; V.B. Konde-Deshmukh, Assistant Public Prosecutor, for the Respondent

Judgement

V.K. Tahilramani, J.—The appellants-original accused have challenged the judgment and order dated 6-12-1991 passed by the learned 4th Additional Sessions Judge, Kolhapur in Sessions Case No. 66 of 1989. By the said judgment and order, the appellants have been convicted for the offence under Sections 498-A r.w. Section 34 and 304-B r.w. Section 34 of IPC. For the offence u/s 498-A r.w. Section 34 of IPC, the appellants were sentenced to SI for one year and fine of Rs. 500/- each i/d SI for three months. For the offence u/s 304-B r.w. Section 34 of IPC, the appellants were sentenced to RI for seven years. However, the learned Sessions Judge acquitted all the appellants of the offence u/s 306 r.w. Section 34 of IPC. The learned Sessions Judge directed that both the substantive sentences of imprisonment shall run concurrently.

2. The appellant No. 1 is the husband of deceased Neeta. Appellant No. 2 is mother of appellant No. 1 and appellant No. 3 is married sister of appellant No. 1. At this stage, it may be stated here that during the pendency of the appeal, appellant No. 2 expired and hence, this appeal abates as far as appellant No. 2 is concerned. Thus, this appeal is being considered only in respect of appellant Nos.

1 and 3.

3. Prosecution case briefly stated is as under:

Deceased Neeta and the appellant No. 1 were in love and as appellant No. 1 did not belong to the same caste as that of deceased, their affair was opposed by the family of Neeta. Due to this, appellant No. 1 and Neeta both ran away from home and got married. At the time of marriage, none of the relatives of Neeta were present. The marriage took place in the year 1985. After the marriage, Neeta started residing at Bagal Chawl, Ravivar Peth, Kolhapur along with the appellant No. 1. It is the prosecution case that demands were made by the accused persons and as the demand made by the appellants was not met, Neeta was harassed by the accused persons. Hence, Neeta committed suicide by setting herself on fire.

PW 1 Mahendra who is brother of Neeta has stated that few months after her marriage, Neeta came to their house. At that time, she was weeping. On being asked as to why she was weeping, Neeta informed him that she was harassed and beaten on the ground that she should bring money from her parents. At that time, complainant paid Rs. 500/- to Neeta and Neeta returned to her house with that amount. After few months again Neeta came to their house and her lips were swollen and there was bandage on her forehead. On being asked, Neeta informed that accused No. 3 caught her hair and pushed her head on the wall. She told them that accused Nos. 1 and 2 asked her to bring Rs. 1500/- as installment of auto-rickshaw which is to be paid to the bank and they had beaten her. The complainant gave Rs. 700/- to Neeta and Neeta returned back to her matrimonial home with the said money. Two months after the delivery of her son Neeta came to their house and stated that accused Nos. 1 and 2 were asking her to bring money from her parents as they had incurred medical expenses. Neeta's father gave Rs. 300/- to Neeta. After some period of time, Neeta came to their house. She was weeping and she told them that her husband beat her on the ground that she should bring huge amount. She stated that she had been beaten by her husband. She also informed them that accused Nos. 1 to 3 told her if she does not bring huge amount, her life would be in danger. At that time, complainant paid Rs. 100/- to Neeta. There-after, Neeta committed suicide by setting herself on fire. After the post-mortem, PW 1 Mahendra lodged his FIR against the accused persons. After completion of investigation, the charge sheet came to be filed.

4. Charge came to be framed against the accused persons under Sections 498-A, 304(B) and 306 r.w. Section 34 of IPC. All the accused pleaded not guilty to the said charge and claimed to be tried. Their defence is of total denial and false implication. It is their specific case that the family of Neeta did not like the fact that Neeta had run away from home and got married to appellant No. 1 and hence, they have falsely implicated the accused persons. After going through the evidence adduced by the prosecution, the learned Sessions Judge convicted and sentenced the appellants as stated in paragraph 1 above, hence, this appeal.

5. I have heard the learned Counsel for the appellants-original accused and the learned APP for the State. I have perused the impugned judgment and order as well as record pertaining to the present case. After carefully and anxiously considering the same, I am of the opinion that the conviction of the accused u/s 304-B r.w. 34 of IPC cannot be sustained.

6. The prosecution case is mainly founded on the evidence of PW 1 Mahendra who is brother of deceased Neeta. PW 2 Vimal is the mother of Neeta and PW 3 Banubai Bhalkar is the neighbour of the complainant. PW 1 Mahendra is the complainant. PW 1 Mahendra stated that few months after her marriage, Neeta came to their house. At that time, she was weeping. On being asked as to why she was weeping, Neeta informed him that she was harassed and beaten on the ground that she should bring money from her parents. At that time, complainant paid Rs. 500/- to Neeta and Neeta returned to her house with that amount. After few months again Neeta came to their house, her lips were swollen and there was bandage on her forehead. On being asked, Neeta informed that accused No. 3 caught her hair and pushed her head on the wall. She told them that accused Nos. 1 and 2 asked her to bring Rs. 1500/- as installment of auto-rickshaw which is to be paid to the bank and they had beaten her. The complainant gave Rs. 700/- to Neeta and Neeta returned back to her matrimonial home with the said money. Two months after the delivery of a son to Neeta, Neeta came to their house and stated that accused Nos. 1 and 2 were asking her to bring money from her parents as they had incurred medical expenses. Neeta's father gave Rs. 300/- to Neeta. After some period of time, again Neeta came to their house. She was weeping, and she told them that her husband beat her on the ground that she should bring huge amount. She stated that she had been beaten by her husband. She also informed them that accused Nos. 1 to 3 told her if she does not bring huge amount, her life would be in danger. At that time, complainant paid Rs. 100/- to Neeta. Thereafter, Neeta committed suicide by setting herself on fire.

7. PW 2 Vimal who is mother of Neeta, has stated that Neeta came to their house after six months of her marriage. At that time, her son Mahendra (PW 1) and she were in the house. Neeta was weeping and stating that accused Nos. 1 to 3 were harassing her and they were demanding money. Therefore, this witness gave Rs. 500/- to Neeta and Neeta left their house. 3 or 4 months thereafter, Neeta came to their house, at that time, Vimal and her son Mahendra were in the house. They both saw bandage on the forehead of Neeta and her lips were swollen. They asked Neeta about the injury. She told them that accused No. 3 caught hold her hair and pushed her head on the wall. Neeta demanded Rs. 1500/- to pay the installment of auto-rickshaw to the bank. They paid Rs. 700/- to Neeta. Sometime after her delivery, Neeta came to their house. She told them that accused Nos. 2 and 3 asked her to bring the amount to pay the medical expenses. At that time, she gave Neeta Rs. 300/-. Some months later, again Neeta came to their house and told that all the accused were harassing her and assaulting her on account of demand of money. As far as both these witnesses

are concerned, though they have stated that on the second occasion when Neeta came to their house her lips were swollen, however they have not stated this fact in their statements before police. This is an improvement. Hence, this piece of evidence cannot be relied upon. The evidence of Banubai is on similar lines as that of Vimal.

8. Moreover, both these witnesses specifically stated that they cannot tell the date or days when Neeta came to their house. They also stated that they could not tell the month during which she had visited them nor could they tell the season during which Neeta came to their house. Thus, it is seen that though both the witnesses have spoken about four separate incidents, they could not even state the approximate time when Neeta had come to their house. Thus, it appears that only vague and general statements have been made by these witnesses.

9. Mr. Mundargi, the learned Counsel for the appellants submitted that the essential ingredient of Section 304-B of IPC is that soon before the death of the lady, there was cruelty or harassment and only in that case, does the presumption u/s 113-B operate. He has placed reliance on the decision of the Supreme Court in the case of Kamesh Panjiyar @ Kamlesh Panjiyar Vs. State of Bihar, wherein it is observed that "soon before" would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. There must be a proximate and live link between the effects of cruelty based on dowry demand and the death concerned. If alleged incident of cruelty is remote in time and has become stale enough not to disturb mental equilibrium of woman concerned, it would be of no consequence."

10. In order to attract application of Section 304-B IPC, the essential ingredients are as follows:

- (i) The death of a woman should be caused by burns or bodily injury or otherwise than under a normal circumstance.
- (ii) Such a death should have occurred within seven years of her marriage.
- (iii) She must have subjected to cruelty or harassment by her husband or any relative of her husband.
- (iv) Such cruelty or harassment should be for or in connection with demand of dowry.
- (v) Such cruelty or harassment is shown to have been meted out to the woman soon before her death.

Section 304-B IPC shows that there must be material to show that "soon before her death" the victim was subjected to cruelty or harassment "for or in connection with the demand of dowry". Prosecution is obliged to show that soon before the occurrence there was cruelty or harassment and only in that case presumption u/s 113 of Evidence Act operates. Evidence in that regard has to be

led by prosecution. "Soon before" is a relative term and it would depend upon the circumstances of each case and no strait-jacket formula can be laid down as to what would constitute a period of soon before the occurrence. It would be hazardous to indicate any fixed period, and that brings in the importance of a proximity test as indicated by the said expression both for the proof of an offence of dowry death as well as for raising a presumption u/s 113-B of the Evidence Act. A reference to the expression "soon before" used in Section 114 Illustration (a) of the Evidence Act, is relevant. The determination of the period which can come within the term "soon before" u/s 114 Illustration (a) is left to be determined by the courts, depending upon the facts and circumstances of each case. Suffice, however, to indicate that the expression "soon before" would normally imply that the interval should not be much between the cruelty or harassment concerned and the death in question. There must be existence of a proximate and live link between the effects of cruelty based on dowry demand and the death concerned.

11. In the present case, none of the witnesses have been able to state as to when the instances as stated by them took place. As observed earlier, they were unable to give the day, date, month or even the season of the year when the incident occurred or when Kalpana came to their house. Thus, there is no material to show that "soon before" her death, Neeta was subjected to cruelty or harassment by any of the accused persons.

12. Moreover, for Section 304-B to be attracted, the cruelty or harassment has to be in connection with the demand of dowry. Two essential ingredients of Section 304-B IPC, apart from others, are (i) death of woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances, and (ii) woman is subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for "dowry". The explanation appended to Sub-section (1) of Section 304-B IPC says that "dowry" shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961.

13. Section 2 of the Dowry Prohibition Act reads as under:

2. Definition of "dowry" - In this Act, "dowry" means any property or valuable security given or agreed to be given either directly or indirectly:

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person, at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dower or mahr in the case of persons to whom the Muslim personal law (shariat) applies.

14. In view of the aforesaid definition of the word "dowry" any property or valuable security should be given or agreed to be given either directly or indirectly at or before or any time after the marriage and in connection with the

marriage of the said parties. Therefore, the giving or taking of property or valuable security must have some connection with the marriage of the parties and a correlation between the giving or taking of property or valuable security with the marriage of the parties is essential. Being a penal provision, it has to be strictly construed. It is an admitted fact that the complainant or any of his relatives i.e. none of the relatives of the victim girl were present during the marriage. As none of the relatives of the victim girl had met either the appellant No. 1 or any of his family members either before or during the marriage or even thereafter, there was no question of any agreement between the parties to give directly or indirectly any property in connection with the marriage of the said parties. In fact, victim girl and appellant No. 1 had both eloped and got married and the marriage was without consent of the family members of the victim girl. In such case, the second ingredient of Section 304-B i.e. being subjected to cruelty for or in connection with "dowry" is not satisfied, hence, Section 304-B cannot apply.

15. Reliance was also placed by Mr. Mundargi on the decision of the Supreme Court in the case of Appasaheb and Another Vs. State of Maharashtra, . The facts in the said case and the facts in the present case are quite similar. In the said case, it is observed that a demand for money on account of some financial stringency or for meeting some urgent domestic expenses cannot be termed as a demand for dowry as the said word is normally understood. The evidence adduced by the prosecution does not show that any demand for "dowry" as defined in Section 2 of the Dowry Prohibition Act was made by the appellants as what was allegedly asked for was some money for meeting domestic expenses. Since an essential ingredient of Section 304-B IPC viz. demand for dowry is not established, the conviction of the appellants cannot be sustained. In the present case also, money was asked for meeting some domestic expenses or medical expenses. In the present case also, the evidence adduced by the prosecution does not show that any demand for dowry as defined in Section 2 of the Dowry Prohibition Act was made by the appellants.

16. As already stated, the appellants were also charged under 306 r.w. Section 34 of IPC but were acquitted of the said charges by the learned Sessions Judge, which order has attained finality for the reason that the State did not prefer appeal against the same. The appeal in the High Court and also in this Court has been preferred by the appellants challenging their conviction u/s 304-B read with Section 34 of IPC. It has been held in State of A.P. v. Thadi Narayana that Section 423(1)(b)(i) of the Code of Criminal Procedure, 1898 (which corresponds to Section 386(b)(i) of the Code of Criminal Procedure, 1973) is clearly confined to cases of appeals preferred against orders of conviction and sentence, the powers conferred by this clause cannot be exercised for the purpose of reversing an order of acquittal passed in favour of a party in respect of an offence charged, in dealing with an appeal preferred by him against the order of conviction in respect of another offence charged and found proved. Therefore, I have refrained from expressing any opinion as to whether the appellants could be held guilty of

having committed the offence u/s 306 IPC on the basis of evidence available on record as their acquittal under the aforesaid charges has attained finality and cannot be reversed in the appeal filed by the appellants challenging their conviction u/s 304-B IPC.

17. However, as far conviction u/s 498-A of IPC is concerned, I find that there is some material on record. This material is found in the evidence of PW 1 Mahendra, PW 2 Vimal and PW 3 Banubai. In view of their evidence, case is made out u/s 498-A of IPC, hence, no interference is called for with the conviction and sentence u/s 498-A of IPC.

18. In the result, the appeal is partly allowed. The conviction and sentence imposed on the appellants u/s 304-B r.w. 34 of IPC vide judgment and order dated 6.12.1991 passed by the learned 4th Additional Sessions Judge, Kolhapur in Sessions Case No. 66 of 1999, is set aside. The appellants are acquitted of the offence u/s 304-B r.w. 34 of IPC. However, the conviction u/s 498-A r.w. 34 of IPC is confirmed. As far as punishment u/s 498-A r.w. 34 of IPC is concerned, looking to the fact that the incident is of the year 1987 and other facts of this case, sentence of imprisonment imposed by the learned Sessions Judge is reduced to the period already undergone by the appellants.