

(2018) 01 BOM CK 0155
In the Bombay High Court
Case No : 451 of 2004

Suresh s/o Premlal Malviya

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 25-01-2018

Acts Referred:

[Indian Penal Code, 1860](#), [Section 302](#),
[Section 34](#), [Section 498A](#) -
Punishment for murder - Acts done by several persons in furtherance of common
intention - Husband or relative of husband of a woman subjecting her to cruelty
[Evidence Act, 1872](#), [Section 32](#), [Section 32\(1\)](#) - Case in which statement of relevant fact by
person who is dead or cannot be found, etc. is relevant - Case in which statement of
relevant fact by person who is dead or cannot be found, etc. is relevant

Citation : (2018) 01 BOM CK 0155

Hon'ble Judges : Rohit B. Deo

Bench : Division Bench

Advocate : P.R. Agrawal, S.V. Kolhe

Final Decision : Allowed

Judgement

1. The appellant is challenging the judgment and order dated 09.07.2004 in Sessions Trial 81/1997 rendered by the Additional Sessions Judge, Achalpur, by and under which, the appellant is convicted for the offence punishable under section 498-A of the Indian Penal Code (" IPC " for short) and is sentenced to suffer rigorous imprisonment for one year and to payment of fine of Rs.500/-. The appellant is acquitted of offence punishable under section 302 read with section 34 of IPC. The mother of the appellant Smt. Lalita Malviya who was co-accused is acquitted of

both the offences.

2. Heard Shri P.R. Agrawal, the learned Counsel for the appellant and Ms. S.V. Kolhe, the learned Additional Public Prosecutor for the respondent-State.

3. Concededly, deceased Arti suffered burn injuries on 31.07.1996 and succumbed thereto on 01.08.1996. The death is within less than three months of her marriage with accused Suresh Malviya which was solemnized on 13.05.1996.

4. The incident occurred at 06:00 a.m. on 31.07.1996.

Arti was admitted in Rural Hospital, Dharni. Her dying declaration (Exh.23) was recorded in Rural Hospital, Dharni by the Executive Magistrate, Dharni. The dying declaration records that Arti suffered accidental burns. Arti was thereafter referred to Irwin Hospital, Amravati. Police Head Constable Babarao visited the spot and prepared panchnama in presence of the panch witnesses. The quilt used for extinguishing the fire was seized.

5. Arti requested that she be admitted in hospital at Khandwa, since her parents reside at Khandwa. A second dying declaration was recorded in the Khandwa hospital on 31.07.1996. The dying declaration purportedly inculpates accused Suresh and the acquitted Sau. Lalita and records that the accused assaulted Arti on the previous night and her mother-in-law set her ablaze after pouring kerosene on her person. On the basis of the second dying declaration, offence under section 307, 498-A read with section 34 of IPC was registered in Mohar Road Police Station, Khandwa and the case papers were transferred to Police Station Dharni. Offence under the said sections was again registered against the accused in Dharni Police Station, A.P.I. Samadhan Gopnarayan visited the spot of the incident, seized burnt clothes from the spot in the presence of witnesses and recorded the

statements of relatives of Arti who resided in Khandwa.

Arti expired on 03.08.1996. Offence under section 302 of IPC was additionally registered, and upon completion of investigation charge-sheet was submitted in the court of Judicial Magistrate First Class, Dharni who committed the case to the Sessions Court. The learned Sessions Judge framed charge (Exh.17) under section 498-A, 302 read with section 34 of IPC, the accused abjured guilt and claimed to be tried in accordance with law.

6. The learned Sessions Judge recorded a finding, and I see no reason to take a different view, that the prosecution has failed to prove that the death was homicidal. The dying declaration (Exh.23) which was recorded on 31.07.1996 recites that Arti suffered accidental burns. The spot panchnama (Exh.24) records the existence of furnace with five half burnt pieces of wood. The incident occurred at 06:00 a.m. No trace or residue of kerosene was noticed on the floor of the room. The half burnt quilt which was used to extinguish the fire and the clothes of the deceased which were seized were sent to the Chemical Analyzer whose report the prosecution did not produce on record. The second dying declaration purportedly recorded in the Khandwa hospital was not proved by the prosecution. In the teeth of the evidence on record, the possibility of homicidal death can be safely excluded. It is not even the case of the prosecution that Arti committed suicide. That the death was accidental is the only reasonable inference which can be drawn from the evidence on record.

7. The learned Sessions Judge, while acquitting the mother of the accused, convicted the accused for offence punishable under section 498-A of the IPC. In order to prove the offence punishable under section 498-A of IPC the prosecution has

examined Shri Premnarayan Rai, the father of the deceased (P.W.1), Smt. Pushpabai Rai, the mother of the deceased (P.W.2) and Smt. Archana Jaiswal, the sister of the deceased (P.W.3).

8. The evidence of P.W.1 is that he was told by P.W.2 that the deceased Arti disclosed to P.W.2 that the accused demanded a gas stove and Rs.10,000/- or Rs.5000/-. P.W.1 states that he was told by P.W.2 that Arti was subjected to ill-treatment and was assaulted by accused Suresh. The evidence of P.W.1 does not take the case of the prosecution any further since he has deposed on the basis of what was conveyed to him by his wife (P.W.2), to whom Arti made the disclosures.

9. P.W.2 Smt. Pushpabai has deposed that when Arti was in her parental home for 15 days, she disclosed that the accused were demanding Rs.10,000/- and gas furnace and was ill-treated and assaulted by the accused. P.W.2 states that when she reached Arti to her matrimonial home, she stayed there for two days and was a witness to a quarrel between Arti and her mother-in-law on the issue of preparation of food. P.W.2 then states that in the hospital Arti told her that her mother-in-law poured kerosene on her person and her husband set her ablaze. P.W.2 states that it was also disclosed by Arti that on the previous night accused Suresh assaulted her on the back with stick.

The statement that accused persons were quarreling with Arti and were assaulting her to coerce her to fulfill the demand of money and gas stove, is an omission, which is duly proved in the evidence of P.W.5 I.O.

10. P.W.3 Archana Jaiswal who is the sister of the deceased has deposed when Arti was residing in the parental home for 20 days, she disclosed that the accused persons were demanding Rs.10,000/- and gas stove and that she was ill-treated.

This evidence is an omission, which inexplicably was not proved.

11. The evidence, sketchy and bereft of details, as the evidence is, is concededly not direct. P.W.1, P.W.2 and P.W.3 have deposed on the basis of the disclosures which the deceased Arti is said to have made when she was residing at her parental home for 15 to 20 days. The pivotal issue is whether such evidence is admissible. The learned Sessions Judge having recorded a finding that the death was not homicidal and was accidental, the cause of death or any of the circumstances of the transaction which resulted in death is not in issue for consideration. Section 32(1) of the Indian Evidence Act carves out an exception to the rule against the admissibility of hear say evidence. Statement of deceased, verbal or written, is admissible under section 32(1) provided the cause of death or the circumstances of the transaction which resulted in death, is an issue and such verbal or written statement is regarding such cause or circumstances.

12. In *Inderpal v. State of M.P.* reported in (2001) 10 SCC 736 the Apex Court observes thus:

7. Unless the statement of a dead person would fall within the purview of Section 32(1) of the Indian Evidence Act there is no other provision under which the same can be admitted in evidence. In order to make the statement of a dead person admissible in law (written or verbal) the statement must be as to the cause of her death or as to any of the circumstance of the transactions which resulted in her death, in cases in which the cause of death comes into question. By no stretch of imagination can the statements of Damyanti contained in Exhibit P-7 or Exhibit P-8 and those quoted by the witnesses be connected with any circumstance of the transaction which resulted in her death. Even that apart, when we are dealing with an offence under Section 498-A IPC disjuncted from the offence under Section 306 IPC the question of her death is not an issue for consideration and on that premise also Section 32(1) of the Evidence Act will stand at bay so far as these materials are concerned.

It would be apposite to also note the following observations in *Bhairon Singh vs. State of Madhya Pradesh*, reported in (2009) 13 SCC 80:

"4. The legal position relating to the admissibility of evidence under section 32(1) has come up for consideration before this court time and again. It is not necessary to multiply the authorities in this regard as reference to a three judge Bench decision of this court in Sharad Birdhichand Sarda Vs. State of Maharashtra, (1984)4 SCC 116:[2009 ALL SCR(O.C.C.) 281], will suffice. Regarding the application of rule under section 32(1) Evidence Act, Fazal Ali, J. culled out the legal position as follows:

"(1) Section 32 is an exception to the rule of hearsay and makes admissible the statement of a person who dies, whether the death is a homicide or a suicide, provided the statement relates to the cause of death, or exhibits circumstances leading to the death. In this respect as indicated above, the Indian Evidence Act, in view of the peculiar condition of our society and the diverse nature and character of our people, has thought it necessary to widen the sphere of Section 32 to avoid injustice".

"(2) The test of proximity cannot be too literally construed and practically reduced to a cut and dried formula of universal application so as to be confined in a straitjacket. Distance of time would depend or vary with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a finale of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death. It is manifest that all these statements come to light only after the death of the deceased who speaks from death. For instance, where the death takes place within a very short time of the marriage or the distance of time is not spread over

more than 3-4 months the statement may be admissible under Section 32 ".

(3) The second part of clause (1) of Section 32 is yet another exception to the rule that in criminal law the evidence of a person who was not being subjected to or given an opportunity of being cross examined by the accused, would be valueless because the place of cross examination is taken by the solemnity and sanctity of oath for the simple reason that a person on the verge of death is not likely to make a false statement unless there is strong evidence to show that the statement was secured either by prompting or tutoring.

(4) It may be important to note that Section 32 does not speak of homicide alone but includes suicide also, hence all the circumstances which may be relevant to prove a case of homicide would be equally relevant to prove a case of suicide.

(5) Where the main evidence consists of statements and letters written by the deceased which are directly connected with or related to her death and which reveal a tell-tale story, the said statement would clearly fall within the four

corners of Section 32 and, therefore, admissible. The distance of time alone in such cases would not make the statement irrelevant."

5. Varadarajan, J. on the other hand referred to the legal position stated by Woodroffe and Amir Ali in their Law of Evidence, (fourteenth edition) and Ratanlal Dhirajlal in their Law of Evidence (1982 Reprint). This is how A. Varadarajan, J. dealt with the admissibility of evidence under Section 32(1) :

"....The position of law relating to the admissibility of evidence under Section 32(1) is well settled. It is, therefore, not necessary to refer in detail to the decisions of this Court or of the Privy Council or our

High Courts. It would suffice to extract what the learned authors Woodroffe and Amir Ali have stated in their Law of Evidence, Fourteenth Edn. and Ratanlal and Dhirajlal in their Law of Evidence (1982 Reprint). Those propositions are based mostly on decisions of courts for which reference has been given at the end. They are these: Woodroffe and Amir Ali's Law of Evidence, Fourteenth Edn.:

"Page 937: Hearsay is excluded because it is considered not sufficiently trustworthy. It is rejected because it lacks the sanction of the test applied to admissible evidence, namely, the oath and cross-examination. But where there are special circumstances which give a guarantee of trustworthiness to the testimony, it is admitted even though it comes from a second-hand source.

Page 941: What is relevant and admissible under clause (1) of this section (Section 32) is the statement actually made by the deceased as to the cause of his death or of the circumstances of the transaction which resulted in his death.

Page 945-946: A statement must be as to the cause of the declarant's death or as to any of the circumstances of the transaction which resulted in his death i.e. the cause and circumstances of the death and not previous or subsequent transaction, such independent transactions being excluded as not falling within the principle of necessity on which such evidence is received. When a person is not proved to have died as a result of injuries received in the incident in question, his statement cannot be said to be a statement as to the cause of his death or as to any of the circumstances which resulted in his death. (AIR 1964 SC 900.) Where there is nothing to show that the injury to which a statement in the dying declaration relates was the cause of the injured person's death or that the circumstances under which it was received resulted in his death, the

statement is not admissible under this clause. (ILR 1901 25 Bom.45.)

Page 947: Circumstances of the transaction resulting in his death: This clause refers to two kinds of statements: (i) when the statement is made by a person as to the cause of his death, or (ii) when the statement is made by a person as to any of the circumstances of the transaction which resulted in his death. The words `resulted in his death' do not mean `caused his death'. The expression `any of the circumstances of the transaction which resulted in his death' is wider in scope than the expression `the cause of his death'. The declarant need not

actually have been apprehending death. (AIR 1964 MP 30.)

Page 947: The expression "circumstances of the transaction" occurring in Section 32, clause (1) has been a source of perplexity to courts faced with the question as to what matters are admissible within the meaning of the expression. The decision of Their Lordships of the Privy Council in *Pakala Narayana Swami v. Emperor* (AIR 1939 PC 47) sets the limits of the matters that could legitimately be brought within the purview of that expression. Lord Atkin, who delivered the judgment of the Board, has, however, made it abundantly clear that, except in special circumstances no circumstance could be a circumstance of the transaction if it is not confined to either the time actually occupied by the transaction resulting in death or the scene in which the actual transaction resulting in death took place. The special circumstance permitted to transgress the time factor is, for example, a case of prolonged poisoning, while the special circumstance permitted to transgress the distance factor is, for example, a case of decoying with intent to murder... But the circumstances must be circumstances of the transaction and they must have some proximate relation to the actual occurrence.

Page 948: "Circumstances of the transaction" is a phrase no doubt that conveys some limitations. It is not as broad as the analogous use in "circumstantial evidence" which includes the evidence of all relevant factors. It is on the other hand narrower than "res gestae". Circumstances must have some proximate relation to the actual occurrence, though, as for instance, in the case of prolonged poisoning they may be related to dates at a considerable distance from the date of actual fatal dose.

Page 948: The Supreme Court in the case of *Shiv Kumar v. State of U.P.* {1966 Cri.App.R (SC) 281} has made similar observations that the circumstances must have some proximate relation to the actual occurrence, and that general expressions indicating fear or suspicion, whether of a particular individual or otherwise and not directly to the occasion of death will not be admissible.

Page 949: The clause does not permit the reception in evidence of all such statements of a dead person as may relate to matters having a bearing howsoever remote on the cause or the circumstances of his death. It is confined to only such statements as relate to matters so closely connected with the events which resulted in his death that may be said to relate to circumstances of the transaction which resulted in his death. [(1939) 66 IA 66.] "Circumstances of the transaction which resulted in his death" means only such facts or series of facts which have a direct or organic relation to death. Hence statement made by the deceased long before the incident of murder is not admissible.[1974 Cri LJ 1200 (MP).] *Law of Evidence by Ratanlal and Dhirajlal* (1982 Reprint)

Page 94: Circumstances of the transaction: General expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of the death are not admissible.

[(1939) 66 IA 66] (18 Part 234.)

Page 95: Circumstances must have some proximate relation to the actual occurrence and must be of the transaction which resulted in the death of the declarant. The condition of the admissibility of the evidence is that the cause of the declarant's death comes into question. It is not necessary that the statement must be made after the transaction has taken place or that the person making it must be near death or that the 'circumstance' can only include the acts done when and where the death was caused....

Dying declarations are admissible under this clause."

"10. The only evidence to bring home charge under Section 498A, IPC, is that of PW-4 and PW-5. In their deposition PW-4 and PW-5 stated that their sister told them that accused was torturing her as he wanted that her brothers arrange a job for him or the house at Ganj Basoda is given to him or a cash of Rs.1 lac is given to enable him to do some business. They deposed that as and when their sister come to their house, she would tell them that accused used to insert cloth in her mouth and give beatings for dowry. The trial court as well as the High Court relied on the evidence of PW-4 and PW-5 and held that charge under Section 498A, IPC, against the accused was proved. Apart from the statement attributed to the deceased, none of the witnesses had spoken anything which they had seen directly insofar as torture and harassment to Ranjana Rani @ Raj Kumari was concerned".

"11. The moot question is: whether the statements attributed to the deceased could be used as evidence for entering upon a finding that the accused subjected Ranjana Rani @ Raj Kumari to cruelty as contemplated under Section 498A, IPC . In our considered view, the evidence of PW-4 and PW-5 about what the deceased

Ranjana Rani @ Raj Kumari had told them against the accused about the torture and harassment is inadmissible under Section 32(1) of the Evidence Act and such evidence cannot be looked into for any purpose. Except Section 32(1) of the Indian Evidence Act, there is no other provision under which the statement of a dead person can be looked into in evidence".

The statement of a dead person is admissible in law if the statement is as to the cause of death or as to any of the circumstance of the transactions which resulted in her death, in a case in which the cause of death comes into question. What has been deposed by PW-4 and PW-5 has no connection with any circumstance of transaction which resulted in her death. The death of Smt. Ranjana Rani @ Raj Kumari was neither homicidal nor suicidal; it was accidental. Since for an offence under Section 498A simpliciter, the question of death is not and cannot be an issue for consideration, we are afraid the evidence of PW-4 and PW-5 is hardly an evidence in law to establish such offence. In that situation Section 32(1) of the Evidence Act does not get attracted".

"12. We are fortified in our view by the decision of this Court in *Inder Pal vs. State of M.P.* (2001) 10 SCC 736, wherein this Court considered the matter thus:

"4. We will consider at first the contention as to whether there is any evidence against the appellant which can be used against him for entering upon a finding that he subjected Damyanti to cruelty as contemplated in Section 498-A IPC. PW 1 father of the deceased and PW 8 mother of the deceased have stated that Damyanti had complained to them of her plight in the house of her husband and particularly about the conduct of the appellant. PW 4 sister of the deceased and PW 5 a relative of the deceased have also spoken

more or less on the same line. Exhibit P-7 and Exhibit P-8 are letters said to have been written by Damyanti. In those two letters reference has been made to her life in the house of her in-laws and in one of the letters she said that her husband had subjected her to beating.

5. Apart from the statement attributed to the deceased none of the witnesses had spoken of anything which they had seen directly. The question is whether the statements attributed to the deceased could be used as evidence in this case including the contents of Exhibits P-7 and P-8 (letters).

6. Before deciding that question we have to point out that the High Court came to a conclusion that the allegation that she committed suicide was not substantiated. A dying declaration was recorded by the Executive Magistrate in which the deceased had stated that she got burns accidentally from a stove. If that be so, death could not be the result of either any harassment or any cruelty which she was subjected to. In this context we may point out that the State has not challenged the finding of the High Court that death of Damyanti was not due to commission of suicide".

7. Unless the statement of a dead person would fall within the purview of Section 32(1) of the Indian Evidence Act there is no other provision under which the same can be admitted in evidence. In order to make the statement of a dead person admissible in law (written or verbal) the statement must be as to the cause of her death or as to any of the circumstances of the transactions which resulted in her death, in cases in which the cause of death comes into question. By no stretch of imagination can the statements of Damyanti contained in Exhibit P-7 or Exhibit P-8 and those quoted by the witnesses be connected with any circumstance of the transaction which resulted in her death. Even that apart, when we are dealing with an offence under Section 498-A IPC disjuncted from the offence under Section 306, IPC the question of her death is not an issue for consideration and on that premise also Section 32(1) of the Evidence Act will stand at bay so far as these materials are concerned."

If the evidence on record is scrutinized on the anvil of the enunciation of law in the judgments of the Apex Court referred to supra, it must be held that there is no admissible evidence on record to prove that the deceased was subjected to

cruelty within the meaning of explanation (a) or explanation (b) of section 498-A of the Act.

13. In the result, the judgment and order impugned is unsustainable and is set aside.

14. The accused is acquitted of offence punishable under section 498-A of IPC.

15. Fine paid by the accused, if any, be refunded.

16. The bail bond of the accused shall stand discharged.

17. The appeal is allowed.