SUPREME COURT OF INDIA

Kamalakar Nandram Bhavsar

Vs.

State of Maharashtra

Crl.A.No.95 of 2003

(N. Santosh Hedge and B. P. Singh, JJ.)

21.11.2003

ORDER

SANTOSH HEGDE, J.

1. The appellants before us were charged for offences punishable under Sections 306 and 498A read with Section 34 of the Indian Penal Code. The trial court relying on an alleged dying declaration said to have been made by the deceased acquitted the appellants of all charges. In appeal the High Court of Judicature at Bombay by the impugned judgment has set aside the said judgment of acquittal and convicted the appellants for offences punishable under Section 306 IPC and directed them to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 5,000/- each in default of fine to undergo further rigorous imprisonment for a period of one year. It also convicted the appellants for the offence punishable under Section 498A of IPC and sentenced them to undergo rigorous imprisonment for three years and to pay a fine of Rs. 5,000/- each in default of payment to undergo rigorous imprisonment for six months. It further directed the substantive sentences to run concurrently.

2. Prosecution case briefly stated is as follows:

Deceased Mina was married to first appellant on 27.4.1982. According to the prosecution, right from the day of marriage deceased was ill treated on account of non- payment of sufficient dowry and also because of her black complexion. According to the prosecution, she was beaten and ill treated during her stay in her matrimonial house. In the month, of January, 1983, the parents of the deceased received a telegram from appellant No. 1 inquiring whether the deceased had come to their house. On receipt to this telegram the deceased's brother (PW-3) went to the house of appellant where he learnt that the deceased had left her matrimonial home and was living in the house of one Sarode Palathi in a very bad condition. According to her brother, the deceased was almost in a semi dead condition, during this meeting she told him about the cruel treatment meted, out to her by the appellants and also about the beatings received by her. Deceased, therefore, requested her brother to take her back to her parental house, accordingly, PW-1 brought her back to his parents house. It is the prosecution case that after staying for about 7 or 8 months with her parents deceased filed a petition for maintenance under Section 125 of the (sic) petition came to be decided in favour of the deceased in March, 1985 but in spite of the order of the court the first appellant did not pay me maintenance ordered by the court, (sic) the deceased and requested them to send the deceased to his house on the pretext of Satyanarayan Puja being performed in their house. It is on this request the

deceased was sent to matrimonial home on 16.2.1986. On 28.4.1986 the deceased suffered severe bum injuries which was to the extent of 94%, consequent to which she died on the next day in the hospital at Nashik. It is the prosecution case that while deceased was being removed to the Civil Hospital one Kantilal went to Yoela Police Station and gave information about the incident in regard to which an entry was made in the Station register thereafter a case of accidental death was registered as per FIR Exhibit 14. After further investigation charge sheet was filed against the appellants for offences under Section 306 read with 34 and 498A read with Section 34, as stated above. During the course of trial, the prosecution examined 8 witnesses out of which PW-1, 2 and 3 spoke about the ill treatment meted out to the deceased as also to the factum of she being driven to suicide because of the acts of the accused persons.

3. During the course of trial, something peculiar happened, notice of which was taken by the High Court. It was not the case of the prosecution that the deceased had made any dying declaration but the doctor (PW-5), who conducted the post mortem, when in the witness box, replied to a question which was posed to him during the cross examination stating that a dying declaration was made by the deceased when she was in the hospital. Even though this doctor was not the doctor treating the patient, the said doctor answered the said question by admitting the suggestion made on behalf of the accused that the deceased had made a dying declaration. At that stage, on behalf of the defence an application Ext. 39 was made calling upon the prosecution to produce the said dying declaration which was allegedly made by the deceased on 28th of April 1986. On 26th of November, 1986, a dying declaration marked as Ex.40 was admitted into the evidence by the learned Trial Judge, the source of production of this document is neither mentioned in the judgment of the trial court, nor any evidence was led as to the proof of this document. The trial court in its judgment brushing aside all the evidences led by the prosecution relying on the so called dying declaration acquitted the accused persons of all the charges framed against them.

4. In appeal, the High Court noticing the manner in which this document Ext. 40 the alleged dying declaration was admitted in evidence, as also noticing the total absence of evidence in regard to the proof of the said document found fault with the trial court for making the said dying declaration as foundation of its judgment by which the accused persons were acquitted. During the course of its judgment, the High Court also noticed the fact that PW-5 was not the doctor who was treating the deceased when she was alive. It came to the conclusion that the said doctor could not have given a certificate to the effect that the deceased was in a fit condition to make a dying declaration. It also noticed the fact that the dying declaration in question was recorded at about 9.40 a.m. while the deceased died at 10.10 a.m., shortly thereafter. The High Court, further, noticed the tact that ever since the deceased was brought to the hospital she was on oxygen till her death. Therefore, it came to the conclusion that such dying declaration on the facts of the case could not have been made. Hence, rejecting the said dying declaration as a fabricated document, the High Court on consideration of the evidence led by the prosecution allowed the State appeal and convicted the appellants, as stated above.

5. It is pertinent to note herein that the High Court also directed the initiation of proceedings under Section 340 of the Criminal Procedure Code against the persons who were involved in fabricating the said dying declaration as also getting the same produced as evidence in the case.

6. In this appeal, Shri S.P. Sharma, learned counsel for the appellants contended that the High Court fell in error in coining to the conclusion that the dying declaration was a fabricated document. He

also contended apart from the contents of the dying declaration, the prosecution has also failed to establish its charges against the appellants. Therefore, he submitted that the High Court fell in error in convicting the appellants relying on the evidence led by the prosecution.

7. So far as the genuineness of dying declaration is concerned, having perused the material on record, we are also satisfied that the said document is not a genuine document. Until PW-5 the doctor who conducted the post mortem was examined, the defence did not, in any manner, indicate or disclose the factum of the existence of a dying declaration. No suggestion was put to the other prosecution witness as to the existence of a dying declaration. It is very surprising that a doctor who admittedly did not treat a patient during her life time would be called upon to certify the fitness of the patient to make a dying declaration when other doctors who treated the said patient were available for the said purpose. From the evidence on record also, it is clear that the deceased was in no condition to make a dying declaration. She had almost 95% burns and she was put on oxygen right from the moment she was brought to the hospital and continued to be on oxygen till she died. In such circumstances, it is difficult to believe that she could have made a dying declaration when she was not even capable of breathing by herself. The evidence on record shows that she died within about half an hour after making the alleged dying declaration. All these circumstances leads to one and the only conclusion that this dying declaration is not a genuine document and the High Court was justified in rejecting the same on that basis.

8. The High Court thereafter examined the evidence led by the prosecution and taking note of the fact that the deceased had died within 7 years of her marriage, placing reliance on the presumption available in law found the appellants guilty of the offences charged, hence sentenced them, as stated above.

9. The learned counsel appearing for the appellants contended that the evidence led by the prosecution apart from being doubtful is not sufficient to base a conviction for the offences charged against the appellants.

10. The perusal of the evidence led by the prosecution in this case shows that because of the ill treatment and harassment meted out to the victim, she had to leave her matrimonial home and in one case had even to take shelter in the house of Sarode Palathi wherefrom she was taken to her parent house by her brother. The fact that she was living with her parents when she was taken back to her house for attending a Satyanarayana Puja has also gone unchallenged. The fact that she did file a petition for maintenance under Section 125 of the Cr.P.C. is also admitted. In such circumstances the fact that the victim was treated badly, consequent to which she had to commit suicide can very well be accepted. But the question that arises for our consideration is who is actually responsible for causing this harassment which led to the death of Mina. If we examine the evidence of PW-2 as accepted by the High Court, it shows that this witness stated that the deceased had told her that her mother- in-law, sister-in-law and husband were ill treating her on the ground that she was black in complexion and that she was short of hearing. PW-3 also states that the deceased had complained about her husband, mother-in-law and sister-in- law of beating her. This witness also stated that the deceased had told her that because of her harassment, she may even commit suicide. PW-1 the brother similarly states that the deceased had complained about the ill treatment meted out to her by her husband, mother-in-law and sister-in-law. It is clear from the evidence of these witnesses that so far as the harassment meted out to the deceased the said prosecution witnesses have consistently spoken about the involvement of the husband, mother-in-law and sister-in-law. Therefore, in our opinion, the High Court was justified in holding these accused persons responsible for offences

punishable under Sections 306 and 498A read with Section 34 of IPC because by this harassment meted out to the deceased these accused persons have abetted her suicide. But so far as the father-in-law of the deceased, who is appellant No. 2 before us, is concerned, we find no evidence at all to hold him guilty of the said offence. Therefore, to this extent, in our opinion, the High Court has erred.

11. The learned counsel for the appellants then contended that the High Court while reversing the judgment of acquittal by the trial court failed to give an opportunity to the accused persons of being heard in regard to the quantum of sentence as required under Section 235 of the Code of Criminal Procedure. In support of this contention, the learned counsel relied on a judgment of this Court in the case of Santa Singh v. The State of Punjab: 1976CriLJ1875 . In that case, this Court came to the conclusion that the failure of the court in complying with the requirement of Section 235(2) is not merely an irregularity but is an illegality which vitiates the sentence. In that case, the trial court while awarding the sentence of death for an offence punishable under Section 302 IPC did not comply with the requirement of Section 235(2) of the Code. Therefore, this court came to the conclusion that since there is an illegality which vitiates the sentence an opportunity should be given to the accused persons of being heard before awarding the sentence, hence, on that ground, viz. on the ground of hearing the appellants on the question of sentence alone remanded the matter back to the trial court for giving an opportunity to the accused to make a representation regarding the sentence proposed. It is on the basis of this judgment, the learned counsel for the appellants contended that the High Court in this case has erred in awarding the sentence to the appellants without affording an opportunity to them to represent against the sentence. Acceptance of the argument of the appellant on this point would only make us remand the matter back to the High Court to award an opportunity to the appellants to represent against the quantum of sentence. But then we find such a remand is not always mandatory. This Court in the case of Dugdu v. State of Maharashtra: 1977CriLJ1206 after considering the earlier judgment in the case of Santa Singh (supra) held :

"The fact that Supreme Court in Santa Singh case : 1976CriLJ1875 remanded the matter to the Sessions Court does not spell out the ratio of the judgment to be that in every such case there has to be a remand but the remand is an exception, not the rule and ought, therefore, to be avoided as far as possible in the interest of expeditious though fair, disposal of cases."

12. We are of the opinion that this law laid down by a three-Judge bench of this Court applies squarely to the facts of this case. Therefore, having come to the conclusion that the conviction by the High Court of appellants 1, 3, 4 and 5 is justified, we affirm the same under Sections 306 and 498A of the Code of Criminal Procedure but postpone the awarding of sentence to give an opportunity to the learned counsel for the appellants to represent before us in regard to the quantum of sentence. We, however, allow the appeal of 2nd appellant Nandram Anand Bhavsar and set aside the conviction and sentence imposed on him by the courts below and acquit him of the" charges framed against him. We find Kamalakar Nandram Bhavsar (A-1), Tara Bai Nandram Bhavsar (A-3), Hirabai Satish Bhavsar (A-4) and Mirabai Nandram Bhavsar (A-5) guilty of offences punishable under Section 306 read with Section 34 and Section 498A read with Section 34 IPC and confirm the conviction of the appellants on that score.

13. Having come to the conclusion that appellants 1, 3, 4 and 5 have been rightly convicted by the

High Court under Section 306 read with 34 and 498A read with 34, with a view to comply with the requirement of Section 235(2) of the Code of Criminal Procedure we listed the matter for further arguments in regard to the sentence to be awarded to the convicted appellants since the same was not done by the High Court. Learned counsel for the appellants contended that the appellants come from economically backward community and have not been accused or convicted of any other offence prior to the incident in this case. He also submitted that the 3rd appellant being an old lady and 4th appellant being a divorcee and a dependent on her parents and 5th appellant being a young lady recently married having a small child should be dealt leniently and the sentence awarded by the High Court being far in excess the same should be reduced considerably in regard to all the convicted appellants whereas learned counsel appearing for the State of Maharashtra submitted there is absolutely no reason why any leniency should be shown to these appellants whose cruel behavior has forced an innocent lady to commit suicide, therefore, the conviction awarded to these appellants by the High Court is appropriate and the same should be maintained. We have noticed that the High Court has sentenced these appellants to undergo 3 years imprisonment under Section 498A read with Section 34 and to pay a fine of Rs. 5000/- each, in default to undergo RI for 6 months. These appellants have also been sentenced by the High Court for an offence punishable under Section 306 read with Section 34 IPC and are sentenced to suffer RI for 10 years and to pay a fine of Rs. 5000/- each, in default to undergo RI for 1 year. All the substantive sentences were directed to run concurrently. The High Court also directed that the fine amount if paid, 80% thereof should be paid to the parents of the victim as compensation. Taking into consideration the individual roles played by these accused persons in abetting the suicide of the victim and the respective age as well as family circumstances we think it appropriate to modify the sentence awarded by the High Court under Section 498A read with Section 34 IPC to the first appellant Kamalakar Nandram Bhavsar to RI imprisonment for 3 years and to pay a fine of Rs. 5000/-, in default to undergo further RI for 6 month. He is also convicted under Section 306 read with Section 34 IPC, but his sentence is reduced to 5 years R.I. and to pay a fine of Rs. 10,000/-; in default to undergo RI for 1 year. Substantive sentences to run concurrently.

14. We modify the sentence awarded by the High Court in regard to Tara Bai Nandram Bhavsar under Section 498A read with Section 34 IPC to 1 year RI and maintain the fine of Rs. 5000/- as also the default sentence awarded by the High Court. In regard to the offence punishable under Section 306 read with Section 34 IPC, we reduce the sentence of this appellant to 3 years' RI and a fine of Rs. 5000/-; in default to undergo 1 year's RI. Substantive sentences to run concurrently.

15. In regard to appellants Hirabai Satish Bhavsar and Mirabai' Nandram Bhavsar taking into consideration the overall circumstances of the case against these appellants, we reduce the sentence under Section 498A read with Section 34 IPC to 1 year RI and to pay a fine of Rs. 1000/-; in default to undergo RI for 6 months. For the offence punishable under Section 306 read with Section 34 IPC also, we reduce the sentence to 1 year RI with a fine of Rs. 1000/-; in default to undergo RI for 1 year. Substantive sentences to run concurrently.

16. We maintain the direction issued by the High Court that 80% of the fine amount, if realised, should be paid to the parents of the victim girl as compensation. With the above modifications this appeal is partly-allowed.