

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL MISC. APPLICATION NO. 295 OF 2018
IN
STAMP NUMBER MAIN NO.3142 OF 2018

Central Bureau of Investigation. Applicant.
Versus
Vijayraj Raia Desai. Respondent.

Mr. Mahesh Amonkar, Special Public Prosecutor, for the Applicant.

Respondent present in person.

**Coram : S.C. Gupte &
Nutan D. Sardesai, JJ.**

Reserved on : 12th June, 2019.

Pronounced on : 12th July, 2019.

ORAL ORDER : (Per S.C. Gupte, J.)

. This Criminal Misc. Application is the State's application for leave to appeal against acquittal of the Respondent-accused.

2. The accused was tried for offences punishable under Sections 3 and 4 of the Dowry Prohibition Act, 1961, as also under Sections 302, 201 and 498-A of Indian Penal Code (IPC) on the basis of a charge-sheet filed by the Central Bureau of Investigation (CBI). It was alleged that after completing his medical graduation, whilst he was working on contract at Dodamarg Hospital of the Directorate of Health Services, Government of Maharashtra, the accused married one Archana Revankar,

daughter of Waman Revankar, resident of Chendiya, Karwar. The civil marriage was registered at the Office of Sub-Registrar, Quepem on 16.12.1994. The accused joined Goa Medical College for his Post Graduation studies on 1st February, 1995 in the Department of Obstetrics and Gynecology, and shifted his residence to the Resident Doctors Hostel at Panaji. Religious marriage of the accused and Archana was held at Karwar on 23rd February, 1996. The couple was blessed with a son, Harshal, in November 2000 and a daughter, Riya, on 5th February, 2003. In between, sometime in 2001, Archana started teaching at Government Primary School at Zuari Nagar. In the year 2003, she joined the Government Primary School at Baina in Kannada section and was teaching classes V to VII. In the year 2004, the accused was selected and appointed at Goa Medical College and joined his new job in May 2005. Archana did not attend her school at Baina since 6th December, 2010. When the Principal of the School contacted the accused over phone, the former was told that Archana did not reside with the latter. On 14th December, 2010, the accused gave an intimation in the Inward Section of Margao Police Station that Archana had left residence on 5th October, 2010. The letters addressed by the school authorities, asking Archana to report on duty, were sent or forwarded to the address of the couple at Kurtarkar Township, but were returned unclaimed. On 4th June, 2011, Waman Revankar, father of Archana, sent a fax message to Margao Police Station stating that there was no contact from Archana for six months. The report was registered under No.53/2011 of Margao Town Police Station. The accused, thereafter, addressed communications to P.I. Margao Town Police, *inter alia*, indicating that Archana had left in a black car bearing No. GA-08-E-2182 driven by their neighbour one

Prabhu Desai. On 8th June, 2011, one Arvind Revankar wrote to Margao Police Station alleging that Archana was subjected to physical and mental harassment by the accused and that the same had led to her disappearance from the house and that her whereabouts were not known. The information was registered under Crime No.201/11 under Sections 498A, 342 and 323 of IPC on 14th June, 2011. In the course of the investigation, an application was moved by CBI to this Court in Writ Petition No.114/2013 for registration of an FIR under Section 302 of IPC against the accused. The application was allowed. FIR bearing No.1(S)/2014 was registered against the accused and other unknown persons on 18th February, 2014 under Sections 120B and 302 of IPC. In the meantime, on or about 11th December, 2010, at Madkhol, Gugiwadi, Sawantwadi, one Raju Gaikwad saw a dead body of an unknown female under a bridge. A postmortem was conducted on the dead body. The cause of death, however, could not be ascertained. Bones of the dead body were preserved and later sent to Miraj Medical College for DNA examination. Based on the DNA profiling, the body was identified as that of Archana. After completion of investigation, CBI filed a charge-sheet on 18th July, 2014, alleging that the accused, with malicious intention of obtaining dowry, started abusing and torturing Archana, both physically and mentally, soon after their marriage and continued harassing her over a period of time and finally on 5th December, 2010 murdered her and disposed of her body at an uninhabited and unknown isolated place, far off from their residence, in order to conceal or destroy evidence of commission of offences. Charges were accordingly framed against the accused for committing offences under Sections 302, 201 and 498-A of IPC and under Sections 3 and 4 of the Dowry

Prohibition Act. The accused pleaded not guilty to the charges and was tried before the Sessions Court at Margao. The learned Sessions Judge, by his Judgment delivered on 14th June, 2018, acquitted the accused.

3. The learned Sessions Judge, firstly, held that it could not be concluded that the Accused had demanded or accepted dowry from the parents of Archana. In support of its case, the Prosecution had produced through PW.17 Arvind Revankar correspondence between the accused and Archana prior to the marriage, which included a letter addressed by the accused to Archana, indicating that he would not demand anything from her family. There was another letter of Archana stating that the accused was a very rare noble person with regard to his views on dowry, though her elderly folk would differ and her parents would like to give both of them some articles and cash as presents if the accused and his folk had no objection. Likewise, there were other letters considered by the learned Sessions Judge which corroborated the evidence of the accused and brought out that he had not demanded any dowry from Archana's parents prior to their marriage, but on the other hand, Archana's parents had insisted upon giving presents to the accused and Archana. The learned Judge considered the evidence of PW.17 Arvind Revankar that at the time of marriage 40 tolas of gold and ₹ 2,00,000/- in deposit were given along with household items to the accused. Though Arvind Revankar deposed in his examination-in-chief that the family of the accused had taken them to a marriage hall in Goa and told them that these items were the minimum requirements for the marriage, in his cross-examination he admitted that his parents had love and affection towards Archana; they had given some things to her in

marriage; even the deposit of ₹ 2,00,000/- was given in the name of Archana; and mangalsutra, chain, jumka for ears, bangles of different types, finger rings, payjans for legs, patlis, bajuband and necklace were made as ornaments for Archana. The learned Judge also considered the evidence of the accused that Archana had sold a few of her ornaments, which were not being used by her, and that a sum of ₹ 68,000/- received by her from such sale was used by her to repay her housing loan. The learned Sessions Judge came to a conclusion, after considering the evidence on record, that the gold and money were gifted by her parents to Archana and not to the accused.

4. The prosecution had relied on two letters written by Archana in support of their case against the accused concerning the demand of dowry. As against these, the accused had relied on a sworn affidavit of Archana, as also a draft of it in her own handwriting, produced by the accused, stating that she had borrowed ₹ 3,000/- per month from her parents for five months for personal use and that the same was not as per demands of the accused and that she had returned the money to her parents in a few months' time. It was further stated in the affidavit that whatever gold and cash her parents had given her at the time of the marriage was out of love and affection and nothing was demanded by the accused. Her affidavit also stated that she had used the money given to her by her parents for purchasing a residential flat, which was booked exclusively in her name, and that the accused had not used her money or demanded even a rupee from her. The learned Judge did not accept the prosecution case that it was the accused who had compelled Archana to swear the affidavit. In view of these statements of Archana in a sworn

affidavit, considered in the light of the fact that there was no cogent evidence which proved that the accused had demanded any money from her parents, the learned Judge was inclined to believe the evidence of the accused. In view of the evidence discussed above, the learned Judge was of the view that merely on the basis of the allegations in the two letters, it could not be concluded that the accused had demanded dowry from Archana or her parents.

5. So far as the question of the accused having subjected Archana to cruelty with a view to coerce her and her family to meet his demand for dowry is concerned, the Prosecution had relied on the letters addressed by Archana to the accused, her mother and to PW.7 Shailaja and PW.17 Arvind and her other writings not addressed to anyone and the evidence of PW.7 Shailaja, PW.9 Nilesh Prabhudessai, PW.17 Arvind, PW.22 Vijay Kalangutkar, PW.8 Jeanette and PW.42 Rosy. The learned Sessions Judge, firstly, dealt with the letters/writings of Archana. The learned Judge considered the dicta of the Supreme Court in various cases including the case of **Patel Hiralal Joitaram vs. State of Gujarat**¹, concerning the evidence of dying declaration under Section 32 of the Evidence Act. The learned Judge conceded that not only is a statement as to the cause of death, but as to any circumstance of the transaction which resulted into the death of the author, is admissible as evidence and that as regards this latter statement, width and contours of the scope of admissibility had to be expanded; anything which has a nexus with the death, proximate or distant, direct or indirect, may fall within the purview of sub-section (1) of Section 32. The learned Judge held that though the correspondence and writings of Archana contained

¹ AIR 2001 SC 2944

allegations of assault against the accused, the last of her allegations, in writings at Exhibits 98 and 99, referred to the alleged assault of 15.01.2008. The learned Judge was of the view that the distance of time between Archana's letters/writings and her death was about 3 years and, as such, in his view, these could not be looked into under Section 32(1) of the Evidence Act; these would have to be treated as documents *per se* and dealt with in the same manner as regards the proof and veracity of their contents as any other documents.

6. Since the accused had admitted the handwriting of Archana, the contents were treated as proved. The learned Judge focused his attention instead on the veracity of the contents. Apropos of the letters addressed by Archana in 1996 and 1997, the learned Judge accepted their veracity and concluded that the accused did assault Archana as stated in those letters. The learned Judge also did accept that Archana had undergone an abortion in 1999, and that the accused knew about it. The case of the accused that the foetus was defective and accordingly, Archana went ahead with the abortion without consulting him, was not accepted by the learned Judge. The learned Judge held that it could not be believed that Archana would go ahead with abortion, even if it was because the foetus was defective, without consulting the accused, her husband, who was a post-graduate in gynaecology. The learned Judge also accepted the evidence of PW.8 Jeanette Gomes about physical violence by the accused towards Archana. The learned Judge held that it was proved that Archana had left their residence in 2006 as she was hurt by the acts of the accused. The learned Judge, however, did not believe the veracity of the letters/writings of Archana of 2007 and 2008.

There is an elaborate discussion in the impugned judgment about the oral and documentary evidence concerning the contents of these letters/writings. The learned Judge observed that the evidence, even *prima facie*, did not allow a finding that the accused had assaulted Archana or had done anything to Archana. From an elaborate discussion of the evidence, considered in its entirety, the learned Judge was of the view that the Prosecution had proved that there were differences between the accused and Archana and he would off and on assault/beat and/or abuse/humiliate her and as a result, she would go either to her parents' house or her brother PW.17.

7. Considering, however, the ingredients of Section 498-A of IPC, in the light of the evidence led at the trial and various judgments bearing on the issue, the learned Judge held that the accused could not be held to be guilty of an offence under Section 498-A. The learned Judge held that neither was the conduct of the accused of such nature as was likely to drive Archana to commit suicide or was likely to cause grave injury to Archana or likely to cause danger to her life, limb or physical or mental health; the case, accordingly, did not fall within the ambit of any of the three limbs of clause (a) of Section 498-A of IPC. Since the learned Judge had already held that there was no demand of dowry, he concluded that even clause (b) of Section 498-A was not attracted. Question No.2 was accordingly answered in the negative.

8. As regards the charge of murder under Section 302, the learned Sessions Judge inquired into the proof of four circumstances, namely, (i) whether the dead body found at Madkhol was of Archana;

(ii) whether the death was caused on 5.12.2010; (iii) whether the death was homicidal; and (iv) whether it was caused by the accused. On circumstance (i), the evidence before the Court included depositions of PW.29 Uttam, PW.7 Shailaja, and PW.17 Arvind, concerning ornaments and pieces of clothes found on the dead body. These witnesses had claimed that these belonged to Archana. The accused, on the other hand, relied on lack of any deposition that about existence of the set of bones belonging to the dead body found in Sawantwadi and its identity with what was given to PW.49 Dr. Kathole for onward DNA examination. The accused argued that there was nothing to show that the clothes or ornaments were unique or belonged to Archana. The Court was of the view that the evidence strongly suggested that the unknown dead body of a female found under the bridge at Madkhol was that of Archana. The Court looked at both the evidence of ornaments found on the body and the medical/expert evidence, including DNA profiling, for such confirmation. The Court, accordingly, after the analysis of the evidence, held that it was conclusively proved that the dead body was of Archana.

9. On circumstance (ii), the Court considered the evidence of PW.48 Dr. Mortade, and PW.51 Dr. Lalwani. The two doctors differed on the possible date of death. Whereas according to PW.48, the time of death was 6 days prior to 12.12.2010, PW.51 put it on 9.12.2010 or thereafter. The Court also took into account the fact that the post mortem report (Exh.312 colly) did not state the time of death. PW.48 had deposed that the body, when it was found and post mortem was carried out on it, was in a completely swollen state in putrefaction; maggots had eaten the abdominal organs and parts of skin; and gases

had escaped through openings made by maggots. This was contrary to the evidence of PW.37 Dr. Netra and the record of inquest panchanama and the post mortem report. The Court, in the premises, did not believe the testimony of PW.48 Dr. Mortade. The Court also observed that no specimen of maggots from the dead body was taken for culture to compare and check the different stages of development to ascertain the time since death. The Court was, accordingly, in agreement with the accused that considering that the rectum had not protruded out and large intestines had not decomposed, it was highly probable that the death was caused between 36 to 72 hours prior to the post mortem, i.e. 2 to 3 days prior to 11.12.2010, and the Prosecution had failed to prove that it was caused on 5.12.2010.

10. On circumstance no.(iii), whether the death was homicidal, the learned Judge noted that the doctors (PW.37 Dr. Netra, PW.48 Dr. Mortade and PW.15 Dr. Lalwani) were unable to identify the cause of death; the viscera could not be preserved as the body was highly decomposed. Even the post mortem report could not ascertain the cause of death. According to PW.48 Dr. Mortade, no organ could be found or made out in the body due to putrefaction, whereas, according to PW.37 Dr. Netra, when the body was opened, she noticed organs such as lungs, heart, liver, etc. though they were fragile, and could not be preserved. The two doctors also differed in their versions on the presence or otherwise of skin on the body. The learned Judge found their evidence to be inconsistent concerning most material facts. The learned Judge took into account various judgments of Court, including the judgments of the Supreme Court about adverse inference to be drawn against the

prosecution on failure of doctors to send the body to anatomy experts in a case where the cause of death could not be identified due to decomposition of the body. The entire prosecution case on homicidal nature of the death was premised on circumstances such as the body being found at a far away place from the residence below a bridge and without any money (?), the height of the bridge below which the body was found so as to cause death by a fall, existence of other bridges in the area of greater heights. The prosecution's case was that the death had taken place somewhere else and the body was disposed of at the place at which it was found. The Court did not believe this case. It observed that death by a fall from the bridge could not be ruled out. The version of the prosecution that the accused knew the roads in the area and it was possible for him to have disposed of the body during day time after showing his presence on duty and returning to the hospital after such disposal, did not carry before the Court. After elaborate discussion of the evidence led on the issue, the Court was of the view that the evidence did not allow it to rule out the death as accidental or to conclude, without reasonable doubt, that it was homicidal, and that the prosecution had, thus, failed to prove that the death was homicidal.

11. That lent itself to justify the Court's conclusion even on circumstance (iv), namely, whether the death was caused by the accused. The case of the prosecution on this issue was four-fold. It was submitted that (1) the accused was torturing Archana and had subjected her to cruelty; (2) her letters had claimed that he had tried to kill her; (3) the accused alone could benefit by the suicide note obtained from Archana (though existence of the note and its production by the accused was

alleged, no such note was actually produced); and (4) all her writings showed that she had feared threat to her life by the accused and she had requested for protection. On the other hand, the accused submitted that the principal witnesses on the physical violence, though inimical to him, had admitted that from January 2009 to December 2010, there were no complaints from Archana. The Court held that as the prosecution had failed to prove either the cause of death or the circumstances in which it took place, it was of the considered view that the letters could not be the basis to conclude that the accused caused Archana's death; more so, because the last of the letters/writings was of the year 2008. The Court also concluded that as the prosecution had failed to prove that the accused had at any time demanded and/or taken dowry from the parents/family of Archana, it was unable to accept any immediate or larger motive, as alleged by the prosecution, on the part of the accused for causing the death of Archana. The Court also did not accept the submissions of the prosecution based on the alleged chain of circumstances such as the accused's conduct in not intimating the police about Archana's absence till 14.12.2010, not making inquiries with Archana's family, not receiving letters addressed by the school to Archana, etc. The Court observed that there was nothing on record, either in the cross-examination of the accused or any other evidence, to indicate that Archana had not left the house on 5.12.2010; she had admittedly stopped attending the school from 6.12.2010; the evidence of the doctors and the inquest panchanama suggested that death was caused between 36 to 72 hours prior to 11.12.2010. The Court was, accordingly, inclined to believe the accused's case that Archana had left the residence on her own on 5.12.2010, and accused did not take it as a

case of missing. Though the Court accepted that the conduct of the accused concerning some stray aspects brought out by the prosecution, such as his conduct after Archana had left the house, his approach vis-a-vis police, his conduct in the proceedings in the Court of JMFC at Belgavi, etc., did raise a suspicion against the accused, the Court observed that suspicion, however strong, could not take the place of proof. The Court observed that except for proving that the dead body found under the bridge at Madkhol belonged to Archana, the prosecution had not proved any other circumstance to prove that the accused had murdered Archana. The Court, accordingly, concluded that the prosecution had failed to prove that the death of Archana was caused by the accused.

12. The Court also concluded that the prosecution had failed to prove that the accused had disposed of the dead body of Archana to cause the evidence of the offence of murder to disappear or at all.

13. The Court, in the premises, acquitted the accused of all offences under which he was charged.

14. The trial Court has properly marshalled the evidence and applied law to it. Learned Special Public Prosecutor could not point out any infirmity in the impugned judgment and order, calling for exercise of the appellate jurisdiction of this Court. The learned Sessions Judge's observations that it could not be concluded that the accused had, at any time, demanded or accepted dowry from the parents of the deceased Archana or that neither of the three limbs of Section 498-A of IPC was

satisfied in the present case, are perfectly reasonable and probable conclusions. The Court has duly taken into account both documentary and oral evidence on these issues and analysed it properly. There is no misapplication of law on any of the issues.

15. So far as the charge of murder under Section 302 of IPC is concerned, learned Sessions Judge has rightly required into the proof of four circumstances, namely, identity of the dead body; the time of death; the cause of death – in particular, whether it was homicidal; and the accused's connection with the death. The learned Sessions Judge, on the basis of the evidence led before him, has come to a perfectly reasonable and probable conclusion that besides the identity of the dead body as the body of the deceased Archana, none of the circumstances bearing on the charge of murder, was made out by the prosecution. The Doctors' evidence, read in the light of the inquest panchanama and the post mortem report, does create a serious suspicion and doubt as to the date of the death. The learned Judge's conclusion that it was highly probable that the death was caused between 36 to 72 hours, i.e. prior to 11.12.2010, and the prosecution had accordingly failed to prove that it was caused on 5.12.2010, does not suffer from any infirmity whatsoever. So far the cause of death and the accused's connection with it are concerned, there is absolutely no material produced in evidence by the prosecution which supports the prosecution.

16. On the circumstance as to whether the death was homicidal, the learned Judge has rightly relied on the central feature of the case that the cause of death was not identified and none of the doctors could

pin-point it. The Doctor's versions as to the condition of the body when it was found and sent to post mortem clearly differ in material respects. On the basis of the evidence led before the Court, the Court's inability to either rule out the possibility of the death being accidental, or to conclude without reasonable doubt that it was homicidal, cannot be faulted. Since the cause of death itself could not be proved, there is no way the prosecution could have connected the accused with the death of the deceased. The prosecution could not construct any chain of circumstances, including by way of conduct of the accused or his whereabouts, so as to connect the accused to the death. Though some of the elements of his conduct did raise suspicion against the accused, the trial Court has correctly observed that suspicion, however strong, could not take the place of proof. The Court finally concluded that except for proving that the dead body found under the bridge at Madkhol belonged to Archana, the prosecution could not prove any other circumstance to bring home the guilt of the accused. There was also absolutely no proof that it was the accused who had disposed of the dead body of Archana to cause disappearance of the evidence of any alleged offence. Acquittal of the accused, in the premises, cannot be faulted. There is no special circumstance or material which the prosecution could point out in the present application, which was not considered by the trial Court and which requires leave to appeal to be granted.

17. In the premises, the Applicant-CBI has failed to make out any case for leave to appeal against the acquittal of the Respondent-accused.

18. The Criminal Misc. Application is, accordingly, dismissed.

Nutan D. Sardesai, J.

S.C. Gupte, J.