

(1997) 10 BOM CK 0054
In the Bombay High Court
Case No : Criminal Appeal No. 517 of 1994

Ajit Chotelal Shah

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 15-10-1997

Acts Referred:

Evidence Act, 1872 — Section 113A

Penal Code, 1860 (IPC) — Section 304A, 306, 498A

Citation : (1999) 1 DMC 86

Hon'ble Judges : Vishnu Sahai, J; R.K. Chandrashekhara Das, J

Bench : Division Bench

Advocate : R.S. Mohite, for the Appellant; I.S. Thakur, Assistant Public Prosecutor, for the Respondent

Judgement

Vishnu Sahai, J.—Through this appeal, the appellant challenges the judgment and order dated 29.8.1994, passed by the Additional Sessions Judge, Greater Bombay, in Sessions Case No. 605 of 1987, whereby he has been convicted and sentenced in the manner stated hereinafter:

- (i) u/s 498-A, Indian Penal Code to three years RI and to pay a fine of Rs. 1,000/- i.d. to suffer 6 months RI;
- (ii) u/s 304-B, Indian Penal Code, to seven years RI; and
- (iii) u/s 306 of Indian Penal Code to seven years RI and to pay a fine of Rs. 1,000/- in default to undergo 6 months RI.

The sentences were directed to run concurrently.

2. In short, the prosecution case runs as under:

The deceased Alka was the daughter of Kantilal Shah, PW 6. Her first marriage from which she had a daughter broke down. On 22.12.1986, she married the appellant whose first marriage too, had failed. He had a son from his first wife. After the marriage, the appellant went to his native place along with Alka and

came back after 8 days and started living in Pitru Chhaya Building, in Shimpolinagar, Borivali (W), Mumbai. Two to three days, after the appellant had returned with Alka, Kantilal went to the appellant's house and gave all the gifts, articles, utensils and ornaments etc. which were received in the marriage. Eight to ten days later, Alka came to Kantilal and started complaining that the appellant was harassing her on the ground that he had not returned all the ornaments. Alka also told Kantilal that the appellant was demanding Rs. 50,000/- for his business. Alka tried to persuade the appellant not to make any demand as her father had returned all the ornaments and had given an assurance that if he treated her well, he would give whatever was possible within his means.

It is said that in order to prevent further ill-treatment of Alka, Kantilal went to the house of one Maganlal Ajmera, PW 1 who was instrumental in getting the marriage settled.

Evidence of Maganlal is that within a month of Alka's marriage, Kantilal came and told him that Alka was being harassed and consequently, he should accompany him to the house of the appellant to persuade him not to ill-treat her. Maganlal also stated that Kantilal told him that the appellant was demanding valuable articles from Alka.

Evidence of Maganlal and Kantilal is that they went to the house of the appellant Alka who was also present there and told them that the appellant was alleging that the articles received in the marriage, had not been given and was demanding that they should be given. Evidence is that Maganlal and Kantilal asked the appellant to remain contented with whatever he had been given and to live happily with Alka. Appellant is said to have agreed that he would treat Alka well. Evidence of Kantilal is that the appellant did not like his and Maganlal's visit and consequently, beat Alka, who came and complained to him. Kantilal again went to the house of the appellant and asked him as to why he was ill-treating Alka and brought her to his house for 3 to 4 days. The appellant telephoned Kantilal and informed him that he was unwell and consequently Kantilal sent back Alka along with her daughter and his nephew Bharat to the house of the appellant.

It is said that the appellant started ill-treating Alka and beating her on the ground that all the ornaments were not given. Alka complained of this ill-treatment to Kantilal.

On 25.2.1987, Alka came to Kantilal's house and informed him that it was becoming unbearable for her to tolerate ill-treatment meted out by the appellant. Kantilal's mother however, assured her that she would send some respectable members of the community to resolve the situation. On this assurance, Alka again went back to the appellant's house.

On 26.2.1987, at about 8.45 to 9 a.m. Alka came to the house of her neighbour Dilipbhai Parekh, PW 4 and told him that the appellant was pressurising her to demand valuables from her parents. Dilip pacified her and promised that he

would inform her parents and bring them in the evening. Ten to fifteen minutes later, Dilipbhai and another neighbour Smt. Bhartiben PW 3, heard shouts of the neighbours and found that Alka was burning in her house. They along with Dhansukhlal and Vinodbhai Parekh extinguished the fire.

Thereafter, Dilipbhai tried to contact Kantilal on phone but, having failed in his bid he proceeded for his house personally. On the way, he met Himmatlal, Alka's uncle and informed him. Evidence of Kantilal is that at about 9.15 a.m. the same day, Himmatlal informed him on phone at his factory that Alka was burnt.

Consequently, Kantilal came to the house of the appellant and found that Alka was in a burnt condition. It is said that Kantilal asked Alka as to what had happened. She replied that she was disgusted on account of the ill-treatment and harassment and hence, had burnt herself. On a taxi, Kantilal and the neighbours, took Alka to Bharat Nursing Home in Borivali (W), Bombay.

3. Evidence of Dr. Dinesh Bhat, PW 2, a Surgeon in Bharat Nursing Home, is that on 26.2.1987, sometimes after 8 a.m. Alka was admitted in the Nursing Home as a case of burns. On examining her, he found that she had 81% burns, their break up being thus:

"9% over face, 18% on both hands, 18% over abdomen, 18% over chest, and 18% over both the thighs."

After examining Alka, Dr. Bhat admitted her in the Nursing Home.

4. Evidence of PSI Pandurang Ghadge, PW 7 is that on 26.2.1987, while he was on duty at the Borivali Police Station, at about 10 a.m. he received a message on phone, that one Alka was admitted in a burnt condition, in Bharat nursing Home, on the said information, PSI Ghadge reached Bharat Nursing Home. He contacted SEM Chaubey and called him to the hospital. SEM Chaubey recorded her dying declaration.

At about 1.30 p.m. after the SEM had recorded Alka's statement, PSI Ghadge contacted Dr. Dinesh Bhat and asked him about the fitness of Alka to make a statement. Dr. Bhat made an endorsement vide Exhibit 8 that Alka was conscious and in a fit condition to make the statement. Thereafter, PSI Ghadge recorded her statement.

It reads thus:

"That she was married to Ajit Shah two months ago thereafter he was repeatedly asking her to bring from her parents money and ornaments for his business, that he was not treating well, but even then she did not force her father, to give money or ornaments, and therefore, her husband used to beat her, for every trifling reason. Alka told me this when she was unable to bear this ill-treatment she used to go to her parents, and disclose everything to her father. That her father use to assure her that if her husband treated her well, he would give necessary help to her husband.

Alka told me that yesterday on 25.2.1987, her husband quarrelled with her in the night over preparing vegetables and harassed her throughout the night and again on 26.2.1987 between 8 a.m. to 8.30 a.m. raised quarrel over the same issue, abused her and left the house in an angry mood.

Alka further told me that at about 9 a.m. she could not control her anger and therefore, took out a rocker can from the cupboard, poured kerosene on her person and set herself to fire, by match stick. Thereafter, she started shouting. People in the neighbourhood gathered and extinguished the fire by using blankets. One Dhansukhbhai and Dilipbhai were amongst those and thereafter, her father and uncle brought her to Bharat Nursing Home for the treatment."

After recording Alka's statement, reading and explaining it to her, he obtained her signature. That statement is Exhibit 18.

5. Immediately after recording Exhibit 18, PSI Ghadge came to the police station and registered C.R. No. 84 of 1987 u/s 498-A, Indian Penal Code against the appellant. There after he went to the place of the incident and recovered therefrom a plastic can containing kerosene, two burnt match sticks, burnt pieces of cloth, etc. During the course of investigation, PSI Ghadge interrogated a large number of persons including Kantilal, Dilipbhai, Bhartiben, Maganlal and Dhansukhbhai.

After completing the investigation, he submitted a charge sheet against the appellant.

6. Going backwards, Alka succumbed to her injuries on 2.3.1987 at Bharat Nursing Home.

The autopsy on her corpse was conducted by Dr. S. A. Khanolkar who found that she has suffered 75% to 80% burns on the face, neck, chest, abdomen, right upper extremity, left upper extremity, back of chest, thighs, and lower part of both buttocks. In the opinion of Dr. Khanolkar, the deceased died on account of complications resulting from burns.

7. The case was committed to the Court to Sessions in the usual manner. In the Trial Court, the appellant was charged for offences punishable under Sections 498-A, 306 and 304-B, Indian Penal Code. To the said charges, he pleaded not guilty and claimed to be tried. During trial, in all, the prosecution examined seven witnesses. There is no eye witness of the incident but mere is the account of the incident given by the deceased Alka to PSI Ghadge in the form of her statement Exhibit 18. It is significant to point out that the evidence of PSI Ghadge is that the dying declaration of Alka which was recorded by the SEM Chaubey, had been handed over to him by the SEM, but inspite of hectic efforts, could not be traced out.

In defence, no witness was examined.

The Trial Judge believed the evidence adduced by the prosecution and convicted

and sentenced the appellant in the manner stated in para No. 1.

8. We have heard Mr. R.S. Mohite for the appellant and Mr. I.S. Thakur, Additional Public Prosecutor for the State of Maharashtra-respondent. We have also perused the depositions of the prosecution witnesses; the statement of Alka recorded by PSI Ghadge; the material Exhibits proved by the prosecution; appellant's statement u/s 313, Criminal Procedure Code, and the impugned judgment. After thoughtfully reflecting over the matter, we are of the view that this appeal deserves to be partly allowed.

9. In our view, there is no trustworthy evidence to sustain the conviction of the appellant for the offence u/s 304-B, Indian Penal Code. The sheet anchor of the prosecution evidence to prove the guilt of the appellant for the said offence is Alka's statement recorded by PSI Ghadge. In the said statement, Alka has alleged that two months ago she was married to the appellant who was repeatedly asking her to bring money and ornaments from her parents for his business and was not treating her well. However, in our view, the same cannot be relied upon for the reasons stated hereinafter.

Evidence of Dr. Bhat of Bharat Nursing Home is that on 26.2.1987, at about 1.30 p.m. a police officer approached him for recording the dying declaration of Alka. He examined her and found her to be in a conscious condition and consequently, gave a certificate in his own handwriting with signature in the margin of a blank paper to this effect. Exhibit 8 is the certificate of Dr. Bhat.

Evidence of PSI Ghadge is that thereafter he recorded the statement of Alka, Exhibit 18. His evidence further is that after Exhibit 18 had been recorded, he immediately proceeded to Borivali Police Station and filled the proforma of FIR at Exhibit 18-A.

A perusal of Exhibit 18-A shows that the time mentioned is 14.00 hours. During cross-examination, it was suggested to PSI Ghadge that initially 19 hours was written, and later on it was changed to 14 hours. To the said question, he replied that he could not say which was the earlier figure over which the figure 4 was written. It is significant to point out that he did not deny that there was over-writing. We have perused Exhibit 18-A and we find that in the same, in figure 14, 4 is clearly the result of over-writing. However, it is not clear what was originally written in place of 4.

Learned Counsel for the appellant pointed out that even according to the prosecution the dying declaration was not recorded in Dr. Bhat's presence.

In such a situation, his contention is that there was a strong probability of the dying declaration being recorded at about 6.30 p.m. on 26.2.1987 and not at about 1.30 p.m. as deposed to by PSI Ghadge and initially in the proforma of the FIR, the time mentioned was 19 hours (7 p.m.) which was later on interpolated to 14 hours (2 p.m.).

In view of the facts mentioned above, we find merit in the submission of the

appellant's Counsel.

10. Once it is held that the dying declaration was probably recorded at about 6.30 p.m. and not at about 1.30 p.m. as alleged by the prosecution the logical question is, it was incumbent for the prosecution to prove that at that time, Alka was in a conscious and fit condition to make the dying declaration. That evidence in the instant case is lacking.

It is a matter of common experience that in cases of high percentage burns, the victims lose their consciousness very fast. Since Alka had sustained 81% burns over her body, it might be that at 6.30 p.m. she was not conscious and may not have been in a fit condition to make her statement.

In such a situation, we regret that we cannot place any reliance on Alka's statement, Exhibit 18, the dying declaration.

11. We find that there is no other dependable evidence to prove the charge u/s 304-B, Indian Penal Code against the appellant. It is true that Maganlal PW1, Dilipbhai PW 3, and Kantilal PW 6 have stated in their statements in the Trial Court about the appellant demanding that the ornaments and valuables given in marriage should be given but in their statements recorded u/s 161, Criminal Procedure Code there is no mention of this. For this reason, it is difficult to accept their statement for the first time in the Trial Court to this effect. For the same reason, it would not be safe to accept Kantilal's statement that Alka told him that the appellant was demanding Rs. 50,000/-.

It is significant to point out that when Maganlal, Dilipbhai and Kantilal were questioned regarding these omissions, all that they could say was that they had stated to the Investigating Officer and could give no reason as to why it was not recorded in their statements u/s 161, Criminal Procedure Code by him.

12. We are not impressed by the submission of Mr. Thakur, Additional Public Prosecutor that since the hostile witness Dhansukhlal, PW 5 when confronted with his statement u/s 161, Criminal Procedure Code stated that he might have stated that the appellant was asking Alka to bring money and ornaments from her father and was ill-treating Alka there is sufficient evidence to establish the guilt of the appellant for the offence u/s 304-B, Indian Penal Code.

We feel that this statement would not bring home the guilt of the appellant for the said offence because in his cross-examination, Dhansukhlal admitted that he had learnt from neighbours that appellant was asking her to bring money and ornaments from her father's place and was harassing her.

This means that information of Dhansukhlal was hearsay.

Apart from it, the Supreme Court in the decision reported in Karuppanna Thevar and Others Vs. The State of Tamil Nadu, , has observed that a hostile witness who makes two different statements at two times has no regard for truth and therefore, Courts should be slow to act on the testimony of such a witness and

normally, look for corroboration.

13. For the said reasons we feel that the appellant deserves to be acquitted for the offence u/s 304-B, Indian Penal Code.

14. We, however, feel that so far as offences under Sections 498-A and 306, Indian Penal Code are concerned, the prosecution has adduced sufficient trustworthy evidence. We find that there is evidence of Kantilal PW 6, father of Alka, to the effect that Alka used to repeatedly complain about the ill-treatment meted out to her by the appellant. In respect of ill-treatment and cruelty being meted out to Alka by the appellant we also have the evidence of Bhartiben, a neighbour of Alka, Dilipbhai another neighbour of her and Maganlal who was instrumental in the settlement of marriage.

15. We also have the oral dying declaration made by Alka to Kantilal. Evidence of Kantilal shows that on receiving the news that Alka was burnt, he rushed to the house of the appellant, found Alka burnt there and when he enquired from her, she stated that she was fed up with the harassment and burnt herself. It is true that in the dying declaration she did not state that the harassment was caused by the appellant but if the dying declaration is examined in the light of evidence given by Kantilal, Bhartiben and Maganlal and the overall facts of the case, there can be no manner of doubt that when she referred to harassment she meant harassment by the appellant alone. There is no evidence that any other person was harassing her.

We find the evidence of Maganlal, Dilipbhai, Bhartiben and Kantilal to be trustworthy.

It is significant to point out that excepting Kantilal, the other three witnesses were wholly independent witnesses and had no axe to grind against the appellant. Unless the appellant had ill-treated Alka and practiced cruelty on her, they would not have falsely stated to this effect.

16. It is significant to point out that Alka committed suicide within two months of her marriage. In this connection, it would be pertinent to refer to the presumption stipulated by Section 113-A of Evidence Act. The said provision reads thus:

"113-A : Presumption as to abetment of suicide by a married woman-

When the question is whether the commission of suicide by a woman had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage, and that her husband or such relative of her husband has subjected her to cruelty the Court may presume having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such abetted of her husband.

Expl.--For the purposes of this section "cruelty" shall have the same meaning as

in Section 498-A of Indian Penal Code (45 of 1860)."

A perusal of the provision would show that where a woman commits suicide within 7 years of her marriage and it is shown that during this period, she had been subjected to cruelty by her husband, or his relations, the Court may presume having regard to all other circumstances that such suicide had been abetted by her husband or relations of her husband.

On the facts of the instant case, we are satisfied that the presumption contained in Section 113-A of the Evidence Act, would be raised against the appellant.

17. In our view, the Trial Judge was wholly justified in convicting the appellant for offences, under Sections 306 and 498-A, Indian Penal Code.

Coming to the question of sentence, Mr. Mohite urged that inasmuch as the appellant was declined bail by this Court after his conviction, his sentence for the offence u/s 306, Indian Penal Code be reduced to the period already undergone by him.

We regret that we cannot accede to his contention in our view, the fact that the appellant in a most shameless manner, ill-treated his wife Alka, compelling her to commit suicide within two months of her marriage, calls for a stiffer sentence. Alka who has a daughter from her first marriage and was aged 23 years at the time of the incident, must have committed suicide because, her existence became nightmarish, otherwise the commission of suicide by her is not rationally understandable. But, all the same after considering the overall circumstances, we feel that the Trial Judge acted harshly in sentencing the appellant to undergo a sentence of 7 years RI for the offence u/s 306, Indian Penal Code. In our view, a sentence of 4 years and 6 months, RI for the said offence, would meet the ends of justice.

We, however, feel that so far as the sentence awarded to the appellant for the offence u/s 498-A, Indian Penal Code is concerned, the same warrants no interference.

18. In the result, this appeal is partly allowed and partly dismissed. We acquit the appellant for the offence u/s 304-B, Indian Penal Code and set aside his conviction and sentence on that count. We confirm the conviction of the appellant for offences u/s 306 and u/s 498-A, Indian Penal Code as also his sentence u/s 498-A, Indian Penal Code. We, However, reduce the jail sentence of the appellant for offence u/s 306, Indian Penal Code from 7 years RI to 4 years and 6 months RI but maintain the sentence of fine and that in its default imposed thereunder.

As directed by the Trial Court, the sentences of the appellant shall run concurrently. The appellant is in jail and shall be released therefrom, after he serves out his sentence.