
(2018) 12 BOM CK 0072

In the Bombay High Court

Case No : Criminal Revision Application No. 57 Of 2018 With Criminal Application No. 435 Of 2018

Anagha Hitesh Arya

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 14-12-2018

Acts Referred:

Indian Penal Code, 1860 — Section 107, 306
Code of Criminal Procedure, 1973 — Section 227, 228
Hindu Marriage Act, 1955 — Section 13(1)

Citation : (2018) 12 BOM CK 0072

Hon'ble Judges : Mridula Bhatkar, J

Bench : Single Bench

Advocate : A.P. Mundargi, K.S. Patil, Rekha Shinde, Yogesh Dabke

Final Decision : Allowed

Judgement

1. This Revision application is moved by the applicant/accused against the judgment and order dated 12.12.2017 below exhibit 4 in Sessions Case No.179 of 2016 passed by the learned Additional Sessions Judge, Thane rejecting the discharge application. The applicant/accused is the wife of the deceased/husband, who is facing prosecution u/s 306 of the Indian Penal Code.

2. The case of the prosecution in brief is that the applicant/accused and her husband Hitesh got married in December, 2002. In 2005, the applicant/wife delivered a boy and they all were residing together at Thane. The deceased Hitesh was working in ICICI bank. The couple was not sailing smooth due to the disputes between them. Both of them were suspicious about each other. The deceased Hitesh used to inform about the torture and harassment at the hands of the applicant/accused. He had informed his father that he was tired of his life because of the ill-treatment. On 3.7.2015, Hitesh showed vulgar messages sent by the applicant/accused to his friend Bhaskar and due to this objectionable communication between the applicant/accused and his friend, the deceased

Hitesh was hurt and disturbed. On 8.7.2015, the applicant/accused called the father of the deceased/husband. Accordingly, he went to Platinum hospital, Thane. At that time, she told him that her husband has set himself on fire. The father of the deceased found him in a burnt condition. He was shifted to National Burns Centre, Navi Mumbai. However, he succumbed to the injuries at 10.30pm on the same day. The father thereafter on the next day, approached Kasarwadavli police at Thane and gave complaint against the applicant/accused. The police after recording an FIR lodged by Mahendra Bhikubhai Arya, registered the offence at C.R. No.I-165 of 2015 under section 306 of the Indian Penal Code against the applicant/accused. The case was then committed against her. During the pendency of the case, an application was moved for discharge at exhibit 4. The learned Additional Sessions Judge II, Thane, by his order dated 12.12.2017 rejected the said application. Hence, this revision application.

3. Mr.Mundargi, the learned Senior Counsel appearing for the applicant/accused, has submitted that the material placed before the Court does not make out the offence of abetment to commit suicide punishable under section 306 of the Indian Penal Code. He has submitted that the husband and wife both were suspicious about each other. The FIR does not disclose the act of abetment by the applicant/accused. He relied on the statement of the witnesses, neighbours Prasad and Priya, who had reported about the quarrel between the deceased and the accused on the night intervening 7.7.2015 and 8.7.2015 and thereafter, they were the first to whom the applicant/accused reported the incident of burning which took place in the morning at 8.10am on 8.7.2015. He relied on the statements of friend Bhaskar, neighbour Sharwari; so also on the statement of one Pooja, the friend of Hitesh. He argued that these statements do not reveal any act of abetment of the applicant/accused wife or any role played by her in the commission of offence of abetment to commit suicide. He relied on the statement of Krishiv Hitesh Arya, the son of the couple which was recorded on 16.7.2015. The learned Counsel has further submitted that she is blamed by the father for getting involved in the phone sex by sending messages with Bhaskar and her another friend at Dubai. The learned Counsel has submitted that this fact of phone sex cannot be denied. However, this cannot be said as abetment to commit suicide as the act was done secretly with a view to keep the deceased husband in dark. The learned Counsel submitted that mens rea is required to prosecute a person under section 306 of the Indian Penal Code which is absent in the present case. The learned Counsel placed reliance on the ratio laid down in the case of S.S. Chheena vs. Vijay Kumar Mahajan(2010) 12 SCC 190.

4. Learned Prosecutor while opposing this application has submitted that the evidence before the trial Court is sufficient to frame charge and the arguments of the learned Senior Counsel can be considered at the stage of trial. It is not correct to consider the statements of the witnesses and the truthfulness in it at the stage of discharge. In support of his submissions, he relied on Amit Kapoor vs. Ramesh Chander(2012) 9 SCC 460.

5. The learned Counsel for the intervener, the complainant, has heavily relied on the messages sent by the applicant/accused and her friend and Bhaskar. She has submitted that the applicant/accused has tortured her husband throughout. The complainant has given details about the ill-treatment given by her during their married life. The deceased husband was shocked to come across such messages sent by his wife and received by her.

3 This led him to commit suicide. In support of her submission she relied on the judgment in the case of Siddaling vs. The State, through Kalagi police station Criminal Appeal No.(s). 1606 of 2009 (Supreme Court) dated 9.8.2018.

6. Heard. While deciding an application for discharge, the Court can neither go into probable defence taken by the accused nor the documents produced by him. Also, the Court cannot think of a possibility of conviction of the accused. The Court while entertaining the application for discharge under Article 227 has to confine itself to the papers or documents produced and relied on by the prosecution. After going through the record of the prosecution, the Court has to find out whether charge can be framed under the offence for which the accused is prosecuted. This is a settled principle of law.

7. Further, it is useful to refer to the ratio laid down in the judgment in the case of Amit Kapoor vs. Ramesh Chander (supra) and S.S. Chhenna vs. Vijay Kumar Mahajan & anr. (supra) and Siddaling vs. The State (supra) to decide this application.

8. In the case of S.S. Chhenna vs. Vijay Kumar Mahajan & anr. (supra), the Supreme Court while dealing with the issue of abetment of suicide, has observed as follows:

"25. Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. The intention of the legislature and the ratio of the cases decided by this Court is clear that in order to convict a person under Section 306 Indian Penal Code there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and that act must have been intended to push the deceased into such a position that he committed suicide."

9. In the case of Amit Kapoor vs. Ramesh Chander (supra), the property of the deceased lady was grabbed. Her signatures were taken on a blank paper. Money was not given to her and the deceased lady in the said case before committing suicide had left a suicide note that though she fully trusted the accused, he has betrayed her. She went in depression. She gave details about the transactions between the accused and her and held him responsible, who drove her to the decision of committing suicide.

In the present case, there is no suicide note. So also, the facts are different.

However, the ratio laid down by the Supreme Court of applying yardstick while deciding the matter under section 227 is useful, which is as follows:

"19. ... The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction."

10. In the case of Siddaling vs. The State through Kalagi police station (supra), the wife had committed suicide within four months of marriage by jumping into a well. She committed suicide due to the demand of dowry, cruelty and so also due to adulterous behaviour of her husband. In the said case, the couple was married on 6.5.2002 and thereafter, when she realised that her husband was having illicit relationship with another lady, the matter was taken before the Panchayat, where he had admitted that he was living with another woman and his deceased/wife had knowledge. He agreed that he will sever his relations, however, he did not. The demand of dowry and ill-treatment continued and ultimately, she committed suicide. The appeal was against the conviction. The Supreme Court has observed that it cannot be said that the appellant's act of having illicit relationship with another woman would not have affected to negate the ingredients of section 306 of the Indian Penal Code.

11. In order to attract section 306 of the Indian Penal Code i.e., the abetment to commit suicide, it is necessary that the act of abetment as contemplated under section 107 of Indian Penal Code is to be complied with. The meaning of 'abetment' under the Indian Penal Code is to be strictly read as per the section and then only can be attracted. Section 107 states as follows:

"107. Abetment of a thing.-A person abets the doing of a thing, who-

First - Instigates any person to do that thing; or

Secondly -Engages with one or more other person or persons in any conspiracy for the doing of that thing,if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly - Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.-A person who, by willful misrepresentation, or by willful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Illustration A, a public officer, is authorized by a warrant from a Court of Justice to apprehend Z. B, knowing that fact and also that C is not Z, willfully represents to A that C is Z, and thereby intentionally causes A to apprehend C. Here B abets by instigation the apprehension of C.

Explanation 2.-Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act".

12. Thus, there should be instigation, aid, or intentional omission to a particular act or there should be such an act of the accused, driving the deceased to the decision of committing suicide. Hence, the facts of the present case are to be looked into on the basis of the FIR and the statements of the witnesses. In the FIR, the allegations are made by the father of the deceased that the applicant/accused Anagha was used to ill-treat him and harass him. She used to nag him on account of his earlier friendship with one lady. She had assaulted him on account of his ex-relationship. However, the deceased son had come across the communication in the form of messages his friend Bhaskar, wife Anagha and her another friend at Dubai. After coming across such objectionable communication, Hitesh was terribly disturbed and he informed his father that he might commit suicide because of the improper behaviour and conduct of his wife. The statement of the mother of the deceased supports the FIR. Apart from this FIR and the allegations made therein, the prosecution has produced printouts of the messages sent on the cellphone of the applicant/accused Anagha and her friend Bhaskar and other friend. These messages are in English and state about sexual activities, which is called and known as Phone Sex. The language used is very vulgar.

13. There is a third set of evidence i.e., the statements of the neighbours, Deshpande couple and other person. They give a different picture that the applicant/accused and the deceased used to fight on different grounds and on that day, the husband was aware of the objectionable chat which took place between the accused and her friends. However, on the day of the incident, when the deceased set himself on fire on 8th July, 2015 in the morning at 8.10 am. However, earlier to that night at 1.30am, the deceased was drunk and there was a fight between them. The accused went to the Police Station alongwith one neighbour Deshpande. She had approached Deshpande and went to the police station alongwith Mr.Deshpande. The deceased also followed them and thereafter, in the morning again, there was fight and the accused set himself on fire and died due to that fire. The statements reveal that the accused person called for help by going to her neighbours that her husband set himself on fire. She tried to extinguish the fire. She took him to the hospital.

14. In his statement, son Krishiv has stated that the father and mother used to fight and the mother used to object whenever his father used to drink and they used to fight. He has also stated that the father used to assault his mother and on the night of 7.7.2015, he saw his father was banging his mother's head on the wall. He also stated that he went to the Police Station alongwith his neighbour on that night.

15. I have considered this material on record which is in the nature of statements and messages. The statements of the father, mother of the deceased

reveal that the deceased was subjected to ill-treatment and nagging and he was shocked and deeply hurt after coming across the objectionable communication between his wife and the friend. Thus, there is evidence of harassment and nagging. However, it cannot be said that this is an abetment to commit suicide. A cruel behaviour with specific incidents is so grave that it leaves no option but to commit suicide, can be said an abetment in certain cases.

16. A bunch of messages produced on record disclosing phone sex are very vulgar. The revelation of this phone sex to the deceased took place as per the evidence on 3.7.2015 and he committed suicide on 8.7.2015 morning.

17. The learned Senior Counsel Mr.Mundargi has made out a point that this communication was secretly done. It is true that this fact is crucial and has direct bearing on deciding whether this Act can be called as an abetment. Undoubtedly, this communication was clandestinely done with a view that it should not be known to the deceased. This was very private and in a way immoral behaviour of the accused. Such phone sex or chatting is not an adultery falling under the definition of adultery under section 13(1) of Hindu Marriage Act, which expressly states that adultery means having voluntary sexual intercourse with person other than spouse. Thus, when the Indian Penal Code or Hindu Marriage Act were enacted in those days, such kind of sexual intercourse by SMSs was never imagined by the law makers. It is not an adultery but these are instances of infidelity and unfaithfulness, which is not expected when the marriage is solemnised. Such acts of infidelity are bound to cause emotional trauma to the spouse, who may react by taking extreme step like suicide. Thus, in the circumstances like a case in hand, the spouse who indulges into such activity is responsible for reaction of the other spouse.

18. Thus, when one partner does such activity clandestinely, then it pre-supposes guilty mind. However, such an act or guilty mind cannot be substituted for mens rea which is the requirement for abetment under section 107 of the Indian Penal Code. The intention of the partner who is engaged into such phone sex or causing ill-treatment should be, that the other spouse should finish his or her life. For example, if at all, the applicant/accused would have indulged into phone sex deliberately disclosing this repeatedly to the deceased albeit warning given by the deceased of discontinuing such activity, it would have been considered a planned harassment to the deceased and therefore, such repeated, deliberate sexual SMSs would have manifested the intention to drive the victim to the decision of committing suicide. The guilty mind is to be necessarily linked with infidelity but not abetment to commit suicide. It is not the case of the prosecution in the present case. No such material is produced on record in the present case. To commit suicide is a very unfortunate reaction of the accused, who was deeply hurt. It was beyond his capacity to bear such behaviour of his wife. However, this also cannot be said that the applicant abetted the deceased to commit suicide. The case of suicide is a very delicate issue which involves understanding and mental condition and fall out of behavioural pattern of human

being. The life is never throughout a bed of roses but there are difficulties, fights, failures what is called as wear and tear of life. Every individual reacts differently to the situation depending on his or her mindset. Some persons are strong and some are weak. Thus, the impact of reaction to a particular incident is always different from person to person and, therefore, the law-makers of Indian Penal Code who drafted section 306 have linked it with section 107 by using the word "abetment".

19. There is evidence that on the earlier night, the deceased was drinking at 1.30am and the incident took place at 8.10am. The submission of the learned Counsel for the Intervener/Complainant that the deceased was having everything and he had no reason to commit suicide is true. The deceased was a family man having wife, a son and parents and was getting a handsome salary while working with ICICI bank. However, it appears that though all these things were with him, the deceased and the accused could not lead happy life because he could not bear the trauma of the behaviour of his wife which led to the tragic end of his life. Thus, though the applicant/accused can be said to be responsible for the trauma caused to the deceased, she is not an abettor for the act of suicide.

In the case of Rahul Raj Singh vs. The State of Maharashtra Anticipatory Bail Application No.661 of 2016 decided on 25.4.2016 it is observed by me as follows:

"Every suicide has cause but all the causes cannot be labelled as abetment. Therefore, while assessing abetment, the Judge has to take the objective view guided by section 107 of the Indian Penal Code. The harassment or torture should be of such a degree that it really left no option and drove a person to commit suicide. An individual may carry suicidal traits, or may be very emotional or may be very egoist or be jealous or vindictive. Such emotions may overpower the individual leading him to take drastic step to kill himself or herself. Under such circumstances, unless the mens rea is brought on record, prima facie it cannot be said that it is an abetment."

21. Under such circumstances, I am of the view that the order of the learned Sessions Judge needs to be set aside as there is no material to frame charge against the applicant/accused under section 306 of the Indian Penal Code. Accordingly, the impugned order dated 12.12.2017 below exhibit 4 in Sessions Case No.179 of 2016 passed by the learned Additional Sessions Judge, Thane is quashed and set aside.

22. Revision application is allowed accordingly.

23. Criminal application No.435 of 2018 stands disposed of.