

(2011) 04 BOM CK 0103
In the Bombay High Court
Case No : Criminal Appeal No. 1170 of 2003

Mohammed Kasam Rajmani Shaikh

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 15-04-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 374(2), 428
Evidence Act, 1872 — Section 106
Penal Code, 1860 (IPC) — Section 300, 302, 304, 307

Citation : (2013) ALLMR(Cri) 208 : (2011) 113 BOMLR 1521

Hon'ble Judges : B.H. Marlapalle, J;A.M. Thipsay, J

Bench : Division Bench

Advocate : Vijay Desai, for the Appellant; A.S. Pai, APP, for the Respondent

Judgement

B.H. Marlapalle, J.—This appeal filed u/s 374(2) of Code of Criminal Procedure is directed against the order of conviction and sentence passed u/s 302 of IPC by the learned Additional Sessions Judge, Greater Mumbai in Sessions Case No. 1081 of 2001 on 19/7/2003 and the Appellant - accused has been sentenced to suffer RI for life and to pay a fine of Rs. 2000, in default RI for three months. The Appellant came to be arrested on or about 12/7/2001 and he is continuously in jail since then.

2. As per the prosecution case, the Appellant and his wife - Shabinabanu were together in their house on 12/7/2001 and at about 3.30 p.m. Shabinabanu asked for money to buy some medicine for her, as she was not well. He avoided to give, despite repeated requests. Therefore, she questioned the intentions of the husband and told him that if he did not wish to give money to buy medicine for her, it is better that he killed her. On these utterances, the accused got annoyed and picked up the kerosene stove and poured kerosene on her person. A burning matchstick was thrown by the accused on the person of Shabinabanu, her dress (chunidar kurta - pajama) caught fire. She raised hue and cry and the neighbors arrived at the scene. The neighbors put a chaddar around her and the accused,

with the help of the neighbors, admitted her at Rajawadi Hospital around 5 p.m. While under treatment, Shabinabanu died of burn injuries on the next day at about 1.45 p.m. and in the meanwhile, on the basis of her statement recorded by PW 4 - Dalpat Sabale, PSI, FIR at Exh. 17 came to be registered for the offence punishable u/s 307 of IPC (C.R. No. 94 of 2001). PW 1 - Prabhakar Yeshwant, Special Executive Officer, visited the Rajawadi Hospital and recorded the dying declaration of Shabinabanu (Exh. 9). She had disclosed to PW 1 as well as PW 4 that her husband had poured kerosene on her and thrown a burning matchstick on her person in which she sustained burn injuries.

3. The dead body of Shabinabanu was sent for post mortem on 13/7/2001 and PW 2 - Dr. V. H. Vihyurkar conducted the post mortem and signed the PM notes at Exh. 11. The clothes of the accused as well as deceased (burnt pieces) along with the articles collected from the spot while drawing the spot panchanama at Exh. 18 were sent for chemical analysis and the report was received at Exh. 23 collectively. On the demise of Shabinabanu, the offence was amended to Section 302 of IPC. On completion of the investigation, charge-sheet was filed.

4. The prosecution examined in all five witnesses. PW 1 - Prabhakar Yeshwant, the Special Executive Officer, who recorded the dying declaration of the deceased. PW 2 - Dr. V. H. Vihyurkar , who conducted the post mortem, PW 3 - Mohd. Sahikh, who was the panch witness for the inquest panchanama at Exh. 14. PW 4 - Dalpat Sabale, PSI, who recorded the statement of the deceased and registered the FIR at Exh. 17 and PW 5 - Najmart Mahedi, PI attached to the Shivaji Nagar Police Station and who had taken over the investigation from PW 4. In his statement recorded u/s 313 of Code of Criminal Procedure the accused denied his involvement in the offence and stated that a false case was filed against him.

5. The trial court, on appreciation of evidence of all the five witnesses, accepted the dying declaration at Exh. 9 as reliable and it was corroborated by the complaint of the deceased recorded by PW 4. It held that Shabinabanu had sustained 77% burn injuries, which was the cause of her death and her death was homicidal. The trial court further held that it was the accused who was present in the house at the relevant time, he had poured kerosene on her person and set her on fire.

6. Mr. Desai, the learned Counsel for the Appellant, did not dispute the finding of the trial court on the cause of death of Shabinabanu. He submitted that the dying declaration recorded by PW 1 at Exh. 9 was not corroborated by any other evidence and it was not reliable in as much as the statement recorded at Exh. 17 by PW 4 was almost at the same time when the dying declaration at Exh. 9 was recorded. The medical officer, who had certified that Shabinabanu was fit to give statement was not examined by the prosecution. In short, it was submitted by Mr. Desai that it would be unsafe to base the conviction solely on the basis of the dying declaration recorded at Exh. 9. Mrs. Pai, the learned APP, on the other hand, submitted that the dying declaration at Exh. 9 was recorded by the Special

Executive Officer, it did not suffer from any infirmities and there was no case made out that it was by way of tutoring or for any other extraneous reason so that it would be vulnerable to rely upon. She pointed out that the dying declaration has been endorsed by the Medical Officer present on duty and it has been supported by the complaint recorded by PW 4 at Exh. 17. There is no contradiction on the material circumstance between Exh. 9 and Exh. 17. Mrs. Pai further pointed out that PW 1 - Prabhakar Yeshwant and PW 4 - Dalpat Sabale were subjected to cross-examination by the defence and nothing was brought out to make the dying declaration recorded at Exh. 9, doubtful or unsafe to rely upon.

7. It would be pertinent to note at this stage itself that after the arguments of the parties were advanced, by way of abundant precaution, we had called upon the learned APP to ask the Rajawadi Hospital to submit, if available, the original medical case papers when the deceased was admitted on 12/7/2001 at about 5.15 p.m. and accordingly, as noted in our separate order, the said record has been placed before us. There is no serious objection to refer to these medical case papers by the defence. The medical history recorded at 5.45 p.m. on 12/7/2001 and as given by the patient in the medical case papers reads thus,

Patient was burnt deliberately by her husband i.e. patient's husband poured kerosene on patient's body, lighted a match stick and threw on patient and husband ran away from back door of house. Incident happened at patient's residence.

8. PW 1 - Shri Prabhakar Yeswant stated before the trial court that on 12/7/2001 he received a request of PW 4 - PSI Sabale to record the dying declaration and, therefore, he visited the Rajawadi Hospital in the evening. He went to the burn ward, contacted the doctor who had shown him the patient i.e. Shabinabanu Kasam Shaikh admitted in the said ward. He informed the doctor that he wanted to record her statement and asked him whether she was in a position to give a statement. The doctor replied cri-appeal-1170-03 that Shabinabanu was in a position to give statement and he could proceed to record the same. He recorded the statement of Shabinabanu after introducing himself and he asked her as to how the incident had taken place. Shabinabanu told him that at about 3.30 p.m. she and her husband were in the house and she demanded the money from her husband for medicine, but he avoided to give the same. She questioned her husband as to whether he wanted to harass her by not giving money. On that the husband picked up a quarrel with her. She, therefore, retorted him and he got angry and poured kerosene on her person from the stove. He lighted the matchstick and threw on her person, in which she sustained burn injuries. She raised hue and cry and the neighbors arrived and with the help of neighbors, the accused had admitted her in the Rajawadi Hospital. We have perused the dying declaration at Exh. 9 and it has been duly endorsed by the Medical Officer on duty stating that the patient was in a fit condition to give statement. The doctor has further endorsed that patient's both hands were burnt and, therefore, she

could not give thumb impression. The endorsement was made at 7.20 p.m. on 12/7/2001. In our opinion, the dying declaration is corroborated by the medical case papers which have been produced before us during the course of hearing of this appeal and, therefore, the submission of Mr. Desai that there was no corroboration cri-appeal-1170-03 to the dying declaration at Exh. 9 cannot be accepted. In fact, the statement recorded at Exh. 17 by PW 4 also corroborates the dying declaration at Exh. 9. The learned Counsel for the defence fairly conceded that between the two statements, there was no contradiction on material facts, but urged that the medical officer who made the endorsement was not examined. We do not accept that on failure to examine the medical officer, the dying declaration would be unreliable. In this regard we are supported by the decision in the case of *State of Tamil Nadu v. Karuppasamy* (2008) 16 SCC 350.

9. We have also noted from the C.A. Report at Exh.23 collectively that the full shirt of the accused, which was seized and sent for chemical analysis was found positive with kerosene residues along with partly burnt clothes of the deceased. The dying declaration at Exh. 9 read with the C. A. reports has proved that the accused was present in the house when the incident had taken place. At the same time, though, while in his statement recorded u/s 313 of Code of Criminal Procedure, the accused had claimed that he was falsely implicated in the case, during the course of arguments before the trial court, and perhaps to discharge his burden of special knowledge as envisaged u/s 106 of the Evidence Act, a specific defence was taken that the deceased suffered burn injuries accidentally. In the case of *Amarsingh Munnasingh Suryawanshi v. State of Maharashtra* (2007) 15 SCC 455 the Supreme Court held that where admittedly the husband and wife were residing in one room, the prosecution have been able to prove that at the time of occurrence it was he and the deceased alone were residing in the house, it was for the Appellant to prove that how the deceased had met her death. In that case also the cause of death was not in dispute and it was contended by the accused that the death of his wife was not homicidal in nature but it was a result of an accident and he failed to bring on record anything to show that the death was a result of any accident. The wife was a victim of kerosene fire burns. The evidence of PW 2 - Dr. Vihyurkar read with the post mortem notes at Exh. 11 does not support the contentions of the accused that his wife sustained burn injuries accidentally. The spot panchanam (Exh.18) did not indicate that there was any burst stove and at the same time the face of the deceased was fully burnt. In our opinion, the false defence so taken would be an additional circumstance against the accused. The trial court was justified in holding the accused guilty of causing the homicidal death of wife. The author of the crime was undoubtedly the accused and it was not a case of suicide or accident.

10. However, there is no evidence on record that prior to the incident, the accused had either ill-treated or harassed the deceased. There was no case of any matrimonial disputes. By taking the prosecution case as it is, the incident

had happened in the sudden quarrel between the spouses. The deceased asked for money to buy the medicine and the accused avoided to give. She, therefore, got fed-up and asked him whether he wanted his wife to die. At that moment, the accused got annoyed, lost his control and poured kerosene on her person. The burning matchstick was thrown by the accused on the deceased. It was also established that the accused was at the spot because his shirt was found with kerosene residues and obviously he tried to extinguish the fire along with the neighbors. He also got her admitted in the hospital with the help of the neighbors. The medical papers also indicated that the accused was with the patient while admitting her. These circumstances proved that there was no premeditation or any motive attributable to the accused to cause the death of his wife. There was no preparation with in intention to cause the death of Shabinabanu. The incident had taken place at the spur of the moment and in the heat of the anger and, therefore, the offence would not come within the ambit of Section 302 of IPC. In our opinion, Exception 4 to Section cri-appeal-1170-03 300 of the IPC would be attracted in the instant case and it is not a case of culpable homicide amounting to murder. At the same time when the accused poured kerosene and threw a burning matchstick on the person of his wife, he was aware that his acts were likely to cause the death of his wife. Hence, the offence would fall u/s 304 (Part I) of IPC . We, therefore, hold the accused guilty of the offence punishable u/s 304 (Part I) of IPC.

11. In the premises, this appeal succeeds partly. The impugned order of conviction and sentence passed u/s 302 of IPC is hereby quashed and set aside and instead the Appellant-accused is convicted for the offence punishable u/s 304 (Part I) of IPC and he is sentenced to suffer RI for ten years and to pay a fine of Rs. 2000/-in default to suffer further RI for two months.

12. As noted earlier, the accused has been in custody since 12/7/2001 and, therefore, he is entitled for set off u/s 428 of Code of Criminal Procedure

The Competent Authority to calculate the total period of cri-appeal-1170-03 sentence along with remissions as may be available under the Rules to the Appellant and take steps to release him on completion of the total imprisonment of ten years.