

(2000) 03 BOM CK 0082
In the Bombay High Court
Case No : Criminal Appeal No. 138 of 1992

Saifan Rahimansaheb Shaikh

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 24-03-2000

Acts Referred:

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

Citation : (2000) 2 DMC 584

Hon'ble Judges : Ranjana Desai, J

Bench : Single Bench

Advocate : Veera Shinde, for T.E. Mane, for the Appellant; Rohini Dandekar, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Ranjana Desai, J.—The appellant (the accused) was tried for offences punishable u/s 498-A and Section 306 of the Indian Penal Code in Sessions's Case No. 72 of 1991, in the Court of Sessions, Solapur.

2. By his judgment and order dated 18th January, 1992, the learned Sessions Judge found the accused guilty of the offences punishable u/s 498-A and Section 306 of the I.P.C. The accused was sentenced to suffer R.I. for two years and to pay a fine of Rs. 1,000/- for the offences punishable u/s 498-A. In default of payment of fine he was to suffer R.I. for six months. For the offence punishable u/s 306 of the I.P.C. he was sentenced to suffer R.I. for two years and to pay a fine of Rs. 1,000/-. In default of payment of fine he was to suffer R.I. for six months. It is the said judgment and order which is impugned in the present appeal.

3. The basic allegation of the prosecution is that because deceased Shehnaz, wife of the accused could not bear a child, the accused was unhappy. He used to ill treat her. Because of the ill treatment deceased Shehnaz poured kerosene on herself and set herself on fire on 31.12.1990 at about 10.30 a.m. in her

matrimonial home situated at Hanuman Nagar, Bhavani Peth, Solapur.

4. The complaint was lodged by P.W. 3 Amin Saheb Bashamiyan Sayed, who is the brother of deceased Shehnaz. He has stated that the deceased was married to the accused about five years back. They lived happily for about a year after the marriage. Accused started ill treating her because she could not bear a child. Whenever Amin Saheb used to go to the house of the deceased, she used to narrate the ill treatment given to her by the accused. Amin Saheb and the other members of the family used to console her and used to tell her to try and adjust and live with her husband. They used to tell the accused to look after Shehnaz and treat her well. Once he had gone to the house of Shehnaz. Shehnaz told him that the accused had beaten her. He informed this fact to his mother. Thereafter he went to the house of the accused and brought Shehnaz to their house. Shehnaz lived with them for about six months. Then accused and his cousin Nabilal came to his house. They told Amin Saheb that they would no ill treat the deceased and would look after her. Shehnaz was reluctant to go with the accused but Amin Saheb and the members of his family sent her with him in order to see that her marriage is not broken.

5. Thereafter Shehnaz stayed with her husband for few days. Shehnaz underwent curetting so that she may get a child. Curating did not help.

6. About a month before the incident, Shehnaz had come to Amin Saheb's house. At that time she told him how the accused used to ill treat her. On 31st December, 1990, at about 10.30 a.m. Amin Saheb was in his shop. The accused came to his shop and told him that Shehnaz was saying that she would set herself on fire. Amin Saheb sent him back. Then he closed his shop and went to his house. Thereafter he, his brother, mother and sister Sharif a decided to go to the house of the accused. One Raju Divekar met him near the Chawl. He told him that Shehnaz was taken to the Civil Hospital and she was burnt Then they went to the Civil Hospital. There they found Shehnaz. She was severely burnt. According to Amin Saheb he asked her as to how she got burnt. She informed him that a quarrel had taken place between her and the accused. The accused had beaten her and, therefore, she had poured kerosene on herself and set herself on fire. The main cause of the quarrel was the fact that she could not bear a child. Amin Saheb gave his complaint Exhibit 15 on 31st December, 1990, at the Jail Road Police Station at 16.00 hrs.

7. P.W. 6 Rashid Hasan Shaikh, who is the police head constable attached to City Police Station, Pandharpur has stated that on 31.12.1990, he was on duty from 8 a.m. to 2 p.m. At about 11.20 a.m. he received a phone from Civil Hospital that Shehnaz Shaikh was admitted in the Civil Hospital. He stated that he was informed that Shehnaz had committed suicide by setting herself on fire because of the ill treatment meted out to her by her husband because she could not bear a child. He made a station diary entry to that effect.

8. P.W. 8 Dhondappa Birajdar, P.S.I. attached to Sakharpeth Police Station, is the

Investigating Officer., He has given the details of the investigation carried out by him. He has stated that after receiving the entry made by PSO Shaikh he went to the Civil Hospital, Solapur to see Shehnaz. He asked the Medical Officer whether Shehnaz was in a condition to give statement. Doctor gave an endorsement on the letter submitted by him that Shehnaz was in a condition to give statement. Thereafter he gave a Yadi to P.W. 1 Tipanna Dandi, who is the Special Executive Magistrate for recording the dying declaration. He recorded the complaint of Amin Saheb. The Special Executive Magistrate recorded the dying declaration of Shehnaz on 31.12.1990. P.S.I. Birajdar handed over the investigation to P.S.I. Jadhav, as he was transferred. P.S.I. Jadhav is also examined. P.S.I. Jadhav has given further details of the investigation carried out by him.

9. P.W. 1 Dandi Tipanna Gurappa, the Special Executive Magistrate has deposed about the recording of dying declaration by him. He has stated that upon receiving the Yadi from the police on 31st December, 1990 at about 1 p.m. he went to the Civil Hospital, Solapur. He enquired with the Medical Officer whether Shehnaz was in a condition to give statement. The doctor informed him that she was in a condition to give statement. Then he disclosed his identity to Shehnaz stating that he was a Special Executive Magistrate. He requested her to tell him as to what had happened to her. He recorded her statement in a question and answer form. She stated that her husband used to ill treat her because she could not bear a child. On the date of incident he had beaten her, therefore, she poured kerosene on her person and set herself on fire due to ill treatment because of which she was fed up. He obtained her signature. He counter-signed her signature. He identified his signature when the dying declaration was shown to him in the Court. He stated that the statement was recorded as per the say of Shehnaz.

10. In cross-examination he has stated that he had asked questions in Marathi. Shehnaz answered the same in Marathi. He asked her whether she was conscious, because he had doubt about it. He denied the suggestion that the relatives of Shehnaz and police were present, when her statement; was being recorded. He denied the suggestion that after the statement was recorded the signature of the Medical Officer was obtained in his chamber. He also stated that doctor had not examined the patient in his presense.

11. Dr. Sunil N. Patil, P.W. 7 who was at the relevant time attached to Civil Hospital, Solapur has given details about her medical examination. He has stated that on 31 st december, 1990 at about 11.05 a.m. Shehnaz was brought to the hospital. She gave history of suicidal turns. He found 100 per cent burns on her person. She was shifted to the Burns ward. The police came and told him that the statement of Shehnaz had to be recorded. He then examined Shehnaz. He found that she was conscious and well oriented. He asked the relatives of Shehnaz to leave the ward. The Magistrate recorded statement of Shehnaz in question and answer form. At that time he was present in the ward. The Magistrate read over the contents of the, statement and obtained her signature.

He put his endorsement to the effect that the patient was in a condition to make a statement. He also signed below the endorsement. When the statement and the endorsement were shown to him he identified , them and stated that the contents thereof were true and correct. Shehnaz died on 4th January, 1991. He produced case papers of Shehnaz which are at Exhibit 22. In the cross-examination, he has clearly stated that the patient was examined and then Magistrate recorded the statement. He clarified that he examined the patient in the O.P.D. at 11.00 a.m. i.e. before recording the dying declaration. It may be stated here that the dying declaration was recorded at 13.20 hrs. on 31.12.1990. He reiterated that Shehnaz was fully conscious.

12. The prosecution has also examined P.W. 4 Arjun Kishan Pawar who was working as a fireman in the Fire Brigade section of the Solapur Municipal Council. He has stated that on 31st December, 1990, he alongwith one other person shifted Shehnaz in a fire brigade van to the Civil Hospital, Solapur. The statement of this witness is recorded seven days after the incident. Therefore, in my opinion, not much weight can be attached to the testimony of this witness when he speaks that Shehnaz had told him that accused used to ill treat her and, therefore, she poured kerosene on herself and set herself on fire.

13. P.W. 5 Raju Tayappa Divekar has stated that on 31st December, 1990, i.e. on the date of incident when he was about to leave his house, the accused came there. He told him that a quarrel had taken place between him and his wife Shehnaz and his wife had threatened that she will set herself on fire. Therefore, this witness went to the house of the accused. He was informed that Shehnaz was taken to the Civil Hospital. He informed this fact to Amin Saheb and the members of his family. Then he went to the Civil Hospital alongwith them. He stated that when Amin Saheb asked Shehnaz as to how she was burnt, Shehnaz told him that accused had beaten her in the morning because she could not bear a child. Therefore, she had committed the said act.

14. The defence of the accused is of denial. In his statement recorded u/s 313 of the Code of Criminal Procedure, he has stated that his relation with prosecution witnesses were cordial Amin Saheb being the brother of Shehnaz is falsely implicating him. He stated that he could not assign any reason as to why witness Dandi Tipanna and Dr. Patil were deposing against him. He stated that in the month of December, 1990, he had admitted his wife in the Civil Hospital as she was complaining about pain. About eight days prior to the incident she was discharged from the hospital. Doctor had asked him to bring her in the month of January. When he was asked whether he wishes to examine any defence witness, his answer was in the negative.

15. After perusing the evidence on record the learned Sessions Judge convicted the accused as aforesaid and hence this appeal.

16. I have heard at some length Ms. Veera Shinde the learned Advocate holding for Mr. T.E. Mane learned Advocate appearing for the appellant-accused and Miss

Rohini Dandekar, the learned A.P.P. for the State. The learned Counsel have taken me through the entire evidence and the record. Miss. Shinde made very strenuous and admirable, efforts to persuade me to hold that the accused is innocent and is wrongly convicted.

17. Miss Shinde first drew my attention to the evidence of Dr. Patil. Dr. Paul has categorically stated that Shehnaz had received 100 per cent burn injuries. My attention is also drawn to Column 17 of the postmortem notes where it is mentioned that the burns were 100 per cent. The cause of death is stated to be shock and treacle due to burns. Miss Shinde strenuously contended that if Shehnaz had received 100 per cent burn injuries it is inconceivable that she would be in a condition to give a dying declaration. It would not be possible for her to sign on the dying declaration. She sought to support this argument by drawing my attention to the evidence of Dandi Tipanna the Special Executive Magistrate who has recorded the dying declaration. The Special Executive Magistrate has in the cross-, examination stated that the doctor did not examine Shehnaz in his presence. He had asked her as to whether she was conscious because he had doubt about it. Miss Shinde, therefore, urged that there is intrinsic evidence on record to show that Shehnaz was not conscious and her statement allegedly recorded by the police is a fabricated statement. I am unable to accept this submission of the learned Counsel.

18. Dr. Patil has clearly stated that when he examined Shehnaz, he found her to be conscious and well oriented. He has put his endorsement to that effect and also signed underneath the said endorsement. I had a look at Exhibit 10 which is the dying declaration. The deceased has signed on it. Dr. Patil has put his endorsement that the patient is in a condition to give valid statement. Dr. Patil has put his signature underneath it. Special Executive Magistrate has also signed on it. I do not find any reason to come to a conclusion that Exhibit 10 is in any way a got-up document.

19. It is significant to note that the incident in question took place on 31.12.1990, Shehnaz survived and died on 4.1.1991. The dying declaration came to be recorded on 31st December, 1990, at 13.20 hours. The fact that the patient survived for about four days lends support to the prosecution case that at the time when the dying declaration was recorded she was in a fit condition and well oriented.

20. The evidence of Dr. Patil is well supported by the evidence of the Special Executive Magistrate. The Special Executive Magistrate has stated that he had asked the doctor whether Shehnaz was in a condition to give the statement and the doctor informed him that she was in a fit condition. He recorded her statement in a question and answer form which is the requirement. Shehnaz then told him that in the morning the accused had beaten her. He used to ill treat her because she could not bear a child. He used to abuse and beat her. She was tired of the ill treatment given to her by her husband and, therefore, she poured kerosene on herself and set herself on fire. To the question whether she was

conscious, she clearly stated that she was conscious.

21. No doubt the Special Executive Magistrate has stated that he asked Shehnaz whether she was conscious because he had doubt about it. From this it cannot be concluded that the patient was not conscious. In my opinion, the Special Executive Magistrate has to take this necessary precaution to ascertain whether the deponent is in a fit condition. The fact that he had got his doubt cleared by asking question to the deponent lends credibility to his evidence. In my opinion, the evidence of the Special Executive Magistrate inspires confidence. He is also supported by the evidence of the Investigating Officer Shri Birajdar, who has also deposed about this.

22. Dr. Patil and the Special Executive Magistrate Dandi Tipanna are independent witnesses. They have no reason to depose against the accused. Nothing has been pointed out to me to persuade me to discard their testimony as tainted testimony. Miss Shinde also urged that there is an indication that Shehnaz was tutored by her relatives. She has drawn my attention to the evidence of Dr. Patil. Dr. Patil has stated that the relatives of the patient were present in the Burns Ward and then he asked them to go out of the ward. On the basis of this Ms. Shinde says that the possibility of tutoring of the deceased cannot be ruled out. I have no hesitation in rejecting this argument. Dr. Patil has stated that he had asked the relatives to go out of the ward at the time of recording of the statement. The Special Executive Magistrate has also denied the suggestion that relatives of the patient and the police were present while the statement was being recorded.

23. It is pertinent to note that Amin Saheb who went immediately after the incident to the hospital to meet his sister has also stated that Shehnaz told him that She poured kerosene on herself and set herself on fire because of the ill treatment meted out to her by her husband and the reason for the ill treatment was the fact that she was not conceiving.

24. History of ill treatment and cruelty is also proved. Amin Saheb has stated that one year after the marriage the accused started ill treating her sister. Whenever he used to go to his sister's house, his sister used to tell him about ill treatment. In fact some days prior to the incident his mother had gone to the house of the accused. When she heard about the ill treatment from the deceased, her mother brought her to their house. The deceased lived with them for about six months. Amin Saheb and his family used to try and persuade Shehnaz to go back to her husband with a fond hope that their marriage could be saved. I have no reason to disbelieve Amin Saheb. Nothing their been brought out in the, cross-examination of this witness to make me discard his testimony.

25. The evidence of P.W. 3 Amin Saheb, P.W. 1 Dandi Gurappa, Special Executive Magistrate and P.W. 7 Dr. Sunil Patil is consistent and clinching. It inspires confidence. I am, therefore, of the opinion that the prosecution has proved its case beyond reasonable doubt.

26. At this stage Miss Shinde, learned Advocate appearing for the appellant submitted that the accused is the only bread earner in his family. He has an aged mother to look-after and, therefore, a kindly view may taken and the sentence be reduced.

27. The learned Sessions Judge has awarded sentence of two years each on both counts. The sentences have been ordered to run concurrently. In my opinion looking to the gravity of the offence, the accused does not deserve any sympathy. I, therefore, confirm the order of conviction and sentence passed by the Additional Sessions Judge Solapur. In the result, the following order is passed.

28. The appeal is dismissed. The judgment and order dated 18th January, 1992, passed by the Vth Additional Sessions Judge, Solapur in Sessions Case No. 72 of 1991, is hereby confirmed. The accused to surrender