
(2014) 12 BOM CK 0136
In the Bombay High Court
Case No : Criminal Appeal No. 80 of 1996

The State of Maharashtra	Vs	APPELLANT
Shaikh Sinkandar Isamoddin		RESPONDENT

Date of Decision : 22-12-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 113A
Penal Code, 1860 (IPC) — Section 304B, 304B, 306, 498A, 498A

Citation : (2015) 1 BomCR(Cri) 348

Hon'ble Judges : S.S. Shinde, J;N.W. Sambre, J

Bench : Division Bench

Advocate : S.G. Karlekar, Advocate for the Appellant; P.S. Chavan, Advocate for the Respondent

Judgement

S.S. Shinde, J.—This Appeal is filed by the Appellant State, challenging the Judgment and Order of acquittal dated 30.11.1995 passed by the 2nd Additional Sessions Judge, Osmanabad in Sessions Case No. 74 of 1993, thereby acquitting the respondent for the offences punishable under Section 498-A, 304-B and 306 of the I.P. Code.

2. The case of the prosecution, in brief, is as under:

(i) The deceased Nasima daughter of complainant Musa Ibrahim Mulani resident of Barshi, was married with accused, 8 to 9 years before her death. Two years after the marriage, accused behaved properly with Nasima. Then he started asking her to bring money from her father. Shahajan brother of deceased gave her Rs.1000/-, when she came with accused to his house, 8 days after giving the money, father of Nasima received information that, Nasima got burnt by flickering of stove. Then his elder brother and son went to Kallam. At that time, his wife was out of station. There he learnt that Nasima was taken to Ambejogai Hospital. Then they went to Ambejogai Hospital. There they saw Nasima in burnt condition. He asked Nasima about the incident. She told that, she will tell it to

her mother. Then mother of Nasima went to see her. Nasima told her mother that, her husband assaulted her severely. She was injured, in anger she put kerosene on her body and then attempted to commit suicide. Immediately after the incident, Nasima was taken to the Government Hospital at Kallam. There her statement was recorded by the Head Constable Kadam. As her condition was critical, she was shifted to the Government Hospital, Ambejogai. There her statement was recorded on 13.12.1992 by Head Constable Gaikwad. Nasima was treated in that Hospital. She died on 15.12.1992 in Hospital. After her death, her father Musa filed complaint, Exh.23 with Police. The papers of investigation were received by P.S.I. Hande on 17.12.1992. On same day, on behalf of State he filed complaint at Exh. 44. He investigated the offence and after completion of investigation, he filed charge sheet.

(ii) After appearance of accused before the Trial Court, charge was framed against accused, at Exh.17, u/s. 498A, 304B, 306 of I.P.C. He pleaded not guilty to the said charge. During trial prosecution examined in all nine witnesses. Statement of accused was recorded u/s. 313 of Cr.P.C. 4

3. The trial Court framed following charge :-

"That, from the date of marriage with deceased Nasimabee sometime in the year 1986, you accused subjected the said Nasimabee cruelty, ill-treatment and harassment till she committed suicide on 12.12.1992 by pouring kerosene on her person in your house situated at Kallam Dist.Osmanabad, in order to extract, gifts and valuable articles i.e. golden ring, and demand for dowry from her parents and thereby committed an offence punishable under section 498-A of the Indian Penal Code and within my cognizance.

Secondly, on the same date, time and place and during the course of same transaction you accused being the husband of deceased Nasimabee who committed suicide by pouring kerosene on her person in your house situated at village Kallam which occurred otherwise than normal circumstances, within the seven years of her marriage and soon before her death, she was subjected to cruelty, ill-treatment and harassment by you in connection with demand for dowry and thereby committed an offence punishable under Sec. 304-B of the Indian Penal Code and within my cognizance.

Thirdly, on the same date time and place, and during the course of same transaction Nasimabee committed suicide by pouring kerosene on her person in your house situated at village Kallam Dist.Osmanabad and you accused abetted its commission by subjecting her to cruelty, ill-treatment and harassment and to extract, gifts and valuable articles from her and from her parents and thereby committed an offence punishable under section 306 of the Indian Penal Code and with my cognizance."

4. After full-fledged trial, trial Court acquitted the respondent. Hence this appeal by the State.

5. The learned Additional Public Prosecutor invited our attention to the evidence of the prosecution witnesses, two Dying Declarations and other material placed on record and submits that, the unlawful and illegal demand by the respondent has been proved through the prosecution witnesses. There are two Dying Declarations which are consistent. Therefore, the Respondent ought to have been convicted by the trial Court.

6. On the other hand, the learned counsel appearing for the respondent submitted that, admittedly, deceased Nasima in her statements at Exh-39 and 33 does not make any grievance against the accused. In the statement dated 16.12.1992 at Exh.23, the father of deceased Nasima also does not make any allegations in respect of ill-treatment, quarrels, dispute or demands. The statements cum-dying declarations at Exh.39 and 33 clearly show that there is no positive act on the part of the accused to instigate or aid in committing suicide. There is absolutely no mens rea to commit offence. In the statement dated 16.12.1992 the father of Nasima did not state any earlier dispute, ill-treatment, quarrels between husband and wife so also illegal demands by the accused. For the first time, father and mother of deceased Nasima made complaints before the Court. It is submitted that, the trial Court after considering the entire oral as well as documentary evidence rightly held that in the dying declarations at Exh.33 and 39 it is nowhere stated by deceased Nasima that before 12.12.1992 there were quarrels, disputes or illegal demands by her husband. The prosecution mainly relied on the dying declarations at Exh.33 and 39 and in both the dying declarations deceased Nasima does not make any grievance in respect of earlier dispute or illegal demands by her husband. It is also submitted that, the trial Court rightly held that in the statement cum-dying declaration dated 12.12.1992 Exh.39, deceased Nasima stated that in an anger she poured kerosene on herself and she does not have any complaint against the accused. Hence, the evidence on record goes to show that there was no complaint against her husband on 12.12.1992. Moreover, in the statements recorded by the Police immediately after the death of Nasima the father does not complain anything against the accused. Hence, the statement at Exh.23 dated 16.12.1992 noticed to be in contradiction to the statement before the court. It is submitted that, from the evidence on record it cannot be said that the accused intended, instigated or aided Nasima to commit suicide. The learned counsel further submitted that, the trial Court has rightly held that, the evidence of prosecution is doubtful about ill-treatment, illegal demands, abetment and as such weak type of evidence and therefore, the accused cannot be held guilty for the offence charged.

The learned counsel placed reliance on the judgments of the Supreme Court in the case of (i) M. Mohan Vs. The State represented by The Deputy Superintendent of Police, (ii) Appasaheb and Another Vs. State of Maharashtra,

7. We have considered the submissions advanced by the learned Additional Public Prosecutor and the learned counsel appearing for the original complainant.

With their able assistance, we have perused the original record and also other material placed on record.

In order to find out whether the accused subjected Nasima to cruelty, ill-treatment and harassment till she committed suicide on 12.12.1996, it is necessary to discuss the evidence of parents, sister and neighbours of the deceased Nasima. It appears that, the father of the deceased namely Musa Ibrahim Mulani on 16.12.1992 in his statement at Exhibit 23 stated that, he came to know that, his daughter Nasimabee poured kerosene on her person and set ablaze due to quarrel with husband and she was hospitalized in S.R.T.R. Hospital, he went to meet her. When he inquired from Nasimabee, she told him that, she herself poured kerosene on her person and set herself on fire. He further stated that, when Nasima was under treatment, on 15.12.1993 at about 17.15 hours she died. He stated in the said statement that, he has no complaint against anybody, and dead body should be given in the custody of son-in-law, Shaikh Sikandar for cremation. He was examined before the Court as PW-1, and in his evidence he stated that, his daughter Nasima got married to accused before 8 to 9 years back. After marriage, she went to her matrimonial home. Accused was demanding golden ring and money to Nasima. After marriage, accused no.1 treated her well for initial two years and after that, he started his demands with Nasima. He was asking to bring money. His Son Shahajan paid Rs. 1,000/-to Nasima when accused came with her at their place. There are other allegations also that, in order to pay rent, the daughter asked for money. When he went to the hospital and asked Nasima how she is burnt? Nasima told that, now she will not tell about the incident, but she will tell to her mother.

8. PW-2 Noorjahan, the mother of the deceased stated that, Nasima married 8 to 10 years before her death. Accused was always beating, quarreling and giving troubles to Nasima. This started after she has given birth to two children. He was asking to bring money and one golden ring. This witness in her cross examination stated that, Nasima told her that, accused poured kerosene on her body and set her on fire. The said statement of this witness does not get any support from the other evidence, which is on record. On the contrary, the Dying Declarations given by the deceased unequivocally indicate that, she herself poured kerosene on her person and set herself on fire.

9. There is evidence of Shahajan at Exhibit -25, the sister of the deceased who was examined as PW-3. More or less, the contention about the ill-treatment and demand are as stated by the PW-1 and PW-2. PW-4- Malati Deshpande was examined in order to prove that, there was some harassment by the accused to the deceased to some extent. PW-5 -Rasulbee Pathan was examined, however in his examination in chief she stated that, it did not happen Nasima told him that, her husband asked her to bring money from her parents and for that he ill-treats her, and beat her. PW-6 Shakilabee was examined as a witness and she stated in her evidence that, the relations between accused and Nasima were good. However, she was declared hostile. In her cross-examination she stated that, it is

not true that, there were always quarrels between Nasima and her husband. There were domestic disputes between them and not quarrel and beating. She specifically stated in her cross-examination that, when Nasima came in burning condition in courtyard, she herself, her husband, her son and accused extinguished fire. Both hands of the accused were burnt and her left hand fingers were also burnt. At the relevant time, when the incident had taken place, the accused and Nasima were living as tenant in the house of PW-6, and therefore, the evidence of PW-6 assumes importance. She has not supported the prosecution case that, there were always quarrels between Nasima and her husband.

10. There are two Dying Declarations of Nasima, which are at Exhibit 33 and Exhibit 39. Dying Declaration at Exhibit 33 is recorded on 13.12.1992. In the said Dying Declaration she stated that, there was quarrel between husband and herself at about 10 p.m. on the ground that, why she is not talking with sister of the accused. She stated that, husband slapped and beat her. However, in said Dying Declaration, it is not stated by Nasima that, the contents of the said Dying Declaration were read over to her and the said are as per her narration. If the contents of the dying declaration are not read over to the declarant and to that effect, there is no mention in the Dying declaration, the said dying declaration cannot be read in the evidence. The Supreme Court in the case of Shaikh Bakshu and Others Vs. State of Maharashtra held thus:-

"There as no mention in the dying declaration that, it was read over and explained to the deceased. The Trial court and the High Court concluded that even though it is not so stated, it has to be presumed that it was read over and explained. The view is clearly unacceptable."

In that view of the matter, the Dying Declaration which has been recorded at Exhibit 33 did not find mention that, the contents of the said Dying Declaration are read over to declarant and same are as per her narration, therefore, we discard the same.

11. Another Dying Declaration is at Exhibit 39, which is recorded on 12.12.1992. In the said Dying Declaration Nasima stated that, there are two children. She is residing in Kalpana nagar, Kallam. She herself poured kerosene on her person and set herself on fire, since she got angry when the husband quarreled with her saying that, why she is not talking with his sister. When she poured kerosene on her person, she was alone. The husband tried to extinguish the fire. Nobody set her on fire. In an anger she herself set her on fire. The said statement is as per her narration and same is correct.

12. PW-8 Dattu Maruti Kadam was examined as witness at Exhibit 38. In his evidence, he stated that, he recorded the Dying Declaration in presence of Dr. Dikale. Nasima was in position to speak. He wrote down the contents of the declaration as per her say. He took thumb impression of Nasima on the Dying Declaration. Dr. Dikale is not examined by the prosecution so as to prove the

Dying Declaration at Exhibit 39. It appears that, PW-7-Bhagwat Manik was examined to prove the Dying Declaration at Exhibit 33, however, Dr. Dikale was not examined to prove Dying Declaration at Exhibit 39.

13. The evidence of PW-1 to PW-4 is required to be considered to find out whether the ingredients of Section 498A are met or otherwise. The provisions of Section 498A reads thus :-

"498A. Husband or relative of husband of a woman subjecting her to cruelty

Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.

Explanation-For the purpose of this section, "cruelty" means-

(a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.]"

14. If the prosecution case is considered in the light of Explanation (a) and (b) in the light of the evidence of prosecution witnesses, it is not possible to conclude that, the accused had intention that, Nasima should commit suicide. The evidence lead by the prosecution is not sufficient to hold that, the conduct of the accused before the incident was willful conduct of such a nature which driven the deceased to commit suicide.

15. If the evidence of the prosecution witnesses is perused, they stated that, there was demand of golden ring and money, however, none of the witnesses has quoted the specific instances and to that effect there is no satisfactory and sufficient evidence brought on record by the prosecution so as to conclude that, there was illegal or unlawful demand by the accused. An immediate conduct of the accused soon before the commission of suicide by Nasima was that, he picked up quarrel with Nasima on the ground that, Nasima was not on talking terms with sister of the accused. If the contents of the Dying Declaration at Exhibit 39 are carefully perused, in fact, there are no allegations that, the husband assaulted Nasima though it is stated that, there was quarrel between the husband and Nasima. Therefore, the prosecution has not proved beyond reasonable doubt that, there was willful conduct of the accused which was of such a nature and because of that, Nasima committed suicide. If the Explanation (b) under Section 498-A is considered, the harassment of the woman by the husband or relative should be of such a nature coercing woman or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such

demand. In the present case, in first place it cannot be said that, there was harassment of such a nature coercing Nasima to meet any unlawful demand. The prosecution has not proved beyond reasonable doubt that, there was any unlawful demand for any property or valuable security. Therefore, the prosecution has not proved beyond reasonable doubt that, the accused has committed offence punishable under Section 498A of I.P. Code. As already observed, there was no intention on the part of the accused that, Nasima should commit suicide by setting herself on fire. There was no positive act or abetment on the part of the accused with an intention that, Nasima should commit suicide. It has come in the evidence of the prosecution witnesses that, marriage of Nasima with accused was performed 8 to 10 years prior to the date of incident. Therefore, the presumption under section 113-A of the Evidence Act is not available in the facts of the present case. The prosecution has not shown that, soon before the death of Nasima she was subjected by accused to cruelty or harassment for or in connection with, any demand for dowry. Therefore, the alleged offence under Section 304-B of I.P. Code is also not proved by the prosecution.

16. The trial Court has considered the evidence of PW-1 to PW-6 about the alleged ill-treatment and demand and found that, the said evidence is not sufficient so as to convict the accused for an offence punishable under Section 498-A of I.P. Code. The trial Court has also taken a note of fact that, there is no reference to illegal demand in both the Dying Declarations. The incident had taken place on 12.12.1992, however, the P.S.I. Hande in his evidence stated that, he started investigation from 17.12.1992 onwards. The trial Court has also taken a note of fact that, though the statements of father and mother was recorded by the Police, but inspite of death of Nasima, they did not complaint against the accused in his statement. The trial Court has also drawn inference that, due to poverty there may be domestic disputes, quarrels between Nasima and her husband, and Nasima herself may be telling it to her father and mother and brother also. However, the same is not sufficient so as to fulfill the ingredients of Section 498A, 304-B and 306 of I.P. Code.

17. Upon reappreciating the entire evidence on record, we find that, the findings recorded by the trial Court are not perverse. The view taken by the trial Court is possible. The Supreme Court in the case of Nepal Singh V/s State of Haryana in Criminal Appeal No. 383 of 2002 decided on 24.04.2009 held that, in case of acquittal, there is a double presumption in favour of the accused-firstly, the presumption of innocence is available to him-secondly, the accused having secured an acquittal, the presumption of his innocence is certainly not weakened but reinforced, reaffirmed and strengthened by the trial court.

Yet in another judgment in the case of State of Andhra Pradesh Vs. M. Madhusudhan Rao, the Supreme Court in para 13 held thus :-

"13. There is no embargo on the appellate court to review, reappreciate or reconsider the evidence upon which the order of acquittal is founded. Yet,

generally, the order of acquittal is not interfered with because the presumption of innocence, which is otherwise available to an accused under the fundamental principles of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a court of law, gets further reinforced and strengthened by his acquittal. It is also trite that if two views are possible on the evidence adduced in the case and the one favourable to the accused has been taken by the trial court, it should not be disturbed. Nevertheless, where the approach of the lower court in considering the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by the court below is such which could not have been possibly arrived at by any court acting reasonably and judiciously and is, therefore, liable to be characterised as perverse, then, to prevent miscarriage of justice, the appellate court is obliged to interfere."

18. In that view of the matter, in our considered view, the impugned judgment and order needs no interference. Hence appeal stands dismissed.