

Mustafa Shahadal Shaikh vs State Of Maharashtra on 14 September, 2012

Equivalent citations: 2012 AIR SCW 5308, 2012 (11) SCC 397, AIR 2012 SC(CRI) 1852, 2012 (6) AIR BOM R 699, (2012) 3 DMC 566, (2012) 2 HINDULR 486, (2012) 8 SCALE 692, (2013) MATLR 45, (2013) 2 RAJ LW 1568, (2013) 2 RECCRIR 23, (2013) 80 ALLCRIC 617, (2013) 1 MARRILJ 18, (2012) 3 ALLCRIR 3149, 2012 ALLMR(CRI) 3785, (2012) 4 ALL RENTCAS 492, (2013) 1 CHANDCRIC 27, 2013 (1) SCC (CRI) 664, 2012 (118) AIC (SOC) 1 (SC), AIR 2013 SUPREME COURT 851

Author: P.Sathasivam

Bench: P. Sathasivam, Ranjan Gogoi

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

1 CRIMINAL APPEAL NO. 1406 OF 2008

Mustafa Shahadal Shaikh

.... Appellant(s)

Versus

The State of Maharashtra

.... Respondent(s)

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J U D G M E N T

P.Sathasivam,J.

1) This appeal is directed against the judgment and order dated 28.11.2007 passed by the High Court of Judicature of Bombay in Criminal Appeal No. 891 of 1990 whereby the High Court confirmed the order of conviction and sentence dated 07.12.1990 passed by the 4th Additional Sessions Judge at

Kolhapur against the appellant herein.

2) The facts and circumstances giving rise to this appeal are as under :

(a) On 26.01.1989, Mustafa Shahadal Shaikh (A1) - the appellant-accused married one Hasina Mustafa Shaikh (since deceased) at Tembalalwadi, Dist.

Kolhapur, Maharashtra. After marriage, Hasina was staying with the appellant in her matrimonial home at Ujalawadi Taluka Karveer, Dist. Kolhapur, Maharashtra. On 23.08.1989, when she was at her matrimonial home, she committed suicide by consuming poison. She was taken to CPR Hospital at Kolhapur where the doctor declared that she was brought dead. The appellant and his parents informed about her death to her family members.

(b) On the same day, Abdul Rahim Shaikh (PW-4) the grand-father of the deceased lodged an F.I.R. at Karveer Police Station, Kohlapur alleging torture and harassment faced by the deceased on account of demand for dowry. On the basis of the said report, C.P. No. 186/89 (Exh.20) was registered against the appellant and his family members for the offence punishable under Sections 306, 304-B and 498-A read with Section 34 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC").

(c) The case was committed to the Court of Sessions and numbered as Sessions Case No. 7 of 1990 and A-1 Husband, A-2 Father, A-3 Mother, A-4 sister-in-law were arrayed as accused nos. 1 to 4. During the trial, prosecution examined 12 witnesses and marked several documents. By order dated 07.12.1990, the 4th Additional Sessions Judge, while acquitting the sister (A-4) of the appellant herein, convicted the appellant and his parents for the offence punishable under Sections 498-A and 304-B read with Section 34 of IPC and sentenced them to suffer RI for 1 year along with a fine of Rs.1,000/-, in default, to further under RI for 6 months and RI for 7 years respectively.

(d) Being aggrieved, the appellant and his parents preferred Criminal Appeal No. 891 of 1990 before the High Court of Bombay. During the pendency of the appeal before the High Court, the parents (A-2 and A-3) of the appellant expired and the appeal against them stood abated. By the impugned judgment dated 28.11.2007, the High Court dismissed the appeal while confirming the conviction and sentence imposed by the trial Court against the appellant.

(e) Aggrieved by the said judgment, the appellant has preferred this appeal by way of special leave before this Court.

3) Heard Mr. Sudhanshu S. Choudhari, learned counsel for the appellant- accused and Mr. Sachin J. Patil, learned counsel for the respondent-State. Discussion:

4) The only point for consideration in this appeal is whether the prosecution has made out a case in respect of the charges leveled against the appellant relating to Section 304B and 498A IPC.

5) In support of the above charges, the prosecution heavily relied on the complaint (Exh. 20), the evidence of PWs 4, 6, 7 and 9 and other relevant circumstance, viz., the death occurred on 23.08.1989 i.e. within a period of 7 months from the date of marriage i.e. 26.01.1989.

6) Before considering the prosecution case as well as the defence pleaded, it is desirable to extract the relevant provisions of Section 304B which relates to Dowry death.

“304B. Dowry death. – (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called “dowry death”, and such husband or relative shall be deemed to have caused her death.

Explanation- For the purpose of this sub-section, “dowry” shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961) (2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment of life” The above provision was inserted by Act 43 of 1986 and came into force w.e.f. 19.11.1986. There is no dispute about the applicability of the above provision since the marriage and the death occurred in 1989. In order to convict an accused for offence punishable under Section 304B of IPC, the following essentials must be satisfied:

i) the death of a woman must have been caused by burns or bodily injury or otherwise than under normal circumstances; ii) such death must have occurred within seven years of her marriage;

iii) soon before her death, the woman must have been subjected to cruelty or harassment by her husband or any relatives of her husband;

iv) such cruelty or harassment must be for, or in connection with, demand for dowry.

When the above ingredients are established by reliable and acceptable evidence, such death shall be called dowry death and such husband or his relatives shall be deemed to have caused her death. If the above-mentioned ingredients attract in view of the special provision, the court shall presume and it shall record such fact as proved unless and until it is disproved by the accused. However, it is open to the accused to adduce such evidence for disproving such compulsory presumption as the burden is unmistakably on him to do so and he can discharge such burden by getting an answer through cross-examination of prosecution witnesses or by adducing evidence on the defence side.

7) Section 113B of the Indian Evidence Act, 1872 speaks about presumption as to dowry death which reads as under:-

“113B. Presumption as to dowry death- When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.

Explanation.- For the purposes of this section, “dowry death” shall have the same meaning as in section 304B of the Indian Penal Code (45 of 1860).” As stated earlier, the prosecution under Section 304B of IPC cannot escape from the burden of proof that the harassment or cruelty was related to the demand for dowry and such was caused “soon before her death”. In view of the explanation to the said section, the word “dowry” has to be understood as defined in Section 2 of the Dowry Prohibition Act, 1961 which reads as under:-

2. Definition of " dowry". In this Act, " dowry" means any property or valuable security given or agreed to be given either directly or indirectly-

(a) by one party to a marriage to the other party to the marriage; or

(b) by the parents of either party to a marriage or by a other person, to either party to the marriage or to any other person; at or before or after the marriage as consideration for the marriage of the said parties, but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies.”

8) To attract the provisions of Section 304B, one of the main ingredients of the offence which is required to be established is that “soon before her death” she was subjected to cruelty or harassment “for, or in connection with the demand for dowry”. The expression “soon before her death” used in Section 304B IPC and Section 113B of the Evidence Act is present with the idea of proximity test. In fact, learned counsel appearing for the appellant submitted that there is no proximity for the alleged demand of dowry and harassment. With regard to the said claim, we shall advert to the same while considering the evidence led in by the prosecution. Though the language used “soon before her death”, no definite period has been enacted and the expression “soon before her death” has not been defined in both the enactments. Accordingly, the determination of the period which can come within the term “soon before her death” is to be determined by the courts, depending upon the facts and circumstances of each case. However, the said expression would normally imply that the interval should not be much between the concerned cruelty or harassment and the death in question. In other words, there must be existence of a proximate and live link between the effect of cruelty based on dowry demand and the concerned death. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence. These principles have been reiterated in *Kaliyaperumal vs. State of Tamil Nadu*, AIR 2003 SC 3828 and *Yashoda vs. State of Madhya Pradesh*, (2004) 3 SCC 98.

9) With these principles in mind, let us analyze the evidence led in by the prosecution. Abdul Rahim Shaikh, PW-4, aged about 65 years at the time of the incident deposed that the deceased - Hasina

was his grand daughter. Hasina was daughter of his daughter Chandbi and her husband's name is Dilawar Khan. According to him, after her marriage on 26.01.1989, she went to reside in the house of the appellant-accused at Ujalawadi. She stayed there for 5 days and returned to their house and stayed for 15 days. Thereafter, she again went to her in-laws house. At the time of Bakrid, Hasina, her husband Mustafa (A1) - the appellant accused and Hasina's brother Ayub had gone to Panaji. After 4 days, Ayub and Mustafa returned from Panaji and she stayed there for 15 days. Hasina narrated all her sufferings to her mother Chandbi (PW-7) daughter of PW-4 as to how the accused were torturing, beating and abusing her for the demand of Rs.5,000/- and a gold ring and a chain. When the appellant and his mother visited his house, he explained to them that they had already spent Rs.6,000/- for marriage and he was ready to get employment for the appellant. He further deposed that after 5-6 days, he had gone to the house of Abubakhar Nimshikari PW-10 – the mediator to the said marriage and informed him about the cruelty and harassment meted out to the deceased in order to fulfill the demand of dowry. He also deposed that when he had gone to the house of the accused about 2-4 days prior to her death, she took him to a room and narrated how the accused began to torture her more for their demand for money and gold chain and she also asked him to do something with regard to the same. He also explained that 4 days thereafter, father-in-law and mother-in-law of Hasina came to their house and told him that Hasina had consumed poison and she had been admitted in CPR Hospital. They also showed the bottle to him. Thereafter, PW-4 and his wife rushed to CPR Hospital. When they reached the Hospital, the Doctor informed that she was brought dead. Nobody was present near the dead body from the house of the accused. Thereafter, he went to Kharvi P.S and lodged a report which is Exh. 20. In fact, while recording his evidence, the trial Judge has noted that PW-4 – grandfather of the deceased became over emotional and began to weep in the witness box. His evidence, who is an elderly person and affectionate to the deceased – Hasina, clearly prove the torture, harassment, and demand of dowry at the hands of the accused including the appellant.

10) The next witness examined on the side of the prosecution is Dilawarkhan PW-6 - father of the deceased. In his evidence, he also explained that his daughter told him that her in-laws used to torture her by beating and keeping her starved. He subsequently mentioned that on 18.08.1989, he himself and his wife had visited the house of his father-in-law, namely, PW-4 at Tembalwadi and, thereafter, they had gone to the house of accused at Ujalawadi. There itself Hasina explained the harassment and torture meted out to her. She started weeping and told PW-6 that her husband – appellant herein tortured her more. On the next day, when the appellant and his mother came to their house, PW-6 told them that he would get employment for the appellant accused and he should not harass her daughter. However, he did not listen to him and left his house. The evidence of PW-6 – the father of the deceased also proves the torture and harassment for the settlement for the payment of money and, in fact, this was narrated on 18.08.1989 i.e. just 5 days prior to the date of her death. It very clearly satisfies the expression “soon before her death”.

11) The next witness relied on by the prosecution is Chandbi PW-7 the mother of the deceased. She also narrated similar to PWs 4 and 6. From her evidence also, it is clear that the accused tortured and harassed her daughter for money.

12) The other witness relied on by the prosecution is Ayubkhan (PW-9) the brother of the deceased. Like PWs 4, 6 and 7, he also highlighted that his sister used to inform that her husband, sister-in-law, father-in-law and mother-in-law tortured her on many occasions for the payment of money and gold ornaments. A perusal of his entire evidence also corroborates with the similar claim made by PWs 4, 6 and 7.

13) Though learned counsel for the appellant contended that all the witnesses relied on by the prosecution are close relatives and no outsider has been examined to prove their case, we are of the view that in a case of this nature i.e. matrimonial death, we cannot expect outsiders to come and depose what had happened in the family of the deceased. We have already highlighted that the death occurred within a period of 7 months from the date of the marriage and she died at her matrimonial home. It has also come in evidence from the prosecution witnesses that on the date of the death, the appellant and his parents alone were in the house. In such circumstances, we reject the contention raised by the counsel for the appellant.

14) Apart from the above witnesses, Dr. Ramdas - the doctor who conducted the post mortem was examined as PW-5. In the post mortem report, he opined that death of Hasina was due to poisoning. He further explained that poison was petroleum hydrocarbons. He also deposed that the said poison was sufficient to cause death of a human being.

15) From these materials, we are satisfied that the prosecution has clearly established the offence under Section 304B IPC and the same has been rightly accepted by the trial Court and confirmed by the High Court.

16) Coming to Section 498A which speaks about cruelty by husband or relatives of husband. It is useful to extract the said provision:-

“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 wilful 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.” The object of inserting the above section by Act 46 of 1983 which came into force w.e.f. 25.12.1983 was with a view to punish the husband or his relatives who harass or torture the wife to coerce her or her relatives to satisfy unlawful demands of

dowry. The prosecution evidence, which we have already discussed, clearly prove the ingredients of cruelty and no further elaboration is required, on the other hand, we fully agree with the conclusion arrived at by the trial Court as affirmed by the High Court.

17) Finally, faint argument was advanced by the counsel for the appellant for reduction of the sentence of appellant-accused considering his age, viz., 23 years at the time of occurrence. It is also pleaded that he is the only earning member in his family and prayed for leniency. These aspects were duly considered by the trial court while awarding punishment.

Further Section 304B itself mandates that in the case of conviction in terms of sub-section (1) the imprisonment shall not be less than 7 years but which may extend to imprisonment for life. In view of the fact that the prosecution has established its case beyond reasonable doubt by placing acceptable evidence and of the fact that minimum sentence of seven years has been prescribed, it cannot be possible to award sentence less than 7 years. These aspects were also considered by the High Court. Accordingly, we reject the similar request made by the counsel for the appellant.

18) In the light of what is stated above, we fully concur with the conclusion arrived at by the trial Court and the High Court. Consequently, the appeal fails and accordingly dismissed.

.....J. (P. SATHASIVAM)J. (RANJAN GOGOI)
NEW DELHI;

SEPTEMBER 14, 2012.
