

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO. 3048 OF 2016

The State of Maharashtra, Through
Police Station, Khultabad,
Dist. Aurangabad.

...Applicant

Versus

- 1] Mustaq Kadu Pathan,
Age : 22 years,
Occu. Agri., R/o Loni,
Tq. Khultabad,
Dist. Aurangabad.
- 2] Kadu Bandu Pathan,
Age : 55 years,
Occu. Agri., R/o As above.
- 3] Kamrubi Kadu Pathan,
Age : 45 years,
Occu. Agri. & Household,
R/o As above.
- 4] Shaikh Sattar Subhan Patel,
Age : 45 years,
Occu. Agri., R/o As above.
- 5] Rafiq Patel Abdul Patel
Age : 40 years, Occu. Service,
R/o Khultabad,

Dist. Aurangabad.

...Respondents

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Mr. R. V. Dasalkar, A. P. P. for Applicant-State.

Mr. S. S. Panale, Advocate for Respondent Nos. 1 to 5.

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**CORAM : T. V. NALAWADE &
SMT. VIBHA KANKANWADI, JJ.**
DATE : 12-10-2018.

JUDGMENT : (Per Smt. Vibha Kankanwadi, J)

01. The present application has been filed by prosecution seeking leave to appeal under Section 378(1) (b) of Cr. P. C. to challenge the acquittal of the respondents / original accused persons by learned Additional Sessions Judge, Aurangabad in Sessions Case No. 83 of 2009 dated 9.3.2016 from the offences punishable under Sections 498A, 304B, 306 read with Section 34 of I. P. C.

02. The prosecution has come with a case that informant Hafiz Amir Shaikh is resident of Shahajapur, Tq. & Dist. Aurangabad. He was residing with wife, 2 daughters and 3 sons. His daughter Shakira got married on 13.5.2007 with accused No. 1. She was treated properly after the marriage by her in-laws and husband. In the month of August, accused No. 2, who is the father-in-law of

deceased Shakira gave a phone call to informant and told that he should come to meet his daughter to give her understanding. Therefore, informant went to the matrimonial home of Shakira with his wife. At that time, accused Nos. 1 and 2, the in-laws and the Sarpanch of his village Sattar Patel told that Shakira does not do proper work and amount of Rs. 60,000/- is remaining from the promised dowry amount. It should be given. Informant told them that he would make arrangements of money till Diwali. When he met Shakira, at that time she cried and told that she is being harassed by husband, father-in-law, mother-in-law and sister-in-law. They were beating her and she was afraid that she would be killed by them. She, therefore, requested her father to take back, but, he gave her understanding and asked his wife i.e. Shakira's mother to stay for a night. On the same day, in the evening around 7 to 8 PM Shakira went to his house while crying. When she was asked as to why she is crying she told that the informant should come to her house immediately. All the accused persons were abusing and assaulting her by kicks, fist and blows and stick. She also showed the injury marks on her person to her father. When informant asked about his wife, she told that she did not see mother and therefore, she has come to take informant. On the

next day informant's wife came back. After about 4 to 5 days, accused Nos. 2 and 3 told informant on phone that about 10 to 12 persons from their side are coming and at that time in presence of all those persons it was informed by the accused No. 2 that Shakira is not behaving properly and informant should give remaining amount of dowry or should take divorce. Informant told that he would give the amount as well as sent his daughter for co-habitation. Accused No. 1 went to informant's house in September and requested that his wife should be sent. At that time, informant told that Shakira is ill and she would be sent after her health becomes normal. After the Ramjan started, he left Shakira to village Loni - the matrimonial home. Thereafter, 8 days prior to Idd, informant went to fetch Shakira for Idd. At that time, Shakira told about the ill-treatment by the accused. On 26.10.2007 informant received a phone call from accused No. 2 stating that accused No. 3 is ill and she has been admitted to GHATI Hospital and informant should come to meet. Thereupon, informant, his wife, son and Shakira went to see accused No. 3 to Ghati Hospital. It was told at that time that Shakira should be sent as the accused persons are facing domestic problem. Even amount of Rs. 100/- was given to the son of informant towards the transportation charges

of Shakira. Accordingly, Nafis left Shakira to Loni and came back on 27.10.2007. On 28.10.2007, Sarpanch Sattar informed to the informant that Shakira is serious and admitted to Khultabad Govt. Hospital. Thereafter, nephew of the informant informed him that Shakira expired at night time and she has been brought to Khultabad Hospital and therefore, informant and others went to Khultabad Hospital and saw her dead body. They found froth coming out of the mouth and nose of Shakira. Thereafter, the informant lodged the report stating that all the accused persons have abetted the commission of the suicide by Shakira.

03. On the basis of the said F. I. R. offence vide C. R. No. 107 of 2007 came to be registered and investigation was carried out. Panchnama of the spot was executed. Inquest panchnama was executed and dead body was sent for post mortem. Statements of witnesses were recorded. Accused came to be arrested and after completion of the investigation, charge-sheet has been filed.

04. After the committal of the case, accused persons appeared and charge has been framed. The contents of the charge were read over and explained to the accused in vernacular. They pleaded not guilty. Trial has been

conducted. After taking into consideration evidence on record and hearing both the sides, the learned Trial Court has acquitted all the accused persons from the offence punishable under Sections 306, 304B, 302, 498A read with Section 34 of I. P. C. This order of acquittal is under challenge in this application seeking leave to appeal.

05. Heard learned A. P. P. Mr. R. V. Dasalkar for State and Mr. S. S. Panale, learned Advocate for respondent Nos. 1 to 5. Perused the record and proceedings.

06. It has been submitted on behalf of the State that the learned Trial Court has not appreciated the evidence properly. Deceased Shakira got married on 13.5.2007 and she died in unnatural condition on 28.10.2007. That means within 5 months she has committed suicide. Time and again she had made complaint about the ill-treatment given to her by the accused persons. Accused persons were demanding the remaining amount of dowry Rs. 60,000/-. Almost all the prosecution witnesses are supporting to the prosecution story. The fact of commission of suicide by Shakira is not disputed by the defence. Under such circumstance, the presumption under Section 113(b) of Evidence Act ought to have been invoked and the accused persons ought to have been convicted by

the learned trial Court.

07. Per contra, the learned Advocate appearing for the accused persons supported the reasons given by learned Trial Court.

08. The accused persons have admitted the inquest panchnam and post mortem report. The post mortem report Exh. 25 shows that the probable cause of death was "due to terminal cardio respiratory failure due to suspected poison. It appears that the viscera was preserved and it was sent for chemical analysis. The C. A. report Exh. 86 shows that result of detection of organochloro was insecticide indosalfan (thiodan). It is also stated in the report that the level of indosalfan detected in the viscera was fatal. Thus, death of Shakira was unnatural. As per the F. I. R., Exh. 84 and the investigation that was carried was on the line that she had committed suicide and therefore, even at the time of filing charge-sheet, offence under Section 304B and 306 were invoked. However, it appears that later on the prosecution witnesses have made allegations about murder and so also, it appears that the charge was also framed under Section 302 alongwith other Sections. It is therefore, now required to be seen as to whether the deceased had consumed the poison herself or it was administered to her.

09. Though the report was lodged by the father of the deceased, during the course of trial, he expired and therefore, he could not be examined. Though his report came to be exhibited through the person who had taken it down, it can not be taken as a substantive piece of evidence and therefore, what the other witnesses have stated is required to be considered.

10. PW-1 Nafees is the brother of the deceased. PW-2 Rafiya is the mother. Both of them have stated that deceased was harassed. PW-3 Shaikh Isaq Ahmed was Mediator for the settlement of marriage. All these 3 witnesses have stated that the accused persons were demanding the amount of Rs. 60,000/- which was remaining towards dowry. None of them say that what was agreed to be given and how much was given. Further, they have stated that the accused person were complaining to the parents of the deceased that the deceased was not performing domestic duties. No other act of alleged cruelty is stated by them. Therefore, whatever evidence has been given by these 3 witnesses will not attract the offence punishable under Section 498A of I. P. C.

11. None of the witnesses have been examined by the prosecution to show that who had seen the dead body first, who was present at that time etc. It has come in the

evidence of PW-1 and 2 that just prior to the death of Shakira accused No. 3 was admitted in the hospital. All these witnesses alongwith Shakira as well as informant went to hospital to see accused No. 3. At that time, after giving amount of Rs. 100/- towards transportation charges, accused No. 2 had requested PW-1 to leave Shakira to the matrimonial home. That means till then she was residing with her parents. On the next day PW-1 Nafis left Shakira to her matrimonial home. PW-2 Rafiya has stated that on the day of incident also accused Nos. 2 and 3 were in the hospital. A question, therefore, arises as to who would have administered the poison if the offence under Section 302 is to be invoked. Even as regards accused No. 1 is concerned, Rafiya says that he had gone after taking food. Therefore, in fact who was inside the house is a question and there is no concrete evidence to support the theory of murder. On what basis the witnesses were stating that the accused persons have committed murder is not explained by them. Further, from shifting the story from suicide to murder what prompted them has also not been brought on record. Merely because Shakira's death is unnatural we can not allow the prosecution to imagine a story. Same is the case as regards the offence punishable under Section 304B of I. P. C. The presumption

under Section 113(b) of Evidence Act can not be invoked ipso facto. It is within the discretion of the Trial Court based upon the evidence hat has been led. Here, the evidence is very much scanty. None of the neighbours of the matrimonial home have been examined to support the contention of the prosecution.

12. The testimony of PW-1 and 2 would show that Shakira was not used to live in a village, work in land. Even when her mother was at her matrimonial home, without informing mother she went to her parental house leaving mother. PW-2 Rafiya went to her own house on a next day. That means Shakira was not willing to co-habit with accused No. 1. In clear terms, PW-2 Rafiya has admitted that though the accused persons were requesting them to sent Shakira to their house, Rafiya and her husband were refusing to send Shakira. What was the reason and why they did not try to ascertain the real reason behind the act on the part of Shakira has not been clearly deposed by the prosecution witnesses. Under such circumstance, the learned Trial Court, on the basis of evidence before it, has taken a possible view. Merely because the death was unnatural, it can not be presumed that it was either murder or suicide. No case is made out to grant leave.

13. Hence, following order;

ORDER

Application is rejected.

[SMT. VIBHA KANKANWADI]

[T. V. NALAWADE]

JUDGE

JUDGE

Dahibhate/-.