
(1995) 05 BOM CK 0002
In the Bombay High Court
Case No : Criminal Appeal No. 590 of 1992

Akbar Ashraf Khan

APPELLANT

Vs

The State of Maharashtra and another

RESPONDENT

Date of Decision : 06-05-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Evidence Act, 1872 — Section 114, 134
Penal Code, 1860 (IPC) — Section 302, 307

Citation : (1995) CriLJ 3575

Hon'ble Judges : Vishnu Sahai, J;G.R. Majithia, J

Bench : Division Bench

Advocate : B.M. Jethani and S.S. Gandhi, for the Appellant; S.B. Patil, Assistant Public Prosecutor, for the Respondent

Judgement

Vishnu Sahai, J.—The appellant aggrieved by the judgment and order dated 9-10-1992 passed by the Additional Sessions Judge, Sangli in Sessions Case No. 2/1992 convicting and sentencing him to undergo life imprisonment u/s 302 of the Indian Penal Code and to further pay a fine of Rs. 5000/- and in default of payment of fine to suffer further imprisonment for a period of 2 years rigorous imprisonment has come in appeal before us.

2. The prosecution case in brief, as emerging from the recitals contained in the evidence of the solitary eye-witness of the incident Mehboobsab Maulali Saunur and the dying declaration of the victim, in brief, runs as follows :

PW 5 (Mehboobsab Maulali Saunur) was the son of the deceased Shamshad. Shamshad's husband, as it emerges from the evidence on record, was a habitual thief and at the time of the incident was undergoing imprisonment. The prosecution case is that the appellant developed illicit relations with Shamshad. He used to frequently visit her room situated at Taluka Miraj, District Sangli, and within a short period started sleeping and dining along with her. Some days preceding the incident the appellant and Shamshad reached one of the daughters

and younger son (of Shamshad) viz., Reshma and Abdul, to village Mulgund where the sister of the husband of Shamshad was living. Hence along with Shamshad was only her minor daughter by name Salma and son Mehboobsab (PW 5). The evidence is that the aforesaid son of Shamshad was aged about 10 1/2 years at the time of the incident.

3. On the date of the incident, that is on, 28th November, 1991 at about 11.30 a.m. the appellant is alleged to have visited the room of Shamshad and demanded a sum of Rs. 1000/- from her. She refused to give the amount on the ground that she was not possessed of the same. The appellant however, persisted with the demand resulting in a furious quarrel between him and Shamshad. All of a sudden the appellant is alleged to have lifted a kerosene canister which was lying on the floor of the house and poured the kerosene from the same on the person of Shamshad and ignited her by fire by throwing a lighted match-stick on the clothes she was wearing. The result was that clothes of Shamshad caught fire and in a desperate attempt to save herself she ran outside the room. She is alleged to have been screaming for help. Some of the neighbours who gathered there threw buckets full of water on her person. Someone informed the local police station.

The police took Shamshad in a precariously injured condition to Civil Hospital, Sangli, where she was medically examined by Dr. Ramchandra Hindurao Madane (PW 2). At about 3.30 a.m. the police sent a written information (Exhibit 12) to Shri M. S. Koshti (PW 1), Executive Magistrate, to record the dying declaration of Shamshad. On the aforesaid request Shri Koshti came to Civil Hospital Sangli. There at about 3.45 p.m. Dr. Madane (PW 2) certified that Shamshad was in a fit medical condition to give a dying declaration; that certificate is at Exhibit 13. Pursuant to that certificate the dying declaration of Shamshad was recorded by Shri Koshti. However, after the recording of the dying declaration no endorsement was given by the doctor to the effect that the victim was in a fit condition throughout the time she made the dying declaration. That dying declaration is a short one and therein she is alleged to have stated as follows :

"Akbar ne muche rakhel dalke jalaya baki muche kuchbhi malum nahin."

The victim is alleged to have succumbed to her injuries at 8 p.m. the same day.

4. The same day PSI Bhosale of Miraj City Police Station, visited the place of the incident, that is the room of the deceased, and attached a plastic can, one broken match box a butt of cigarette, one full pant of stone-wash colour, sample of earth mixed with kerosene, bangle pieces, burnt pieces of petti-coat, etc. He then prepared the spot panchanama. A case was registered vide C.R. No. 201/91 u/s 307 IPC against the appellant at Miraj City Police Station by PSI Bhosale.

5. The post mortem examination of the dead body of the deceased was conducted on 28-11-1991 between 10 p.m. and 11 p.m. by Dr. S. S. Sonar. A perusal of the post-mortem report shows that the deceased had 96% burn injuries on her person. The death of the deceased was on account of the

aforesaid burn injuries.

6. The appellant was arrested on the same day at 11.35 p.m. from the Civil Hospital Sangli. On 30-11-1991 the appellant is alleged to have made a confessional statement before ASP Mrs. Rashmi Uday Shukla (PW 6) who took over investigation from PSI Bhosale and two panchas to the effect that he had given his clothes, which he was wearing at the time of the incident, to a laundry situate in Mangalwar Peth, Miraj, for washing, that he would point out the shop, and that he could get the same recovered. Pursuant to that statement in the presence of panchas at the pointing out of the appellant, ASP Mrs. Shukla (PW 6) recovered the aforesaid clothes which comprise of one pant, one shirt and one banian, from the aforesaid laundry shop. The aforesaid articles were seized under a panchanama. These articles along with blood stained and plain earth were sent to the forensic laboratory, Pune. On examining the aforesaid articles the Assistant Director of the said Laboratory certified that kerosene residue was found on each of them.

7. After completion of the investigation charge-sheet in the instant start case was submitted against the appellant on 27th December, 1991.

8. In the trial Court a charge u/s 302 IPC was framed against the appellant to which he pleaded not guilty and claimed to be tried. His defence was of blanket denial. His defence is that one Jahida, who was the sister of the deceased Shamshad, became angry with him for his having illicit relations with Shamshad and that she is the architect of his false implication in the instant case. The defence case is that the solitary eye-witness of the incident viz. Mehboobsab (PW 5) deposed against the appellant on account of pressure of the aforesaid Jahida.

9. In the trial Court as many as 6 witnesses were examined by the prosecution. The prosecution also tendered and proved various exhibits. In defence on ocular evidence was led by the appellant. The learned trial Judge believed the evidence of the dying declaration and the ocular account furnished by Mehboobsab (PW 5) and passed the impugned order. Hence this appeal.

10. At the outset we may mention that Mr. B. M. Jethani, the learned counsel for the appellant, has argued this appeal with great tenacity. He has argued the matter from all angles. He primarily canvassed 4 submissions before us, namely :

(a) The dying declaration is not a reliable document.

(b) The child witness Mehboobsab Maulali Saunur (PW 5) is not a reliable witness and it would neither be prudent nor safe to accept his testimony, particularly because, no corroboration is forthcoming.

(c) That some witnesses who saw the deceased Shamshad coming out in a burnt condition from her room and who poured buckets full of water on Shamshad have not been examined and the evidence of these witnesses was essential for the unfolding of prosecution story.

(d) The conduct of the appellant would show that he was not the murderer.

The contention of Mr. Jethani is that circumstances and probabilities indicate that the deceased committed suicide.

11. We now propose taking up contentions canvassed by Mr. Jethani. We may straightaway mention that we are in agreement with the contention of learned counsel for the appellant that the dying declaration is not a reliable document and the evidence with respect to it has to be rejected by us. We have reached this conclusion for a number of reasons.

We firstly find that the evidence on record is that at 3.45 p.m. Dr. Madane (PW 2) gave a certificate Exhibit 13 in the presence of the Executive Magistrate, Mr. Koshti, to the effect that the victim was in a fit mental condition to make a statement. This obviously means that the Executive Magistrate must have received the letter of request by the police to record the dying declaration prior to 3.45 p.m. Mr. Jethani invited our attention to Exhibit 12, which is the letter of request sent by police to Mr. Koshti to record the dying declaration and he brought to our notice that initially in the aforesaid letter the time written was 3.50 p.m. and thereafter, when the prosecution realised that the certificate had been issued by the doctor at 3.45 p.m. the time was interpolated to 3.30 p.m. We have perused Exhibit 12 and we regret to hold that the aforesaid interpolation is there. We find that in it originally 3.50 p.m. was written and thereafter by converting 5 into 3 it was made 3.30 p.m.

The second reason as to why we are not inclined to rely on the dying declaration is that Mr. M. S. Koshti (PW 1), the Executive Magistrate who recorded the dying declaration candidly admitted in the cross examination that at the time when statement of the victim was recorded her sister was present near her. This obviously cannot rule out the truth in the criticism levelled by the defence counsel to the effect that the victim may have been tutored.

The third infirmity which we find in the dying declaration is that after the same was recorded there is no endorsement of the doctor to the effect that throughout the time when the statement was recorded she was in fit mental condition.

Fourthly we are forced to reject the dying declaration because we find that the evidence of the Executive Magistrate Mr. Koshti is to the effect that after he had asked the deceased 10 to 20 times the deceased made the aforesaid dying declaration. We went thorough the original dying declaration Exhibit 14 and therein we find that repeatedly thrice the Magistrate asked the victim to make her statement and every time she went on asking for water and saying that she would make a statement later on. It was only thereafter when the Magistrate further asked her, she made the dying declaration.

Lastly we are not inclined to place reliance on the dying declaration because we find that the Executive Magistrate Shri Koshti candidly stated that at the time when the dying declaration was recorded the doctor was absent. For the

aforesaid reasons we reject the evidence of dying declaration.

12. We now propose to take up the second contention of the learned counsel for the appellant. In order to appreciate as to whether there is merit in the aforesaid contention of the learned counsel for the appellant we have gone through the statement of Mehboobsab (PW 5), bearing in mind that he is a child witness and that he was aged about 10 1/2 years at the time of the incident. The crucial thing to be kept in mind in case of a child witness is as to whether he is possessed of sufficient understanding and understands the significance of oath. We find that the learned trial judge was alive to the question that he was a child witness and had put some questions to the witness in order to ascertain as to whether he was possessed of sufficient understanding and understood the significance of oath. The learned trial Judge after conducting the aforesaid exercise was satisfied that the witness understood the significance of oath and after administering oath to him proceeded to record his statement.

13. At the very outset, the learned counsel for the appellant contended that it would not be proper for us to accept the evidence of the aforesaid child witness because no corroboration is forthcoming in the instant case. We are afraid that we do not find any merit in this contention. In our opinion the norms with respect to the appreciation of the evidence of a child witness only require that the evidence of such a witness should be accepted after the same has been subject to caution and scrutiny. There is no rule of law which requires that the testimony of a child witness cannot be relied upon unless it is corroborated on material particulars by some other witnesses. We are fortified in our view by a Division Bench decision of our Court, reported in State of Maharashtra Vs. Prabhu Barku Gade, , to which one of us (Sahai J.) was a party. After going through the statement of the aforesaid child witness we find it to be a perfectly natural and probable statement. We also find it to be implicitly reliable. In our opinion his solitary statement is alone sufficient for conviction. In the decision reported in Vadivelu Thevar Vs. The State of Madras, , in paragraph 11, their Lordships of the Apex Court held that in view of the provisions contained in Section 134 of the Indian Evidence Act which provides that no particular number of witnesses shall, in any case, be required for the proof of any fact, conviction can proceed on the testimony of a solitary witness. The aforesaid decision remains legally tenable even today.

We now propose giving in brief the account of the incident as deposed to by Mehboobsab (PW 5). The witness stated that at about 11.30 a.m. he was in the room. At that time the appellant demanded Rs. 1000/- from his mother and his mother refused saying that she did not have that amount. Then all of a sudden, the accused picked-up a kerosene can from the floor, and poured kerosene oil on the victim and threw a match-stick resulting in her catching fire. The witness also stated that the victim started screaming when her clothes caught fire and tried to run in order to save herself. Some neighbours poured buckets full of water and extinguished the fire on the person of the victim. We find no infirmity or

improbability in the aforesaid statement of this witness. The account given by this witness is corroborated by medical evidence. We find no apparent reason as to why this witness should falsely implicate the appellant. The contention of the learned counsel for the appellant that it was at the instance of Jahida who felt sore against the appellant because he was carrying on with the deceased, who was her sister, that PW 5 Mehboobsab deposed against the appellant is unworthy of acceptance. We are afraid that we do not find any tangible material, much less documentary material, on the basis of which we can reach such a conclusion. The only infirmity (it appears so on the first blush) in our opinion, which the learned counsel for the appellant could point out in the statement of the aforesaid witness was that when the police reached immediately on the place of the incident the witness did not tell anything about the incident to it. With great respect we cannot agree with the learned counsel. In our opinion he has completely overlooked the fact that this witness was aged about 10 1/2 years at the time of the incident and after seeing this ghastly incident he must have been far too shocked and terrified to narrate it to the police. In our opinion nothing turns on this the learned counsel for the appellant also contended that there are circumstances to show that the witness was tutored. Again we do not find any merit in this contention. We find from the evidence on record that the statement of this witness, u/s 161 Cr.P.C. was recorded the same evening (evening of 28-1-1992) and in our opinion there was no time to tutor this witness. We must not lose sight of the fact that Jahida at whose hands, the learned counsel contends that this witness was tutored had no opportunity and time to tutor her. The evidence is that after the incident, the same day, Jahida went to the hospital and was there along with the victim. We find that late in the same evening the statement of this witness has been recorded. The learned counsel for the appellant also emphasised that the evidence on record shows that two days prior to his giving evidence in the trial Court, this witness, stayed with Jahida and this circumstances should be construed by us to mean that during this time the witness was tutored by Jahida. With great respect, the learned counsel again lost sight of the fact that the version given by this witness had already seen the light of the day in his statement recorded u/s 161 of Cr.P.C. Sometimes in the late evening of the date of the incident. There must not have been any glaring omissions in the aforesaid statement because the same have not been put to this witness in cross examination, when he was examined in the trial Court.

We find the statement of Mehboobsab (PW 5) to be a wholly reliable and natural statement. In our judgment it would be legally permissible to sustain the conviction and sentence of the appellant solely on it. We are fortified in our view by the decision of the Apex Court reported in *Vadivelu Thevar Vs. The State of Madras*, . In para 12, of this decision the Apex Court held that the testimony of a wholly reliable witness can be acted upon without any corroboration. In our opinion the aforesaid statement by itself is safe and sufficient for confirming the conviction and sentence of the appellant.

14. We may also mention that the learned trial Judge has rejected the evidence

with respect to the clothes recovered at the pointing out of the appellant, and has not chosen to attach much importance to the recovery of plain and blood stained earth from the place of the incident. The latter because of the fact that the uncontroverted position is that the incident took place in the room in which the deceased was living. In our opinion even if this evidence, as well as the evidence of dying declaration, is eliminated, the statement of the solitary eye-witness Mehboobsab (PW 5) is sufficient to sustain the finding of conviction.

15. The learned counsel for the appellant also contended that the neighbours who extinguished the fire on the victim were not examined. In his contention the examination of these witnesses was essential to the unfolding of the narrative. In his contention on account of the failure to examine these witnesses we should draw legal inference provided by Section 114(g) of the Evidence Act, against the prosecution. However, in our view the failure on the part of the prosecution to examine these witnesses would not vitiate in any manner the evidence on which we have placed reliance in confirming the guilt of the appellant.

16. The learned counsel finally contended that the conduct of the appellant showed that the appellant was not the murderer. He also pointed out that the appellant was present in the hospital. In his contention had he been the real murderer he would not have been present in the hospital and instead would have absconded. Again we do not find any merit in this contention. The reason for presence of the appellant in the hospital can also be on account of the fact that he wanted to eliminate all suspicions against him. The appellant may have thought that failure on his part to be present in the hospital may be construed by the police and the Court as a circumstance indicating his involvement in the crime. In our considered view, nothing much turns in favour of the appellant on the circumstances that he was present in the hospital at the time when the deceased was admitted therein.

17. We also do not find any merit in the contention of Mr. Jethani that from the circumstances it appears that the deceased had committed suicide. The evidence on record spells out no plausible reason as to why she would have committed suicide.

18. In the result we find this appeal to be devoid of substance and dismiss the same. We confirm the order of conviction and sentence passed against the appellant by the learned Additional Sessions Judge, Sangli. We are informed that the appellant is in jail. He shall continue to remain there till he serves out his sentence.

19. Appeal dismissed.