
(2016) 12 BOM CK 0043
In the Bombay High Court
Case No : Criminal Appeal No. 712 of 2002

Archana

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 16-12-2016

Acts Referred:

Evidence Act, 1872 — Section 32(1)

Penal Code, 1860 (IPC) — Section 201, Section 302, Section 498A

Citation : (2017) 1 AIRBomRCri 661 : (2017) ALLMRCri 1045 : (2017) 1 MhLJCri 182

Hon'ble Judges : B.P. Dharmadhikari and Kum. Indira K. Jain, JJ.

Bench : Division Bench

Advocate : Shri P.R. Agrawal, Counsel, for the Respondents in Criminal Appeal No. 127 of 2003; M.J. Khan, Additional Public Prosecutor, for the Respondent in Criminal Appeal No. 712 of 2002; P.R. Agrawal, Advocate, for the Appellant in Criminal Appeal No. 712 of 200

Final Decision : Dismissed

Judgement

Indira K. Jain, J.Criminal Appeal No.712/2002 arises out of judgment and order dated 28/11/2002 passed by learned Additional Sessions Judge, Amravati in Sessions Trial No.38/2002. By the said judgment and order, the learned Additional Sessions Judge convicted appellant Archana Sitaram Dhole of the offence punishable under Section 302 of the Indian Penal Code and sentenced her to imprisonment for life and fine of Rs.200 in default RI for six months.

By the very same judgment and order the learned Additional Sessions Judge acquitted accused Nos.2, 3 and 4 of the offence punishable under Section 302 read with Section 34 IPC, accused No.5 of the offence punishable under Section 201 IPC and all the accused of the offence punishable under Section 498A read with Section 34 of the IPC. The State being aggrieved of the judgment and order of acquittal has assailed the same in Criminal Appeal No.127/2003.

2. For the sake of convenience, we shall refer the appellant in Criminal Appeal

No.712/2002 and respondents in Criminal Appeal No.127/2003 in their original status as accused Nos.1 to 5 as they were referred before the trial court.

The gist of prosecution case is as under :

(i) Deceased Shila Surendra Dhole was resident of Warkhed, Tiosa, Dist. Amaravati. Incident occurred on 21/12/2001 at 12 in the noon. According to prosecution accused Archana Dhole sisterinlaw of Shila sprinkled kerosene on person of Shila and set her on fire. Accused No.2 Ranjana is another sister of husband of Shila. Accused Nos.3 and 4 mother-in-law and father-in-law of Shila were present in the house when Archana set Shila on fire. They did not intervene to save the life of Shila. Accused No.5 Ashok was serving at Rural Hospital, Tiosa at the relevant time. He told Shila not to disclose the names of accused in the dying declaration and thereby attempted to screen the real offenders.

(ii) Initially Shila was taken to Primary Health Center, Warkhed and then shifted to Rural Hospital, Tiosa. An intimation of burn case was sent to Tiosa Police Station. PW8 PI Dinkar Mahajan attached to Tiosa Police Station deputed PW9 PSI Pandurang Taide to make further inquiry into the incident. PSI Taide visited the spot and drew spot panchnama. Articles lying on the spot including burnt clothes found in a bag were seized.

(iii) PW3, Abdul Jabbar Abdul Sattar was working as Executive Magistrate. A memo was issued to him for recording dying declaration of Shila. By this time Shila was shifted to Irwin Hospital, Amravati. Executive Magistrate Abdul Jabbar visited the hospital. He ascertained from Medical Officer on duty, condition of the patient to give her statement. Medical Officer examined Shila and opined that she was conscious and mentally fit to give her statement. Executive Magistrate then put certain preliminary questions to the patient and on being satisfied recorded her dying declaration (Exhibit 59). This dying declaration was recorded on 22/12/2001 between 22.50 and 23.05 hours.

(iv) It appears that before this dying declaration, statement of Shila was recorded on 21/12/2001 itself by Executive Magistrate in which she narrated that she received burn injuries due to accidental fire. The second dying declaration recorded by Executive Magistrate was submitted to Police Station. On receiving the same, FIR was registered for the offences under Sections 498A, 307 read with 34 of IPC. PI Mahajan took over investigation and recorded statements of mother, brother and other relatives of Shila. They disclosed about the oral dying declarations given by Shila to them implicating Archana for setting her on fire. Accused were then arrested.

(v) On 23/12/2001 PSI Taide visited the hospital and recorded statement of Shila. Before PSI Taide, Shila stated that Archana and Ranjana both came to her house. Archana was holding kerosene can, she poured kerosene on her person and Ranjana set her on fire by lighting a match stick.

(vi) Shila succumbed to burn injuries on 24/12/2001 at 10.15 pm. Offence

punishable under Section 302 of IPC was then added. Inquest Panchanama was drawn. Dead body was sent for postmortem to General Hospital Amravati. Dr B. K. Deshmukh (PW4) performed postmortem on 25/12/2001 and found 82% burn injuries on the person of deceased. Medical Officer opined cause of death due to extensive burns with shock 82% deep burns.

(vii) Investigating agency forwarded seized muddemal to Chemical Analyser. On completing investigation, charge-sheet was submitted to the concerned Judicial Magistrate who in turn, committed the case for trial to the Court of Sessions.

3. On committal of the case, trial Court framed charge against the accused at Exhibit 10. They pleaded not guilty and claimed to be tried. According to the accused, Shila sustained burns accidentally while cooking food and they were falsely implicated.

4. To bring home guilt of the accused, prosecution examined in all nine witnesses. After going through the evidence adduced by the prosecution, learned Judge convicted and sentenced appellant Archana and acquitted remaining accused as stated herein above. Hence these appeals.

5. We have heard the learned counsel for parties. On careful consideration of the facts and circumstances of the case, arguments advanced by learned counsel and learned Addl. Public Prosecutor, reasoning's recorded by the trial Court and evaluation of evidence on record, for the below mentioned reasons, we are of the opinion that prosecution could not prove the guilt of the accused beyond reasonable doubt and the trial Court ought to have acquitted even accused Archana.

6. At the threshold we may mention here that the learned Addl. Public Prosecutor did not press the state appeal against the judgment and order of acquittal of the accused. He however, strongly supported the judgment and order of conviction against accused Archana.

7. Prosecution case is mainly based on three written dying declarations and oral dying declarations given to father PW1 Pama Dolas, PW2 brother Gajanan, PW5 Aunt Shevantabai and PW7 Uncle Ramdas Dolas.

8. On the law relating to appreciation of dying declaration, learned counsel for appellant Archana vehemently submitted that there is no endorsement on dying declaration Exhibit 59 that it was read over to the victim and she admitted the contents therein to be true and correct. Learned counsel submitted that presence of father at the time of recording dying declaration (Exhibit 59) is admitted and in such circumstance, it cannot be said that dying declaration (Exhibit 59) is free from doubt. According to learned counsel, Dr G.K. Belokar who issued a certificate on dying declaration did not record that patient was fit to give her statement though it is stated that she was conscious and mentally fit. It is submitted that dying declarations are inconsistent and in such a case pick and chose cannot be allowed; particularly in the light of the fact that the first dying

declaration recorded on the same day clearly shows that it was a case of accidental fire.

9. In support of his submissions, learned counsel for appellant Archana placed reliance on :

(a) Kalyan Balasaheb Barungale, v. State of Maharashtra (1998 Cri.L.J. 1859.)

(b) Shivaji s/o Tukaram Patdukhe v. State of Maharashtra (2004 ALLMR (Cri) 3220)

(c) Suresh s/o Arjun Dodorkar (Sonar) v. State of Maharashtra (2005 ALL MR (Cri) 1599)

(d) Abdul Riyaz Abdul Bashir v. State of Maharashtra (2012 ALL MR (Cri) 2188)

(e) Balu @ Raju Rustam Suradkar v. State of Maharashtra (2016(1) Mh.L.J. (Cri) 304.)

(f) Anil Laxman Hichami v. State of Maharashtra (2016 (5) Mh.L.J. (Cri) 63)

(g) Munnabee w/o Shoukat Tadvi v. State of Maharashtra (2016(5) Mh.L.J. (Cri.) 637.)

10. In response to the submissions made on behalf of appellant Archana, learned Addl. Public Prosecutor submitted that in case of multiple dying declarations, each dying declaration has to be considered initially on its own merits and one cannot be rejected because of the contents of other dying declarations. It is contended that certificate of doctor as to fitness is not always necessary and absence of certificate is not enough to keep the dying declaration out of consideration. In support of arguments, learned Addl. Public Prosecutor relies upon :

(a) Sohan Lal alias Sohan Singh and ors. v. State of Punjab (AIR 2003 Supreme Court 4466)

(b) Nallam Veera Stayanandam and ors. v. Public Prosecutor, High Court of A.P. ((2004) 10 Supreme Court Cases 769.)

(c) Sayarabano @ Sultana Begum v. State of Maharashtra (2007 Cri.L.J. 1458.)

(d) State of Rajasthan v. Champa Lal (2009 Cri.L.J. 2403)

11. We have gone through the authorities relied upon by the learned counsel for the parties. Needless to state that in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny keeping in view the fact that statement has been made in the absence of accused who had no opportunity of testing the veracity of the statement by cross examination. It is a settled law that once the Court comes to a conclusion that dying declaration is the truthful version as to the circumstance of death and the assailant of victim, no further corroboration is required to such a dying declaration.

12. Keeping in view these legal parameters, we now advert to the evidence of star witness PW3 Executive Magistrate Abdul Jabbar. On 22/12/2001 he received a memo from police to record dying declaration of Shila S. Dhole. He states that on receiving memo, he went to Irwin hospital. He ascertained from the Medical Officer on duty regarding condition of the patient to give her statement. Medical Officer examined the patient and issued fitness certificate on dying declaration. The endorsement made by doctor is at Exhibit-58. The evidence of PW3 Abdul Jabbar shows that he ascertained from the patient whether she was under influence of anyone. Then he put some preliminary questions and ensured that she is fit to give her statement. He then recorded dying declaration of the patient in her own words. After recording dying declaration he could not obtain signature or thumb mark of the patient as hands and fingers of patient were severely burnt. The note was accordingly made at the bottom of dying declaration. PW3 Abdul Jabbar proves dying declaration at Exhibit 59. After writing of statement was over, he again asked the Medical Officer to examine the patient and certify whether she was fit during the course of recording dying declaration or not. Doctor examined her and endorsed regarding her fitness vide Exhibit 60.

13. The next dying declaration was recorded by PW9 PSI Taide. On 23/12/2001 he had been to the hospital and recorded statement of Shila. It is at Exhibit 72. PSI Taide admitted that he did not verify from the Medical Officer about the fitness of the patient to give her statement. It appears that Exhibit 72 was initially recorded as statement under Section 161 of the Code of Criminal Procedure and after the death of victim, treated as dying declaration under Section 32 of the Evidence Act.

14. The crucial question that now falls for our consideration is whether reliance can be placed on dying declarations Exhibits 59 and 72. Exhibit 59 recorded by Executive Magistrate shows that victim attributed role to accused No.1 Archana and stated that when she was cooking food her sisterinlaw came, poured kerosene on her person and set her on fire. She disclosed that her father-in-law and mother-in-law were present but no one tried to extinguish fire. Incident occurred on 21/12/2001 at 12 in the noon. The first dying declaration came to be recorded on 21/12/2001 at 05.05 pm by the Executive Magistrate. In the first dying declaration Shila stated that she was cooking food and when she pumped the stove it flared up and she was caught by fire.

15. As mentioned above, second dying declaration (Exhibit 59) came to be recorded on 22/12/2001 after arrival of father, brother and other relatives. This statement was recorded between 22.50 and 23.05 hours. In dying declaration victim stated that Archana poured kerosene and set her on fire. So far as the third dying declaration recorded by PSI Taide is concerned, victim had changed the manner of occurrence of incident and stated that her sisterinlaw Archana and Ranjana came to the house. She was cooking food. Archana was holding a kerosene can in her hand. She poured kerosene on the person of Shila and Ranjana set her on fire by lighting a match stick. Thus in both the dying

declarations on which vehement reliance is placed by the prosecution, there is material inconsistency regarding manner of occurrence of incident. In this view of the matter, we do not find it necessary to go into the technical and procedural aspects of recording of dying declaration as pointed out by the learned counsel for appellant Archana.

16. PW1 Pama Dolas, father of victim admitted in unequivocal terms that he was present at the time of recording dying declaration (Exhibit 59) and he arranged for recording the second dying declaration. It is significant to note that father, brother and other relatives of the victim reached the hospital on the same day in the afternoon. PW1 states that he came to know that on the basis of first dying declaration given by his daughter, no action could be taken against the accused persons and so he arranged for the second dying declaration. Intervention of father and his presence at the time of recording dying declaration Exhibit 59 would clearly indicate that dying declaration is not above suspicion and doubt.

17. On oral dying declarations, prosecution examined four witnesses. PW1 father Pama Dolas, PW2 brother Gajanan, PW5 aunt Shevantabai and PW7 uncle Ramdas. The evidence of these witnesses on oral dying declarations is in conflict with the written dying declarations Exhibits 59 and 72. Another reason to not to give importance to the evidence of these witnesses on oral dying declarations is unexplained delay in not disclosing the incident to police. It is stated by Investigating Officer PI Mahajan that on 23/12/2001 FIR could be registered against the accused. The statements of witnesses on oral dying declarations were not recorded on the same day. Around thirty hours delay in recording statement of father, brother and other witnesses has not been explained by the prosecution. These witnesses met police in the hospital. Witnesses reached the hospital on the same day. Father had stated that he was not satisfied with the dying declaration recorded by the Executive Magistrate and arranged for second dying declaration when he came to know that no action can be taken against the accused on the basis of first dying declaration. In view of these facts elicited in cross-examination, prompt action at their end was expected and delay would certainly throw doubt on the oral dying declarations allegedly given to the close relatives of the victim.

18. It is pertinent to note that all the accused including Archana have been acquitted of the offence punishable under Section 498A of IPC. The order of acquittal against Archana is not challenged by the State. In none of the dying declarations, Shila attributed any motive to the accused to set her on fire. Initially she disclosed about the accidental fire. Then implicated Archana as the sole culprit and on the third occasion, changed the entire manner of occurrence of incident implicating Archana and Ranjana both in commission of alleged crime.

19. In this premise and in totality of the facts and circumstances, we are of the considered view that dying declarations, oral as well as written are suspicious and none of the multiple dying declarations on which reliance is placed by the prosecution can be relied upon as true and voluntary statement of the accused.

If the dying declarations are disbelieved in entirety, conclusion is inevitable that prosecution could not establish the guilt of accused and even accused Archana ought to have been acquitted. As we find conviction and sentence of appellant Archana unsustainable in law, we proceed to pass the following order :

Criminal Appeal No.127 of 2003, filed by the State Government, is dismissed.

Acquittal of surviving respondent No.1 therein viz. Smt. Ranjana Prakash Shende and respondent No.4 Ashok Parashram Dhole is maintained.

Criminal Appeal No.712 of 2002 filed by convicted accused Kumari Archana Sitaram Dhole is allowed.

The Judgment and order holding her guilty for the offence under Section 302 of the Indian Penal Code, delivered on 28/11/2002 by learned Additional Sessions Judge, Amravati, in Sessions Trial No.38 of 2002, is quashed and set aside.

The bail bonds furnished by her are cancelled.

Muddemal property be destroyed after appeal period is