
(2015) 05 BOM CK 0094
In the Bombay High Court
Case No : Criminal Appeal No. 283 of 2008

Ashok Yeshwant Jagtap

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 05-05-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 235(2)
Penal Code, 1860 (IPC) — Section 300, 302, 304, 307, 498-A

Citation : (2015) 05 BOM CK 0094

Hon'ble Judges : V.K. Tahilramani, J;B.P. Colabawalla, J

Bench : Division Bench

Advocate : A. Majid H. Banderkar, Advocate appointed by Legal Aid Committee, for the Appellant; G.P. Mulekar, APP, Advocates for the Respondent

Final Decision : Dismissed

Judgement

B.P. Colabawalla, J.—By this Appeal, preferred by the Appellant - Original Accused - Ashok Yeshwant Jagtap, exception is taken to the judgement and order dated 11th February, 2008 passed by the Additional Sessions Judge, Islampur, in Sessions Case No. 23 of 2007. By the said judgement and order, the learned Sessions Judge convicted the Appellant under section 235(2) of the Code of Criminal Procedure, 1973 of the offence under section 302 of IPC and sentenced him to suffer imprisonment for life and to pay a fine of Rs. 5,000/-. In default thereof, the Appellant is to suffer a further R.I. for six months.

2. The prosecution case stated briefly, is thus-

(a) The deceased - Sangita is the wife of the Appellant and the daughter of P.W. 2 - Akkatai. The Appellant and the deceased - Sangita were married for about 13 years before the incident and use to reside on Kapari Road, at Shirala. The Appellant and the deceased - Sangita have two children. The two children used to reside with P.W. 2 - Akkatai since childhood. The reason for this was that the Appellant used to ill treat and assault the deceased - Sangita after consuming liquor and use to ask her to bring money for him.

(b) The incident in question occurred on 13th March, 2007 at around 11.30 p.m. At that time, the neighbour of P.W. 2 - Akkatai, (Husen Ahamad Mulla) came to her house and informed her that he had received a phone call that the deceased - Sangita had got burnt and they should go there immediately. Accordingly, P.W. 2 - Akkatai went to the Government Hospital, Shirala, where she saw her daughter deceased - Sangita being treated, and saline was being administered to her. Thereafter, the deceased - Sangita was shifted from the Government Hospital, Shirala to Civil Hospital, Sangli. At the time of shifting the deceased - Sangita from the Government Hospital, Shirala to Civil Hospital, Sangli, P.W. 2 - Akkatai (mother of deceased) accompanied her. At that time, P.W. 2 - Akkatai asked the deceased - Sangita how she sustained the burn injuries. The deceased - Sangita replied that her husband asked her to bring money from them. Since she refused, her husband said that he will not keep her alive that day. As the deceased - Sangita refused to bring any money, a scuffle took place and he threw the deceased - Sangita on the bed. Thereafter, he brought a rockel can and poured kerosene on her person and ignited a match stick and set her on fire.

(c) After she was admitted to the Civil Hospital Sangli, P.W. 5 - Dr. Nilesh Shende, who was on duty at that time, recorded the history narrated by the deceased - Sangita that she had come with a complaint of homicidal burns and at 11:30 pm on 13th March 2007, the Appellant poured kerosene on her and ignited her with a match-stick causing burns on the entire body. Thereafter, the statement of the deceased - Sangita was also recorded by P.W. 4 - ASI Shrikant Shinde. In the statement given by the deceased - Sangita (in the form of a dying declaration) to P.W. 4 - ASI Shinde, the deceased - Sangita informed him that on 13th March, 2007 at about 11.30 p.m., the Appellant came home in a drunken condition, as usual. When the deceased - Sangita asked him not to drink, he abused and beat her by kicks and fist blows. While she was crying, the Appellant told her why she was crying and he will kill her. The Appellant then took the can of kerosene from the house and poured kerosene on the deceased - Sangita and set her on fire by a match-stick. When the deceased - Sangita started screaming for help, the Appellant took out the saree from her person and threatened the deceased - Sangita not to disclose to anyone about the incident. Due to the screaming, the deceased - Sangita's neighbours, Ramchandra Yadav, Shama Yadav and Padmini Yadav came to her home and after seeing her with burn injuries, made a phone call to her mother, P.W. 2 - Akkatai. This statement (dying declaration) was also endorsed by P.W. 5 - Dr. Shende stating that on examining the deceased - Sangita he found that she was conscious and fit to give a statement. Thereafter, P.W. 4 - ASI Shinde forwarded the dying declaration to Vishrambaugh Police Station for onward submission to Shirala Police Station as the incident had occurred within the jurisdiction of the Shirala Police Station.

(d) On receipt of the said dying declaration, Shirala Police Station registered Cr. No. 17/07 for offences punishable under Sections 307 and 498-A of IPC. Thereafter, investigation commenced. Deceased - Sangita succumbed to her burn injuries and expired on 17th March, 2007. In view thereof, an inquest

panchnama was drawn and the post mortem was performed. The death of the deceased - Sangita was informed to the Shirala Police Station whereupon the offence under Section 307 of IPC was altered to Section 302 of IPC. After completion of the investigation, chargesheet came to be filed and in due course the case was committed to the Court of sessions.

3. Charge came to be framed against the Appellant under section 302 of IPC. The Appellant pleaded not guilty to the said charge and claimed to be tried. His defence was that of total denial and false implication. After going through the evidence adduced in this case, the learned Sessions Judge convicted and sentenced the Appellant as stated earlier in paragraph 1 above. Hence the present Appeal.

4. We have heard the learned Advocate for the Appellant and the learned APP for the State. After carefully considering the facts and circumstances of the case, hearing the arguments advanced by the learned Advocates for the parties, and minutely perusing the evidence on record and the judgment delivered by the learned Sessions Judge, for the reasons mentioned hereinafter, we are of the opinion that the Appellant poured kerosene on the body of the deceased - Sangita and set her on fire which caused her death.

5. The conviction of the Appellant is mainly based on the evidence of P.W. 4 - ASI Shrikant Shinde, P.W. 5 - Dr. Nilesh Shende and P.W. 2 - Akkatai (the mother of the deceased). Before all these three witnesses, the deceased - Sangita gave a dying declaration. P.W. 4 - ASI Shinde has deposed that on 14th March 2007, he was attached to the Police Chowky at Civil Hospital, Sangli. At about 8.00 a.m. he received a phone message from Vishrambagh Police Station that the deceased - Sangita was admitted due to burn injuries and that he should record her statement. He accordingly went to the burn ward of Civil Hospital, Sangli where he met P.W. 5 - Dr. Nilesh Shende and asked him whether he could record the statement of the deceased - Sangita. Thereafter, the said Dr. Nilesh Shende as well as P.W. 4 - ASI Shinde went to the deceased - Sangita and P.W. 5 - Dr. Nilesh Shende examined her. P.W. 4 - ASI Shinde has further deposed that after examining the deceased - Sangita, P.W. 5 - Dr. Nilesh Shende stated that he could record her statement. P.W. 4 - ASI Shinde obtained a Certificate from the doctor to that effect. Thereafter, ASI Shinde recorded the statement of the deceased - Sangita which is at Exh. 14. In the said statement, the deceased - Sangita informed P.W. 4 - ASI Shinde that on 13th March 2007, at about 11.30 p.m. the Appellant came home in a drunken condition, as usual. When the deceased - Sangita asked him not to drink, he abused her and beat her by kicks and fist blows. While she was crying, the Appellant stated that he will kill her and he brought kerosene and poured it on the deceased - Sangita and set her on fire with a match-stick. When the deceased - Sangita started screaming for help, the Appellant took out the saree from her person and told her not to disclose to anyone about the incident. Due to the screaming, the deceased - Sangita's neighbours came to her and after seeing her with burn injuries, made a phone

call to her mother P.W. 2 - Akkatai. After recording the aforesaid statement, P.W. 4 - ASI Shinde put the date and time below the statement and also obtained the signature of the deceased - Sangita thereon. He also signed the said statement. When shown the said statement during his deposition, P.W. 4 - ASI Shinde has stated that the deceased - Sangita's signature was put on the said statement in his presence and that he identifies the same. He also stated that below the said statement, P.W. 5 - Dr. Nilesh Shende had once again given his certificate and put his signature, date and time thereon. He has further stated that P.W. 5 - Dr. Nilesh Shende was present throughout the recording of the said statement. There is nothing that has been elicited in the cross-examination of P.W. 4 - ASI Shinde to discredit his testimony. It is not the case of the Appellant that P.W. 4 - ASI Shri Shrikant Shinde had any enmity with the Appellant and therefore he was being falsely implicated.

6. The evidence of P.W. 4 - ASI Shinde and the dying declaration (of the deceased - Sangita - Exh. 14) recorded by him, is further corroborated by the evidence of P.W. 5 - Dr. Nilesh Shende. P.W. 5 - Dr. Nilesh Shende has deposed that on the day of the incident, he was on round the clock duty from 8.00 a.m. on 13th March, 2007 to 8.00 p.m. on 14th March, 2007 in the burn ward of Civil Hospital, Sangli. During his duty, the deceased - Sangita was admitted in the burn ward. At the time of admission of the deceased - Sangita, P.W. 5 - Dr. Nilesh Shende recorded the history as narrated by her that she had come with a complaint of homicidal burns and at around 11.30 p.m. on 13th March 2007, at her residence, the Appellant poured kerosene on the deceased - Sangita and set her on fire with a match-stick causing burns on the entire body. This was a result of their personal conflict. This history as recorded by the P.W. 5 - Dr. Nilesh Shende is also a part of the record at Exh. 22. P.W. 5 - Dr. Nilesh Shende has further deposed that alongwith P.W. 4 - ASI Shinde, who came to the hospital that morning, he went to meet the deceased - Sangita wherein he examined whether she was fit enough to give a statement. On examining the deceased - Sangita, P.W. 5 - Dr. Nilesh Shende found that she was conscious and fit enough to give a statement and therefore gave a certificate to that effect. This certificate is given at the top of the dying declaration itself at Exh. 14. P.W. 5 - Dr. Nilesh Shende has further deposed that thereafter the deceased - Sangita narrated the entire incident that occurred on 13th March, 2007 to him and P.W. 4 - ASI Shinde, who recorded the same. After recording of the said statement, the deceased - Sangita signed it in his presence and P.W. 5 - Dr. Nilesh Shende identified the signature of the deceased - Sangita. He has further deposed that P.W. 4 - ASI Shinde also put his signature below the statement in his presence. Thereafter, P.W. 5 - Dr. Nilesh Shende, after examining the deceased - Sangita once again gave another endorsement at the bottom of the dying declaration (Exh. 14). He has stated that the contents of the statement are correctly recorded as stated by the deceased - Sangita. Here also, we find that there is nothing that has been elicited in the cross-examination of P.W. 5 - Dr. Nilesh Shende to discredit his testimony.

7. On perusing the depositions of P.W. 4 - ASI Shinde as well as P.W. 5 - Dr. Nilesh Shende, we find that the dying declaration recorded by P.W. 4 - ASI Shinde is adequately corroborated by the evidence of P.W. 5 - Dr. Nilesh Shende. We find that the testimony of P.W. 4 - ASI Shinde and P.W. 5 - Dr. Nilesh Shende to be cogent, consistent, trustworthy and one which inspires confidence. Hence we have no hesitation in relying upon the same.

8. Over and above these two witnesses, the prosecution is also relying upon the evidence of P.W. 2 - Akkatai (mother of the deceased - Sangita). From the evidence of P.W. 2 - Akkatai, it is clear that the deceased - Sangita made an oral dying declaration to her mother. P.W. 2 - Akkatai has deposed that the deceased - Sangita was her daughter and was given in marriage at Shirala to the Appellant. The deceased - Sangita and the Appellant had two children who were residing with P.W. 2 - Akkatai since their childhood since the Appellant used to ill-treat the deceased - Sangita and assault her after drinking liquor and constantly asking her to bring money for him. P.W. 2 - Akkatai has further deposed that on 13th March, 2007 her neighbour (Husen Ahmad Mulla) came to her house and informed her that he had received a phone call that the deceased - Sangita had got burnt and they should go there immediately. On receiving the aforesaid information, P.W. 2 - Akkatai went to the Government Hospital, Shirala where she saw the deceased - Sangita being treated and saline was being administered to her. Thereafter, the deceased Sangita was shifted to Government Hospital, Sangli. P.W. 2 - Akkatai has stated that when the deceased - Sangita was being shifted from the Government Hospital, Shirala to Civil hospital, Sangli, P.W. 2 - Akkatai accompanied her and asked Sangita what had happened. In reply thereto, the deceased - Sangita stated that the Appellant had asked her to bring money from them and since she refused, the Appellant said that he would not keep her alive that day. Since she refused, a scuffle took place and the Appellant threw the deceased - Sangita on the bed. Thereafter, he brought a rockel can and poured kerosene on the person of the deceased - Sangita and ignited a match-stick and set her on fire. On perusing the evidence of P.W. 2 - Akkatai, it is clear that an oral dying declaration was made by the deceased - Sangita to her mother, P.W. 2 - Akkatai. There is nothing that is elicited in the cross-examination of P.W. 2 - Akkatai to discredit her testimony.

9. In addition to the above evidence, the prosecution is also relying upon the evidence of P.W. 6 - Dr. Basappa Koli who conducted the post mortem on the body of the deceased - Sangita. P.W. 6 - Dr. Koli has deposed that the post mortem was conducted on the dead body of the deceased - Sangita on 17th March, 2007 from 3.15 p.m. to 4.15 p.m. After the post mortem was conducted, post mortem notes were prepared (Exh. 24). In the post mortem notes, at column 17, it is stated as under:-

After conducting the post mortem, P.W. 6 - Dr. Koli opined that the death of the deceased - Sangita occurred because of "shock due to 90 % mixed burn".

10. In the facts of this case, we find that there is a written dying declaration that

was recorded by P.W. 4 - ASI Shinde as well as an oral dying declaration made by the deceased - Sangita to P.W. 2 - Akkatai. In addition thereto, we find that P.W. 5 - Dr. Nilesh Shende has also noted in the history of the deceased - Sangita that she had come with a complaint of homicidal burns and at around 11.30 p.m. on 13th March, 2007, the Appellant poured kerosene on the deceased - Sangita and ignited a match-stick and set her on fire causing burns on the entire body. After carefully going through the record, we are clearly of the view that all this evidence points to the guilt of the Appellant and the prosecution has proved its case beyond reasonable doubt that the Appellant poured kerosene on the deceased - Sangita and set her ablaze which caused her death.

11. Mr Banderkar submitted that the testimony of P.W. 2 - Akkatai should not be relied upon as she being the mother of the deceased - Sangita was an interested witness. To counter this argument, Mrs. Mulekar, the learned APP for the State, rightly relied upon the observations of the Supreme Court in the case of Masalti Vs. State of U.P., AIR 1965 SC 202 : (1964) 8 SCR 133 and more particularly paragraph 14 thereof, which reads as under:-

"14. Mr Sawhney has then argued that where witnesses giving evidence in a murder trial like the present are shown to belong to the faction of victims, their evidence should not be accepted, because they are prove to involve falsely members of the rival faction out of enmity and partisan feeling. There is no doubt that when a criminal court has to appreciate evidence given by witnesses who are partisan or interested, it has to be very careful in weighing such evidence. Whether or not there are discrepancies in the evidence; whether or not evidence strikes the court as genuine whether or not the story disclosed by the evidence is probable, are all matters which must be taken into account. But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, criminal courts have to deal with evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautions in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct."

(emphasis supplied)

12. In Masalti's case the Supreme Court has clearly laid down that a mechanical rejection of the evidence of an interested witness would invariably lead to failure of justice. The court has to carefully appreciate such evidence and see whether there are any discrepancies and whether the evidence strikes the court as genuine and probable. In the facts of the present case, we have carefully scrutinized the evidence of P.W. 2 - Akkatai and we do not find any discrepancies in her evidence. We find her testimony to be genuine and the oral dying

declaration made to her, is in consonance with the written dying declaration recorded by the P.W. 4 - ASI Shinde. We therefore have no hesitation in rejecting this argument. In any event, even if we were not to rely upon the evidence of P.W. 2 - Akkatai on the ground that she was an interested witness, it would make no difference to the outcome of the present case. Apart from evidence of P.W. 2 - Akkatai, there is evidence of two other independent witnesses viz. P.W. 4 - ASI Shinde as well as P.W. 5 - Dr. Nilesh Shende which would be enough to convict the Appellant of the charge under section 302 of IPC. We therefore find no substance in this argument.

13. Mr Banderkar, learned counsel appearing for the Appellant, next submitted that the present case would not fall under section 302 of IPC as there was no motive to murder the deceased - Sangita. He submitted that in the present case, at the highest the Appellant could be convicted either under section 304, Part II of IPC or under section 304, Part I of IPC. We cannot agree with the aforesaid submission. The motive to kill the deceased - Sangita has been clearly brought out in the evidence of P.W. 2 - Akkatai as well as in the dying declaration recorded by P.W. 4 - ASI Shinde. The evidence of P.W. 2 - Akkatai as well as the dying declaration of the deceased - Sangita clearly establish that because the deceased - Sangita refused to bring money for the Appellant, he brought a kerosene can and poured kerosene on her person and ignited a match-stick and set her on fire. It is therefore totally incorrect to submit that there was no motive in the present case. In any event, looking to the injuries suffered by the deceased - Sangita, we are clearly of the view that by pouring kerosene on the deceased - Sangita, the Appellant intended of causing bodily injury to her, sufficient in the ordinary course of nature to cause her death. In this regard, it would be apposite to reproduce the provisions of section 300 of IPC which reads as under:-

"300. Murder.--Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or--

2ndly.--If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or--

3rdly.--If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or--

4thly.--If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

Exception 1.

Exception 2.

Exception 3.

Exception 4.

Exception 5."

(emphasis supplied)

Section 302 of IPC stipulates that whoever commits murder shall be punished with death, or imprisonment for life, and shall also be liable to a fine.

14. The provisions of Section 300 of IPC came for interpretation before the Supreme Court in the case of Budhi Lal Vs. State of Uttarakhand, AIR 2009 SC 87 : (2009) CriLJ 360 : (2008) 10 JT 572 : (2008) 12 SCALE 848 . In paragraphs 20 and 21, the Supreme Court opined as under:-

"20. These observations of Vivian Bose, J. have become locus classicus. The test laid down by Virsa Singh Vs. The State of Punjab, AIR 1958 SC 465 : (1958) CriLJ 818 : (1958) 1 SCR 1495 for the applicability of clause "Thirdly" is now ingrained in our legal system and has become part of the rule of law. Under clause Thirdly of Section 300 IPC, culpable homicide is murder, if both the following conditions are satisfied i.e. (a) that the act which causes death is done with the intention of causing death or is done with the intention of causing a bodily injury; and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must be proved that there was an intention to inflict that particular bodily injury which, in the ordinary course of nature, was sufficient to cause death viz. that the injury found to be present was the injury that was intended to be inflicted.

21. Thus, according to the rule laid down in Virsa Singh Vs. The State of Punjab, AIR 1958 SC 465 : (1958) CriLJ 818 : (1958) 1 SCR 1495 even if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be murder. Illustration (c) appended to Section 300 clearly brings out this point."

(emphasis supplied)

15. In view of the provisions of section 300 of IPC as well as the authoritative pronouncement of the Supreme Court in Budhi Lal's case, we are unable to agree with the submission of Mr. Banderkar that in the present case the Appellant could not be punished under section 302 of IPC. It must be mentioned here that none of the exceptions have been invoked in the present case to take it out of the purview of section 300. This argument of Mr. Banderkar would therefore have to be rejected.

16. Lastly, Mr. Banderkar submitted that the dying declaration ought not to be relied upon because Exh. 15 (the report of the Vishrambaugh Police Station

dated 14th March, 2007) states that the deceased - Sangita's brother-in-law, Bhimrao Yashwant Jagtap, brought her to the Hospital for treatment of burn injuries which occurred due to bursting of the stove. He submitted that this would indicate that this was a case of accidental burning and not homicidal burns. This argument is made only to be rejected. The statement recorded at Exh. 15 was given by the brother of the Appellant. It is obvious that the aforesaid statement has been given by the brother of the Appellant only for the purpose of shielding the Appellant from the consequences of his actions of pouring kerosene on the deceased - Sangita which ultimately led to her death. The reliance therefore placed on Exh. 15 by Mr. Banderkar is of no assistance to the Appellant. No other argument was advanced on behalf of the Appellant.

17. For all the aforesaid reasons, the conviction and sentence of the Appellant under section 302 of IPC is maintained and the Appeal is dismissed.

18. The Office is directed to communicate this order to the Appellant who is in prison.