

(1998) 11 BOM CK 0135
In the Bombay High Court
Case No : Criminal Appeal No. 677 of 1994

Balasaheb Abasaheb Farate

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 07-11-1998

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 294
Evidence Act, 1872 — Section 3, 32, 45, 9
Penal Code, 1860 (IPC) — Section 302, 307, 498

Citation : (1999) 5 BomCR 170 : (1999) 2 DMC 717 : (1999) 1 MhLj 342

Hon'ble Judges : Vishnu Sahai, J; Ashok Desai, J

Bench : Division Bench

Advocate : Mrs. Revti Mohite Dere, for the Appellant; D.N. Salvi, Assistant Public Prosecutor, for the Respondent

Judgement

Vishnu Sahai, J.—Through this appeal the appellant challenges the judgment and order dated 29-10-1994 passed by the Additional Sessions Judge, Pune, in Sessions Case No. 88/94, whereby he has been convicted and sentenced in the manner stated hereinafter :--

i) u/s 302 I.P.C. to suffer imprisonment for life and to pay a fine of Rs. 1000/- in default to undergo 1 year"s R.I. :

ii) u/s 498-A I.P.C. to suffer 2 years R.I. and to pay a fine of Rs. 500/- in default to undergo 6 months R.I.:

The substantive sentences of the appellant were ordered to run concurrently.

2. In short the prosecution case is that the appellant was married to the deceased Bebi on 20-5-1987 in village Dokarai, Taluka Shrigonda, Dist. Ahmednagar. After the marriage the deceased started staying with the appellant in his house in village Pimpalsuit. Out of the wedlock two children were born.

On 5-11-1993 the appellant asked Bebi to go to her father"s house for bringing money to celebrate Diwali. But she did not do so. On the night of 6- 11-1993

Bebi sustained severe burn injuries in her house. She was immediately taken to Dr. Lonker and thereafter she was brought to K.E.M. Hospital, Pune.

On 7-11-1993 at about 3.45 a.m., the Special Executive Magistrate Ulhas Dattatray Koranne, recorded her dying declaration at the K.E.M. Hospital, in question and answer form. It reads thus:

"Ques. Are you fully conscious?

Ans. Yes.

Ques. How are you burnt?

Ans. At about 7-00 p.m. after i returned from work of uprooting the onions, when I lighted the stove for preparation of Tea and pumped and pinned. The kerosene came out and when the match is lighted the fire broke out and I am burnt thereby.

Ques. Who extinguished the fire?

Ans. Both (mother-in-law and husband) have extinguished the fire.

Ques. Whether you have complaint against anyone?

Ans. I have no complaint against any one."

On 12-11-1993 she disclosed to her uncle Zumbar Baravkar P.W. 1 and aunt Sindhu Sonawane P.W. 2 that the appellant wanted her to go to her parents house to bring money for Diwali and on her refusing to accede to his wishes he poured kerosene oil on her and burnt her. Thereafter she asked Sindhubai to call the police as she wanted to make a statement. Consequently Sindhubai went to Samarth Police Station where she told the police the said facts. The police then asked her to make an application which she made and pursuant to that a second dying declaration of Bebi was recorded by the Special Judicial Magistrate, Aniruddha Yellappa Sasane P.W. 5. The said dying declaration is also in question and answer form and we extract the same since its perusal is necessary for the disposal of this appeal. The relevant portion of the said dying declaration are as under:

"1. Ques: Are you fully conscious?

Ans: Yes.

2. Ques: I am Special Judicial Magistrate, which fact is told to you. Did you understand it perfectly?

Ans: Yes.

3. Ques: You had recorded your statement earlier. Is it not true?

Ans: Yes. I had given.

4. Ques: What did you tell in your statement at that time?

Ans: I had told that as the stove exploded, I have been burnt.

5. Ques: What is the reason for recording statement again?

Ans: Since I am not able to bear myself and therefore I want to record my real statement.

6. Ques: What do you want to say about the statement earlier recorded?

Ans: The earlier statement was false, because my mother-in-law had brought pressure on me. Because of two children I had recorded false statement."

7. Ques: What do you want to tell in the present statement?

My husband told me to go to Bazar on Saturday and he also told me that after the purchase in the bazar is over go to your father and bring money from him. I did not go. When I came home from field after uprooting the onions, my husband beat me by whip. After I went in the room, my husband came there. He poured kerosene from a tin on my person. Then he set fire to me by a match stick. I came out of the room. Seeing me, my mother in law shouted. "burnt, burnt". She tried to extinguish the fire.

8. Ques : Have you anything to say more than this?

Ans: No.

9. Ques: Are you recording the present statement under any pressure of anyone?

Ans: No."

It is pertinent to point out that prior to the recording of the said dying declaration Dr. Jayshree Todkar had medically examined Bebi and had found her in a fit condition to give the statement,.

2A. On the basis of the said dying declaration the F.I.R.. was registered as Crime No. 105 of 1993 of Shirur Police Station. Initially the F.I.R. was registered u/s 307 read with 498-A I.P.C. but on Bebi's death on 17-11-1993 the offence was converted to one u/s 302 I.P.C..

3. The investigation was conducted in the usual manner by A.P.I. Baban Appasaheb Ethape of Shirur Police Station who on completing the same submitted the chargesheet.

It is pertinent to point out that during the course of investigation on 16-11-1993 the appellant was arrested and was sent for medical examination. He was medically examined by Dr. Pradip Pan"1 P.W. 4, who found on his person the following injuries:

"1. Dot at anterior side of radial aspect of right fore arm blackish in colour. I have not mentioned the size, but it was very tiny.

2. 3 or 4 black spots at middle and index finger of right hand at posterior aspect.

These aspects were also tiny."

In the opinion of Dr. Patil the said injuries were simple in nature and were 8 to 10 days old.

4. Going backwards the autopsy on the corpse of Bebi was conducted on 18-11-1993 by Dr. Mahajan. Since the genuineness of the post mortem has been admitted by the defence u/s 294 Cr. P.C.. Dr. Mahajan has not been examined by the prosecution.

A perusal of the post mortem report shows that Dr, Mahajan found the following external injuries on the corpse of the deceased:

"1. Superficial to deep burns injuries present involving:-

a) Lips, chin, part of neck.

b) Lt. Breast and multiple small patches over chest wall;

c) Abdominal wall complete;

d) Lt. upper limb complete;

e) Lt. upper limb posterior aspect of lower half of arm and proximal half of back of forearm;

f) Both lower limbs complete;

g) Back partially- Rt. half at places signs of infection total percentage about 70%."

In the opinion of Dr. Mahajan the deceased died out of shock and toxaemia due to burn injuries.

5. The case was committed to the Court of Sessions in the usual manner where the appellant was charged for offences for which he has been found guilty by the learned trial Judge. During trial in all the prosecution examined 7 witnesses. We may straight away mention that there is no eye-witness of the incident, and the evidence on which the conviction of the appellant has been founded comprises of the second dying declaration recorded by the Special Judicial Magistrate Aniruddha Sasane P.W. 5 and the two oral dying declarations by Bebi on 12-11-93 made to Zumbar Baravkar P.W. 1 and Sindhu Sonawane P.W. 2, her uncle and aunt respectively.

6. We have heard Counsel for the parties and perused the evidence on record. In our judgment this appeal deserves to be allowed as we find considerable merit in Mrs. Revti Dere's submission that in the teeth of the categorical averment in the first dying declaration to the effect that the deceased had sustained bum injuries when the stove exploded while she was preparing tea it was not prudent and proper on the part of the learned trial judge to have accepted the second dying declaration and the two oral dying declarations wherein she had stated that the

appellant had poured kerosene oil on her and set her on fire as she had refused to bring money from her parents' place at the time of Diwali.

7. In para 2 of this judgment we have extracted the relevant part of the first and second dying declarations recorded by the Magistrate and the oral dying declaration made to Zumbar P.W. 1 and Sindhu Sonawane P.W. 2, her uncle and aunt respectively.

In our view the 2nd dying declaration is not only at variance with the first dying declaration but in all probability was the result of tutoring. The evidence of Sindhubai P.W. 2 shows that after the 9th her father and other relations were visiting her. She also stated that from 8th onwards every morning and evening she had been visiting her. In the said situation the possibility of Bebi being tutored prior to the making of the second dying declaration on the 12th cannot be eliminated. The Supreme Court in para 16 in the oft referred to case of Khushal Rao Vs. The State of Bombay, has laid down that the following requirements have to be satisfied before the evidence of dying declaration is to be accepted. The said paragraph reads thus:

16) On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration the Court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the (acts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties."

A perusal of the said paragraph would show that the possibility of tutoring has to

be eliminated before a dying declaration can be accepted and if there are more than one dying declarations, as is the case here, they should be consistent.

8. In our view since the second dying declaration and the two oral dying declarations are antagonistic to the first dying declaration where in no uncertain terms Bebi stated that she was accidentally burnt while preparing tea as a consequence of explosion of stove it would not be prudent to place reliance on them.

It would also be pertinent to point out that the Supreme Court in paragraph 12 of the judgment reported in Bhagwandas Vs. The State of Rajasthan, , has held that ordinarily an oral dying declaration by itself is insufficient for sustaining a conviction on the charge of murder.

9. We are constrained to observe that the learned trial judge erred in holding that had the averments mentioned in the first dying declaration been true the appellant would not have sustained burns of a trivial nature and the said dying declaration was the result of the pressure being brought on the declarant by her mother-in-law.

10. It is true that the burns found on the person of the appellant when he was medically examined by Dr. Pradeep Patil, P.W. 4 on 16-11-1993 were not found to be of a serious nature. Dr. Patil stated in his examination-in-chief that if there is an attempt to extinguish fire set to any living person there would be much more injuries to the anterior aspect of the palm and the injuries were of a trivial nature. But the above statement of Dr. Patil has to be read along with his admission in his cross-examination wherein he stated that the injuries sustained to a person trying to extinguish the fire, would depend on the manner in which and the substance with which he was trying to extinguish the fire. In view of the said statement of Dr. Patil, merely because the appellant sustained trivial injuries would be no ground for casting shadow of doubt on the first dying declaration.

11. The second reason given by the learned trial Judge viz. that the mother in-law of the deceased may have prevailed upon her to give the said statement is based on conjecture and there is no evidence to support the averment. It is significant to point out that there is intrinsic evidence to indicate that the mother-in-law of Bebi could not have tutored her. The evidence of Subhash Jaysing Gaikwad P.W. 3 who proved the panchanama of the place of the incident shows that the mother-in-law of Bebi was admitted in Kashti hospital for burns. This was also stated by Zumber Baravkar P.W. 1 in his statement u/s 161 Cr. P.C. Since he did not say this in his statement in the trial Court he was confronted with the said statement and failed to give a satisfactory answer. It is pertinent to point out that Exhibit 16 is a certificate issued by Dr. N.B. Lad of Kashti hospital and the same shows that on 7-11-1993 at 9 a.m. the mother in-law of Bebi was admitted in the said hospital as she had sustained burns on face and inner side of both the hands.

12. For the aforesaid reasons in our view the learned trial Judge erred in

rejecting the first dying declaration. We feel that it would be very hazardous on the facts of this case to place reliance on the second dying declaration and the two oral dying declarations. Admittedly there is no other evidence connecting the appellant with the crime.

13. In the result this appeal is allowed. The conviction and sentence of the appellant for the offences under sections 302 and 498-A I.P.C. is set aside. He is acquitted of the said offences. He is in jail and shall be released therefrom unless wanted in some other case. In case he has paid the fine it shall stand refunded to him.

14. Appeal allowed.