
(2012) 11 BOM CK 0126

In the Bombay High Court

Case No : Criminal Appeal No. 1367 of 2004

Balasaheb Rangnath Waghmare, C. No. 4405, Presently
confined in Nashik Road Central Prison (N.R.C.P.), Nashik
Road-422101 (Maharashtra)

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 21-11-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 302, 307, 498A

Citation : (2012) 11 BOM CK 0126

Hon'ble Judges : V.K. Tahilramani, J;A.R. Joshi, J

Bench : Division Bench

Advocate : D.G. Khamkar, for the Appellant; S.V. Gajare - Dhumal, APP for
State, for the Respondent

Final Decision : Dismissed

Judgement

A.R. Joshi, J.—Heard rival arguments on this Criminal Appeal preferred by the appellant/orig. accused challenging his conviction in the matter of offence punishable u/s 302 of Indian Penal Code. The appellant/accused was convicted vide judgment and order dated 27.1.2004 passed by II Adhoc Additional Sessions Judge, Nashik in Sessions Case No. 3 of 2003. For the offence punishable u/s 302 of IPC, the appellant was sentenced to suffer imprisonment for life and to pay fine of Rs. 3000/- in default to suffer RI for six months. However, he was acquitted for the offence punishable u/s 498A of Indian Penal Code. Admittedly, there is no appeal preferred against the acquittal of the appellant for the charge u/s 498A of IPC. The accused challenged his conviction for the offence punishable u/s 302 of IPC. From the date of arrest of the appellant till date, the appellant is in custody.

2. The case of the prosecution in nutshell is as under :-

The appellant/accused and deceased married sometime in March, 2002. After

some days, the appellant started ill-treating his wife mainly on account of doubting her character. At times, he used to assault her. He was addicted to drinking liquor. Victim Rekha used to complain to her mother regarding ill-treatment caused to her at the hands of the appellant/accused. However, mother of the victim had already lost her husband, and as such was a poor illiterate widow, unable to take any action against the appellant/accused regarding his conduct. Apparently, victim Rekha was silently suffering ill-treatment. However, the situation did not last long even for a year, as within about 7 - 8 months of the marriage, the fateful incident occurred in which victim Rekha was set on fire by the appellant/accused. Said incident occurred on the night of 8.11.2002. It was in fact last day of Diwali celebrations and it was Bhaubeej Day. On that evening, victim Rekha came to her matrimonial home from the house of her mother and that time she was wearing a sort of garland of red colour flowers on her hair. Apparently, the appellant/accused became infuriated on seeing flowers on the hairs of victim and he started abusing her probably on account of suspecting her character. He also took up quarrel with his wife Rekha on the ground that why she had not gone to his brother for the occasion of Bhaubeej. He assaulted her with kicks, fist blows and also stick blows on her back and abdomen. After such assault also, the appellant/accused did not stop, but poured kerosene on her person and set her on fire. Victim Rekha raised shouts for help. Nearby villagers started collecting near the spot of the incident. Seeing this, the accused poured water on the person of victim Rekha trying to extinguish the fire. Intimation reached to the mother and other relatives of the victim. They attended the house of the victim and the appellant, and took her to the hospital in a vehicle. On way to the hospital, victim Rekha informed her mother and other relatives that her husband/appellant had poured kerosene on her person and set her ablaze. As per the medical report, she had sustained 91% burn injuries almost on all parts of the body. When victim Rekha was taking treatment in Civil Hospital, Nashik, one Head Constable Baburao visited the hospital and after ascertaining the condition of the victim from the attending doctor and after obtaining relevant endorsement, recorded statement of the victim on 8.11.2002. It was treated as First Information Report (Exhibit-26). Initially offence was registered against the appellant/accused u/s 307 of Indian Penal Code. On the same day night, at about 22:00 hours Special Judicial Magistrate one Ashok Deshpande (PW-2) attended the hospital and recorded the dying declaration of the victim after obtaining endorsement of the attending Medical Officer and after ascertaining that the victim was conscious and fit to give statement. Said dying declaration is Exhibit-17 in the record and proceedings, wherein the witness had narrated the same story as to the assault at the hands of appellant/accused and subsequently pouring kerosene on her person and setting her on fire.

3. While under treatment in the hospital, victim Rekha succumbed to the injuries on 14.11.2002 and as such the offence which was initially registered u/s 307 of IPC was converted into Section 302 of Indian Penal Code.

4. During the investigation, spot panchnama was conducted after visiting the

house of the appellant/accused. Match box, plastic can having smell of kerosene and other articles and half burnt clothes were seized. Statement of witnesses were recorded. Appellant/accused was put under arrest and after completion of investigation, charge-sheet was filed.

5. During the trial, total seven prosecution witnesses were examined. It is seen that there are two written dying declarations - one Exh. 26 a statement of the victim recorded on 8.11.2002 by PW-7 police head constable Baburao and which is treated as FIR, second one is Exh. 17 recorded by PW-2 Ashok Deshpande, Special Judicial Magistrate which is in question and answer form.

6. Apart from these two written dying declarations, there are three oral dying declarations given to PW-3 Sangita cousin of the victim, PW-4 Alka Suryavanshi mother of the victim, and PW-5 Dipak Suryawanshi relative of the victim. These oral dying declarations were made by the victim to those relatives while on her way to the hospital when she was taken from the spot in a vehicle for medical treatment. PW-6 was the panch witness for spot/scene of offence.

7. During the arguments, learned Advocate for the appellant/accused mainly assailed the written dying declarations on the ground that the Doctor who allegedly gave endorsement vouching for the consciousness and fitness of the victim to give statement, has not been examined. Secondly, both dying declarations gave different account and as such are unreliable.

8. Prior to discussing the main thrust of the argument advanced on behalf of the appellant/accused as mentioned above, certain factual position is required to be narrated in order to have proper perspective of the matter and also to ascertain whether the case of the prosecution is required to be accepted considering the material brought on record, sufficient to prove guilt of the accused beyond reasonable doubt. Such factual position is as under :-

(a) Marriage between the victim and the accused was performed on 21.3.2002 and immediately within a span of eight months, the incident happened. (b) Pouring of the kerosene on the person of the victim and setting her ablaze has happened on the evening of 8.11.2002 and while under treatment the victim succumbed to the injuries on 14.11.2002 when she had 91% burn injuries almost on her all parts of the body. (c) The statement of the victim recorded by PW-7 Police Head Constable Baburao was treated as FIR on 8.11.2002, and immediately on 9.11.2002 the appellant/accused was put under arrest.

9. Bearing in mind the aforesaid factual position, the sole argument advanced on behalf of the appellant is discussed hereunder. It is to be ascertained whether there is material difference so far as contents of both the written dying declarations are concerned. On this aspect, it is argued on behalf of the appellant that the statement of the victim (which is at Exh. 26) contain the cause for which the victim was set on fire and it was to the effect that the appellant/accused assaulted the victim on the ground as to why she had not been to the house of his brother on the occasion of Bhaubeej ceremony. As against this cause, in

another dying declaration (Exhibit-17) recorded by the Special Judicial Magistrate it is mentioned that the appellant/accused assaulted the victim on account of she wearing red flowers on her hair on that evening and that he was suspecting the character of the victim.

10. We have carefully gone through the contents of both these dying declarations. By noting the contents of these dying declarations, it is seen on the material aspect as to the assault at the hands of the appellant/accused on the victim and pouring of the kerosene on her person and setting her on fire by the appellant, both the dying declarations are in consonance with each other. In other words, it is observed that there is no variance in the contents of both the dying declarations so far as involvement of the appellant in the act of pouring kerosene and setting the victim on fire. Moreover, it is seen that the second dying declaration recorded by PW-2 Special Judicial Magistrate is in question and answer form. Otherwise also the contents of these two written dying declarations are to be viewed in juxtaposition of the substantive evidence of prosecution witnesses - PW-3 Sangita Shirsat, PW-4 Alka Suryavanshi & PW-5 Deepak Suryavanshi. At the cost of repetition, it must be mentioned that while on the way to the hospital the victim narrated the incident to these witnesses and taken name of the appellant/her husband as to the person who poured kerosene on her person and set her on fire. On careful perusal of the substantive evidence of these witnesses, it is found out that the part of such substantive evidence as to victim making oral dying declarations before death is not at all hit by any infirmity or omission or otherwise vis-a-vis their statements recorded by the police u/s 161 of Cr. P.C. In that event, their testimony cannot be doubted as to victim making oral dying declarations before them and taking name of the appellant/accused as an offender.

11. For the reasons mentioned hereinabove and after ascertaining the reasonings given by the trial Court in arriving at the conclusion on the conviction of the accused for the offence punishable u/s 302 of Indian Penal Code, in our considered view, there is nothing to interfere with the said judgment and order of conviction challenged in the present appeal. Hence, there is no merit in the present appeal and the same is accordingly dismissed. This judgment and order be communicated to the appellant who is presently lodged in jail, through concerned jail authorities.