
(2002) 08 MP CK 0020
In the Madhya Pradesh High Court
Case No : Criminal Appeal No. 610/95

Bhagwantibai

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 13-08-2002

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Evidence Act, 1872 — Section 32
Penal Code, 1860 (IPC) — Section 302, 307, 34

Citation : (2002) 5 MPHT 346

Hon'ble Judges : Subhash Balwant Sakrikar, J;S.L. Kochar, J

Bench : Division Bench

Advocate : Jaisingh and Vivek Singh, for the Appellant; G. Desai, Dy. A.G., for the Respondent

Final Decision : Allowed

Judgement

S.B. Sakrikar, J.—Accused/appellant has directed this appeal against the judgment dated 16-8-1995 passed by VII Addl. Sessions Judge, Indore in S.T. No. 17/88, whereby the appellant was convicted for the offence u/s 302, IPC and sentenced to undergo life imprisonment.

2. The facts of the case in brief are that, on 19-11-1987, at about 6.30 a.m. deceased Kusumbai w/o Jalalsingh was found burning in front of her house situated at Jagannath Ki Chal, Nemawar Road, Indore. Kusumbai at the same time fell on the ground in the burning state. It is said that at the time of said incidence appellant Bhagwantibai and her husband Manoharlal (acquitted accused) were found standing. The witnesses rushed to the place of incident and poured water on the body of Kusumbai with the intention to save her from the alleged burning. It is said that, on extinguishing the fire, Kusumbai was in sense and she told the witnesses that the appellant and her husband poured kerosene on her and set her in fire. An information was given to Jalalsingh, husband of the deceased Kusumbai and she was taken to M.Y. Hospital, Indore. Shiv Kumar

(P.W. 6) gave information about the incidence at Police Station, Bhanwarkuwa which was written in the "Rojnamcha Sanha" No. 1568 same day at 6.45 a.m. Sub-Inspector Shri A.K. Sachran of Police Station, Bhanwarkuwa rushed to the M.Y. Hospital, Indore and arranged for recording the dying declaration of deceased. Dying declaration (Ex. P-11) of the deceased was recorded by Naib Tehsildar and Executive Magistrate Shri Balkrishna Kshatriya (P.W. 12) at 1.45 p.m. On the basis of the said dying declaration, an FIR at Police Station, Bhanwarkuwa was registered same day u/s 307/34, IPC against the appellant and her husband. On medical examination 89% burn injuries were found on the front parts of the body of Kusumbai. Injured Kusumbai, during treatment, died of the burn injuries on 24-11-1987 and on getting the information of death of said Kusumbai, the offence registered against the appellant and her husband was converted into Section 302/34, IPC and on completion of the usual investigation, challan was filed against the accused persons.

3. Appellant and her husband both were charged and tried for the offences punishable u/s 302 and in the alternative u/s 302/34, IPC. On completion of the trial, husband of the appellant Manoharlal was acquitted of the charges and the appellant was convicted and sentenced for the offence u/s 302, IPC as indicated above. Aggrieved the appellant has filed this appeal.

4. We have heard Shri Jai Singh, learned Sr. Counsel with Shri Vivek Singh, appearing for the appellant and Dy.A.G. Shri G. Desai, appearing for the State.

5. Learned Counsel for appellant contended that case of the prosecution rest on the oral dying declaration given by deceased Kusumbai soon after the incidence to the witnesses present on the spot and also the dying declaration Ex. P-11 recorded by the Executive Magistrate Shri Balkrishna Kshatriya in the hospital at 1.45 p.m. same day. No direct evidence is produced on behalf of the prosecution indicating that the accused/appellant is responsible for the homicidal death of the deceased. The learned Counsel submitted that the aforesaid evidence of the dying declaration is not sufficient to convict the appellant for the offence u/s 302, IPC.

6. As against this, the learned Dy.A.G. appearing for the State submitted that the alleged oral dying declaration stated before the witnesses soon after the incident and a dying declaration Ex. P-11 recorded by the Executive Magistrate same day, are sufficient to implicate the appellant for the alleged offence. He supported the impugned judgment of the Trial Court and submitted that no interference is necessary.

7. Having heard the learned Counsel for the parties and on careful perusal of the record as also the evidence adduced on behalf of the prosecution, it is not disputed that no direct evidence is produced on behalf of the prosecution against the appellant. The case of the prosecution rests on the alleged oral dying declaration stated to the witnesses soon after the incident by deceased Kusumbai and the dying declaration (Ex. P-11) recorded by the Executive Magistrate Shri

Balkrishna Kshatriya (P.W. 12) in the hospital same day.

8. On considering the evidence adduced on behalf of the prosecution in connection with the alleged oral dying declaration of Kusumbai, the prosecution has examined Guddu @ Navin (P.W. 1), Shiv Kumar (P.W. 6) and Jalalsingh (P.W. 7). On perusal of the statement of Guddu @ Navin (P.W. 1), it is found that in his examination-in-chief, he supports the case of prosecution and stated that soon after the incidence when he went to the house of Jalalsingh he found that his wife Kusumbai was lying in front of the house in burning stage. At the same time, deceased Kusumbai stated that Manoharlal and his wife poured kerosene and set her to fire. But in para No. 3 of the cross-examination, he denied the aforesaid fact and stated that in his presence wife of Jalalsingh has not stated about the setting her to fire by the appellant and her husband Manoharlal. As such, statement of Guddu (P.W. 1) is not at all useful for the prosecution.

9. Shiv Kumar (P.W. 6) in his statement, has said that after the incident, when he reached in front of the house of deceased Kusumbai w/o Jalalsingh he found that Kusumbai was lying on the ground having burn injuries on the different parts of her body and at the same time on asking the injured Kusumbai, she stated that Manoharlal and his wife are responsible for setting her to fire, but as per case of the prosecution the information of the alleged incident was given at the Police Station, Bhanwarkuwa by this witness which is written in the Rojnamcha of the Police Station at Sanha No. 1568 at 6.45 a.m. In the said information, Shiv Kumar (P.W. 6) has not stated even a word that who is responsible for setting Kusumbai to fire causing serious burn injuries to the deceased. It is stated on behalf of the prosecution that the alleged Rojnamcha Sanha No. 1568 is not exhibited at the trial and it is an unproved document; as such, the facts stated in the said Rojnamcha Sanha cannot be considered in evidence at this stage.

10. In this respect, the learned Counsel for appellant submitted that on behalf of the prosecution, the copy of the alleged Rojnamcha Sanha was filed alongwith the challan papers and it was also supplied to the defence. The learned Counsel invited our attention towards the statement of Shiv Kumar (P.W. 6) and a note appended below para No. 10 of his statement and submitted that during the cross-examination of the said witness, the original Rojnamcha Sanha No. 1568 was demanded and for this purpose the cross-examination of Shiv Kumar was deferred to other date. On perusal of the statement of SHO, Gajanand Sharma (P.W. 15), it is found that the alleged original Rojnamcha Sanha was not produced before the Court for the cross-examination of Shiv Kumar (P.W. 6). The learned Counsel relying on the decision of this Court in case of Samedas v. State of M.P. (1969 J.L.J-SN 54) submitted that a defence is entitled to take use of any document filed on behalf of the prosecution alongwith the challan papers even if the said document is not proved and exhibited at the trial. As such, the facts stated in the said Rojnamcha which is available on the record can be considered in evidence.

11. In view of the facts available on the record, the contention of the learned

Counsel for the appellant deserves to be accepted. In case of Samedas (supra) in similarly situated position, it was held that:--

"The first information report has not been proved and for this reason it was not marked as an exhibit. Therefore, so far as the prosecution is concerned, that document cannot be used, because it has remained unproved. But, even so, it is open to the defence to make use of that document if it supports the defence in any manner."

12. Similar view is also expressed by the Division Bench of this Court in case of Lallusingh v. State of M.P. (1996 MPLJ 452).

13. As such, in view of the facts of the case on hand and the law applicable, we are convinced that report entered in Rojnamcha Sanha No. 1568 of Police Station, Bhanwarkuwa, though not exhibited or proved at the trial, can be used by the defence if it is favourable to the accused.

14. On perusal of the facts stated in Rojnamcha Sanha No. 1568, in which the names of the appellant and her husband as also with regard to the responsibility of causing burn injury to deceased Kusumbai by setting her to fire are not stated. Needless to say that, when Shiv Kumar (P.W. 6), soon after the incidence got the knowledge of burning deceased Kusumbai by the present appellant and her husband by pouring kerosene on her body, then why this fact was not informed to the concerned police. The only inference which can be drawn is that if Shiv Kumar (P.W. 6) had that knowledge, he must have informed the police with regard to the persons who were responsible for setting her to fire. But in absence of the aforesaid facts, in Rojnamcha Sanha No. 1568, dated 19-11-87 which was prepared at 6.45 a.m. within 15 minutes of the incident creates doubt on the statement of Shiv Kumar (P.W. 6) that in an oral dying declaration, the deceased named the appellant and her husband as miscreants. In view of the aforesaid facts, uncorroborated statement of Shiv Kumar (P.W. 6) cannot be relied on for the fact of alleged oral dying declaration given before the witnesses by deceased Kusumbai.

15. The third witness of the said dying declaration is Jalalsingh (P.W. 7), husband of the deceased. His evidence on the point of oral dying declaration can safely be rejected on the ground that the facts with regard to the alleged dying declaration does not found place in his statement (Ex. D-2), recorded by the police same day u/s 161 of the Cr.PC. His statement can also be rejected on the ground that it is not in dispute that some disputes were existing between the parties prior to the incident and the reports were lodged against each other at the police station with regard to some quarrels taken place between the deceased and the accused persons. His statement also becomes doubtful on the ground that Jalalsingh (P.W. 7), in para No. 8 of his cross-examination, has clearly stated that soon after the incident, he took his wife Kusumbai in a rickshaw to the police station and at the police station the police officer has written the report as stated by his wife. In this para, he specifically stated that her wife narrated the facts of the

incidence to the police officer and the police officer reduced it into writing and also took thumb impression of his wife on the said written report. But no such written report is alleged or submitted on behalf of the prosecution alongwith the challan papers. In this respect, SHO, Gajanand Sharma (P.W. 15), in para No. 7 of his cross-examination, has totally denied that Jalalsingh alongwith his wife came to the police station after the alleged incident and at the police station Kusumbai has lodged any report in connection with the alleged incident.

16. In view of the aforesaid facts, only two inferences are possible. First is that Jalalsingh (P.W. 7) is giving a false statement before the Court that on the date of the incidence he took his wife Kusumbai to police station by an autorickshaw and at the police station a written report of the deceased was prepared and her thumb impression was also taken on the said report; or the prosecution has deliberately suppress the said report as it may not be favourable to the prosecution. Apart from the aforesaid facts, material omissions and contradictions are also found in the statement of Jalalsingh (P.W. 7). As such, his statement also becomes unreliable and doubtful on the point of alleged oral dying declaration of deceased Kusumbai.

17. In view of the foregoing discussion, we are of the opinion that the oral dying declaration of deceased Kusumbai cannot be considered as evidence against the accused and appellant's conviction on the basis of the same is not sustainable.

18. On the point of written dying declaration (Ex. P-11) recorded by Executive Magistrate Shri Balkrishna Kshatriya, is not sufficient to convict the appellant for the alleged offence, as the prosecution has not established from evidence that at the time of recording such statement, deceased Kusumbai was fully conscious and in a state of giving a statement. The prosecution has not examined the doctor who certified that during the recording of the statement (Ex. P-11) Kusumbai was fully conscious and in a state of giving statement. In case of *Kanchy Komuramma v. State of Andhra Pradesh* [1996 SCC (Cr) 31], the Apex Court has held that:--

"Under Section 32 of the Evidence Act, a dying declaration if found to be true and free from embellishment then it is sufficient for recording conviction. Prosecution must prove that the deceased was in proper mental condition to make the dying declaration. Merely because the dying declaration has been recorded by a Judicial Magistrate is not by itself a proof of its truthfulness."

The Court further held that :--

"The failure of the prosecution to establish that the deceased, before she made the dying declaration, was in proper mental condition to make the dying declaration detracts materially from the reliability of the dying declaration and it would not be safe to rely upon it. That the dying declaration has been recorded by a Judicial Magistrate by itself is not a proof of truthfulness of the dying declaration, which in order to earn acceptability has still to pass the test of scrutiny of the Court. In the present case the prosecution did not examine the

doctor who is alleged to have made endorsement on the dying declaration that "the patient was in a fit state of mind to depose". No other witness was examined to prove the certificate of the doctor either. That creates a doubt as to whether the patient was actually in a proper mental condition to make a consciously truthful statement. This infirmity renders it unsafe to rely on the dying declaration."

19. Shri Balkrishna Kshatriya (P.W. 12) who recorded the said dying declaration, in para No. 3 of his cross-examination has admitted that at the time of giving statement, Kusumbai was not fully normal. Even otherwise, on perusal of the contents of dying declaration (Ex. P-11), it emerged that the deceased had enmity with the appellant and some reports were lodged by the deceased at the police thana. The language used in Ex. P-11 marked as "E to E" as extracted below for convenience:--

^^eSa lcdks crk nwaxh fd rqeus vxk yxk ds tyk MkykA oks dg jgh Fkh] fd D;k
eq>s ejokvksxs D;k**

indicate that the deceased had in her mind to involve the appellant responsible for the alleged incidence of setting her to fire. As such, the alleged dying declaration (Ex. P-11) alone does not acquire much confidence for basing the conviction of the appellant for a serious offence like Section 302 of the IPC.

20. From the statement of the prosecution witnesses, it also emerged that at the time of recording the alleged dying declaration of deceased Kusumbai, husband of the deceased Jalalsingh and employees of the police department were also present. The said fact again creates doubt on the statement (Ex. P-11) that the statement was voluntarily and of her own accord was given by the deceased Kusumbai. As such, on this count also the appellant's conviction u/s 302, IPC becomes unsustainable under the law and the appellant deserves acquittal.

21. As a result of the foregoing discussion, the appeal filed on behalf of the appellant deserves to be allowed and it is allowed accordingly. The accused/appellant is acquitted from the charges. The conviction and the sentence passed against the appellant by the Trial Court are set aside. The accused/appellant is on bail. Her bail bonds stands cancelled and she is discharged from the bail bonds.