

(2015) 06 BOM CK 0236
In the Bombay High Court
Case No : Criminal Appeal No. 951 of 2009

Chandrapal Khubiram Rajoriya	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 30-06-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 302

Citation : (2015) 06 BOM CK 0236

Hon'ble Judges : P.V. Hardas, J;A.S. Gadkari, J

Bench : Division Bench

Advocate : Sarojini Upadhyay, appointed Advocate, for the Appellant; V.R. Bhosale, APP, Advocates for the Respondent

Final Decision : Allowed

Judgement

P.V. Hardas, J—The Appellant, who stands convicted for an offence punishable under Section 302 of the Indian Penal Code and sentenced to imprisonment for life and to pay fine of Rs. 2,000/- in default of which to undergo R.I. for six months, by the Additional Sessions Judge, Greater Mumbai, by Judgment dated 31.12.2008, in Sessions Case No. 803 of 2007, by this Appeal questions the correctness of his conviction and sentence.

2. Facts in brief as are necessary for the decision of this Appeal may be stated thus.

PW-2 PSI Sanjay Nalawade, who was attached to Deonar Police Station and was on duty in the Police Station from 7.00 p.m. of 2.7.2007 to 8.00 a.m. of 3.7.2007 received message from the Rajawadi Hospital at about 2.30 a.m. recording admission of one Shashidevi, wife of the Appellant, due to burns. PW-2 PSI Nalawade immediately requested the Special Executive Officer PW-3 Chandrakant Nyaynirgune to proceed to the hospital. PW-2 PSI Nalawade went to the hospital and met PW-3 Chandrakant Nyaynirgune at the gate of the hospital. Together they contacted the Medical Officer, who was on duty and requested the

Medical Officer to ascertain the condition of the injured to give her statement. The Medical Officer accordingly examined the injured and opined that injured Shashidevi was in a condition to give her statement. Accordingly, PW-3 Nyaynirgune recorded the statement of injured. In the aforesaid statement injured Shashidevi stated that on account of quarrel with her husband, the husband (Appellant) had poured kerosene on her and had set her ablaze. The aforesaid statement was read over to the injured who admitted the same to have been correctly recorded. The said statement is at Exhibit 10.

PW-2 PSI Nalawade, thereafter, recorded the statement of injured at Exhibit 10. He thereafter proceeded to the scene of the incident and drew the scene of the incident panchnama in the presence of witnesses at Exhibit 8. From the scene of the incident he seized bed-sheet, one bed cover, towel, partly burnt clothes, plastic can, a match-box and half burnt match-stick. The Appellant was arrested at 3.00 p.m. Further investigation was then entrusted to PW-7 PI Pandurang Doke.

3. PW-7 PI Pandurang Dhoke, who was also attached to the Deonar Police Station was entrusted with the investigation of Crime No. 227 of 2007. As injured had succumbed to her injuries, an offence under Section 302 of the Indian Penal Code came to be added. Statement of brother of the deceased was recorded. Statement of son of the deceased i.e. DW-1 Manish was also recorded. Statements of other relatives of the deceased were recorded. The seized property had been referred to the Chemical Analyzer and the report was received by PW-7 PI Dhoke. Further to the completion of investigation, a charge-sheet against the Appellant was submitted.

4. Postmortem on the dead body of deceased Shashidevi was performed by PW-4 Dr. Waman Gaikwad, who noticed that deceased Shashidevi had sustained 99% superficial to deep burns. He also noticed contusion over the scalp and brain. He opined that the injuries were antemortem injuries. Blood clots were also noticed in the brain due to the contusion. He therefore opined that cause of death was shock due to 99% superficial to deep burns alongwith the contusion of scalp and brain. Postmortem report is at Exhibit 16.

5. On the case being committed to Court of Sessions, Trial Court vide Exhibit 2 framed charge against the Appellant for offence punishable under Section 302 of the Indian Penal Code. The Appellant while Exhibit 3 denied his guilt and claimed to be tried. Prosecution in support of its case examined 7 witnesses while the accused in his defence examined 2 witnesses. The defence of the Appellant as can be culled out from the cross-examination of the prosecution witnesses is that the deceased on account of a trivial quarrel set herself ablaze and in order to teach the Appellant a lesson has falsely implicated him. The learned Judge accepting the prosecution evidence convicted and sentenced the Appellant as aforestated.

6. We have heard the learned Counsel appointed for the Appellant and the

learned APP and in order to effectively deal with the submissions advanced before us, it would be useful to refer to the evidence of the prosecution witnesses.

7. Prosecution has examined PW-3 Chandrakant Nyaynirgune, the Special Executive Officer, who had recorded the dying declaration of injured Shashidevi at Exhibit 12. Though this witness deposes in his examination-in-chief that the said statement had been read over to Shashidevi and Shashidevi had admitted the contents to have been correctly recorded, we find a total absence of such an endorsement in the dying declaration at Exhibit 12. Thus, the contemporaneous documents i.e. Exhibit 12 does not support the assertion of PW-3 Chandrakant Nyaynirgune that the statement had been read over to injured Shashidevi and Shashidevi had admitted the contents to have been correctly recorded. In the absence of such evidence, in our opinion, the dying declaration at Exhibit 12 will have to be left out of consideration.

8. Prosecution has further relied upon the evidence of PW-2 PSI Nalawade, who had recorded the dying declaration of injured Shashidevi at Exhibit 10. Prosecution has also examined PW-6 Dr. Swati Sontate, who had examined injured Shashidevi and who deposes that Shashidevi had disclosed to her that she had been set ablaze by the Appellant. The cross-examination of both these witnesses does not in any manner affect the credibility of the witnesses regarding the recording of the dying declaration.

9. The evidence of PW-1 Vishnu Chalke, a panch to the scene of the incident further discloses particularly in the cross-examination that the deceased had orally stated to her son, DW-1 Manish that she had herself taken kerosene and had set herself ablaze in order to teach the Appellant a lesson. Though this admission is made by PW-1 Vishnu Chalke in the cross-examination, the prosecution took no efforts at declaring PW-1 Vishnu Chalke hostile or cross-examining him in support of the statement made in the cross-examination by the Appellant. An admission made by a witness favouring the accused cannot just be wished away on the ground that the admission is made in the cross-examination. The prosecution ought to have taken steps at declaring the witness i.e. PW-1 Vishnu Chalke hostile and cross-examining him. In this regard, reference may usefully be made to the Judgment of the Supreme Court in Javed Masood and Another Vs. State of Rajasthan, AIR 2010 SC 979 : (2010) CLT 641 : (2010) CriLJ 2020 : (2010) 2 Crimes 20 : (2010) 2 JT 473 : (2010) 2 SCALE 717 : (2010) 3 SCC 538 : (2010) 3 SCR 236 . The Supreme Court in the aforesaid Judgment has held that the prosecution witness who had supported the defence could be relied upon as the prosecution had not declared the witness hostile. The evidence of such witness therefore, in our opinion, in the absence of cross-examination which would affect the credibility cannot just be wished away by the prosecution. PW-1 Vishnu Chalke was cited as a prosecution witness and therefore, the prosecution is bound by the said statement. The evidence of DW-1 Manish also further discloses about the oral dying declaration made by injured

Shashidevi in respect of setting herself ablaze. DW-1 Manish has been cross-examined by the prosecution, but the cross-examination is of little substance as it does not affect the credibility of DW-1 Manish. DW-1 Manish has been examined as a defence witness. DW-1 Manish is the son of the Appellant as well as the son of deceased Shashidevi. The evidence of the defence witness cannot be termed as a lie. The defence witnesses are entitled to equal treatment as that of prosecution witnesses and the Courts must overcome their traditional and instinct disbelief of a defence witness. Reference may usefully be made to the Judgment of the Supreme Court in *Dudh Nath Pandey Vs. State of Uttar Pradesh*, AIR 1981 SC 911 : (1981) CriLJ 618 : (1981) 1 SCALE 285 : (1981) 2 SCC 166 : (1981) SCC(Cri) 379 : (1981) 2 SCR 771 . The Supreme Court in *Sanjiv Kumar v. State of Punjab* [AIR (2009) 16 SCC 487] has observed that the defence witnesses have been observed to be often untruthful but that is not to say that in all cases defence witnesses must be held to be untruthful.

10. In the present case we find that the cross-examination by the prosecution, of the defence witness, does not in any manner affect the credibility of the defence witness regarding the oral dying declaration made to DW-1 Manish by deceased Shashidevi.

11. Thus, we have before us two dying declarations one made to PW-2 PSI Nalawade and the other made to PW-6 Dr. Swati Sontate which implicates the Appellant as having poured kerosene on Shashidevi and set her ablaze. The oral dying declaration made to PW-1 Vishnu Chalke as well as DW-1 Manish indicates that Shashidevi had set herself ablaze. In cases resting on multiple dying declarations which are conflicting and where acceptance of one dying declaration would necessarily falsify the other dying declaration, it would not be open for the Court to pick and choose any other dying declaration which favours the prosecution case. Since the credibility of the oral dying declaration has not been affected by the cross-examination on behalf of the prosecution, in our opinion, in the present set of facts, the Appellant would be entitled to be given the benefit of doubt. The learned Single Judge of this Court in *Sanjay Ruhatiya Vs. State of Maharashtra*, (2000) 102 BOMLR 818 : (2000) 1 MhLj 118 , while examining multiple dying declarations as by relying on *Smt. Kamla Vs. State of Punjab*, AIR 1993 SC 374 : AIR 1992 SC 374 : (1993) CriLJ 68 : (1992) 3 Crimes 1088 : (1993) 1 DMC 4 : (1992) 6 JT 707 : (1992) 3 SCALE 205 : (1993) 1 SCC 1 that where there was no consistency in all the three dying declarations given by the deceased the irresistible conclusion was that the dying declarations were inconsistent and in such situation one cannot just pick up one dying declaration and base the conviction on the sole basis of the dying declaration.

12. Thus, in our opinion, the Appellant in the present Appeal is entitled to be given the benefit of doubt.

13. Accordingly, Criminal Appeal No. 951 of 2009 is allowed and the conviction and sentence of the Appellant is hereby quashed and set aside and the Appellant is acquitted of the offence with which he was charged and convicted. Fine if paid

by the Appellant be refunded to him. Since the Appellant is in Jail, he be released forthwith, if not required in any other case. Fees payable to the learned Counsel appointed for the Appellant is quantified at Rs. 5,000/-.