
(2015) 09 BOM CK 0172
In the Bombay High Court
Case No : Criminal Appeal No. 356 of 2001

Dangal Omkar Bhil and Others	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 09-09-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 306, 34, 452, 453, 506

Citation : (2015) 09 BOM CK 0172

Hon'ble Judges : M.T. Joshi, J.

Bench : Single Bench

Advocate : Nitin B. Suryawanshi, Advocate, for the Appellant; V.P. Kadam, A.P.P., for the Respondent

Final Decision : Dismissed

Judgement

M.T. Joshi, J.—Heard both sides.

2. Aggrieved by the judgment and order dated 31/07/2001 recorded by 2nd Additional Sessions Judge, Dhule in Sessions Case No. 70 of 1997, thereby convicting both the present appellants for the offences punishable under section 452 r/w.34 , 506 r/w. 34 and 509 r/w. 34 of the Indian Penal Code, the present appeal is preferred.

3. Both the appellants were sentenced to suffer rigorous imprisonment for three years, rigorous imprisonment for two years and rigorous imprisonment for three months, respectively, on each of the count, with direction to pay fine, as detailed in the impugned judgment. Aggrieved by the said decision, the present appeal is preferred.

Both appellants were also charged for the offence punishable under section 306 of the Indian Penal Code. They however were acquitted from the said offence.

4. The prosecution case would reveal as under:

"That both the present appellants as well as deceased Sumanbai and her

husband Raghunath are residents of same village Khambale Tal. Shirpur, Dist. Dhule. On 2/3/1997 at about 8.00 pm in the night, deceased Sumanbai was all alone in her house as her husband had gone away. At that time, both the present appellants entered the house and both of them asked her to have sexual intercourse with them. They also threatened that they would commit rape with her and would kill her by knife. When deceased Sumanbai told them that she would disclose the said incident to her husband, both of them left her house."

The deceased was, however, very much aggrieved by the said incident. She however kept mum when her husband Raghunath returned to the house and on the next day when her husband Raghunath went away, as on that day, certain election program was there in the village, at about 12 in the noon, she set herself on fire. Her husband, the brother of the husband and others came at the spot. They admitted her to the Government Hospital at Shirpur. She suffered 73% burn injuries. Her admission in the hospital was reported to the Police. Thereafter, the Police recorded her dying declaration cum FIR in the hospital. Lateron, the Executive Magistrate also recorded her dying declaration and on the next day, she died.

5. The investigation was carried in the matter. In the investigation, it was found that oral dying declarations were also made by the deceased to her husband - Raghunath and his relatives. Necessary exercise like preparation of inquest panchanama, spot panchanama, collection of post-mortem notes etc. was carried and the chargesheet came to be filed.

6. Before the learned Additional Sessions Judge, Dhule, in all 9 witnesses were examined. The learned Additional Sessions Judge came to the conclusion that all the offences except the offence punishable under section 306 of the Indian Penal Code are proved beyond reasonable doubt. In view of the learned Additional Sessions Judge, from the evidence on record, it cannot be inferred that the present appellants had any intention to abet the commission of suicide and, therefore, acquittal on that count came to be recorded.

7. Mr. Nitin B. Suryawanshi, learned counsel for the appellants submitted before me that there is a vast variance between the two dying declarations recorded at Exhibit 43 and Exhibit 54 i.e. the F.I.R. and the dying declaration recorded by the Executive Magistrate. Further, the oral dying declarations are completely contradictory to these two recorded dying declarations. Surrounding of the house of the deceased, as has been revealed in the panchanama of the spot of occurrence, would show that there are houses in the neighbourhood. In the circumstances, he submitted that the learned Additional Sessions Judge ought not to have placed reliance on these dying declarations.

In the alternative, he submitted that there is a variance in the prosecution case, as to whether the present appellants were wielding knife at the time of occurrence. He therefore submitted that offence punishable under section 452 of the Indian Penal Code is not made out. At the most, it would be an offence of

preparation punishable under section 453 of the Indian Penal Code.

In the circumstances, he submitted that the period of incarceration of 109 days already suffered by the present appellants would be just and sufficient punishment in the present case.

8. On the other hand, learned A.P.P. submitted that the variance between the two recorded dying declarations and the oral version given by the prosecution witnesses would not cast any doubt on the prosecution case. Hence, he submitted that no interference is warranted.

9. On the basis of this material, following points arise for my determination:--

"I) Whether the prosecution has proved that on 2/3/1997 at about 8.00 pm., both the present appellants, in furtherance of their common intention by making preparation to commit an offence have committed house trespass by entering into the house of deceased - Sumanbai in the village Khambala ?

II) Whether the prosecution has further proved that on the given date, time and place, the appellants, in furtherance of their common intention threatened the deceased - Sumanbai on the point of knife?

III) Whether the prosecution has further proved that on the given date, time and place, the present appellants, in furtherance of their common intention had insulted deceased Sumanbai intending to breach her modesty ?"

My findings to all the points are in the affirmative. The appeal is therefore dismissed for the reasons to follow.

REASONS

10. The prosecution has examined in all 9 witnesses. Dying declaration cum F.I.R. recorded by P.W. 6 - Keshav, the Police Head Constable at Exhibit 42 and the dying declaration at Exhibit 54 recorded by P.W. 9 - Executive Magistrate - Prabhakar Pandit proved the facts as detailed supra. In the FIR, the statement regarding the knife is that the present appellants threatened the deceased to kill her by knife while in the dying declaration recorded by the Executive Magistrate, the statement is that both of them brandished the knife and threatened as narrated.

11. In the dying declaration recorded by the Executive Magistrate further the statement that, there was no previous enmity between the appellants on one hand and herself and the husband on the other hand, is missing from the F.I.R.

12. The husband of the deceased P.W. 3, his brother P.W. 4, the uncle of the husband of the deceased i.e. P.W. 5 - Gorakh made certain variances in the oral dying declarations said to have been made to them. The deceased told them that the present appellants had committed rape on her. Evidence on record would further show that earlier the deceased had filed complaint against the present appellants of making sexual advances against her. The said complaint however

was compromised and, thereafter, the present incident has occurred.

13. The statement of the deceased in the dying declaration recorded by the Executive Magistrate that there was no earlier enmity, should have therefore to be appreciated in the light of the fact that the earlier complaint was compromised and therefore no enmity had remained.

14. It is no doubt true that the oral versions given by the relatives of the deceased are exaggerated than the dying declaration as well as the F.I.R. of the deceased. Certain embellishment from the interested witnesses would be natural. The Court however has to scrutinize the evidence and remove the chaff from the grain and find out the truth. There was no reason for the deceased to make false allegations against the present appellants that they had breached her modesty by entering in her house by threatening her with knife.

15. In that view of the matter, I do not find that the inconsistency is worth throwing away the material on record.

16. Mr. Suryawanshi relies on the ratio in the case of "Suresh S/o Shrirang Mandawgane v. State of Maharashtra" 2010 ALL MR (Cri.) 147, to buttress his submission that if there is variance between two dying declarations regarding details of the incident being completely different, the dying declarations should not be believed. It is however not applicable in the present set of facts.

17. Mr. Suryawanshi has submitted that panchanama of spot of occurrence would show that one house is in the vicinity of the house of the deceased and, therefore, there is a probability that an eye witness to the incident or atleast to the entering of the appellants in the house of the deceased, however, no such independent witness is examined.

18. The argument is based on probability. It was 8.00 pm in the night. The prosecution case is that there was electioneering and, therefore, the husband of the deceased was away from the house. It can therefore be gathered that the other male members of the nearby houses possibly were not in their houses. In the circumstances, the probability need not be probed further.

19. The next of the submission of the learned counsel for the appellants that, as there was no preparation of making any offence before entering the house is made out, the ingredients of the offence punishable under section 452 of the Indian Penal Code are not made out.

Mr. Suryawanshi for this purpose relied on the ratio of Subhash Sahebrao Datkar Vs. State of Maharashtra, , wherein it was held that if the accused enters in the house by simply unlatching the chain and there was no preparation, the offence punishable under section 452 of the Indian Penal Code is not made out.

20. It is to be noted that in both the dying declarations, the deceased has referred to knife. In one of the dying declaration, she stated that the appellants threatened her that they would take her life by knife, while in the other dying

declaration, she stated that they brandished knife while doing so.

It would thus be clear that the present appellants with knife entered in her house. In that view of the matter, the lesser offence is also not made out.

21. The last of the submission of Mr. Suryawanshi is that, since the appellants were in custody for a period of 109 days, the same would be sufficient punishment.

22. The record would show that the earlier dispute between the parties of similar nature was settled by the deceased and her husband, still, the same incident has been repeated by the appellants, which ultimately took the life of the deceased. In the circumstances, no leniency is required to be shown. Hence the following order:--

23. Criminal Appeal is hereby dismissed.

24. Bail bonds of the appellants shall stand cancelled.

25. Disposal of the property on the line of the directions issued by the learned Sessions Judge, be carried.