

(2021) 03 BOM CK 0035

In the Bombay High Court

Case No : Criminal Appeal No. 1224 Of 2011

Dhaku Alias Daku Uddhav Badekar

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 31-03-2021

Acts Referred:

Indian Penal Code, 1860 — Section 302, 307, 504

Citation : (2021) 03 BOM CK 0035

Hon'ble Judges : Prasanna B. Varale, J;S.M. Modak, J

Bench : Division Bench

Advocate : Chaitanya Mulawkar, Sandeep S. Salunkhe, M.M. Deshmukh

Final Decision : Dismissed

Judgement

Prasanna B. Varale, J

1. Being aggrieved by the judgment and order passed by the Sessions Judge, Pune in Sessions Case No. 456/2009, dated 10th May, 2011, whereby Appellant herein (Original Accused) was convicted for the committing offences punishable under Sections 302 of the Indian Penal Code (for short "IPC") and awarded sentence of life imprisonment along with fine of Rs. 100/- (Rs. One hundred only), in default to undergo rigorous imprisonment for three months, the present Criminal Appeal is preferred by the Appellant – Accused.

2. The prosecution case rests on circumstantial evidence, two dying declarations i.e. one written dying declaration recorded by Shashikant Waghule (PW 1) and another is an oral dying declaration to Tanaji Kamble (PW 4), son of deceased victim. The prosecution also relied on other material in the forms of the version of witnesses before the Court, panchanamas and the medical evidence in the process of investigation.

3. The case of prosecution can briefly summarized as follows: Subhadra Mahadev Kamble (deceased) was residing in a chawl at Gugale wasti, Uralikanchan, Tq. Haveli, Dist. Pune. 10 years prior to the date of incident Subhadra lost her

husband and she came to the above referred place to reside. Subhadra was having two sons namely, Dhanaji and Tanji. Subhadra came in contact with Dhaku (Accused). The couple was engaged in an illicit relationship which was not initially approved by younger son Tanaji and as such he was also residing separately from his mother with his family. Subsequently, there was change in the strain relationship between Subhadra and Tanaji and Tanaji started visiting house of Subhadra for taking bath, lunch and dinner. It is further the case of prosecution that on 10.01.2009 Tanaji visited the residence of Subhadra and had his dinner there, at that time accused was also there. After finishing the dinner Tanaji and Dhaku both left the house of Subhadra. At about 01.00 am accused returned to the residence of Subhadra and he started abusing Subhadra with an allegation that she is keeping illicit relations with other person. Subhadra denied all the allegations but the accused by uttering stated that enough is enough now and he will not keep her (Subhadra) alive. He then poured kerosene from the can which was kept in the house and set her ablaze. Then accused ran away from the house and reached to the house of Tanaji and informed him that Subhadra committed suicide by setting her on fire. Tanaji immediately rushed to the residence of his mother, and on inquiry with Subhadra as to how the incident took place Subhadra told Tanaji that accused was suspecting her character and then pouring on her person setting her ablaze.

4. As Subhadra was subjected to extensive burns she was immediately shifted to Sassoon General Hospital, Pune by Tanaji and accused was accompanied Tanaji. On admission of Subhadra in the Hospital, the medical officer attached to Sassoon Hospital at the relevant time forwarded the information to the police outpost situated in the Sassoon Hospital. Mr. Shashikant Waghule, PHC was on duty at the relevant time on receipt of information he immediately rushed to burn ward. He contacted the medical officer, he ascertained the physical condition of Subhadra through the medical officer and on an assurance that Subhadra is in a fit state to make statement he immediately recorded the statement of Subhadra. The statement recorded by him was forwarded to Haveli Police station and in turn it was sent to Loni Kalbhor police station as the place of incident is within the jurisdiction of Loni Kalbhor police station.

5. On the basis of statement of Subhadra initially the police authority registered an offence vide crime no. 08/2009 for commission of offence under Section 307 and 504 of IPC. The investigating agency was set in motion. The investigating officer took necessary steps in the process of investigation such as, visiting the spot of incident, drawing the spot panchanama in presence of panch witnesses, collecting the material from the spot, effecting seizure of material from spot. Subhadra who was under treatment succumbed to his burn injuries at about 11.00 am. On the death of Subhadra the offence under Section 302 was added. Dead body of Subhadra was forwarded for conducting postmortem. Articles which was seized from the spot of incident were forwarded for chemical analysis to the forensic laboratory. Investigating officer collected the chemical analyzer's report from the laboratory. Arrest of the accused was effected. Thus, on completion of

investigation, charge-sheet was filed in the Court of JMFC. As the offences attracted in the matter being exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions.

6. Learned Sessions Judge on appreciation of evidence found that the evidence brought on record by the prosecution was reliable and trustworthy and recorded the judgment and order of conviction and awarded the sentence to the accused. Hence, this appeal by the Appellant – Accused.

7. Learned Counsel, Mr. Chaitanya Mulawkar appearing for the Appellant – Accused vehemently submitted that the entire case of prosecution is based on a weak piece of circumstantial evidence i.e. the dying declarations. Learned Counsel further submitted that though, the prosecution brought on record two dying declarations in support of its case none of the dying declaration is acceptable and trustworthy. Learned Counsel further submitted that the oral dying declaration to Tanaji (PW 4) cannot be accepted as it is made to an interested witness. It is also submitted by learned Counsel that as per the case of prosecution Subhadra had suffered extensive burns when she was admitted in the hospital and considering the nature of this extensive burns it is difficult to believe that Subhadra was in a fit condition so as to give her statement to PHC Waghule. It is also submitted by learned Counsel that evidence brought on record by the prosecution in the form of spot panchnama showing that Subhadra was subjected to accidental burns. It is also the submission of learned Counsel that as the investigating officer failed to record the statement of neighbours and the possibility of third person entering in the house and committing crime cannot be ruled out. Learned Counsel then submitted that as the prosecution failed to establish the complicity of the appellant in commission of crime the appellant is entitled for benefit of doubt. Learned Counsel in support of his submissions placed reliance on the following judgments: Surinder Kumar Vs. State of Haryana (2011) 10 SCC 173, Kamlabai Haribhau Lastane Vs. State of Maharashtra 2019 (3) Bom.C.R. (Cri.) 47. Thus, learned Counsel for the Appellant prayed for setting aside the judgment and order and sentence recorded by the Trial Court by allowing the Appeal.

8. Per contra, learned APP vehemently submitted that the evidence brought on record by the prosecution is clear clinching and trustworthy. It is submitted by learned APP that both the dying declarations are reliable and trustworthy. It is then submitted by learned APP that while Subhadra was being shifted to Sassoon Hospital and immediate disclosure of the incident and the active role played by the accused is disclosed to Tanaji (PW 4). It is submitted by learned APP that merely because Tanaji is son of Subhadra version of witness which gives a truthful account of incident before the Court cannot be rejected by treating the witness as an interested witness. It is also submitted by learned APP that the dying declaration recorded by PHC Waghule is also free from any suspicion and as such is reliable and trustworthy. Learned APP then submitted that PHC Waghule (PW 1) on receipt of information that a patient is admitted in burn

wards immediately rushed to the burn ward and on ascertaining the physical condition of the patient through Dr. Rohit Fulwar (PW 3) and also on his own assessment recorded the statement of victim. Learned APP then submitted that merely because the statement of neighbourers are not recorded by the investigating officer it cannot be a sole ground to discard the prosecution case when the other evidence on record is reliable and trustworthy. Learned APP then submitted that the trial Court committed no error in appreciation of evidence and arrived at just conclusion and prayed that appeal be dismissed.

9. With the assistance of learned Counsel appearing for the respective parties, we have gone through the record.

10. There are six witnesses examined by the prosecution in support of its case. We may now refer to Tanaji (PW 4) first who is the son of Subhadra.

11. Tanaji Kamble (PW 4) in his examination-in-chief stated before the Court about the relationship i.e. victim Subhadra was his mother. His elder brother Dhanaji resides at the native place Erli, Taluka Barshi, Dist. Solapur. His father Mahadev Kamble died in the year 2003. Mother Subhadra then started residing in the Gugale Vasti of Urulikanchan along with accused. He stated that initially he was not residing with his mother as he don't like the illicit relationship between accused and his mother. He was also not in talking terms with his mother for sometime. Thereafter, he started talking with his mother and was also visiting her house for taking bath, tiffin and for dinner. After dinner he used to return to his room situated in an area known as Ghule Vasti. He further stated before the Court that in absence of accused Dhaku his mother used to tell him about the allegations about her character leveled by the accused. She also told Tanaji that if she had a talk with any stranger accused used to pick up quarrel on that ground he used to abuse and beat her. He further stated that though he made an attempt to pacify his mother and told his mother not to quarrel with each other, there was no change in the situation and the ill-treatment to his mother Subhadra was continued.

He then stated that on 09.01.2009 he visited the house of his mother at 08.30 pm for dinner at that time accused was also there. After dinner Tanaji returned to his room and at about 02.00 am accused came to his room, woke him up and informed him that as he had not taken mean his mother set herself on fire. He immediately rushed to the room of his mother Subhadra, he found that Subhadra was lying outside the room. She had burn injuries all over her body. Then Subhadra asked for water and he provided water to Subhadra and made inquiry as to how the incident took place, she then told him that at about 01.00 am in the night accused came to the house he started quarreling with her on the ground that she had illicit relations with other person. Then he poured kerosene on her person and set her on fire with matchstick.

Meantime, many people had gathered on the spot. Somebody called for the ambulance and Subhadra shifted to hospital. While admitting Subhadra in the

hospital accused accompanied Tanaji. He further stated that his mother was admitted in the hospital early in the morning and while she was under treatment at about 11.00 am she expired. He stated that after this incident police approached him and recorded his statement. Then he identified the accused who was sitting in the Court. He further stated that his statement was also recorded by JMFC.

12. In the cross-examination of this witness a suggestion was given to this witness that Subhadra suffered haematoma on her head, this suggestion is denied. Another suggestion was given to this witness that when he reached on the spot Subhadra was unconscious, even this suggestion is denied. Another suggestion was given to this witness that he was carrying an grudge or anger against his mother because of illicit relations with accused, this suggestion is also denied with an clarification that he and his family reconcile with the situation and arrived at a conclusion that it is the fate of Subhadra. Though, certain suggestions were denied and an attempt made by the defence to make out a case before the Court on examination of this witness that he was an interested witness and carrying a grudge against his mother Subhadra and after the incident Subhadra was unconscious as such she was unable to make any statement and on clear denial of the suggestions the attempt made by the defence failed. Thus, Tanaji (PW 4) son of Subhadra emerges as truthful and reliable witness and as such trial Court committed no error in accepting this immediate disclosure as an oral dying declaration of the deceased to this witness.

13. Now we may come to the next important witness i.e. Shashikant Waghule, PHC (PW 1). Shashikant Waghule (PW 1) gives a detailed description of sequence of events. He stated before the Court that on 10.01.2009 at about 04.15 am in the morning he received an information that one Smt. Subhadra Kamble was set on fire by accused Dhaku and she was admitted in the ward no. 25 of Sassoon General Hospital, Pune. Then he went to ward no. 25, contacted medical officer on duty. He then apprised the medical officer that he wanted to record the statement of patient Subhadra and requested the medical officer to examine Subhadra to certify as to whether she is physically and mentally fit and able to make statement. The medical officer then put certain questions to Subhadra and told this witness that Subhadra is medically and mentally fit and able to give statement. Then Shashikant Waghule (PW 1) himself asked certain questions to Subhadra in respect of her age, occupation and address and on ascertaining himself that Subhadra was physically and mentally fit to give statement he recorded the statement of Subhadra. Then he stated about the contents of the said dying declaration recorded by him. This witness then reiterated the version of Subhadra which was disclosed to him and recorded by him as her statement and then the same was treated as her dying declaration. He further stated before the Court that on completing the statement he obtained left toe impression of Subhadra as hands of patient had suffered burn injuries. Then he made his endorsement in attestation below the statement and also obtained the endorsement of attestation of medical officer who was present throughout.

This witness was subjected to cross-examination and though certain admissions are elicited in the cross-examination that neither any entry about the receipt of a phone call is made in the register nor any separate phone register is maintained at the outpost, these admissions hardly affect truthfulness of the dying declaration. It was also an attempt made by the defence to suggest that this witness failed to call the Special Executive Magistrate to record the dying declaration. The perusal of cross-examination show that the act of the witness not calling the Special Executive Magistrate to record the statement would not be a factor to reject the dying declaration recorded by this witness as this witness provides a justifiable explanation that the patient had received severe burns to the extent of nearly 100%, the exercise of calling the Special Executive Magistrate to record the dying declaration would have been futile exercise, considering the urgency involved in the matter. Thus this witness committed no error in recording the statement of the injured victim immediately without waiting for Special Executive Magistrate. It was an also attempt made by the defence to suggest the witness that the dying declaration is an outcome of tutoring by relatives and villagers, this suggestion is also clearly denied.

14. We may refer to Dr. Rohit Fulwar (PW 3). He stated that on 10.01.2009 he was a duty medical officer in Sassoon General Hospital, Pune in burn ward. Patient by name Subhadra Kamble was admitted in burn ward on 10.01.2009. He examined the patient Subhadra and gave primary treatment. An information was forwarded to the chief medical officer. Then he stated that PHC Waghule had come to the hospital to record the statement of Subhadra. He then stated that he examined patient Subhadra before recording the statement by PHC and on examination of patient he found that patient Subhadra was physically and mentally fit to give valid statement. Then he stated that his endorsement finds place in the statement Exhibit 15. An attempt was made to suggest this witness that while the statement of Subhadra was recorded and after completion of the statement Subhadra was unconscious, these suggestions are clearly denied. It was also suggested to this witness that the witness failed to ascertain the fitness of the patient and failed to make necessary entries in corresponding documents, this suggestion is denied by a specific reply that he had recorded the pulse beat of patient and he also recorded her blood pressure and other primary things. The noting of the examination were made in the case papers.

This witness was recalled for examination and even in the examination of the witness on recall nothing was elicited from this witness so as to create suspicion over the dying declaration recorded by PHC Waghule. Thus, evidence of Shashikant Waghule (PW 1) and Dr. Rohit Fulwar (PW 3) supports the case of prosecution in respect of written dying declaration.

15. Lingappa Baburao Dorkar (PW 2) who was a panch witness to the spot panchanama. This witness turned hostile and in the cross-examination this witness admits that there was a plastic can having some kerosene in it found on the spot. Then there was a match box lying on the ground, burned pieces of

saree found there, place was smelling of kerosene, some hair were seen scattered in front of the door. He then admits in the cross-examination that the articles found on the place were packed and kept in packet. These packets were sealed by affixing labels having signatures of panch witness. Spot panchanama was proved through investigating officer show that along with a kerosene can, matchstick, a stove was there. It also reveals from the evidence from investigating officer that the stove was intact. Considering this material fact the learned Trial Court arrived at a conclusion that the facts emerged from the spot panchanama rules out the possibility of an accidental burns. Learned Trial Court observed that if it would have been the case of accidental burn the stove would not have been intact and in case of accident there ought to have been bursting of stove. Learned Trial Court was justified in making these observations on the basis of spot panchanama. An attempt was also made by the defence to submit that as planks of the door were broken the accused could not have been chained the door from inside and could not have approached Tanaji to inform him about the accident. The spot panchanama show that one plank of the door was partially broken and a chain was hanging. The version of witnesses reveals that the residence gathered on the spot and when Tanaji approached to the house of his mother and Subhadra was lying outside the room. Thus, in view of these facts the attempt made by the defence to create theory of third person entering in the room or taking exit from the room cannot be accepted.

16. Dr. Ajay Taware (PW 5) an autopsy surgeon who had conducted the postmortem examination of the dead body along with Dr. Chaudhari. He stated before the Court that estimated age of the deceased was 43 years. He further stated that on external examination, they found following superficial to deep burn injuries:

1. Head, Neck and Face 07%
2. Anterior trunk 18%
3. Posterior trunk 18%
4. Right upper limb 07%
5. Left upper limb 08%
6. Right lower limb 18%
7. Left lower limb 18%

Thus 94% burn injuries were found. They noticed stitched wound present over right leg near ankle joint (1cm above therapeutic) with two stitches. All the injuries were antemortem in nature.

He further stated that during the internal examination they found in head, scalp haematoma was present over frontal region admeasuring about 3cm x 2cm and reddish in colour and over brain subarachnoid hemorrhage were seen at some places. Brain was congested and edematous. Both lungs were congested and

edematous. Peritoneum was found congested. Esophagus was found congested. The liver, pancreas, spleen and kidneys were congested. He further stated that on examination, in their opinion as to cause of death was, 'shock due to burns with evidence of head-injury'.

In the cross-examination, an attempt was made to show that victim who had suffered extensive burns was unconscious and as such was not able to make any statement, this suggestions is clearly denied. We may refer to this part of the cross-examination which read thus:

9. It is true to say that the person suffering 94% burn injuries, suffers from severe and unbearable pains. It is not true to say that the person suffering from head injury as found by us coupled with burn injuries as mentioned above, become unconscious within a period of one or two hours from suffering of those injuries.

17. Last witness is Manojkumar Yadav. He stated in the examination-in-chief that since November 2008, he was posted at Loni- Kalbhor Police Station, Pune. He was in-charge of outpost of Urulikanchan within the jurisdiction of the said police station. He further stated that on receiving the statement of Subhadra an offence was registered as Crime No. 08/2009 punishable under Section 307 and 504 of IPC. Then this witness took over the investigation and proceeded to the spot of occurrence. The necessary formalities were completed such as drawing the panchanama in presence of panchas. On receiving the information that Subhadra died during the treatment at Sassoon Hospital, Pune he added the offence punishable under Section 302 of IPC and accordingly made report to the concerned JMFC. Then he stated about the steps taken by him in the process of investigation. Certain suggestions were given to this witness in respect of breaking open the door of the house by use of Pahadi an iron rod, this suggestion is denied.

18. Considering the evidence above referred, we are of the opinion, that the prosecution was successful in proving death of victim Subhadra was a homicidal death. We have already assigned our reason for not accepting the theory of an accidental death as put up by defence in trial and reiterated before us by learned Counsel for the Appellant.

19. The prosecution was justified in relying on the dying declarations, firstly oral dying declaration to Tanaji (PW 4) son of victim Subhadra and secondly written dying declaration recorded by Shashikant Waghule (PW 1). We are unable to find any fault in the conclusions drawn by the learned Trial Court in respect of dying declarations. Learned Trial Court was justified in placing reliance on the judgment of the Apex Court in the matter of Laxman Vs. State of Maharashtra 2002 Cri.L.J. 4095 and the observations therein read thus:

"What is essentially required is that the person who records the dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make statement

even without examination by the Doctor, the declaration can be acted upon provided the Court ultimately holds the same to be voluntary and truthful. The certification by the Doctor is essentially a rule of caution and, therefore, voluntary and truthful nature of the declaration can be established otherwise”.

20. Version of Dr. Rohit Fulwar (PW 3) is sufficient enough to establish that victim Subhadra though had received extensive burns was in a fit condition to make a statement and as such the submissions of learned Counsel appearing for the Appellant that victim Subhadra was unconscious and was unable to make any statement are not acceptable. Submission of learned Counsel for Appellant that Shashikant Waghule (PW 1) ought to have called the Special JMFC or Executive Magistrate to record the dying declaration of victim Subhadra and the statement recorded by Shashikant Waghule (PW 1) cannot be accepted in view of version of Shashikant (PW 1). Shashikant (PW 1) stated before the Court that considering the extensive burns suffered by victim he himself firstly ascertained the physical and mental condition of the victim and then recorded the statement. Learned Trial Court committed no error in observing that Shashikant (PW 1) took a prompt action of recording the statement of victim by himself.

21. Though, learned Counsel for Appellant placed reliance on the judgment of the Apex Court in the matter of Surinder Kumar Vs. State of Haryana (supra) and invited our attention paragraph 28 which reads thus:

28. Though there is neither a rule of law nor of prudence that dying declaration cannot be acted upon without corroboration but the court must be satisfied that the dying declaration is true and voluntary and in that event, there is no impediment in basing conviction on it, without corroboration. It is the duty of the court to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. Where a dying declaration is suspicious, it should not be acted upon without corroborative evidence. Likewise, where the deceased was unconscious and could never make any declaration the evidence with regards to it is rejected. The dying declaration which suffers from infirmity form the basis of conviction. All these principles have been fully adhered to by the trial court and rightly acquitted the accused and on wrong assumption the High Court interfered with the order of acquittal.

Considering the facts of the present matter, in our opinion, the judgment of the Apex Court is of no help to the appellant.

22. Similarly the judgment relied on by the learned Counsel for Appellant of Division Bench of this Court in the matter of Kamlabai Haribhau Lastane (supra), in our opinion, is not of any help to the Appellant.

23. Considering the above referred facts, and on minute scrutiny of the material placed on record, the conclusion arrived at by the Trial Court are based on sound reasoning and just and proper assessment of evidence. Appeal, thus, being devoid of any merit, deserves to be dismissed. Accordingly, Criminal Appeal is dismissed.