
(2013) 01 BOM CK 0235

In the Bombay High Court

Case No : Criminal Appeal No. 316 of 2011

Dnyaneshwar Ramchandra Suryawanshi

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 07-01-2013

Acts Referred:

Citation : (2013) ALLMR(Cri) 3133

Hon'ble Judges : S.B. Deshmukh, J;P.V. Hardas, J

Bench : Division Bench

Advocate : Rajendra S. Deshmukh, for the Appellant; B.V. Wagh, APP, for the Respondent

Judgement

S.B. Deshmukh, J.—Heard respective counsel. The judgment and order of the learned Extra Joint Ad-hoc Additional Sessions Judge, Nanded in Sessions Case No. 122 of 2010 dated 13.6.2011, thereby convicting the appellant for the offence u/s 302 of the Indian Penal Code ("IPC") and sentencing him to suffer rigorous imprisonment for life and to pay fine of Rs. 3,000/-, in default, to suffer simple imprisonment for three months is questioned in this appeal.

2. Prosecution story, in brief, is as under:-

Victim Kalpana was married to appellant (accused No. 1) in May 1997. Out of the said wedlock she had two sons. At that time, appellant was in a private service as a Driver. Subsequently, he got the Government job and therefore, the family shifted to Nanded. Appellant used to drink and ill-treat the victim. He used to ask her to fetch Rs. 50,000/- from her parents. However, she did not disclose this to her parents with a hope that everything will be fine.

On the fateful day i.e. 25.6.2008 at about 9.00 pm drunk appellant came to home. He raised quarrel. At around 9.45 pm, according to victim, when she was filling the lamp with kerosene, appellant came near her and asked her whether she is pouring kerosene on her person. She told him that she is filling the lamp. Appellant snatched the bottle from her, poured kerosene on her person and set

her ablaze. Victim rushed out of the house. Sat below the water tap. One Joshi Kaka also rushed towards her and tried to extinguish the fire. However, since the Saree on her person totally got burnt she received burn injuries.

Victim was shifted to Shila Kadam Hospital in a rickshaw. Where, according to victim, her relatives told her to forget what happened and tell the police that she caught fire due to fall of kerosene lamp on her Saree Further according to her, she gave such a statement (Exhibit 64) under coerce.

According to victim, her parents shifted her to Burn Hospital, Airoli for further treatment, where, after certification of Doctor about consciousness and ability of the patient to give statement, her statement was recorded by Police Sub Inspector, Rabale Police Station, New Mumbai. Based on the said statement, initially offence under Sections 307, 498A read with 34 of IPC was registered against the appellant and other accused. Thereafter, the papers were sent to Bhagya Nagar Police Station, Nanded for registration of the offence.

Unfortunately, victim succumbed to the burn injuries at New Mumbai. ASI Laxman Mane conducted inquest panchanama. Post Mortem was conducted at General Hospital, Washi. Papers, along with the statement of victim were sent to Bhagya Nagar Police Station, within whose jurisdiction, the offence took place. Accordingly, Police Sub Inspector, Bhagya Nagar Police Station, Nanded registered the offence vide Crime No. 204 of 2008 under Sections 302, 498A read with 34 of IPC, after following the due process.

Based thereon, investigation was carried out by API Dahedkar. He visited the spot, prepared spot panchanama, seized Bisleri bottle smelling kerosene, burnt piece of Saree and one match box from the spot. He recorded statements of some witnesses and handed over the papers to PSI Goutam for further investigation.

PSI Goutam continued with the investigation and completed it. He filed charge sheet against the appellant and other accused.

3. Charge was framed against the accused by the learned trial Judge. They pleaded not guilty and claimed to be tried.

4. To bring home guilt of the accused, before the trial Court, prosecution examined thirteen witnesses. PW 1 is Satwaji Rodge, panch of the spot panchanama (Exhibit 14). PW 2 is Jalbaji Rodge, father of victim Kalpana (Exhibit 17). PW 3 is Ishwar Rodge, brother of victim (Exhibit 19). PW 4 is Sunderabai, mother of victim (Exhibit 21). PW 5 is Mukund Rodge, uncle of victim (Exhibit 22). PW 6 is Kamlakar Kale, Police Station Officer, who registered the offence (Exhibit 24). PW 7 is Dr. Bhusan Jain, Medical Officer, who conducted autopsy (Exhibit 29). PW 8 is Mangesh Prabhu, API of Rabale Police Station, New Mumbai (Exhibit 32). PW 9 is Geetanjali Vijay Shinde, Special Executive Magistrate (Exhibit 38). PW 10 is Laxuman Mane, the then ASI of Rabale Police Station, who conducted inquest panchanama (Exhibit 43). PW 11 is Dr. Vinaya Pachpute, who

treated victim at Burn Hospital, Mumbai (Exhibit 49). PW 12 is Ravindra Dehedkar, who carried out some part of the investigation (Exhibit 55). PW 13 is PSI Gautam, who completed the investigation and submitted charge sheet in the Court (Exhibit 65).

5. After recording the evidence and hearing counsel for both sides, the learned trial Judge vide its judgment and order referred to above, while acquitting all other accused for the offences with which they were charged, convicted and sentenced the appellant only for the offence u/s 302 of IPC. Aggrieved thereby, present appeal has been filed by the appellant.

6. The learned trial Judge has considered the evidence brought on record on behalf of the prosecution. The learned trial Judge has accepted the evidence of father and mother of deceased Kalpana.

At this stage and in view of the findings recorded by the learned trial Judge in its judgment paragraph No. 31, we ourselves have considered the oral evidence of PW 2 Jalbaji Rodge father of deceased Kalpana. It is stated by him that his daughter deceased Kalpana was married to appellant in the year 1997. At the time of marriage, appellant was working as a private driver. It reflects from the evidence of PW 2 Jalbaji Rodge that deceased Kalpana was ill-treated by appellant on account of fulfillment of demand of Rs. 50,000/- to be brought from PW 2 Jalbaji Rodge. The evidence of PW 2 Jalbaji Rodge indicates alleged ill-treatment extended by appellant to deceased Kalpana. Since the appellant has been acquitted for the offence punishable u/s 498A of IPC and has been only convicted for the offence punishable u/s 302 of IPC, we are not discussing the entire evidence of PW 2 Jalbaji Rodge on the point of alleged harassment and ill-treatment to deceased Kalpana on account of non fulfillment of the alleged demand of Rs. 50,000/- by the appellant.

7. In support of the case of prosecution that deceased Kalpana was ill-treated and harassed by the appellant the prosecution has examined PW 3 Ishwar Rodge. Evidence of PW 3 Ishwar Rodge pertains to alleged ill-treatment and harassment by the appellant.

8. PW 4 Sunderabai Rodge is mother of deceased Kalpana. With the assistance of counsel before the Court, we have considered the entire evidence of PW 4 Sunderabai Rodge. From the evidence of PW 4 Sunderabai Rodge it appears that prior to three days of the incident, she herself and PW 2 Jalbaji Rodge had been to Alandi and there they received a phone call from her brother-in-law informing her that her daughter Kalpana was burnt and admitted in the hospital at Nanded for treatment. It was also informed that injured was shifted to Mumbai for further treatment. According to PW 4 Sunderabai Rodge she along with her husband PW 2 Jalbaji Rodge came to Mumbai-Pune Express Way and waited for arrival of Kalpana. Kalpana was brought in an ambulance by sister of PW 4 Sunderabai Rodge. PW 4 Sunderabai Rodge had seen Kalpana and found that she was fully burnt. PW 4 Sunderabai Rodge claims that she had been to Mumbai

along with her daughter. Kalpana was admitted in the hospital for treatment.

An important and relevant part of the evidence of PW 4 Sunderabai Rodge is that according to PW 4 Sunderabai Rodge there is oral dying declaration/disclosure of the alleged incident to her by Kalpana. It is alleged by PW 4 Sunderabai Rodge that Kalpana told her that Kalpana was filling kerosene in the lamp stored in the mineral water bottle and while performing this exercise, the appellant came to the house, who was under the influence of liquor, quarreled with her, took bottle of kerosene, poured kerosene on the person of Kalpana and set her ablaze. PW 4 Sunderabai Rodge claims that oral dying declaration was made by Kalpana to her father PW 2 Jalbaji Rodge. However, it was not made in her presence. In the cross-examination PW 4 Sunderabai Rodge admitted that the incident took place on 25.6.2008 and police have recorded the statement of PW 4 Sunderabai Rodge at Nanded on 19.7.2008, virtually after about a month of the incident and during this entire period of one month she did not disclose this fact of oral dying declaration made to her by Kalpana to any one.

We have noticed from the cross-examination of PW 4 Sunderabai Rodge that the alleged ill-treatment disclosed to her by deceased Kalpana was disclosed by her to the police on 19.7.2008, when her statement was recorded by Police. In paragraph No. 5 of the cross-examination, PW 4 Sunderabai Rodge admitted that Nanded Police did not record her statement nor Mumbai Police recorded her statement, though she was accompanying deceased Kalpana in the hospital for about 4-6 days. She claims that her statement was recorded by the police at Nanded 4-5 days after the demise of Kalpana. In the same paragraph, she also admitted that she was present in the hospital at Mumbai even after admission of Kalpana till her death. We have also noticed some omissions in the evidence of PW 4 Sunderabai Rodge. However, we are not recording those omissions since they are on the point of alleged offence punishable u/s 498A of IPC for which we have no concern in the present appeal in relation to the present appellant - husband.

9. Evidence of PW 2 Jalbaji Rodge do show that he along with his wife PW 4 Sunderabai Rodge had been to Mumbai from the date of admission of deceased Kalpana in Mumbai hospital. Both of them stayed in the hospital at Mumbai for 3-4 days after admission. It is significant to notice from paragraph No. 3 of the examination-in-chief of PW 2 Jalbaji Rodge that according to him deceased Kalpana, after 3-4 days of her admission in the hospital at Mumbai could not talk with them i.e. PW 2 Jalbaji Rodge and PW 4 Sunderabai Rodge. According to him on the fourth day Kalpana talked with him and PW 4 Sunderabai Rodge and told them that she was filling the kerosene in the lamp, appellant her husband came to he house and asked her what she was doing and snatched the bottle of kerosene from her, put kerosene on her person and set her on fire with three match sticks, one after another. He claimed that thereafter, she died in the hospital while taking the treatment.

10. We have heard learned counsel for the parties at length. Both of them took

us through the relevant evidence i.e. oral evidence of PW 2 Jalbaji Rodge, PW 4 Sunderabai Rodge, written dying declarations Exhibits 64 and 39.

11. According to the learned counsel for the appellant, evidence of PW 2 Jalbaji Rodge and PW 4 Sunderabai Rodge - father and mother of deceased Kalpana - regarding the alleged oral dying declaration is inconsistent. PW 2 Jalbaji Rodge claims that after fourth day of admission in the hospital at Mumbai, deceased Kalpana had disclosed alleged incident implicating the appellant. PW 4 Sunderabai Rodge on the contrary claims that the disclosure regarding oral dying declaration involving the present appellant was made alone to her and was informed to PW 2 Jalbaji Rodge father of deceased Kalpana. According to him, the oral dying declaration made to these two witnesses PW 2 Jalbaji and PW 4 Sunderabai is inconsistent and untrustworthy, despite this fact has been accepted and considered by the trial Court while recording conviction against the appellant for offence punishable u/s 302 of IPC.

12. Learned APP, per contra, submitted that evidence of PW 2 Jalbaji Rodge and PW 4 Sunderabai Rodge is consistent. Both of them have in clear terms stated before the Court that they accompanied deceased Kalpana in an ambulance and were along with her from the date of her admission in the hospital at Mumbai, till her death. He further stated that deceased Kalpana made oral dying declaration to both of them which corroborates the statement recorded by the Police Officer of deceased Kalpana Exhibit 33 as well as the dying declaration recorded by the Special Executive Magistrate Exhibit 39.

13. With the assistance of learned counsel before the Court, we have perused the record of the case. We find from the record that dying declaration recorded by the Joint Judicial Magistrate (FC) (Exhibit 64) is part of the record. It was tendered by the prosecution u/s 294 of the Code of Criminal Procedure. This dying declaration has been admitted on behalf of the appellant/accused during the trial. This dying declaration therefore, has been justifiably accepted and exhibited by the learned trial Judge. This dying declaration is admissible piece of evidence. We have minutely considered the said dying declaration from the original record. This dying declaration makes it clear that it was an accidental occurrence, according to deceased Kalpana, as recorded by the Joint Judicial Magistrate (First Class). At this stage, we would like to consider the findings recorded by the trial Court, as observed in paragraph No. 31 that dying declaration Exhibit 64, though recorded by the learned Judicial Magistrate (First Class), he was not examined on behalf of the accused. The observation of the learned trial Judge we would like to quote:-

..... In the present case, accused have admitted the contents of dying declaration recorded by Judicial Magistrate F.C. Nanded vide Exhibit 64 but did not take effort to prove its contents by examining executant (learned Judicial Magistrate First Class) and Doctor for establishing that patient (deceased Kalpana) was conscious when her statement was recorded by J.M.F.C. contents by defence counsel is insufficient to hold that its contents are proved without examining

executant and Doctor.

14. We are unable to countenance the findings recorded by the learned trial Judge in relation to proof of dying declaration Exhibit 64. In our opinion, Section 294 is clear and in the case on hand, document Exhibit 64 has been duly exhibited by the learned trial Judge. Said document, therefore, needs to be accepted to be proved document and ought to have been relied upon by the learned trial Judge, even in the absence of oral evidence of learned Judicial Magistrate (First Class) as well as the Medical Officer concerned.

15. It appears that the learned trial Judge was impressed with the evidence of Police Officer Rabale Police Station, while observing that due to coercion of appellant and his relatives, deceased Kalpana had given dying declaration before the learned Judicial Magistrate (First Class), Nanded (Exhibit 64) and disbelieved the dying declaration Exhibit 33.

16. We have perused the evidence of PW 8 Mangesh Prabhu (Exhibit 32). It appears from his evidence that on 7.7.2008, he was serving as PSI at Rabale Police Station, Navi Mumbai. At about 1.00 p.m. one Jalbaji Rodge came to police station and stated that his daughter Kalpana is taking treatment in burn hospital at Airoli Navi Mumbai and further stated that she is to give a statement to the police. He, therefore, called Special Executive Magistrate on phone for recording the statement of Kalpana. He, thereafter, went to the Burn Hospital along with Special Executive Magistrate and inquired with the available Medical Officer regarding consciousness of deceased Kalpana and her condition for recording the statement. According to evidence of this witness, Medical Officer examined Kalpana, made an endorsement regarding her mental as well as physical fitness and thereafter dying declaration/statement of Kalpana (Exh. 33) came to be recorded. This dying declaration is heavily relied upon by learned APP. This dying declaration implicates appellant. In the cross examination, paragraph No. 6, this Police Officer has given some admission in relation to other acquitted accused and offence u/s 498A of IPC and therefore, we are not in detail discussing the said part of the evidence. We have noticed admission in paragraph No. 7 of the deposition of this witness that first part of statement Exhibit 33 was written by him in routine course. He has also admitted that he did not put her questions to remove the impressions on her mind in respect of her relatives met her within the span of 27.6.2009 to 7.7.2008. He was unable to identify the signature below dying declaration Exhibit 33, whether it was of deceased Kalpana. He has also admitted at the end of paragraph No. 7 of deposition that on the statement Exhibit 39, recorded by the Special Executive Magistrate, there is a thumb impression of deceased Kalpana and not her signature. He further admitted in paragraph No. 7 of the deposition that the dying declaration Exhibit 33 does not bear any endorsement of Medical Officer showing the physical and mental fitness of deceased Kalpana. He denied the suggestion that he has taken endorsement of the Medical Officer at one and the same time after completing the statement.

(Emphasis supplied).

17. We have considered the oral evidence of PW 8 Mangesh Prabhu and dying declaration Exhibit 33 i.e. original document as well as evidence of PW 10 Dr. Vinaya Pachpute. There is no dispute that PW 10 Dr. Vinaya Pachpute was serving in the Burn Hospital at Mumbai under Dr. Kesvani, who was in charge of the ICU Department at the relevant time and deceased was admitted in that ward on 7.7.2008. It reflects from the evidence of PW 10 Dr. Vinaya Pachpute that Special Executive Magistrate had visited the Burn Ward on 7.7.2008 at about 5.00 p.m., for recording statement of Kalpana in the form of dying declaration Exhibit 33. This witness had examined Kalpana and made an endorsement Exhibit 50. She found that the patient was conscious, well oriented and fit for recording her statement. It appears that the statement was completed at about 9.45 p.m. and endorsement is made by PW 10 Dr. Vinaya Pachpute to that effect. She admitted in the cross examination that the patient was under treatment of Dr. Kesvani, who is the best person to know health condition of deceased Kalpana. Suffice to notice that the dying declaration was recorded by Special Executive Magistrate in the presence of PW 11 Dr. Vinaya Pachpute and deceased Kalpana was well oriented and in a fit condition to give the statement. Exhibit 33 was accordingly recorded by Special Executive Magistrate.

18. It is appropriate for us at this juncture to consider the evidence of PW 9 Geetanjali Shinde. PW 9 Geetanjali Shinde, Special Executive Magistrate had received a phone call on 7.7.2008 from Police Station Officer Rabale at about 3.00 p.m. She, thereafter, went to Burn Hospital and contacted the Medical Officer. She was accompanied by Police Constable Dhobale, who identified patient Kalpana. According to her, Doctor examined patient and told her that the patient was in a fit condition for recording the statement/dying declaration. Patient, at the relevant time was in ICU, conscious and well oriented. Doctor accordingly made an endorsement on the dying declaration Exhibit 39. Statement was recorded by PW 9 Geetanjali Shinde. It was read over by her to deceased Kalpana who admitted the same. She, thereafter, obtained thumb impression of deceased Kalpana. According to this witness Kalpana had also signed but her fingers were rumbling. This witness also put her stamp and signature on the said dying declaration. This dying declaration Exhibit 39 implicating the appellant has been duly proved by the evidence of this witness PW 9 Geetanjali Shinde so also Police Officer PW 8 Mangesh Prabhu and Medical Officer PW 10 Dr. Vinaya Pachpute.

19. We have considered three important documents i.e. statement of deceased Exhibit 33 implicating the appellant, dying declaration of deceased Kalpana recorded by Special Executive Magistrate Exhibit 39 also implicating the appellant and dying declaration Exhibit 64 recorded by the learned Judicial Magistrate (First Class), Nanded absolving the appellant and categorically showing that it was accidental burn injuries sustained by deceased Kalpana.

We have given thoughtful consideration to the submissions of the learned counsel for the parties. We ourselves have examined/assessed the oral evidence/

exhibited document i.e. Exhibits 33, 39 and 64. It is a case of two conflicting dying declarations Exhibits 64 and 39. At this stage, we appreciate the submission of learned counsel for the appellant that in case of multiple dying declarations and acceptance of one dying declaration falsifies the other, the dying declarations have to be necessarily rejected. The dying declaration has to pass all the tests of reliability as the declarant is not available for cross-examination as held by this Court in the case of Suresh Dodorkar (Sonar) Vs. State of Maharashtra, . The facts in the present case are nearer to the facts in the cited judgment by the learned counsel for the appellant. We are inclined to accept the dying declaration Exhibit 64 absolving the appellant indicating sustaining accidental bum injuries to deceased Kalpana. We, therefore, reject the dying declaration Exhibit 39 recorded by the Special Executive Magistrate as well as ignore the statement of deceased Kalpana recorded by the Police Officer Exhibit 33. In our opinion, two oral dying declarations of deceased Kalpana to her father and mother, which we have discussed in foregoing paragraphs, are not trustworthy and no explicit reliance can be placed on said oral dying declarations, which are also inconsistent. Resultantly, we are inclined to allow the appeal.

In the result, Criminal Appeal is allowed. 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.