
(2012) 12 BOM CK 0148
In the Bombay High Court
Case No : Criminal Appeal No. 1320 of 2006

Ishwar Ganpat Machhi

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 16-12-2012

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 506

Citation : (2013) 1 ABR 743

Hon'ble Judges : V.M. Kanade, J;P.D. Kode, J

Bench : Division Bench

Advocate : V.A. Gangal and Ashok Gade, for the Appellant; H.J. Dedhia, APP, for the Respondent

Judgement

V.M. Kanade, J.—Heard the learned counsel appearing on behalf of the Appellant and the learned APP for the State. The Appellant has filed this appeal being aggrieved by the judgment and order dated 17.10.2006 passed by the Sessions Judge, who was pleased to convict the Appellant for the offence punishable u/s 302 of the Indian Penal Code and was pleased to sentence him to suffer imprisonment for life and to pay fine of Rs. 1,000/- and, in default, to undergo rigorous imprisonment for six months. The Appellant was also convicted for the offence punishable u/s 506 of the Indian Penal Code and sentenced to undergo imprisonment for six months and to pay fine of Rs. 200/- and, in default, to undergo rigorous imprisonment for one month. Both the sentences were directed to run concurrently.

2. Brief facts are as under:-

The incident in question took place in 1997. Two years prior to the said incident, the Appellant Original Accused had married the deceased. On the date of the incident, the Appellant was 23 years old and deceased was 19 years old. The prosecution case is that on the date of the incident, both the husband and deceased wife worked in the agricultural field and returned home in the evening. The prosecution case is that on that day, it being a Friday, the deceased was

fasting and she was feeling little weakness and, therefore, she did not do the domestic work. It is alleged that the husband was curious and he picked up a quarrel with the deceased and thereafter, he poured kerosene on her body and set her on fire. The deceased, therefore, was taken to the hospital and she succumbed to the injuries and after 9 days she died. The prosecution case is that her statement was recorded by the investigating officer after the endorsement was given by the doctor, who had stated in the said endorsement that she was physically and mentally in a fit condition to make a statement and accordingly the statement of the deceased was recorded in the presence of the Special Executive Magistrate.

3. The accused was arrested and an offence was converted to Section 302 of the Indian Penal Code after the deceased succumbed to the burn injuries and died. The prosecution examined 7 witnesses. Out of 7 witnesses, burned witness viz. the neighbour of the accused turned hostile. The Trial Court on the basis of the evidence which was adduced by the prosecution, more particularly, after relying on the dying declaration, was pleased to convict the Appellant for the offence punishable under Sections 302, 506 of the Indian Penal Code.

4. Shri Gangal, the learned Senior counsel appearing on behalf of the Appellant submitted that the prosecution had relied only on the dying declaration which was recorded by the investigating officer and which was allegedly made in the presence of the Special Executive Magistrate. He submitted that though the investigating officer had an ample opportunity to record the dying declaration through an Executive Magistrate, he had chosen to record it in the presence of the Executive Magistrate. He submitted that, therefore, the procedure followed by the investigating officer of recording the dying declaration was patently illegal and, therefore, no reliance could be placed on the said dying declaration. Secondly, he submitted that there were inherent infirmities in the said dying declaration. He submitted that in the dying declaration, the deceased stated that she was pregnant by three months. It is stated that this fact was neither established by the doctor, who performed the post-mortem nor by any other witnesses viz. the parents of the deceased. He then submitted that the second infirmity in the dying declaration was that it was mentioned in the dying declaration that her first statement was recorded by the police in which she had stated that her saree had caught fire on the stove and that statement was made since her husband had threatened her and being afraid, she had given the said statement. It is submitted that since the so called first statement was not produced on record by the prosecution and was not before the Court, an adverse inference ought to have been drawn by the Trial Court on account of suppression of the first dying declaration. It was then submitted that the endorsement of the doctor was made not at the bottom or at the top of the dying declaration but it appears to have been taken after the statement was recorded and therefore, it creates a doubt about the authenticity of the said endorsement. The learned counsel for the Appellant has relied on the two judgments of the Apex Court in support of his submissions viz. in the case of Arjun Prajapati vs. State of Bihar

and Others, (2001) 9 SCC 252 and in the case of Dalip Singh and Others Vs. State of Punjab, . Lastly, it was submitted that the prosecution has not produced the letter which was written to the Special Executive Magistrate, asking him to remain present for the purpose of recording the dying declaration. It is submitted that all these infirmities are fatal to the prosecution case and on that ground, the order of conviction is liable to be set aside and quashed.

5. On the other hand, the learned APP for the State submitted that the Trial Court had given cogent reasons and had rightly relied on the dying declaration which was recorded by the police. It is submitted that it is not necessary to call Special Executive Magistrate where the dying declaration is required to be recorded immediately and in the present case the Investigating Officer had recorded the said statement in the presence of the Special Executive Magistrate after obtaining the permission of the Medical Officer. He submitted that the Special Executive Magistrate in his evidence supported the I.O.'s statement and in clear terms, he had stated that the said statement was recorded in his presence. The said statement was given, because the procedure of Special Executive Magistrate recording the dying declaration itself was not followed. It could not be a ground for discarding the dying declaration in its entirety.

6. We have heard both the learned counsel at length and we have also gone through the judgment and order of the Trial Court and the statements of the witnesses who have been examined by the prosecution viz.

PW-1 Suman Pravin Aagri - the mother of the deceased Hemlata;

PW-2 Pravin Ramchandra Aagri - the father of the deceased;

PW-3 Uday Balkrishna Afale - the Investigating Officer;

PW-4 Laxman Dalvi - the neighbour of the accused and the deceased;

PW-5 Anant Dendu Patil, the Executive Magistrate;

PW-6 Shaikh Firoj Shakh Chand Shaikh - PSI of Dahanu Police Station; and PW-7 Umakant Bankairao Garad, the Medical Officer before whom the statement of deceased was recorded and who also conducted the post-mortem.

7. In the present case, the prosecution is relying only on the dying declaration for the purpose of proving the case against the Appellant herein. It is not in dispute that the death of the deceased Hemlata was homicidal death. PW-7 doctor, who performed the postmortem, has clearly stated that the deceased had almost 90% burn injuries and her death was homicidal.

8. The only question which requires to be decided is whether the Appellant was responsible for causing the death of his wife Hemlata, the deceased herein.

9. There is much substance in the submissions made by the learned Senior counsel Shri V.A. Gangal that the dying declaration which was recorded by the investigating officer could not be relied upon.

10. The law on the said point is quite well settled. The Apex Court in the case of *Khushal Rao Vs. The State of Bombay*, , in terms, has observed in paragraphs 16 and 17 as under:-

16. On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

17. Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once, the Court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration.

If, on the other hand, the Court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the Court, in a given case, has come to the conclusion that that particular dying declaration was not

free from the infirmities, referred to above or from such other infirmities as may be disclosed in evidence in that case.

11. The Apex Court has also observed that it is not necessary that in each and every case, the dying declaration has to be recorded in a question and answer form by the Executive Magistrate. The Court, however, has sounded a note of caution and observed that when the evidence consists solely of a singular dying declaration recorded by the investigating officer and in the event infirmities are found in the dying declaration or procedure which is followed in recording the dying declaration is faulty, then, in such a case, the Court should be slow in convicting the accused on the basis of such dying declaration. In the present case, there are several infirmities in the said dying declaration which is recorded by the investigating officer. Firstly, in the dying declaration, the deceased had clearly stated that in her previous statement recorded by the police she had not blamed her husband but had stated that she was burnt due to accident. Surprisingly, though this statement was made by her in the dying declaration at Exhibit 16, the prior statement which is referred to in this dying declaration has not been brought on record. This circumstance itself creates a doubt about the authenticity of the dying declaration at Exhibit "16". Secondly, in the said dying declaration, it is alleged that the deceased had stated that on the date on which the incident took place, she was three months' pregnant. This fact is proved to be incorrect since neither the doctor who performed the postmortem, has stated that the deceased was pregnant nor the post-mortem notes indicate that there was fetus in the womb of the deceased. Lastly, normally when a Special Executive Magistrate is called for the purpose of recording a dying declaration, a letter to that effect is sent to the Special Executive Magistrate. No such letter has been brought on record and apart from that, when a Special Executive Magistrate is called to record the dying declaration, a duty is cast on him to record the dying declaration himself in a question and answer form and secondly, he is under an obligation to record the exact words of the deceased or at least the gist of the exact words used by the deceased in her statement. In this particular case, the Special Executive Magistrate has failed to perform that obligation which is cast on him by law viz. to act as an independent witness and to record the statement in impartial manner so as to create confidence about the truthfulness of the dying declaration.

12. Under these circumstances, in our view, it is not possible to rely on the said dying declaration. Apart from the evidence of this dying declaration, the prosecution has examined the father and mother of the deceased, none of her parents have stated either there was demand of dowry or that any complaint was made about the Appellant husband regarding his conduct. No complaint has been recorded with the police or any other authority. The marriage had taken place two years prior to the incident and even on the date of the incident, the husband and wife had come back home after working in their agricultural land. There is no other evidence of independent witness who has stated that there used to be a quarrel between husband and wife. The neighbour PW-4 who has been examined

by the prosecution, has in fact, stated in his evidence that at no point of time, he had heard the Appellant and the deceased quarrelling with each other. The said witness was declared as " hostile witness since he did not support the prosecution case. As such, there is no independent evidence whatsoever to corroborate the alleged dying declaration recorded by the investigating officer. Under these circumstances, it is difficult to convict the Appellant for the offence punishable u/s 302 of the Indian Penal Code.

13. In such cases, it is the duty of the police to investigate the case in a proper manner so as to bring on record the true facts and circumstances of the case. It has been held that right from when the incident had occurred, it is the duty of the prosecution to ensure that the true facts emerged, after the investigation is made and the investigating officer as aforesaid should act impartially. There is no evidence of whatsoever nature regarding the threats and, therefore, the Appellant is also acquitted of the offence punishable u/s 506 of the Indian Penal Code. In the present case, unfortunately, since the proper investigation is not made, the true facts have not been brought on record and, in such cases, the Court has no other alternative but to give benefit of doubt to the accused. In view of the above, the following order is passed.

ORDER

1. Criminal Appeal is allowed.
2. The judgment and Order passed by the Trial Court is quashed and set aside.
3. The Appellant is acquitted of the offence punishable under Sections 302 and 506 of the Indian Penal Code.
4. The Appellant is in jail since 2006, he is directed to be released forthwith unless his presence is required in any other case.
5. Fine amount, if any paid, be refunded to the Appellant. Criminal Appeal is disposed of.