
(2014) 11 BOM CK 0197
In the Bombay High Court
Case No : Cri. Appeal No. 816 of 2008

Mahadeo Prabhu Loondhe

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 20-11-2014

Acts Referred:

Citation : (2015) 1 MhLJCrI 434

Hon'ble Judges : P. V. Hardas and G. S. Kulkarni, JJ.

Bench : Division Bench

Advocate : Vikas Shivarkar with Sambat Bhoite, Advocates, for the Appellant;
Mrs. U. V. Kejriwal, APP, for the State

Final Decision : Dismissed

Judgement

G. S. Kulkarni, J. (Oral)—The Appellant who stands convicted for the offence punishable under section 302 of Indian Penal Code and sentenced to suffer imprisonment for life and to pay a fine of RS. 1000/- and in default of payment of fine to undergo rigorous imprisonment for three months, by the Sessions Judge, 5, Pune, by judgment dated 25-7-2008 in Sessions Case No. 396 of 2007, by this appeal questions the correctness of his conviction and sentence.

2. Facts as are necessary for decision of this appeal, may briefly be stated thus :-

When P.W.4 - Govarlal Kanhaiyalal Dabhade, PSI attached to Hadapsar Police Station was on duty on 27-2-2007, at about 9.30 p.m. P.W.3 - Janabai Bhagwan Khalase who is the mother of deceased Banabai Mahadeo Londhe came to the police station and informed that deceased Banabai was set on fire by her husband - the appellant in this appeal and was admitted at the Sasoon Hospital at Pune. PSI Dabhade visited the hospital. A statement of deceased Banabai was recorded on 27-2-2007 and an offence under section 307 of Indian Penal Code was registered against the appellant-accused. Thereafter, investigation was undertaken by P.W.4. Statement of witnesses were recorded. A spot panchanama was prepared in the presence of panchas. The spot was the house of deceased

Banabai and the appellant. From the spot, plastic kerosene can, half burnt candle, burnt pieces of matchsticks and burnt pieces of sari and a stove were seized. A panchanama to that effect was recorded which was signed by P.W.4 and the panchas which is at Exhibit 19. A second statement of the deceased came to be recorded by P.W.4 on 28-2-2007 in the presence of Medical Officer. The appellant was arrested on 1-3-2007. The deceased expired during her hospitalization on 3-3-2007 and hence offence under section 302 of Indian Penal Code was substituted by submitting a report to that effect. Postmortem on the dead body of deceased Banabai was performed on 3-3-2007 by P.W.2 Dr. Rohit Dagdu Phulwar, Medical Officer attached to Forensic Department of Sasoon Hospital. P.W.2 Dr. Rohit has found the following external injuries :- "Superficial to deep burns over following surfaces :

(1) Head, neck, face 8%

(2) Upper limbs 18%

(3) Lower limbs 32 %

(4) Trunk 18%

(5) Back 18%

(6) Perineum 1%

Total: 95%"

P.W.2 Dr. Rohit has recorded a finding that there was evidence of infection and that the cause of death was "shock due to burns". P.W.2 Dr. Rohit has recorded that the burnt injuries were ante-mortem and they were sufficient in the ordinary course of nature to cause death of the deceased.

3. On the case being committed to the Court of Sessions, the trial Court vide "Exhibit 4" framed charge against the appellant for offence punishable under section 302 of Indian Penal Code. The appellant having denied his guilt claimed to be tried. The prosecution in support of its case has examined five witnesses. The defence of the appellant was of denial. The trial Court, upon appreciation of evidence, has convicted and sentenced the appellant as afore stated.

4. We have heard Mr. Vikas Shivarkar, learned Counsel for the appellant and Mrs. U. V. Kejriwal, learned APP for State. In order to effectively deal with the submissions advanced before us by the learned Counsel for the parties, it would be useful to refer to the evidence of the prosecution witnesses.

5. P.W.3 - Janabai Bhagwan Khalase is the mother of the deceased. She has deposed that the deceased was married to the appellant about 15 years back and that after marriage, the deceased was residing along with the appellant at Gosavi Vasti, Hadapsar. She deposed that the deceased had three children from the appellant. She deposed that the appellant was not doing any work and was in the habit of drinking liquor and used to assault the deceased. She further

deposed that the deceased used to come to her house and the appellant used to take her back assaulting her. She further deposed that the appellant had kept one mistress and used to pay money to her. She deposed that the appellant was causing lot of harassment to the deceased. She further deposed that the appellant had given her an amount of Rs. 5,000/- at the time of her daughter's (Manisha) marriage and that the appellant was demanding the said amount. She deposed that the incident had taken place at 9 p.m. on 26-2-2007 and that the brother-in-law of the deceased had informed P.W.3 at about 4 a.m. on 27-2-2007 that the appellant-accused had set on fire his wife-deceased Banabai and that she was admitted to Sasoon Hospital. She has deposed that when she reached Sasoon Hospital and made inquiry with Banabai as to how she sustained burns, deceased Banabai told P.W.3 that on that day appellant has harassed and ill-treated her the whole day. She deposed that in the evening at 7.30 p.m., the appellant had returned to the house in drunken condition and started beating her. She deposed that, therefore, the deceased threatened the appellant that she will pour kerosene on herself and set herself ablaze. She deposed that the deceased accordingly to threaten the appellant, poured kerosene on herself from stove. She deposed that at that time there was no electricity supply and hence a candle was lighted and that the appellant took one of the lighted candle and set ablaze the deceased, causing her burn injuries. She deposed that deceased Banabai was brought to the police chowky and from the police chowky she was referred to Sasoon Hospital where she died after 5 - 6 days. She deposed that police recorded her statement.

6. In the cross examination, P.W.3 admitted that the appellant was not doing any work and that he was looking after she-buffaloes and was earning about Rs. 1000/- to Rs. 1500/- per month. She admitted that the police had recorded her statement at the police station and thereafter at Sasoon Hospital. She admitted that the deceased was completely burn. She admitted that police had not come to the hospital from 26-2-2007 to 3-3-2007. She admitted that police had recorded her statement that since the time of marriage, appellant used to beat, assault and harass the deceased and that the deceased used to come to her house after such beating by the appellant. She admitted that the appellant used to come to the house of P.W.3 and beat her and take her away. P.W.3 admitted that she has stated before the police that the appellant's brother had informed P.W.3 and other that the appellant had burnt Banabai. P.W.3 denied the suggestion that Banabai had poured kerosene on herself and accidentally pallu of her saree fell on the lighted candle and hence she sustained the burns.

7. P.W.5 Dr. Mangesh Gopalrao Kohale, Medical Officer attached to the Sasoon Hospital was on duty in February, 2007 in Ward No. 27. P.W.5 deposed that the deceased Banabai was admitted at hospital on 27-2-2007 at 1.15 a.m. with the history of burns. P.W.5 deposed that the statement of the deceased was recorded by the police on 27-2-2007 in his presence. P.W.5 deposed that he had examined the deceased before and after recording of her statement and found her to be in a proper state to give a valid statement. P.W.5 deposed that the statement was

read over to her and that she admitted it to be correct and made her thumb impression on it and that he had also made an endorsement to that effect on the said statement which is at Exhibit 23. P.W.5 deposed that on 28-2-2007 in the morning deceased Banabai had expressed her intention of giving another statement, hence, a requisition to the police was made. P.W.5 deposed that accordingly PSI Dabhade came at 3 a.m. for recording the statement of the deceased. P.W.5 deposed that at that time he had examined the deceased and found her conscious and oriented to give a valid statement. P.W.5 deposed that except him, police and the patient, no one else was allowed to remain present when the statement of the deceased was being recorded. P.W.5 deposed that in her second statement, the deceased has given the case of homicidal burns at the hands of her husband. P.W.5 deposed that after recording of the statement of deceased, he had examined her and found her to be in a fit condition to give the statement. He deposed that the statement was read over to the deceased and that she admitted it to be correct and put her thumb impression on the same and that he has made endorsement on the statement and signed below it. The said statement is at Exhibit 17.

8. In the cross-examination, P.W.5 admitted that deceased sustained 87% of burns and that her fingers and hands were burnt. P.W.5 admitted that the recording of timing of 3.30 a.m. recorded below P.W.5's endorsement is the time of completion of recording of statement of the deceased. P.W.5 admitted that the face of the deceased was more or less burnt. P.W.5 denied the suggestion that due to burns, the deceased was unable to open her mouth. P.W.5 further denied the suggestion that PSI Dabhade has not recorded the statement of the deceased in his presence on 28-2-2007. P.W.5 admitted his endorsement on the statement of the deceased. P.W.5 further denied the suggestion that the thumb impression on the statement was not that of the deceased.

9. The other witnesses as examined by the prosecution was P.W.1 - Atmaram Sayaji Sonawane, a panch witness who is declared hostile and hence, was cross-examined on behalf of the prosecution. In the cross-examination he denied the panchanama.

10. Learned Counsel for the appellant has urged before us that the evidence as come on record before the trial Court was extremely discrepant to prove beyond reasonable doubt that the appellant had committed murder of deceased Banabai. He submits that two dying declarations namely dying declaration dated 27-2-2007 and the second dying declaration dated 28-2-2007 are totally inconsistent. Learned Counsel for the appellant would urge that the material discrepancies in the evidence in no manner bring home the guilt of the appellant so as to conclude that the appellant has committed offence of murder of his wife deceased Banabai. Learned APP had supported the findings arrived at by the trial Court.

11. On examining the evidence, we find that the case of the prosecution against the appellant is principally on the following circumstances :-

(I) That P.W.3 Janabai - mother of the deceased had deposed that the appellant-accused was in a habit of consuming liquor and used to beat deceased Banabai. That the appellant was not doing any work and had kept a mistress on whom he was spending money;

(II) The evidence of P.W.3 is corroborated with the second dying declaration of the deceased. The statements of the deceased in the second dying declaration are thus :-

That on the day of the incident at about 9.30 p.m. the appellant had come home after consuming liquor and was giving abuses to the deceased. At that time, deceased Banabai was inside the house along with the children preparing food on stove. The deceased feared that the appellant would assault her and hence, she closed the door from inside. At that point of time, the appellant started shouting loudly from outside, the deceased told the appellant that he should beat her, she would pour kerosene on her. The second dying declaration records that despite this threat, the appellant started kicking the door and hence, the deceased poured kerosene on her so as to threaten the appellant. However, the appellant with the help of stone broke opened the door and entered the house and pulled her hair and started assaulting her with foot and fist. At that time there was no light in the house. The appellant picked up a burning candle and set her ablaze. That there was a big fire and hence looking at this her brother in law Shashibhau rushed and put a blanket on her so as to extinguish the fire. That the appellant had burnt his hand when he was trying to extinguish the fire. That it was the appellant who had burnt her for the reason that mother of the deceased was not paying Rs. 5000/- as taken by her as also for the reason that he had kept one mistress named Soni.

(III) That the evidence of P.W.2 Dr. Rohit Dagdu Phulwar corroborates the fact that the deceased had died on account of 95% burn injuries sustained by her and the injuries were ante-mortem in nature and sufficient to cause death of the deceased.

(IV) That P.W.5 Dr. Mangesh Gopalrao Kohale had admitted both the dying declarations dated 26-2-2007 and 27-2-2007 respectively to depose that the deceased was in a proper condition and well oriented to give valid statement when both the dying declarations were recorded.

12. On examining the evidence on record, we may at the outset observe that the case of the prosecution is purely on circumstantial evidence. Secondly, the discrepancies and inconsistencies in the evidence cannot be overlooked. The discrepancies being that deceased Banabai had made two dying declarations one dated 27-2-2007 and the other dated 28-2-2007. Both these dying declarations are completely inconsistent with each other. In the first dying declaration deceased Banabai has stated that she was burnt on account of bursting of stove and that nobody had intentionally attempted to burn her as also she had no quarrels with anybody on the day of the incident. In this dying declaration, she

stated that the appellant was sitting at the entry of the house and on noticing that saree of the deceased was burnt, came to control the fire and in the process, his hands were burnt. In the second dying declaration which was recorded on the next day at about 3.30 a.m., the deceased recorded a version that the appellant had set her ablaze and had burnt her, as observed by us above. This shows complete variance in the version of the deceased as set out in both these dying declarations. There is major variance in the incident which was narrated in both these dying declarations. This goes to the root of the issue as to which dying declaration should be read to be the genuine and truthful declaration of the deceased.

13. It is a settled principle of law that in a case resting on multiple written dying declarations, the Court cannot pick and choose any one dying declaration. The dying declarations are required to be consistent in respect of the material aspect of the incident. A perusal of the dying declarations in question clearly shows that there is no consistency or a common thread which would support the case of the prosecution to point out the guilt of the appellant. There is complete variance of the incident as recorded in each of the dying declaration. In our considered view, the prosecution cannot place reliance on these two dying declarations at Exhibit 23 and Exhibit 17. In this context it would be useful to refer to the decision of the Supreme Court in the case of *Sanjay v. State of Maharashtra*, (2007)9 SCC 148. The facts in this case were quite similar to the facts in the present appeal. In the first dying declaration the deceased had stated that the deceased was pumping stove and it burst suddenly and her saree caught fire and that hearing her shout her husband rushed towards her and tried to save her. In the subsequent dying declaration, a different version was stated that the deceased being angry with her husband deceased herself set her body ablaze. In this context the Supreme Court observed that in view of the different dying declarations, it would not be safe to uphold the conviction of the accused and a benefit of doubt was required to be given to him. It was held that it cannot be said that the prosecution had proved the guilt of the accused under section 306 of IPC of abetting the suicide beyond reasonable doubt.

We may also make a reference to the decision of the Division Bench of this Court in the case of *Suresh s/o. Arjun Dodorkar (Sonar) v. State of Maharashtra*, 2005 All MR (Cri) 1599, to which one of us (P. V. Hardas, J.) is a member, wherein the Division Bench has held that two dying declarations when are in complete variance in respect of the incident, cannot be relied upon. It was held that if in the dying declaration the truthfulness of the narration itself is rendered doubtful, no reliance whatsoever can be placed on the dying declaration. The Division Bench in para. 9 has observed thus :-

"9. ? . ? . ? . ?... ?... In cases resting on multiple written dying declarations, the Courts cannot pick and choose any one dying declaration. All the dying declarations have to be consistent in respect of material aspects of the incident. According to us, consistency is expected in multiple dying declarations in respect

of the names and the number of accused, the prelude to the incident and the incident itself. In these two dying declarations there is consistency in respect of the name and the number of accused. However, in respect of the prelude to the incident, there is variance. There is also variance in respect of the incident itself. The variance is apparent on perusal of the dying declarations and can be discerned from the perusal of the same. Therefore, according to us, no reliance can be placed on the two written dying declarations at Exhs.24 and 27, as acceptance of any one dying declaration necessarily renders the other as false. If in the dying declaration the truthfulness of the narration itself is rendered doubtful, no reliance whatsoever can be placed on the dying declaration. Merely because the overt act attributed to the accused is consistent in both the dying declarations would not make the dying declarations a reliable piece of evidence. The dying declaration has to pass all the tests of reliability as the declarant is not available for cross-examination. In cases where there are multiple dying declarations and acceptance of one dying declaration falsifies the other, the dying declarations have to be necessarily rejected. In our opinion, therefore, no reliance can be placed on the dying declarations at Exhs.24 and 27."

14. In the light of our aforesaid observations, we are of the opinion that the trial Court was not correct in finding a favour with the case of the prosecution on the basis of the evidence as discussed above to convict the appellant of the offence punishable under section 302 of IPC. The second dying declaration could not have been the sole basis to convict the appellant, in the absence of any corroborative evidence pointing out that the appellant had in fact burnt the deceased. The circumstantial evidence as discussed above is not sufficient so as to prove beyond reasonable doubt that the appellant was guilty of committing offence of murder. The prosecution, therefore, failed to establish the offence punishable under section 302 of IPC. For the reasons afore stated we cannot sustain the conviction of the appellant as awarded by the trial Court. We, accordingly, pass the following order:-

ORDER

1. Appeal 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.