
(2015) 06 BOM CK 0211
In the Bombay High Court
Case No : Criminal Appeal No. 449 of 2004

Mahendra	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 15-06-2015

Acts Referred:

Evidence Act, 1872 — Section 32(1)
Penal Code, 1860 (IPC) — Section 302

Citation : (2015) 06 BOM CK 0211

Hon'ble Judges : B.P. Dharmadhikari, J; P.N. Deshmukh, J

Bench : Division Bench

Advocate : R.M. Daga, for the Appellant; T.A. Mirza, APP, Advocates for the Respondent

Final Decision : Allowed

Judgement

P.N. Deshmukh, J—This appeal takes exception to the judgment and order dated 15th of July, 2004 passed in Sessions Trial No. 389 of 1999 by the learned 4th Additional Sessions Judge, Nagpur, thereby convicting appellant/accused Mahendra Shankarrao Bagde for the offence punishable under Section 302 of the Indian Penal Code and sentencing him to suffer life imprisonment and to pay a fine of Rs. 300/-, in default to suffer rigorous imprisonment for fifteen days.

2. In brief, it is the case of prosecution that deceased Saroj d/o Janardan Nikose was resident of Khapa, Tq.Saoner, Distt. Nagpur. However, for the purpose of education she was residing in a tented room situated at Bajrang Nagar, Nagpur. PW 1 Sapna is her younger sister who was also brought by her to Nagpur on 7th of December, 1998 to pursue her studies. Accordingly, both were residing in the same room where appellant was on visiting terms to deceased and also used to share the same room pretending to be as their brother.

It is the case of prosecution that on 9th of December, 1998 PW 1 Sapna saw appellant and the deceased in compromising position. On 17th of December, 1998 appellant indulged into quarrel with deceased as she was found talking to

one boy from locality and also subjected her to beatings due to which PW 1 Sapna insisted deceased to return to Khapa to which she agreed and both the sisters, accordingly, on 18th of December, 1998 were preparing to return back to Khapa when appellant prevented them from leaving Nagpur and again entered into the quarrel and in the course of same transaction picked up a plastic can containing kerosene in it and on pouring the same on the person of Saroj set her on fire and ran away from the room from the back door. Saroj came out of room in burning condition raising shouts whose fire was extinguished by neighbours who also removed her to Medical College, Nagpur.

3. It is the case of prosecution that while in hospital, police recorded two dying declarations of deceased on the same day vide Exhs. 21 and 56. Her parents also visited the hospital on the same day. Saroj succumbed to her injuries on 19th of December, 1998. On receipt of intimation of death of Saroj, A.D. was registered and was investigated. During the course of investigation spot panchanama (Exh. 28) came to be drawn and after preparing inquest panchanama the dead body was forwarded for its Post Mortem which was carried out by PW 5 Dr. Makrand Vyawahare who issued Post Mortem Note (Exh. 42).

It is further case of prosecution that on 29th of December, 1998 PW 4 Arjunprasad, Head Constable, by visiting village Khapa recorded statement of PW 1 Sapna wherein she has implicated the appellant as responsible for setting deceased on fire and thus on 29th of December, 1998 on the strength of report (Exh. 9), FIR came to be registered for the offence punishable under Section 302 of the Indian Penal Code against the appellant which was further investigated and appellant came to be arrested. His clothes, blood sample and nail clippings were seized. The seized muddemal was forwarded for its analysis to Nagpur and on completion of investigation charge-sheet came to be filed before the Chief Judicial Magistrate, Nagpur. In the course of time, case came to be committed to the Court of Sessions for trial.

4. Charge is framed against appellant vide Exh. 2 for the offence punishable under Section 302 of the Indian Penal Code to which he pleaded not guilty and claimed to be tried. The defence of the appellant is of denial and false implication.

5. The learned Trial Court, on considering the evidence and documents on record, convicted the appellant as aforesaid. Hence, this appeal.

6. Heard Shri R.M. Daga, learned counsel for the appellant and Mr. T.A. Mirza, learned Additional Public Prosecutor for the State.

7. To effectively evaluate the submissions advanced by learned Advocates for both the sides, with their assistance, we have scrutinized the evidence on record.

8. Admittedly, case of prosecution is based on the ocular evidence of PW 1 Sapna and on oral evidence of PW 2 Hirkanibai, mother of the deceased and two dying declarations (Exhs. 21 and 56) both recorded on 18th of December, 1998, in the hospital by PW 3 Panjab Yeole, H.C. and PW 7 Dattaram, PSI, respectively. In the

light of above facts, we have considered evidence of PW 1 Sapna who has stated that deceased was her elder sister and at the time of incident was residing at Bajrang Nagar, Nagpur in a rented room to whom she joined few days prior to the incident. She further stated that during her stay she found appellant visiting them to whom she was also knowing as he used to visit village Khapa. According to her, all the three used to share room in the night and on one occasion she had also seen deceased along with the appellant in compromising position and thus on this count insisted deceased to return back to village Khapa to which appellant objected. She further stated that thereafter when deceased talked with one boy from neighborhood, said fact was informed to appellant by one lady namely Bebi who was residing as neighbour of deceased upon which appellant raised quarrel questioning deceased as to why she talked with said boy and on that count they indulged into quarrel saying that he can set her on fire and immediately thereafter poured kerosene on the person of deceased and set her ablaze. PW 1 Sapna further stated that deceased Saroj came out of the room in burning condition and raised shouts who was attended by neighbours who extinguished the fire and carried Saroj to Medical College, Nagpur. She has further stated that appellant accompanied them in the auto rickshaw to hospital and had asked her as well as deceased not to disclose about the incident of fire involving him and to state that she sustained burns accidentally. She further stated that she could not lodge report earlier as appellant gave her threats. PW 1 Sapna had proved her report (Exh. 9) on record. Though PW 1 Sapna has stated that appellant extended threats and thus has not lodged report, we do not find substance in this piece of evidence being omission in her report (Exh. 9) so far as threats as stated by her are concerned.

9. In the cross-examination PW 1 Sapna admitted to have not stated to any of the neighbours who had extinguished the fire that appellant set Saroj ablaze though she admits that several neighbours had gathered when fire came to be extinguished. She has further admitted that on the day of incident on 18th of December, 1998 she was interrogated by police and her statement was recorded.

10. PW 7 Dattaram Girap, Investigating Officer, has admitted that on 18th of December, 1998 he had recorded statement of Sapna in Government Hospital, Nagpur and that she had not stated that appellant had set Saroj on fire. According to his evidence, PW 1 Sapna had stated that when she was cleaning household utensils outside the house, Saroj came outside in burning condition. He has also stated that in her statement recorded on 18th of December, 1998 Sapna had stated that at the time of incident except for herself and deceased nobody else was present in the house.

11. In the background of above discussed evidence of PW 1 Sapna, who is mainly relied by the prosecution, we have considered the evidence of PW 2 Smt. Hirkanibai, mother of the deceased, who has stated that on 18th of December, 1998 on learning about the incident from Khapa she reached Medical College at Nagpur on the next day morning and stated that on her enquiry with deceased,

she was informed by Saroj that she was set ablaze by appellant. In the background of evidence of PW 1 Sapna, who admittedly had involved appellant after eleven days of the incident by lodging report (Exh. 9) on 29th of December, 1998, we find no force in the evidence of PW 2 Hirkanibai who is relied by prosecution on oral dying declaration as even otherwise oral dying declaration by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where such a dying declaration is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance.

12. In the background of above discussed evidence of PW 1 Sapna, PW 2 Hirkanibai when evidence of PW 3 Panjab Yeole, Head Constable, is perused, it reveals that on 18th of December, 1998 when he was on duty at Medical College Hospital Booth, Nagpur, Saroj was admitted in the hospital for sustaining burn injuries in Ward No. 4 of whose statement was recorded by him on the same day at about 2 p.m. which is on record at Exh. 21. He has stated that before recording statement he had issued requisition letter to Medical Officer for verifying the physical condition of Saroj upon which doctor, after recording the statement, had certified her to be fit to make her statement at 4.25 p.m. Though there is nothing in the dying declaration (Exh. 21) to establish that before recording statement deceased was medically examined, from the contents of her statement in Exh. 21 what is stated by deceased is that she sustained burn injuries due to flaring of stove while she was preparing breakfast and as such sustained burn injuries on her face, neck, abdomen, both the legs, back and buttock. According to PW 3 Panjab, H.C. said statement is recorded at 2 p.m. which, therefore, is first in the point of time after deceased was admitted in the hospital.

Similarly, from the evidence of PW 7 Dattaram, P.S.I. it has come on record that on the day of incident on 18th of December, 1998 after PW 3 Panjab, H.C. had recorded statement in the after-noon, he visited Government Medical College and on obtaining medical endorsement about her physical fitness certificate vide Exh. 23 recorded her statement which is at Exh. 56 and has stated that in her statement Sapna had stated to him that on 18th of December, 1998 she was preparing "Pohe" on a stove and as stove exploded she caught fire which was extinguished by the neighbours. In view of evidence of PW 3 Panjab as well as of PW 7 Dattaram, PSI, coupled with the statements of deceased vide Exh. 21 and 56 respectively, which are recorded immediately after the incident on 18th of December, 1998, we find much substance in the case of appellant of deceased sustaining burn injuries accidentally as stated by her in both these statements as against the case of prosecution as has been brought on record from the evidence of PW 1 Sapna and PW 2 Hirkanibai that it is appellant who has set deceased on fire as evidence of neither of these witnesses is convincing at all to hold involvement of appellant in the present crime.

13. From the evidence of PW 5 Dr. Makrand Vyawhare, it has come on record

that on 20th of December, 1998 on receiving requisition memo from Ajani Police to conduct the postmortem, he has performed Post Mortem on the dead body of Deceased Saroj and issued P.M. Note Exh. 42. He has stated that deceased had sustained 98% burn injuries and died due to shock due to burns. The Medical Officer, in fact, substantiates the probable case of appellant of deceased sustaining burns accidentally when he has stated that, on considering the portion of body on which deceased had sustained burns, there is possibility of accidental burns as deceased had sustained burn injuries on anterior as well as posterior parts of her body.

14. The case of the appellant is further substantiates from the evidence of defence witness D.W. 1 Tarabai Madankar, who at the time of incident was residing as neighbour of deceased and has stated that at the time of incident when she was present in the house she heard commotion from the deceased due to which she came out of the house and saw Saroj in burning condition whose fire was extinguished by neighbours. She has further stated that on her enquiry from Saroj as to how she has sustained burns, she has replied that she sustained burns accidentally while igniting stove and was thereafter referred to Medical College. Nothing is brought on record to demolish her evidence as above. In that view of the matter, we find that evidence on record established that deceased has sustained burns accidentally.

15. Though as per Chemical Analyzer Report (Exh. 66) residues of kerosene are certified to have detected on the clothes of deceased, we do not find much substance on this piece of evidence having considering the fact that appellant came to be arrested in this crime on 29th of December, 1998 i.e. after eleven days from the date of incident vide Exh. 27 and on 30th of December, 1998 his clothes being one baniyan and full-pant, came to be seized. In that view of the matter, finding of kerosene residues as aforesaid is of no consequence as there is nothing on record to show that the clothes of appellant which were seized after 12 days of the incident from his person were same which were on his person on the day of incident. Moreover, we also do not find this as reliable piece of evidence as clothes of appellant which were seized on 30th of December, 1998 were sent to Chemical Analyzer under requisition Memo (Exh. 40) on 2nd of February, 1996 i.e. almost after 11/2 months and no evidence is led with reference to sealing and safe custody of muddemal articles after its seizure. On this count also case of prosecution thus fails.

16. Learned counsel Shri R.M. Daga in the background of above facts has referred to the decision of the Hon'ble Supreme Court in the case of Gaffar Badshaha Pathan Vs. State of Maharashtra, (2004) 10 SCC 589 wherein on considering the scope of Section 32(1) of the Evidence Act and the defence relying on dying declaration has held that when the declaration indicating that the death of deceased was accidental, burden of proof in such a case was on prosecution to establish that the declaration was false and concocted and it was not for the appellant to prove conclusively that the said declaration was correct

and the story therein was not concocted. It is observed in that case that burden on appellant is much lighter and he is only required to prove reasonable probability. In this case also the dying declaration was recorded by police officials, upon which doctor had made his endorsement that the deceased made statement in a conscious state.

17. In view of law relied as aforesaid and on considering evidence of PW 3 Panjab, Head Constable and PW 7 Dattaram, PSI, there is nothing to doubt their evidence as the only obligation of the author of declarations would be to show that the statement was recorded with bona fide intention and without any pressure having been exerted by him on the maker of the statement. Nothing of this sort is suggested to either of these police officials who had investigated the crime.

18. On scrutinizing the entire evidence as aforesaid and for the reasons stated herein above, we find that prosecution has failed to establish the charge levelled against the appellant. The appeal is thus liable to be allowed. Hence, the following order.

19. Criminal Appeal No. 449 of 2004 is allowed.

Appellant Mahendra Shankarrao Bagde is acquitted of the offence punishable under Section 302 of the Indian Penal Code.

Personal bond furnished by the appellant stands cancelled.

Sureties furnished by the appellant are discharged.

Muddemal property be destroyed after appeal period is over.