

(2007) 03 BOM CK 0035
In the Bombay High Court
Case No : Criminal Appeal No. 110 of 2005

Namdeo Dashrath Shinde and Others	APPELLANT
Vs	
State of Maharashtra	RESPONDENT

Date of Decision : 16-03-2007

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Evidence Act, 1872 — Section 32(1)
Penal Code, 1860 (IPC) — Section 300, 302, 303, 304, 305

Citation : (2007) CriLJ 3147

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

Bench : Division Bench

Advocate : A.V. Deshmukh and V.G. Sakolkar, for the Appellant; P.M. Shinde, Assistant Public Prosecutor, V.G. Sakolkar, for the Respondent

Judgement

S.P. Kukday, J.—Appellant No. 3 is convicted for having committed an offence punishable u/s 302 of the Indian Penal Code and is sentenced to suffer imprisonment for life. She is further convicted for the offence punishable u/s 498A of the Penal Code and is separately sentenced to suffer rigorous imprisonment for three years. Appellant Nos. 1 and 2 are also convicted for the offence punishable u/s 498A of the Penal Code. They are sentenced to suffer R.I. for two years. All the sentences carry default stipulation.

2. Brief facts giving rise to this appeal, are that Balaji (P.W. 4) is native of Degaon. His daughter Sangita (since deceased) married Vyankati (appellant No. 2) in the year 2000. At the time of marriage, payment of Rs. 25,000/- by way of dowry along with some other articles, was to be made. Out of this, Rs. 20,000/- were paid and Rs. 5,000/- were to be paid subsequently. As this amount was not paid, husband of the deceased, her father-in-law Namdeo (Appellant No. 1); and mother-in-law Majlasabai (Appellant No. 3) started ill-treating the deceased. Sometime after the Sankrant of the year 2003, P.W. 4 along with Vishwambhar Sakharam Wade (P.W. 3) and some other villagers went to the house of the appellants for sorting out the grievances of the deceased. In view of the promise

for the payment of balance amount, the appellants agreed to give proper treatment to the deceased. On 15-2-2003, appellant Nos. 1 and 2 had been to the field. After completing the household work, deceased went to the first floor for taking rest, while she was sleeping, appellant No. 3 set her saree of fire by using lighted match stick. After her saree caught fire, the deceased started shouting for help. In response, her cousin mother-in-law Sheshabai (D.W.3) doused the fire. The deceased was then taken to Primary Health Centre at Barbade and from there to Guru Govind Singh Hospital, at Nanded.

3. After admission of the deceased with 32% burns, medical officer on duty relayed the information to Vazirabad Police Station. In response, A.S.I. Kisan Bokhare (P.W.6) went to the hospital and recorded first dying declaration (Ex. 32) of the deceased at 5.00 p.m. in presence of Dr. Narvade (P.W.7) who certified that patient was conscious and well oriented during recording of the dying declaration. As a matter of routine, P.W. 6 sent request letter to the Special Judicial Magistrate Shri Sambhaji Dhavle (P.W. 5). In pursuance of this request, the Special Judicial Magistrate recorded dying declarations of the deceased (Ex. 29) in question and answer form in presence of Dr. Dode (P.W. 8). The dying declarations were then forwarded to Kuntur Police Station. On the basis of first dying declaration, an offence under Sections 307, 498A r/w 34 of the Penal Code, come to be registered against the appellants on 18-2-2003. After registration of the offence, A.P.I. Dhole (P.W. 9) took over the investigation and visited the spot. He prepared Panchanama of the scene of occurrence (Ex. 18) and recorded the statements of witnesses. The deceased succumbed to the injuries on 14-3-2003. After her death, Inquest was held and the post mortem was performed by Dr. Dange (P.W. 2). The autopsy surgeon prepared postmortem report (Ex. 22) certifying that the death is caused on account of shock due to 32% burns. In view of the death of deceased, Investigating Officer changed the penal section from 307 to 302 of the Penal Code. On completion of investigation, he submitted a charge sheet against the appellants to the Court.

4. The prosecution examined in all nine witnesses. Sanjay Tode (P.W. 1) who is panch to Spot Panchanama, had turned hostile. Dr. Dange (P.W. 2) is the autopsy surgeon and has proved post mortem report (Ex. 22), which gives the cause of death as shock due to 32% burns. Vishwambhar Wade (P.W. 3) is the neighbour of the father of deceased. Balaji (P.W. 4) is the father of deceased. Both these witnesses state that the deceased was tortured by the appellants as balance amount of dowry was not paid. They had been to the house of the appellants sometime after the Sankrant of the year 2003. On that occasion, the appellants had agreed not to ill-treat the deceased in view of the promise given by P.W. 4 regarding payment of the balance dowry amount of Rs. 5,000/- . P.W. 4 further states that on the day of occurrence, after receiving the message, he went to Primary Health Centre at Barbade with his wife and son. There they came to know that the deceased is sent to the hospital at Nanded. They reached Guru Govindsing Hospital at about 9.00 p.m. At the hospital the deceased informed them that after completing her household work, she went to the first floor for

sleeping. At that time she heard appellants planning to kill her. Subsequently, appellant Nos. 1 and 2 left the house. Appellant No. 3 came to the first floor and set her saree on fire by lighting a match stick. In response to her call for help, her cousin mother-in-law Sheshabai came to her rescue and doused the fire. The villagers then brought her to the hospital.

5. Sambhaji Namdeo Dhavle (P.W. 5) is special Judicial Magistrate. On receipt of the requisition letter, he went to the hospital for recording dying declaration of the deceased at about 9.00 p.m. At the hospital he contacted Resident Medical Officer Dr. Dode (P.W. 8). The Medical Officer examined the patient and certified that she is fit to make a statement. P.W. 5 then recorded her statement (Ex. 29) in question and answer form. In her second dying declaration the deceased stated that because she does not have a fair complexion, could not conceive a child even after three years and has a defective speech, the appellants were subjecting her to torture. On the day of the occurrence she herself and her mother in law were alone at the house. On the earlier day she had to do strenuous work at the function of the engagement ceremony of her brother-in-law, therefore, on account of the fatigue she was sleeping on the first floor. Her mother-in-law set her saree on fire with lighted match stick. She thus sustained burns. Statement of the deceased was read over to her. When she vouched for the correctness of the statement, P.W. 8 again examined her and made an endorsement at the foot of the statement certifying that the patient was conscious throughout the recording of her statement.

6. P.W.6 stated that on receipt of the intimation from the hospital, he immediately went there, Dr. Narvade (P.W. 7) verified that the patient was conscious and is able to make a statement. He then recorded her statement (Ex. 32) in presence of the doctor. The deceased stated that she married appellant No. 2 three years back and was jointly living with her husband and in-laws. Since last Sankrant, the appellants were subjecting her to beating as she had not conceived a child. Her husband used to tell her that he wants to marry a second wife. At about 2.00 p.m. her mother-in-law set her on fire, thus she suffered burns. The fire was extinguished by Sheshabai Shinde (D.W. 3) and she was brought to the hospital by the villagers. The statement was read over to her. After she vouched for the correctness of the statement, P.W. 7 put an endorsement on the statement certifying that the patient was conscious throughout the recording of the statement.

7. A.P.I. Dhole is the investigating officer. He prepared spot panchanama (Ex. 18) and recorded statement of the witnesses.

8. The appellants set up a defence that clothes of the deceased caught fire while she was preparing tea in the kitchen. In support of their defence, the appellant examined three witnesses. D.W. 1 House is brother of appellant No. 1 D.W. 3 Sheshabai is his wife. Both of them state that clothes of the deceased caught fire while she was preparing tea but her father lodged report because his demand for Rs. 80,000/- was turned down by the appellants. D.W. 2 Sambhaji Tode is a spot

panch. He stated that tea was spilled and tea pot was near the mud stove. The panchanama was prepared in the kitchen. Half burnt clothes of the deceased were attached from this place.

9. On appreciation of the evidence, the Trial Judge found that the evidence of the prosecution witnesses is cogent and reliable. Their evidence establish that the appellants subjected the deceased to torture as the balance of the dowry was not paid and appellant No. 3 set her on fire on the day of the occurrence, causing her death. He further found that the evidence of defence witnesses is contradicted by the panchanama of the scene of the occurrence and does not inspire confident. In conformity with these findings, the Trial Judge convicted appellant No. 3 of the offence punishable u/s 302 of the Penal Code. He further convicted all the appellants of the offence punishable u/s 498A of the Penal Code and sentenced them as stated earlier.

10. In support of the appeal, learned Counsel Shri Deshmukh holding for Adv. Sakolkar would argue that the deceased was not physically and mentally fit for making any statement. The medical officers have routinely certified fitness of the deceased to make a statement. This inference is substantiated by the admission of P.W. 7 that he did not examine the patient after the recording of statement (Ex. 32) was completed. In any event, there is variance between the two dying declarations and the witnesses have admitted that the statement made by the deceased was incoherent. In addition, the fact that one of the dying declaration (Ex. 32) is signed by the deceased, where as, on the second dying declaration Special Judicial Magistrate was required to obtain thumb impression, suggest the possibility of the statements being manipulated. In these circumstances, it was not permissible for the trial Court to convict the appellant No. 3 of the serious offence of murder. It is further contended that the evidence of P.Ws. 3 and 4 regarding cruelty does not inspire confidence. In any event, the evidence does not establish cruelty envisaged by Section 498A of the Penal Code. It is contended that the order of conviction and sentence passed by the trial Court suffers from the vice of non-application of mind and deserves, to be set aside by allowing the appeal.

11. Per contra, Shri P.M. Shinde, learned A.P.P. has referred to the evidence of prosecution witnesses to assert that the dying declarations are recorded by taking necessary precautions. Both the dying declarations are consistent and inspire confidence. Evidence of P.W. 3 and 4 does establish that the appellants had subjected the deceased to harassment during her life time. Learned A.P.P. would thus contend that no fault can be found with the order of conviction and sentence passed by the trial Court.

12. In the present case the prosecution mainly relies on the dying declarations of the deceased. The law relating to the dying declaration is by now well settled. The dying declarations are an exception to the hearsay rule and are admissible in evidence u/s 32(1) of the Evidence Act. Under the Indian Law, it is not necessary that the declarant must be under expectation of death at the time of making a

statement as to the cause of his death or as to the transaction which resulted in his death. The statement becomes admissible in evidence if it satisfies two conditions mentioned in Section 32(1) of the Evidence Act. The evidentiary value of the statement depends on the circumstances of each case. No particular form or procedure is prescribed for recording dying declaration. It is not always required to be recorded by a Magistrate. Though it is advisable to get the fitness of the declarant certified from the medical expert, in appropriate cases satisfaction of the person recording the statement regarding the state of mind of the deceased would be sufficient to hold that the deceased was in a position to make coherent statement. In a case solely depending on the dying declaration, the Court must exercise due care and caution to ensure genuineness of the dying declaration, keeping in mind that the accused has no opportunity to test veracity of the statement by cross examination. However, once it is found the dying declaration is voluntary and not tainted by tutoring, there is no impediment in convicting the accused on the basis of even an uncorroborated statement if it satisfies the conscious of the Court regarding its truthfulness. The law governing this topic is expounded in *Muthu Kutty and Another Vs. State by Inspector of Police, Tamil Nadu*, . In para 15 it is observed:

15. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of the deceased was not as a result of either tutoring, or prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

13. Referring to *Laxman Vs. State of Maharashtra*, and *Rambai Vs. State of Chhattisgarh*, , it is observed in para 18 of the report:

Further if the person recording the dying declaration is satisfied that the declarant is in a fit medical condition to make a dying declaration then such dying declaration will not be invalid solely on the ground that the doctor has not certified as to the condition of the declarant to make the dying declaration.

14. We have carefully scrutinized the entire evidence with the help of the rival parties. In the present case, dying declaration of the deceased is recorded in the presence of the medical officer by P.W. 6 as well as P.W. 5. Both the medical officers have vouched the fact that the declarant was in a fit state of mind to make a coherent statement. Besides, the fact that the deceased survived for about a month, as she had sustained comparatively low percentage of burns,

would also lend credence to the evidence of these witnesses that she was in fact in a fit condition to make a coherent statement. Referring to the admission of the witnesses that speech of the deceased was incoherent, it is sought to be argued that no reliance can be placed on such a statement. Reading of the evidence would show that the prosecution witnesses meant to convey that there was a defect in the speech of the deceased. The trial Court has committed an error in using the word incoherent while recording the evidence, as is clear from the vernacular recording. In these circumstances, we cannot sustain the contention that the deceased was not in a position to make a coherent statement. It is further contended by learned Counsel for the appellant that manipulation of the statement is manifest from the fact that the first statement is signed by the deceased, where as, on the second statement the Special Judicial Magistrate has obtained her thumb impression. This contention is also devoid of merit. The difference in approach of the two individuals cannot lead to an adverse inference in the absence of evidence to show that the hands and fingers of the deceased were affected to such an extent that it was not possible for her to make a signature or that it was not possible to obtain clear thumb impression. In similar circumstances, in *Ravi v. State of T.N.* reported in (2004) 10 SCC 776, it is observed in para 6 of the report:

6. Learned Senior Counsel then submitted that the victim was a literate person and there was no reason why the Judicial Magistrate failed to take his signature and had taken only left-thumb impression. We do not think that on this ground veracity of recording of dying declaration can be doubted in any manner.

15. In this view of the matter, in the circumstances of the present case, we are not inclined to sustain contention that the difference in approach adopted by the Special Judicial Magistrate and the A.S.I., affects the veracity of the dying declaration.

16. It is next argued that there is inconsistency between the two statements of the deceased. This contention is also devoid of merit. The first statement is recorded by a Police Officer in the usual manner of recording statement u/s 161 of Criminal Procedure Code eliciting facts relevant for the purpose of the investigation, whereas, the second statement is recorded in question and answer form by the Magistrate. Apart from the minor details relating to the engagement ceremony of the brother-in-law of the deceased on the earlier day and the reason for taking rest, there is no inconsistency between the two statements. Both the statements are recorded by taking necessary precautions and were read over to the deceased to verify that they were recorded as per her narration. Father of the deceased reached the hospital at Nanded at about 9.00 p.m. The first statement was recorded at 5.00 p.m. P.W. 8 has specifically mentioned that the relatives of the deceased were asked to leave the place before recording her statement. His evidence is not controverted by the defence. It is thus, apparent that there was no tutoring of the deceased and both the statements are voluntary. The fact that the deceased has not made any effort to implicate her

husband and father-in-law, further lends credibility to her statement. On pragmatic assessment of the material available on record, we are satisfied that there is no inconsistency between the two dying declarations, that both the statements are free from the vice of tutoring and are not the product of the imagination of the deceased. It would also be pertinent to notice that the fact that at the relevant time the deceased and appellant No. 3 alone were at the house, is also not controverted by the defence during the course of the cross examination. Considering the totality of the evidence, in our considered opinion, learned Trial Judge has not committed any error in relying on these statements to conclude that appellant No. 3 set her on fire.

17. Relying on the decision of the Division Bench of this Court in *Deva Dudhya v. State of Maharashtra*, it is sought to be argued that even assuming that the deceased was set on fire by appellant No. 3, having regard to the fact that she sustained only 32% burns, it cannot be said that, the intention of the appellant was to cause death, thus, the offence made out can only be u/s 325 of the Penal Code. In that case the accused was intoxicated and had no apparent reason for causing death of his wife. Apart from this, most of the material witnesses had turned hostile. Considering these facts, it was held that in absence of the intention to cause death, the offence would fall u/s 325 of the Penal Code. Such is not the case here, the evidence shows that the appellants were displeased mainly because the deceased had not conceived a child even after three years of the marriage. All the appellants were thus torturing the deceased mainly because she had a defective speech and had not given birth to a child. Appellant No. 2 was expressing his desire to marry a second wife. On the earlier day, engagement of brother of appellant No. 2 had taken place and immediately on the next day appellant No. 2 set the deceased on fire while she was resting on the first floor of the house. It is sought to be argued that no kerosene is used which is another indication of the absence of intent to cause death. This contention is unsustainable as it overlooks the fact that the ladies wearing synthetic clothes are aware of the fact that these clothes catch fire without kerosene and such a fire always proves to be fatal. The test to ascertain intention of the accused in commission of the offence is formulated by Justice Vivian Bose in *Virsa Singh Vs. The State of Punjab*, that, the prosecution has to objectively establish that the accused had an intention to inflict bodily injury and the injury inflicted was sufficient to cause death. After referring to these aspects, it is observed in para 20 of the report:

20. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder u/s 300 thirdly. It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the

rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced, that the injury was accidental or otherwise intentional. Applying this test to the facts of the present case, it is clear that once it is proved that appellant No. 3 intentionally set fire to the clothes of the deceased and the burns suffered by the deceased were sufficient in the ordinary course of the nature to cause death, the inevitable inference is that the appellant No. 3 had an intention to cause death of the deceased, the offence would fall u/s 302 and not u/s 325 of the Penal Code." The earlier decision relied upon by learned Counsel is based on the peculiar facts of that case and does not lay down principle of universal application. The true test to be applied has been specified by the Apex Court in the matter of Virsa Singh (supra). In this view of the matter, we cannot subscribe to the theory propounded by the learned Counsel that in cases where no inflammable liquid is used and the percentage of the burns is less, it cannot be said that the intention was to cause death of the deceased. The intention of the accused has to be gathered from the facts and circumstances of each case by applying the test evolved by the Apex Court. We also do not find any fault with the conclusion of the trial Court that the evidence of the defence witnesses is not worthy of acceptance in view of the fact that defence of accidental death is set up only at the time of the trial and that the evidence of these witnesses is contradicted by the unchallenged evidence of the investigating officer that the incident took place in the first floor room, from where half burn pieces of saree and other clothes of the deceased were attached. The totality of the evidence adduced by the prosecution in the present case proves beyond doubt that appellant No. 3 did commit offence punishable u/s 302 of the Penal Code.

18. It is next argued that evidence of P.W. 3 and 4 regarding ill treatment of the deceased for the failure of the father of the deceased to make payment of balance amount of the dowry, deserves consideration. The person to disclose reason for her torture is the deceased herself. In both the dying declarations the deceased has mentioned that she was tortured because of her black complexion, her height and because she could not procreate. There is no whisper of non payment of alleged balance amount of the dowry as one of the reasons for her torture. In addition the fact that P.W. 4 has made an effort to rope in all the appellants by mentioning that in her oral dying declaration the deceased had mentioned that all the appellants had conspired to kill his daughter and in execution of this conspiracy, appellant No. 3 killed the deceased. This evidence regarding the conspiracy has been rightly discarded by the trial Court, as the theory of conspiracy is not substantiated by the dying declarations. The dying declarations show that the ill treatment was essentially for the reason that the deceased did not conceive a child. Such an ill treatment cannot be construed as

cruelty envisaged by Section 498-A of the Penal Code. Under that Section the cruelty must either related to a dowry or must be a conduct designed to drive the victim to commit suicide or cause grave injury or danger to her life, limb or health. For the reasons stated earlier, we are not inclined to rely on the testimony of P.W. 3 and 4 that the deceased was tortured for non payment of the balance amount of the dowry. In this view of the matter, we hold that the Trial Court has committed an error in convicting the appellants for the offence punishable u/s 498-A of the Penal Code:

19. Taking overall view of the material on record, we partly allow the Criminal Appeal No. 110 of 2005. The conviction of appellant No. 3 Majlasabai w/o Namdeo Shinde, for offence punishable u/s 302 of the Indian Penal Code and sentence of imprisonment for life and fine of Rs. 2,000/- is confirmed. However, appellant No. 3 Majlasabai is acquitted of the offence punishable u/s 498-A read with Section 34 of the IPC. Fine, if paid by her in respect of offence punishable u/s 498-A read with Section 34 of the IPC be refunded to her. The conviction and sentence of appellant Nos. 1 and 2 for offence punishable u/s 498-A read with Section 34 of IPC is hereby quashed and set aside and the appellant Nos. 1 and 2 are acquitted of the offence with which they were charged and convicted. Fine, if paid, by the appellant Nos. 1 and 2 be refunded to them. The bail bonds of appellant Nos. 1 and 2 stand cancelled.

Appeal partly allowed to the extent indicated above.