

(2016) 07 BOM CK 0143
In the Bombay High Court
Case No : Criminal Appeal No. 411 of 2014

Narendra Ramdas Meshram

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 12-07-2016

Acts Referred:

Evidence Act, 1872 — Section 32
Penal Code, 1860 (IPC) — Section 302, 34

Citation : (2016) 3 AIRBomRCri 95 : (2017) ALLMRCri 214

Hon'ble Judges : B.R. Gavai and V.M. Deshpande, JJ.

Bench : Division Bench

Advocate : Mr. R.M. Daga with Ms. F.N. Haidari, Advocates, for the Appellant;
Mr. S.M. Ukey, Addl. Public Prosecutor, for the State

Final Decision : Allowed

Judgement

V.M. Deshpande, J. - The present appeal is directed against the judgment and order of conviction passed by the learned Additional Session Judge, Bhandara, dated 23rd of May, 2014, in Session Trial No. 46 of 2009, convicting the appellants for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code and directed them to suffer imprisonment for life and to pay a fine of Rs. 1000/- each of them and in default of payment of fine to suffer further rigorous imprisonment for three months.

2. During the pendency of the trial itself, original accused no. 3 Sitabai Ramdas Meshram has expired. A Charge was framed against the appellants and deceased accused for the offence punishable under Section 498A read with Section 34 of the Indian Penal Code and for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code. The accused persons were acquitted of the offence punishable under Section 498A read with Section 34 of the Indian Penal Code and no appeal is preferred against the said acquittal.

3. We have heard Shri R.M. Daga, learned counsel for the appellants and Shri S.M. Ukey, the learned Additional Public Prosecutor for the State. According to

the learned counsel for the appellants, the case which is based on Dying Declaration of deceased Kavita must fail in view of the authoritative pronouncement of Hon"ble Apex Court in the case of Shaikh Bakshu and ors. v. State of Maharashtra, reported in 2007 (11) SCC 269 and also in view of the decision of this Court in the case of Vilas @ Bandu Punjabrao Misal v. State of Maharashtra reported in 2016(1) Mh.L.J.(Cri) 493.

4. Appellant Narendra is the husband of deceased whereas appellant no. 2 Amrut is brotherinlaw. The date of the incident is 3rd of January, 2009. Dr. Yogesh Shamrao Nakade (PW 8) was on C.M.O. duty in General Hospital Bhandara on 3rd of January, 2009. On the said day, Kavita was admitted in General Hospital, Bhandara with 75% burn injuries. Accordingly, he informed the police by intimation letter vide Exh.48.

5. Purushottam Waghmare (PW 7) was attached to General Hospital, Bhandara as a A.S.I. He had been to Kavita Meshram for recording her statement. He gave request letter (Exh.41) to Medical Officer to examine the patient. According to this witness, doctor examined and gave certificate and thereafter he recorded her statement. The said statement so recorded by Purushottam Waghmare is at Exh.42. This statement (Exh.42) was treated as a First Information Report and was registered the same as such by Bhaurao Chachane (PW 1), a Police Head Constable, attached to Lakhani Police Station. The printed FIR is at Exh.19. The said FIR was registered for the offence punishable under Sections 498A, 307 read with Section 34 of the Indian Penal Code vide C.R. No. 7 of 2009.

6. PW 6 Bhikanrao Bibane, P.S.O., Lakhani took the investigation of Crime No. 7 of 2009. He visited the spot and prepared the spot panchanama (Exh.33). He also recorded the statement of parents of the deceased. He caused arrest of the accused persons. Articles scattered on the spot were seized by him under seizure Panchanama (Exh.34). Muddemal properties were sent by him to Chemical Analyzer. Further investigation was carried by PW 9 Purushottam Badewale who filed the Charge-sheet.

7. The Dying Declaration, which is treated as First Information Report is scribed by Purushottam Waghmare (PW 7). He gave request letter to doctor at Government Hospital, Bhandara to examine the patient and to give certificate as to whether she is in a fit condition. The said letter is at Exh.41. According to Scribe Purushottam Waghmare, doctor has examined and put his endorsement on Exh.41 itself that "fit for statement". However, the doctor who has examined patient Kavita and who has given aforesaid endorsement is not examined by the prosecution.

Even during the substantive evidence, Purushottam Waghmare did not state that he himself was satisfied about the fitness of Kavita. It is not necessary that for recording Dying Declaration by the Scribe there should be a Medical Certificate. However, in such case the person who takes down the statement of the declarant must himself be satisfied that the patient is in a condition to give his or her

statement. In the present case, neither Exh.42 shows the endorsement by Purushottam Waghmare, a Scribe, that he himself was satisfied about the fitness of Kavita regarding giving her statement nor during his substantive evidence he has stated so. In that view of the matter, the Court cannot rely on the said Dying Declaration since there is nothing available on record about the fact that the Kavita was in a fit condition to give her statement.

8. Another Dying Declaration is recorded by a Naib Tahsildar. He is Nanaji Wasade (PW 4). On 4th of January, 2009 Police sent letter (Exh.23) requesting the Tahsildar to record the Dying Declaration of Kavita who is admitted in the Government Hospital at Ward No. 18. Accordingly, Shri Wasade went to hospital. There, he met Dr. Avinash Bokade (PW 5). He requested Dr.Bokade to examine Kavita and to certify whether she is able to give statement. Dr.Avinash Bokade examined Kavita and gave certificate (Exh.51) that the patient is in a fit condition to give statement. Thereafter, Nanaji Wasade proceeded to record statement of Kavita who has stated that on the day of the incident a quarrel took place between her and deceased accused i.e. her mother-in-law.

Therefore, she went back side of the house and sat under a Nim tree. Thereafter, the present appellants came and they caught hold her hands and her mother-in-law (deceased accused) poured kerosene and set her ablaze. The said Dying Declaration is at Exh.24.

The perusal of the Dying Declaration shows that the said Dying Declaration is absent in respect of the endorsement made by the Scribe that after recording the Dying Declaration it was read over to the declarant/Kavita and she admits it to be true. Therefore, the said Dying Declaration cannot be relied upon and cannot be made basis for conviction of the accused persons in view of the authoritative pronouncement of the Hon"ble Apex Court in the case of Shaikh Bakshu v. State of Maharashtra, cited supra. The said view is also followed by various judgments of this Court and also in the reported case of Vilas @ Bandu Punjabrao Misal, cited supra.

9. The prosecution has also examined PW 2 Anandabai Suryawanshi and PW 3 Prabhu Suryawanshi. They are the parents of deceased. According to them, deceased made oral Dying Declaration to them. Evidence of PW 2 Anandabai that after disclosing to them by deceased, they came to Police Station Lakhani on 3rd of January, 2009 itself and filed a complaint against the accused persons. On the said aspect, PW 3 Prabhu her husband, is not corroborating her. The visit of parents to Police Station as claimed by PW 2 Anandabai found to be incorrect in view of the evidence of Investigating Officer PW 6 Bhikanrao Bibane, who has stated in his evidence that on 3rd of January, 2009 parents of deceased did not come to the Police Station Lakhani for lodging the complaint.

According to these two witnesses, when oral Dying Declaration was made, they were accompanying the deceased from village Mundipar to the hospital. At the hospital itself, there was a Police Chowky and therefore, they could have

disclosed about the oral Dying Declaration, immediately. Their police statements are recorded on 7th of January, 2009. No explanation is given for belated recording. In that view of the matter, it will really doubtful as to really oral Dying Declaration was made to the parents by the deceased, as claimed by them.

10. In view of the aforesaid discussion, we have no hesitation in our mind that the appellants are required to be acquitted and accordingly we pass the following order.

ORDER

11. The Criminal Appeal is allowed.

12. The conviction and sentence awarded to the appellants/accused for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code vide Judgment and order dated 23rd of May, 2014 passed by Additional Sessions Judge, Bhandara in Sessions Trial No. 46 of 2009 are quashed and set aside and the appellants/accused are acquitted of the offence. The fine amount, if paid, be refunded to the accused.

13. The appellants are ordered to be released and set at liberty forthwith if not required in any other case.