
(2013) 01 BOM CK 0232

In the Bombay High Court

Case No : Criminal Appeal No. 861 of 2007

Nasrina Eakbal Pathan (Khan)

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 08-01-2013

Acts Referred:

Citation : (2013) 5 ABR 590

Hon'ble Judges : V.K. Tahilramani, J;Sadhana S. Jadhav, J

Bench : Division Bench

Advocate : Rebecca Gonsalves, for the Appellant; D.P. Adsule, APP, for the Respondent

Judgement

V.K. Tahilramani, J.—Through this appeal, the appellant/original accused has challenged the judgment and order dated 7th Dec, 2006 passed by the Ad hoc Additional Sessions Judge-3, Nashik in Sessions case No. 86 of 2006. By the said judgment and order, the learned Sessions Judge convicted the Appellant u/s 302 of Indian Penal Code (45 of 1860) Code and sentenced her to life imprisonment. The prosecution case briefly stated is as under:

P.W. 3 Ayesha was residing with her husband Eakbal Khan (deceased) and her 5 children at Viratnagar, Ambad, District Nashik. They were residing on the ground floor in one room. The appellant was also residing on the ground floor but in a separate portion of the room in which Ayesha was residing with her family. The appellant was residing there along with her two minor children. The prosecution case is that there was a love affair between the appellant and the deceased Eakbal Khan. They had also begotten one son who was about 4 months at the time of incident. However, thereafter the appellant started telling the deceased that she does not want to marry him as he is old. On 4/10/2005 at about 3 to 3.30 a.m. a fight took place between the appellant Nasrin and the deceased Eakbal Khan. Nasrin poured kerosene on Eakbal Khan and set him on fire. P.W. 3 Ayesha, wife of deceased Eakbal and P.W. 7 Rajia, daughter of Eakbal Khan witnessed the incident. Thereafter, Eakbal was taken to the hospital. His dying

declaration Exh. 19 was recorded by P.W. 6 police constable Gangurde. The said dying declaration was treated as FIR. Another dying declaration Exh. 16 was recorded by P.W. 5 SEO Sapute. In the course of investigation, the body of Eakbal was sent for post-mortem. P.W. 10 Dr. Shimpi conducted post-mortem on the dead body of Eakbal. In the opinion of Dr. Shimpi the case of death is due to septicemia due to superficial to deep burns (51%). On completion of investigation, charge-sheet came to be filed.

2. Charge came to be framed u/s 302 of I.P.C. against the appellant. The appellant pleaded not guilty to the said charge and claimed to be tried. Her defence is that of total denial and false implication. After going through the evidence adduced in this case, the learned Sessions Judge convicted and sentenced the appellant as stated in paragraph 1 above. Hence, this appeal.

3. We have heard the learned counsel for the appellant and the learned APP for the State. We have carefully considered the judgment and order in this case, the arguments of both sides and the evidence in this case. After carefully considering the matter we are of the opinion for the reasons mentioned hereinbelow that the appeal deserves to be allowed.

4. The conviction of the appellant is based on the evidence of two eye-witnesses i.e. P.W. 3 Ayesha, who is wife of the deceased and P.W. 7 Rajia, who is the daughter of the deceased. In addition, conviction is based on two dying declarations recorded at Exh. 16 and Exh. 19. Exh. 16 is recorded by P.W. 5 SEO Sapute and Exh. 19 is recorded by P.W. 6 police constable Gangurde. P.W. 3 Ayesha has stated that the appellant Nasrine was residing in the room adjacent to her house. Nasrin was always quarrelling with Eakbal, husband of Ayesha. Nasrin was always demanding money from Eakbal i.e. husband of Ayesha and he always used to fulfill demand of Nasrin. On the date of the incident at about 3 a.m. Nasrin came to their house. Her husband opened the door. Nasrin poured kerosene on her husband and set him on fire. However, in the cross-examination P.W. 3 Ayesha has stated that after Nasrin poured kerosene on Eakbal, he took kerosene can from her and kept it in the house. There was quarrel between Nasrin and Eakbal for about 10 to 15 minutes. P.W. 3 Ayesha intervened by saying that they should not quarrel as it was night time. At that time, an exchange of words took place. Thereafter, Nasrin took Eakbal to her house. Thereafter Eakbal did not return to their house. P.W. 3 Ayesha admitted that one cannot see from her house as to what is going on in the house of Nasrin. P.W. 3 Ayesha categorically stated that when Eakbal had gone to the house of Nasrin, she was in her own house. She further admitted that it is true to say that after hearing shouts, they rushed to the house of Nasrin. This clearly shows that witness Ayesha had not witnessed Nasrin setting Eakbal on fire. Ayesha had categorically stated that after hearing shouting, they rushed to the house of Nasrin. If this is so, the evidence of P.W. 7 Rajiya, daughter of Eakbal and P.W. 3 Ayesha who claims to be an eye-witness also cannot be believed, because the evidence on record clearly shows that Nasrin took Eakbal to her house.

Thereafter he did not return and thereafter only on hearing shouting, Ayesha and others rushed to the house of Nasrin. This shows that the evidence of P.W. 7 Rajiya stating that she had witnessed the incident, also cannot be believed. The evidence of P.W. 7 Rajiya daughter of Ayesha is on the same lines as that of Ayesha. Ayesha has given the reason for the quarrel. She has admitted that Nasrin used to say to Eakbal that he was old person and she would not marry him. This appears to be the reason for the incident

5. At this stage, we would like to advert to the information, which was received first in point of time by the police in relation to this incident. This information is at Exh. 21. This exhibit shows that on 4/10/2005 at 3 a.m. Eakbal Mustakkhan being fed up of quarrel of both his wives set himself on fire. This information corroborates the evidence of P.W. 3 Ayesha who has stated that Nasrin used to state to Eakbal that as he was old person, she would not marry him. The dying declaration of Eakbal shows that he regarded Nasrin as his wife and that Nasrin had begotten from Eakbal one son who was 4 months old at the time of incident. From the evidence of Ayesha, it is clear that Eakbal used to give money to Nasrin to run the household and whenever Nasrin used to make any demand for money it was always fulfilled by Eakbal.

6. As stated earlier, the prosecution is relying on the two dying declarations Exh. 16 and Exh. 19. Exh. 16 is recorded by P.W. 5 SEO Sapute and Exh. 19 is recorded by P.W. 6 P.C. Gangurde. Both these witnesses have stated that they went to the hospital and recorded the dying declaration of Eakbal. We are not inclined to place any reliance on the two dying declarations. Firstly, for the reason that both the dying declarations show that they were recorded at 12.45 p.m. on 4/10/2005. If they were recorded at the same time, neither P.W. 5 SEO Sapute makes a reference to P.W. 6 Police Constable Gangurde, nor Police Constable Gangurde has made a reference to SEO P.W. 5 Sapute. It would not be possible that both these persons stood next to Eakbal at one and the same time or on either side of Eakbal at the same time and recorded his dying declaration. In such case the contents of both the dying declarations would be the same but both the dying declarations are different. Exh. 19 recorded by P.W. 6 Police Constable Gangurde is a lengthy one and Exh. 16 recorded by P.W. 5 SEO is a brief dying declaration. No doubt basic contents of the dying declarations are the same. However, the dying declaration recorded by P.W. 6 is stated to be first in point of time. If that was recorded at 12.45 p.m., some time would have been consumed for recording entire dying declaration and therefore P.W. 5 recording the dying declaration at 12.45 p.m. is just not possible. This raises serious doubt in the mind regarding the veracity of the two dying declarations. Moreover, if both the dying declarations are seen in the context of the first information received by the police that Eakbal committed suicide because he has fed up due to quarrels between both his wives, in such case, these two dying declarations do not inspire any confidence.

7. It is to be noted that both P.W. 5 and P.W. 6 are not lay persons but P.W. 6 is a

police constable and P.W. 5 is a Special Executive Officer, thus from the very nature of their job they would be extremely particular about time. They would not give an approximate time but would take special care and see that the exact time is given. In such case the recording of same time on both the dying declarations throws a cloud of doubt on both the dying declarations especially looking to the fact that both P.W. 5 and P.W. 6 make no reference to the presence of each other. Hence, for all the above reasons we are not inclined to place any reliance on both the dying declarations.

8. The learned APP pointed out that there is one another piece of evidence against the appellant i.e. the evidence of P.W. 2 - Patil who has deposed about the oral dying declaration being made to him by Eakbal that Nasrin set him on fire. As far as this witness is concerned, it is pertinent to note that P.W. 3 Ayesha was the first to rush to the house of Nasrin on hearing shouts. Rajiya was along with her. However, both these witnesses who were present since beginning did not make any reference to P.W. 2 Patil. This again raises doubt about the presence of this witness at the spot and his evidence that Eakbal made an oral dying declaration to him.

9. Looking to the evidence on record, it appears that Eakbal committed suicide by pouring kerosene on himself and he set himself on fire and thereafter, he has implicated the Appellant because she refused to marry him. P.W. 3 Ayesha and P.W. 7 Rajiya have implicated the appellant because Ayesha obviously did not want her husband to marry the appellant. Moreover she did not like the fact that Nasrin was demanding money from Eakbal and every time Eakbal used to fulfill the demand of Nasrin. The evidence of Ayesha shows that she was telling her husband that since she had more children, Eakbal should give her more money. All these facts show that Ayesha had a grudge against Nasrin and hence, she would be interested in falsely implicating her. P.W. 7 Rajiya being the daughter of Ayesha would side with her mother as she would not want her father to marry another woman. Hence, she also had a reason to falsely implicate the appellant though it was a case of suicide.

10. As stated earlier, we do not find the dying declarations to be credible nor the evidence of two eye-witnesses to be credible. Nor the testimony of P.W. 2 Patil inspires any confidence. In this view of the matter, we are of the opinion that the appellant deserves to be given benefit of doubt.

11. At this stage, we must record our appreciation for Ms. Rebecca Gonsalves appointed from High Court Legal Services Committee, Bombay to represent the appellant. We found that she had meticulously prepared the matter and she has very ably argued the matter. We quantify legal fees to be paid to her by the High Court Legal Services Committee at Rs. 2500/-. The said fees be paid to Advocate Ms. Gonsalves within three months from today. In view of the evidence on record, we pass the following order:

ORDER

(I) The conviction and sentence of the appellant u/s 302 of Indian Penal Code is set aside. The appellant be set at liberty, if not required in any other case.

(II) The appeal is allowed in above terms.

(III) Office to communicate this order to the jail authorities and to the appellant who is in prison.