
(2019) 01 BOM CK 0075
In the Bombay High Court
Case No : Criminal Appeal No. 497 Of 2014

Navlabai And Ors

APPELLANT

Vs

State Of Maharashtra And Ors

RESPONDENT

Date of Decision : 10-01-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302
Code Of Criminal Procedure, 1973 — Section 437A

Citation : 2019 CriLJ (NOC 368) 126

Hon'ble Judges : R.G. Avachat, J;S.S. Shinde, J

Bench : Division Bench

Advocate : S.B. Bhapkar, S.B. Joshi

Final Decision : Allowed

Judgement

1. This appeal has been filed against the judgment and order dated 24.07.2014 passed by learned Additional Sessions Judge, Omerga, whereby the appellants herein were convicted for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code and sentenced to suffer life imprisonment and fine of Rs.10,000/- each. In default of payment of fine amount, they were directed to suffer rigorous imprisonment for one year. The appellants herein were original accused nos.5, 6 and 8 before the Trial Court. Originally, there were eight accused persons to face the trial. However, by the impugned judgment and order, the other accused persons have been acquitted. The State has not preferred appeal against the order of acquittal.

BRIEF FACTS :-

2. Mahananada (deceased) was married to Dayanand (deceased) and was residing at Belamb, Tq. Omerga, Dist. Osmanabad. Dayanand passed away just 15 days before the fateful day i.e. 15.05.2011. Appellant no.1 - Navlabai is mother-in-law of deceased Mahananda. Appellant no.2 - Gangabai is wife of brother-in-law of deceased Mahananda and appellant no.3 is her sister-in-law.

On 15.05.2011, Mahananda was rushed to rural hospital at Murum with more than 90% burn injuries. PW 1 - Dr.Pravin, Medical Officer at Rural Hospital, Murum, informed Murum Police Station about admission of Mahananda to the hospital. The police personnel rushed to the rural hospital. The relatives, who were around Mahananda, were asked to leave for a while. PW 1 - Dr. Pravin medically examined Mahananda and certified her to be conscious oriented to make a statement. Since Mahananda did not understand Marathi language, the police officer called Mahananda's maternal uncle for translating her statement in Kannada language to Marathi. The Assistant Police Inspector attached to Murum Police Station recorded Mahananda's statement (Exh.26) in question and answer form. Mahananda stated that she was set ablaze by the appellants herein after having doused her with kerosene. She further stated in her statement that Jayabai (accused no.7), wife of Mahananda's brother- in-law did not intervene to save her.

3. As the condition of Mahananda was critical, on advise of PW 1 - Dr. Prvain, she was shifted to Civil Hospital, at Solapur. PW 6 - Dr.Suchita was Casualty Medical Officer at the Civil Hospital, at Solapur. She gave emergent treatment and certified Mahananda to be conscious oriented to give a statement. PW 3 - Anant was Awal Karkun serving with Tahsil office at Solapur. The Tahsildar/Executive Magistrate had directed him to rush to the Civil Hospital for recording Mahananda's statement. PW 3 - Anant recorded Mahananda's statement-cum-dying declaration (Exh.34), wherein original accused nos.1, 3 to 5 and 8 were stated to be responsible to set her on fire.

4. On the following day, Mahananda succumbed to burn injuries. PW 8 - Sharanbasappa, brother of Mahananda, lodged the FIR (Exh.69), wherein he claimed Mahananda to have made him oral dying declaration stating that all accused nos.1 to 8 were responsible for setting her ablaze. Pursuant to the FIR (Exh.69), crime vide C.R. No.56 of 2011 was registered. PW 10 - Santosh, the In-charge Police Station Officer was entrusted with the investigation. He visited the scene of offence and drew panchnama of situs (Exh.48), and inquest panchnama (Exh.76). Post-mortem on Mahananda's dead body were conducted. Her clothes were seized. The accused persons were arrested. The statements of the persons acquainted with the facts and circumstances of the case, were recorded. Seized articles were sent to the Regional Forensic Laboratory, Aurangabad, for analysis and report thereof. On completion of the investigation, Charge-sheet was filed before the Court of the Judicial Magistrate, First Class, Omerga. Learned Judicial Magistrate, First Class, committed the case to the Court of learned Additional Sessions Judge for trial in accordance with law. Learned Trial Judge framed Charge (Exh.6). The appellants pleaded not guilty and claimed to be tried. It was the defence of the accused persons that Mahananda set herself ablaze.

5. To bring home the Charge, the prosecution examined ten witnesses and tendered in evidence some documents. The accused persons examined one

witness in their defence. On appreciation of the evidence, learned Additional Sessions Judge convicted the appellants herein and acquitted the other accused persons.

SUBMISSION :-

6. Learned Counsel appearing for the appellants would submit that the dying declarations have not been duly proved. Mahananda did not understand Marathi. A close relative of Mahananda interpreted her dying declaration. However, he has not been examined. The condition of Mahananda was so critical that she was not conscious oriented to make a statement. Learned counsel took us through the cross- examination of PW-1 - Dr. Pravin and other Medical Officers examined as witnesses in the case. According to learned counsel, if the dying declarations held to have been proved, they are mutually exclusive. None of the dying declarations relied upon by the prosecution, would inspire confidence. In view of learned counsel, the trial court ought not to have relied upon such a peace of evidence to convict the appellants herein. He, ultimately, urged to allow the appeal.

7. Learned A.P.P. would, on the other hand, submit that the dying declarations have been duly proved. The Trial Court did not err in holding the appellants guilty of the offence. Learned APP, ultimately, urged for maintaining the impugned judgment and order.

8. Two panch witnesses (PW 4 and PW 5) and neighbor (PW 7) did not stand by the prosecution. There is evidence of three medical officers, three police personnel and one revenue officer.

9. The case is based on two written dying declarations and oral one. This being appeal from conviction, we are supposed to re-appreciate the entire evidence. Before examining the evidence on record, it is desirable to refer to the position of law as regards evidenciary value of the dying declarations and appreciation of evidence in the nature multiple dying declarations.

10. In the case of Khushal Rao Vs. State of Bombay, AIR 1958 SC 22, the Hon'ble Supreme Court made following observations :-

"16. On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been

recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human, memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

17. Hence, in order to pass the test of reliability, a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once the court has come to the conclusion that the dying declaration was the truthful version as to the circumstances of the, death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the court, after examining the dying declaration in all its aspects, and testing its veracity has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the court, in a given case, has come to the conclusion that particular dying declaration was not free from the infirmities referred to above or from such other infirmities as may be disclosed in evidence in that case."

In the case of State of Gujarat Vs. Jayrajbhai Punjabhai Varu, AIR 2016 SC 3218, it has been observed thus :-

" Courts have to be extremely careful when they deal with a dying declaration as the maker thereof is not available for the cross-examination which poses a great difficulty to the accused person. A mechanical approach in relying upon a dying declaration just because it is there, is extremely dangerous. The Court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration. The Court has to weigh all the attendant circumstances and come to the independent finding whether the dying declaration was properly recorded and whether it was voluntary and truthful. Once the Court is convinced that the dying declaration is

so recorded, it may be acted upon and can be made a basis of conviction. The Courts must bear in mind that each criminal trial is an individual aspect. It may differ from the other trials in some or the other respect and, therefore, a mechanical approach to the law of dying declaration has to be shunned."

In case of more than one dying declaration, plurality thereof does not add weight to the prosecution case but it is their qualitative worth. The dying declaration, which are mutually exclusive or grossly inconsistent with each other, would not form basis for conviction.

11. Let us examine the evidence in the present case in the light of the aforesaid legal position. Exhibit 26 is the statement/dying declaration of Mahananda, recorded first in point of time. It was recorded by none other than the A.P.I., Murum Police Station. The same should have, therefore, been treated as FIR. It is the case of the prosecution that Mahananda had married Dayanand two years before May 2011. Mahananda would reside along with her husband and in-laws at village Belamb. Dayanand died of kidney failure about three weeks before 15.05.2011. Mahananda was residing in a tin-shed raised adjoining to her matrimonial home. Since Dayanand had passed-away, Mahananda's father, brother and some other relatives were scheduled to visit Mahananda's matrimonial home to reason with her in-laws and to ensure that Mahananda would be treated well. That was not to happen. Mahananda suffered more than 90% of burn injuries. She succumbed thereto, is a fact not in dispute. The post-mortem report (Exh.29) states that Mahananda died due to shock due to 97% burn injuries. The question is whether Mahananda met with homicidal death or was it an accident or case of suicide.

When Mahananda was rushed to Rural Hospital at Murum, PW-1 Dr. Pravin was on duty. On her medical examination, he found her to be conscious and oriented to make statement (Exh.26). Although, PW 1 - Dr. Pravin testified that Mahananda was in great pains and agonies, she was groaning too, his evidence would further indicate that Mahananda's condition was critical and therefore, he advised to rush her to civil hospital, at Solapur. PW 1 - Dr. Pravin further maintained that Mahananda was mentally fit to make a statement. It is further in his evidence that A.P.I. Recorded Mahananda's statement (dying declaration Exh.26) in his presence. It is further in his evidence that Mahananda did not understand Marathi. She gave her statement in Kannada language. Since none was present there who could understand Kannada language, Mahananda's maternal uncle, Shivyogi Birajdar was called as an interpreter to translate Mahananda's statement to Marathi language, being recorded by the Police Officer. Uncle of Mahananda has not been examined as witness. Learned Counsel appearing for the appellants may, therefore, have reason to submit that the dying declaration (Exh.26) has not been duly proved. On close scrutiny of the evidence on record, we are, however, of the view that within minutes of the incident, PW 1 - Dr. Pravin and the concerned police Officer did not have reason to scribe an imaginary statement. We, therefore, do not subscribe to the

submission made by learned Counsel for the appellants that the dying declaration (Exh.26) has not been proved.

12. The dying declaration (Exh.26) has been recorded in question and answer form. Mahananda stated therein that her father, brother and some others were scheduled to visit her matrimonial house for requesting her in-laws to take her care. Just 10- 15 minutes before their arrival by 06.30 p.m., Gangabai (appellant no.2) had doused her with kerosene. Mallamabai (appellant no.3) lit a match-stick and set her ablaze. Mahananda further stated that her mother-in-law - Navlabai (appellant no.1) was also involved in setting her ablaze. Mahananda was categoric in stating in her evidence that no male members were present at home while she was set ablaze.

13. Then comes the second dying declaration (Exh.34). It was recorded at Civil Hospital, Solapur. Admittedly, Mahananda was shifted to civil hospital at Solapur, as her condition was critical. At the civil hospital, PW 6 - Dr.Suchita medically examined her and gave treatment. Although PW 6 - Dr.Suchita was subjected to a searching cross-examination as regards medical fitness of Mahananda to make a statement, PW 6 - Dr. Suchita was categoric to state that Mahananda was conscious and oriented to make a statement. PW 6 - Dr. Suchita accordingly certified in writing on dying declaration (Exh.34).

14. PW 3 - Anant claimed to have recorded dying declaration (Exh.34). It is in his evidence that he rushed to the civil hospital in response to the requisition of the police and direction given by the Tahsildar/Executive Magistrate. It is further in his evidence that he recorded Mahananda's statement in question and answer form. Mahananda did not understand Kannada language. True, there is inconsistency between the evidence of PW 1 - Dr. Pravin and PW 3 - Anant as regards Mahananda's understanding about Marathi language. The dying declaration (Exh.34) is in Marathi language. There is evidence to indicate that the brother and father of Mahananda also did not understand Marathi. Mahananda must not be knowing Marathi. Be that as it may, the dying declaration (Exh.34) came to be admitted in evidence. We assume it to have been duly proved, more so, when it does not run counter to the interest of the appellants. In the dying declaration (Exh.34), Mahananda stated to have suffered burns as she was set ablaze. When she was questioned as against whom, she had a complaint of setting her ablaze, she gave the names of Siddram Gurubasappa Khajure, Navla Gurubasappa Khajure, Mallama Gurubasappa Khajure, Ravi Gurubasappa Khajure and Shivanand Gurubasappa Khajure.

15. It then takes us to oral dying declaration made by Mahananda to her brother, PW 8 - Sharanbasappa. It is in his evidence that he had been to the matrimonial house of Mahananda along with his father and others on the fateful day, to reason with Mahananda's in-laws. It is further in his evidence that while they reached Mahananda's house, they saw her in flames. He, therefore, questioned Mahananda what had happened. Mahananda told him that her mother-in-law (appellant no.1) caught hold her hands, Gangabai (appellant no.2) poured

kerosene on her person and Mallamabai (appellant no.3) lit a match-stick and set her ablaze. Jayabai (original accused no.7) kept watching. PW 8 - Sharanbasappa testified that Mahananda had also told him that male members of her family were also involved in setting her ablaze.

16. PW 8 - Sharanbasappa had lodged the report (FIR Exh.69) with the police. In legal parlance, the statement of Mahananda (Exh.26) is the FIR. Be that as it may, let us scrutinise all the three dying declarations, to find out whether any of them is found to be truthful, to find basis for conviction of the appellants.

17. In the first dying declaration, no male person of the family of Mahananda has been named. Mahananda was categorical to state that none of the male members of the family was present while the incident occurred. In her first part of the statement, she stated that the appellants herein jointly set her ablaze. While describing role of each of the appellants, she stated that Gangabai (appellant no.2) poured kerosene on her person and Mallamabai (appellant no.3) set her ablaze. Here, she ruled out involvement of her mother-in-law, Navlabai (appellant no.1). As such, the contents of the dying declaration (Exh.26) are found to be inconsistent inter-se.

18. In the second dying declaration (Exh.34), Mahananda named all male members of her family along with her mother-in-law, Navlabai (appellant no.1), Gangabai (appellant no.2) and Mallamabai (appellant no.3). In the first dying declaration, she was categorical to state that none of the male members of the family was present at home. Navlabai (appellant no.1) did play no role in setting her ablaze. As such, the dying declarations are grossly inconsistent with each other, much less mutually exclusive to a great extent. None of these dying declarations inspire confidence.

19. Same is the case of the oral dying declaration made to PW 8 - Sharanbasappa. In the FIR, PW 8 - Sharanbasappa has named all the appellants herein and Jayabai (original accused no.7) as the persons, who set Mahananda ablaze. He gave their names in the FIR as was told to him by Mahananda. After two days of registration of the FIR, he gave supplementary statement stating that Mahananda had also told him that male members of the family were also involved in setting her ablaze.

20. Had Mahananda really made oral dying declaration to her brother, PW 8 - Sharanbasappa, he would have been the first to report the same to the concerned police officials or name them in the history that was given at the time of admission of Mahananda to rural hospital at Murum. The evidence of PW 8 - Sharanbasappa as regards the oral dying declaration of Mahananda found to be self-contrary, attempting to make it consistent with the first two dying declarations. The same does not inspire confidence.

21. After considering the evidence and legal position, we are of the opinion that the evidence available on record do not inspire confidence, in our mind, to make all the three dying declarations or any one of them the basis for conviction of the

appellants. We do not propose to refer to the other evidence on record since the same does not further the prosecution case. Instead of critically examining the impugned judgment, suffice it to say that the trial Court, in the given facts and circumstances of the case, ought not to have reached the conclusion holding the appellants guilty of the offence in question.

22. For the reasons given herein-above, the appeal succeeds. Hence, we pass the following order:-

(i) Criminal Appeal is allowed.

(ii) The judgment and order dated 25th July, 2014, passed by the Additional Sessions Judge, Omerga in Sessions Case No. 7 of 2012, thereby convicting and sentencing the appellants for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code, is quashed and set aside.

(iii) The appellants/original accused Nos.5, 6 and 8 namely, Navlabai s/o Gurubasappa Khajure (Samudre), Gangabai Siddram Khajure (Samudre) and Mallamabai d/o Gurubasappa Khajure (Samudre), respectively are acquitted of the offence punishable under Section 302 read with Section 34 of the Indian Penal Code. Fine amount, if deposited by these appellants as per the impugned judgment and order, be refunded to them.

(iv) The appellant No.1/original accused No.5 namely Navlabai s/o Gurubasappa Khajure (Samudre) has already been released on bail during the pendency of this appeal. Her bail bonds shall stand cancelled.

(v) Appellant Nos.2 and 3/original accused Nos.6 and 8 namely, Gangabai Siddram Khajure (Samudre) and Mallamabai d/o Gurubasappa Khajure (Samudre), respectively be released forthwith, unless required in any other case.

(vi) The appellants/original accused Nos.5,6 and 8 shall furnish Personal Bond of Rs.15,000/- each and sureties each in the like amount, under Section 437-A of the Code of Criminal Procedure, before the Court of Additional Sessions Judge, Omerga.