
(2015) 12 BOM CK 0050
In the Bombay High Court
Case No : Criminal Appeal No. 893 of 2005

Nilkanth Laxman Koli

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 10-12-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 307

Citation : (2015) 12 BOM CK 0050

Hon'ble Judges : V.K. Tahilramani, Actg. C.J. and Dr. Shalini Phansalkar Joshi, J.

Bench : Division Bench

Advocate : K.M. Mhatre, for the Appellant; H.J. Dedia, APP, for the Respondent

Final Decision : Dismissed

Judgement

Dr. Shalini Phansalkar Joshi, J.—The appellant - original accused, who stands convicted, by judgment and order dated 29th June, 2005, in Sessions Case No. 619 of 2003, of Additional Sessions Judge for Greater Bombay, for the offence punishable under Section 302 of Indian Penal Code and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs. 5,000/- in default to suffer rigorous imprisonment for three months, by this appeal challenges his conviction and sentence.

2. Brief facts of the appeal can be stated as follows:--

"Deceased Bharati was the wife of appellant. Their marriage had taken place on 25th April, 2002 at Madh village. After the marriage, they were residing together in the same village. As per prosecution case, appellant was suspecting the fidelity of his wife Bharati and on that count there used to be frequent quarrels. On the day of incident, on 13.7.2003, in the morning, the appellant quarrelled with the deceased and then left the house. In the afternoon, he returned and slept. At about 5 to 5.30 p.m., he woke up from the sleep and then poured kerosene on his wife Bharati and set her ablaze by lighting match stick. When Bharati shouted, her brother-in-law P.W.1 Kishor and his wife P.W.3 Malan rushed to her

help. They extinguished the fire and then took her in a rickshaw to Bhagwati hospital. On the way, P.W.1 Kishor got down from the rickshaw, went to Malwani and informed P.W.2 Ganga, the mother of Bharati."

3. P.W.10 API Shinde, who was on duty at Malwani Police Station, received message at about 7.30 p.m. from Bhagwati Hospital, Casualty Department, about admission of a patient Bharati, having sustained burns due to her husband pouring of kerosene on her and setting her ablaze on the ground of taking suspicion of her character. P.W.10 API Shinde made station diary entry to that effect and then went to Bhagwati Hospital, ward No. 4. After making enquiry with P.W.9 Dr. Thakery, as to whether Bharati was in a position to give statement, he recorded her statement vide Exh.27. On making telephone call Malawani Police Station, he obtained running C.R. No. 107 of 2003 from the Officer on duty and accordingly offence under Section 307 of Indian Penal Code was registered against the appellant. On the same night at about 8.00 p.m. P.W.4 Special Executive Magistrate-Manda Barba, recorded dying declaration of Bharati vide Exh.16 in which Bharati reiterated the fact that the appellant has poured kerosene on her and set her ablaze.

4. From Bhagwati Hospital, P.W. 10 API Shinde, alongwith API Dalvi, went to the spot of incident. He drew panchnama of scene of offence in presence of panchas vide Exh.18 and burnt piece of clothes of Bharati and other incriminating articles were seized under said panchnama. The appellant was arrested on the same day under panchnama Exh.13. P. W. 10 API Shinde then recorded statements of witnesses. Further investigation of the case was taken over by P.W.11 Police Inspector Chaskar.

5. On 17.7.2003, Bharati succumbed to burn injuries. Hence offence was converted to section 302 of IPC. During the course of further investigation, seized muddemal articles were sent to chemical Analyzer on 24.4.2003. The Chemical Analyzer's Report is at Exh.10. Further to completion of investigation, chargesheet came to be filed in Court of Additional Chief Metropolitan Magistrate, against appellant on 25.8.2003.

6. On committal of the case to the Sessions Court, trial Court framed charge against the appellant vide Exh.3. The appellant pleaded not guilty and claimed to be tried, raising the defence of false implication. In support of his plea that at the time of incident, he was not present in house, appellant examined one defence witness, his nephew Suryakant Koli.

7. As against it, in order to bring home guilt of accused, prosecution examined in all 12 witnesses and on appreciation of their evidence on record, trial Court was pleased to hold the guilt of the appellant to be proved beyond reasonable doubt and convicted and sentenced him, as aforesaid.

8. In this appeal, we have heard learned counsel for appellant and learned APP for the State. In our considered pinion, in order to appreciate rival submissions made by them, it would be useful to refer to evidence on record.

9. The prosecution in the present case stands on a very strong and solid evidence of oral and written dying declarations which are found to be thoroughly consistent to one another. The law is well settled that the conviction can be based on the sole evidence of dying declaration as great solemnity and sanctity is attached to the words of dying person because a person on the verge of death is not likely to speak lie or to concoct the case so as to implicate an innocent person. As per law, however, when there are multiple dying declarations, consistency in each dying declaration is the relevant factor to be considered for placing full reliance thereupon. In the instant case, though there are multiple dying declarations, all of them are proved to be thoroughly consistent, completely, reliable and voluntary. The first dying declaration is in the form of immediate disclosure made by Bharati before P.W.1 Kishor, her brother-in-law, whose house is just adjacent to the house of the deceased with one partition in between. According to evidence of P.W.1 Kishor, on the date of incident, at about 6 to 6.30 p.m. when he and his wife were in their house, he saw smoke coming out of the house of Bharati. The said smoke was coming to their house also through the door fixed in the partition wall. He further heard cries of Bharati. Hence he and his wife P.W.3 Malan came out of the house and went in front of the door of Bharati's house. They saw Bharati was in flames and the appellant was standing outside the house. They extinguished the fire. At that time Bharati was talking and saying that her husband was suspecting her chastity; he has poured kerosene on her person, set her on fire and then he had come out of the house. As per evidence of P.W.1 Kishor, he and his wife took Bharati to Bhagwati Hospital. Bharati was in the hospital for about 5 to 6 days. Thereafter she died.

10. Though this witness is cross examined at length, absolutely nothing worthwhile is elicited in his cross examination to disbelieve him. No reason is also pointed out for him to state anything falsely against his own real brother. His evidence also reveals that on the way to the hospital he got down from the rickshaw near Malwani village in order to give information to the mother of the deceased. His evidence proves presence of the appellant at the time of the incident.

11. This evidence gets complete support and corroboration from the evidence of P.W.2 Ganga, the mother of the deceased, who on receiving information from P.W.1 Kishor, went to the hospital and there made enquiry with Bharati. According to her evidence, at that time, Bharti was conscious and she told her that her husband has poured kerosene on her and set her on fire.

12. The material piece of evidence is naturally the dying declaration recorded by P.W.4 Special Executive Magistrate, Manda Barba, to whom information was given by the police and she reached hospital at about 8.30 p.m. According to her evidence, she made enquiry with the Medical Officer about the condition of Bharati and he told her that Bharati was in a position to give statement. Then, she went near Bharati. Bharati opened her eyes, saw her and then she asked Bharati her name, made enquiry with her about her age and educational

qualification. Thereafter P.W.4 Manda asked her as to how she sustained the burns and Bharati told P.W.4 Manda that her husband was beating and illtreating her as he was suspecting her chastity. On that day in the morning at about 10 to 10.30 a.m., her husband quarrelled with her, went out of the house, returned in the afternoon and slept thereafter. In the evening at about 6 to 6.30 p.m., he woke up and poured kerosene oil in small tin from the big tin. She was folding clothes in the house, her husband poured kerosene on her and set her on fire by lighting the match stick due to which she sustained the burns. She made hue and cry and then her brother-in-law P.W.2 Kishor and P.W.3 Malan, his wife came to her house and extinguished her fire and brought her to the hospital. As per evidence of P.W.4 Special Executive Magistrate, Manda, as the hands of Bharati were burnt, she obtained her thumb impression on the dying declaration Exh.16. She also got endorsement of the Doctor on the same after recording of dying declaration.

13. This dying declaration gets full support and full corroboration from evidence of P.W.10 API Shinde, who was on duty at Malwani Police Station and at about 7.30 p.m. on the receipt of message from Bhagwati Hospital about admission of patient by name Bharati, having burnt by her husband at about 5.00 p.m. on the ground of suspicion about her chastity, has rushed to the hospital and thereafter, after verifying from the Doctor, that she was in position to give statement, recorded her statement. In the statement before him also, Bharati has reiterated what she has told before P.W.4 Special Executive Magistrate, Manda that it was the appellant, who had poured kerosene on her and set her ablaze. Thereafter her brother-in-law P.W.1 Kishor and his wife P.W. 3 Malan having heard noise and shouting rushed to her house and extinguished her fire. They brought Bharati to the hospital whereas her husband- the appellant remained standing at the door of the house.

14. According to evidence of P.W.10 API Shinde, after completion of recording of statement, he has read it over to her. It was explained to her. She confirmed the recitals to be correct as narrated by her and then made thumb impression on the same. He has countersigned thereon endorsing that the thumb impression was made in his presence. Thereafter he obtained written endorsement of P.W. 9 Dr. Thakarey on this statement Exh.27 that she was in position to give statement. On the basis of this statement/complaint, immediately C.R. No. 107 of 2003, was registered.

15. If at all any further corroboration is required, then it is also coming from the evidence of P.W.9 Dr. Thakery, who was on duty at Bhagwati Hospital. According to his evidence, Bharati was admitted in the hospital at about 7.20 p.m. She was brought by P.W.3 Malan. He has examined Bharati and found that she suffered 85 to 90% superficial burn injuries. He asked history to her and Bharati informed him that she was burnt by her husband by pouring kerosene on her body and setting her ablaze by lighting the match stick. He has recorded said history in the case papers Exh.25. He has further deposed that after some time, P. W.4 Special

Executive Magistrate, Manda came there, made enquiry with him about Bharati and he has informed her and made endorsement on the dying declaration also that the patient was in condition to give statement. At the same time, police officer had also come and he also made enquiry with him about the condition of Bharati and he has told him that Bharati was in a position to give statement and after statement was recorded by police officer, he has made endorsement thereon.

16. Thus, there are two oral dying declarations made by Bharati before P.W.1 her brother-in-law Kishor, P.W.2 her mother Ganga and three written dying declarations, one in the form of history noted in the case papers Exh.25 by P.W.9 Dr. Thakery, another Exh.16 as recorded by P.W.4 Special Executive Magistrate, Manda and third, the complaint Exh.27, as recorded by P.W.10 API Shinde. All these four dying declaration are thoroughly consistent with one another. They are recorded immediately after the incident within a span of 2 to 3 hours and that too by independent persons like P.W.9 Dr. Thakare, P.W.10 API Shinde, and P.W.4 Special Executive Magistrate, Manda. Though P.W.1 Kishor is her brother-in-law, as stated above nothing is suggested in his cross examination to point out any reason for him to implicate his real brother falsely. All these dying declarations are categorical to the effect that it was the appellant who has poured kerosene on Bharati and set her ablaze.

17. The evidence of P.W.9 Dr. Thakarey goes to prove that Bharati succumbed to these burn injuries on 17.7.2003. The postmortem examination is conducted by P.W.6 Dr. Vihurkar which reveals that Bharati has sustained 76% burns on vital parts of the body and the cause of her death was septicemia due to those burns. The postmortem report is at Exh.20.

18. Thus, the evidence on record categorically goes to prove guilt of the appellant. Though appellant has examined his nephew to show that at the time of incident, he was not in the house and was playing football and only after hearing commotion he has rushed to the house, the evidence on record falsifies plea raised by the appellant. The evidence of P.W.1 Kishor clearly proves that appellant was very much present outside the house when he rushed there on hearing cries of Bharati.

19. As per evidence of P.W.11 Police Inspector, Chaskar, at the time of arrest of the appellant on the same day, some burn injuries were found on his right hand and hence he was referred to Bhagwati Hospital where he was examined by Doctor on 14.7.2015 at 15.25 hrs and there they found 6 to 7% superficial to deep burns on his right hand. The certificate to that effect is produced at Exh.38. Though the appellant has raised defence that these injuries were sustained by him while extinguishing the fire, it can hardly be accepted. If it was so, then injuries should have been on both hands and not only on the right hand. This burn injury to right hand proves his involvement in the act of pouring kerosene and lighting the match stick. The evidence of P.W.1 Kishor, clearly goes to prove that the appellant was standing outside the door of the house while they found

Bharati in flames and it was P.W.1 Kishor and his wife P.W.3 Malan, who extinguished her fire; whereas the appellant did not make any effort to do so. Therefore, the involvement of the appellant in the act of setting Bharati on fire is writ large on the face of record and proved beyond doubt.

20. The only contention raised by learned counsel for appellant is that P.W.3 Malan, the wife of P.W.1 Kishor, has however, not supported the prosecution case. In our considered opinion, merely because she has disowned the prosecution case and hence declared hostile by prosecution, the evidence of P.W.1 Kishor and unimpeachable evidence of dying declarations cannot be discarded. Moreover, to some extent, she has also supported the case of prosecution by depositing that when they saw smoke coming from the house of appellant, they went there and saw Bharati in flames in her house, then she herself and her husband extinguished fire. Therefore, her evidence also supports the prosecution case to a major extent.

21. An attempt is made by learned counsel for appellant to submit that in none of her dying declarations, Bharati has disclosed the fact that she was five months pregnant, which fact is proved on record by the evidence of Doctor. In our considered opinion, non disclosure of this fact by Bharati, in her dying declarations, does not make any difference to the validity of dying declaration. There is also no merit in the submission that the cause of death of deceased Bharati that is the septicemia was on account of death of a child in her womb because the evidence of P.W.9 Dr. Thakarey and P.W.6 Dr. Vihurkar, is categorical that the cause of her death was 77% burn injuries sustained by her.

22. Learned counsel for appellant has then submitted that at the time of recording dying declaration Exh.16 by P.W.4 Special Executive Magistrate, Manda, and complaint Exh.27 by P.W.10 API Shinde, P.W.9 Dr. Thakarey, was not present. This fact is admitted by P.W.9 Dr. Thakarey himself and therefore, according to him, whether Bharati was in fit physical and mental condition to give such statement is not proved. The reliance in this respect is also placed on the judgment of our High Court in Shripad Arjun Kamat v. State of Goa, 2002(5) LJSOFT 133. However, facts of this reported authority reveal that non presence of Doctor at the time of recording dying declaration was considered fatal in the light of the facts that Exh.30 and 31 memos issued to the Doctor though bear endorsement, "fit for statement" the said endorsement was not appearing on the copies of the memos which were supplied to the accused alongwith charge-sheet. Hence it was held that an attempt has been made by the prosecution to put an endorsement on Exh.30 and 31 subsequently probably, which in reality had not existed on these memos. In the light of these facts, it was held that recording of dying declaration becomes suspicious. As against it, in the present case, P.W.9 Dr. Thakarey has categorically stated that immediately on arrival of Bharati, he has examined her and thereafter within one or two hours, P.W.4 Special Executive Magistrate, Manda and P.W.10 API Shinde had come. Both of them had independently made enquiries with him and he had informed them that Bharati

was in a position to give statement. After recording was completed, they had approached him and he has made endorsements on both the statements that Bharati was in a position to give statement. Therefore, merely because he was not present at the time of actual recording of the statements, it will not make any difference, especially when both these witnesses viz P.W.4 Special Executive Magistrate Manda and P.W.10 API Shinde, have verified the condition of Bharati by asking her various questions and satisfied themselves that she was in a position to give statement. It is also pertinent to note that Bharati has survived those injuries for about four days. She died on 17.7.2003. It was also not case of 100% burns. Hence there is no question of doubting her fitness to give statements and on that ground dying declarations cannot become suspicious in any way.

23. Learned counsel for appellant has then relied upon *State of Maharashtra v. Raghunath Ramchandra Sable* 2015 (11) LJSOFT 101, wherein the evidence on record showed that the thumb impression of the deceased on the dying declaration was not attested by Special Executive Magistrate, but it was attested by police. Moreover, several other infirmities were also pointed out in the dying declaration, like there was no mention in the dying declaration that the contents were read over to the deceased and those were as per her narration. It was further found that the history of accidental burns due to explosion of stove was given by patient herself to the Medical officer; whereas in dying declaration she had stated that her husband poured kerosene on her person and set her ablaze. Moreover, Doctor had admitted that at the time of recording dying declaration relatives of deceased were present near the bed. In the light of those infirmities and lapses in recording of dying declaration, the evidence relating to it was disbelieved.

24. Per contra, in the instant case, the evidence of P.W.10 API Shinde and P.W.4 Special Executive Magistrate- Manda, goes to prove that the contents of dying declaration were read over to Bharati. She has admitted them to be correct and then made Thumb Impression in their presence. They have countersigned on the dying declaration. There is also no evidence to show that any of the relatives of the deceased were present with Bharati before dying declaration was recorded and lastly dying declaration recorded by P.W.4 Special Executive Magistrate, Manda and by P.W.10 API Shinde is thoroughly consistent with the history given by Bharati before Doctor at the time of treatment and disclosure made before P.W.1 Kishor.

25. Thus, having reappreciated the entire oral and documentary evidence on record, we are convinced that in this case, the prosecution has proved the guilt of the appellant beyond reasonable doubt for the offence punishable under Section 302 of the Indian Penal Code. Hence appeal deserves to be dismissed and stands dismissed accordingly. The office to communicate this order to the appellant who is undergoing his sentence in Central Jail at Thane.