
(2002) 07 BOM CK 0007
In the Bombay High Court
Case No : Criminal Appeal No. 170 of 1997

Pandurang

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 24-07-2002

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 498A

Citation : (2003) BomCR(Cri) 464 : (2003) 2 DMC 244

Hon'ble Judges : V.M. Kanade, J;R.K. Batta, J

Bench : Division Bench

Advocate : M.R. Daga, for the Appellant; T.D. Khade, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

R.K. Batta, J.—The appellant was tried for subjecting his wife Rekha with cruelty as also her murder Under Sections 498-A and 302 of the Indian Penal Code. In support of the said charges, the prosecution had examined ten witnesses. The Trial Court vide judgment dated 10.1.1997 found the appellant guilty of both the charges. The appellant has been sentenced to undergo life imprisonment as also fine of Rs. 5\$0/-, in default R.I. for six months. He has also been sentenced to undergo R.I. for two years and fine of Rs. 300/-, in default R.I. for three months u/s 498-A of the Indian Penal Code. The substantive sentences are ordered to run concurrently. The appellant was given benefit of period of detention which was set-off u/s 428 of the Code of Criminal Procedure. The appellant challenges his conviction and sentences in this appeal.

2. The prosecution case, in brief, is that the appellant had married the deceased, who was divorcee. After marriage, the appellant started suspecting her character and used to quarrel and assault her after drinking liquor. The deceased had lodged a complaint with the police in respect of assault by the appellant on 27.5.1993. On 25.10.1993, in the evening, the deceased had gone to her parents' house which was just across the road from her house and complained

that the appellant had assaulted her by throwing pat on her, on account of which, she has received injury over the cheek. Her parents advised her to go back to the house. The appellant had also come and he also went back to his house. After some time, the incident in question took place. When the parents of the deceased reached the house of the appellant, they saw that the appellant was taking the deceased in a rickshaw to the hospital. They also went to the hospital. In the hospital, her dying declaration was first recorded by Head Constable which is at Exh. 69. After about half an hour, her dying declaration was recorded by the Executive Magistrate, which is at Exh. 63. The police recorded another dying declaration on 28.10.1993 after which the crime was registered. The deceased died on 29.10.1993. She had suffered 97 percent burns. The learned Additional Sessions Judge, after placing reliance on dying declaration (Exh. 63) which was recorded by the Executive Magistrate as also the other circumstances, recorded the conviction of the appellant. The learned Additional Sessions Judge, however, discarded the dying declaration (Exh. 69) and dying declaration (Exh. 67). The defence of the appellant was that he was at the house of his in-law at the time of the incident and did not know how his wife was set on fire.

3. Learned Advocate Mr. Daga for the appellant urged before us that there are three dying declarations on record that, there are inter se variations between the three dying declarations and on account of the said variations the appellant is entitled to benefit of doubt. In this respect, he has relied upon the judgment of the Apex Court in Smt. Kamla Vs. State of Punjab, . He further submitted before us that the Trial Court erred in believing dying declaration (Exh. 63) recorded by the Magistrate, since in the dying declaration (Exh. 69), which had been recorded by the police only, about half an hour prior to that, the deceased had stated that she had ignited the stove which then flared up and she caught fire due to stove. He also urged before us that the police did not registered any offence after the dying declaration was recorded by the Executive Magistrate, but continued with the enquiry into the crime and it is only after police again recorded dying declaration (Exh. 67) of the deceased on 28.10.1993 that the crime was registered; that there has been delay in recording the F.I.R. on account of which there is reason to believe that the dying declaration by the Executive Magistrate had not been recorded on 25.10.1993. It was also urged by the learned Advocate for the appellant that the contents of the dying declaration (Exh. 63) have not been specifically put to the accused and to the statement recorded u/s 313 of the Code of Criminal Procedure and as such the same cannot be used against the appellant. He, therefore, contends that the appellant be acquitted of the charges.

4. On the other hand, learned A.P.P. urged before us that the parents of the deceased namely, P.W. 2 Manjula and P.W. 3 Tejrao have spoken of the fact that the appellant used to assault the deceased; that the deceased had, in fact, lodged a complaint with the police of assault by the appellant on 27.5.1993 and that it is in this background that the incident had taken place. According to her, the Trial Court had rightly discarded the dying declarations (Exhs. 69 and 67) recorded by the police for which sound reasons have been given; that the Trial

Court has rightly accepted the dying declaration recorded by the Executing Magistrate which does not suffer from any infirmity; that, in fact, there is no delay in the matter since the crime was registered after enquiry and that there is no reason whatsoever to interfere with the judgment of the Trial Court,

5. P.W. 2 Manjula and P.W. 3 Tejrao, who are parents of the deceased, have both stated that the deceased was initially married to one Sadashiv Dongre and the marriage ended with divorce; that the deceased had then married the appellant who started suspecting the character of the deceased and was assaulting the deceased under influence of liquor. The police had produced the complaint made by the deceased on 27.5.1993 regarding the assault by the appellant on her. Therefore, the prosecution has been able to establish that the appellant was treating the deceased with cruelty.

6. On the date of the incident, the deceased had come to her parents to inform that she was assaulted by the appellant who threw a pat on her, as a result, she received injury. The parents sent her back. The appellant had also come there. He also went back home. After some time, the deceased was burnt. The deceased and the appellant were the only persons in the house. The stand taken by the appellant that at the time of the incident, he was with his in-laws is not borne from the record and this stand taken by the appellant is false. According to P.W. 2 Manjula, she along with her husband, had gone to the hospital and there the deceased told her that the appellant had set her on fire.

7. Now, we shall deal with the three dying declarations. The first in point of time the dying declaration (Exh. 69) which was recorded by the Head Constable Haridas Gajbhiye (P.W. 7). This dying declaration was recorded between 9.45 p.m. and 10.00 p.m. on 25.10.1993 wherein it is stated that the deceased had ignited the stove which suddenly flared up and she caught fire due to stove. RW. 7 has stated that her husband and other relatives were present when he recorded the said statement and she was frightened. According to him, he was not satisfied with the said statement and as such he had given a letter to the Executive Magistrate for recording the dying declaration. This dying declaration (Exh. 69) has been disbelieved by the Trial Court on the ground that the same is inherently incorrect since no stove at all was found at the scene of the offence, but there was hearth which had ash. The Trial Court also came to the conclusion that the possibility of the appellant threatening the deceased on the way to the hospital cannot be ruled out. Thirdly, it is pertinent to note that the Chemical Analyser found residue of kerosene on the clothes as also on the earth which was collected from the scene of the offence which would also rule out the theory of the stove flaring up due to which the deceased caught fire and on the contrary they support the case that the kerosene was poured on the deceased and she was set on fire. The Trial Court also noticed that RW. 7 had not made any efforts to call for the Executive Magistrate and in this respect, reliance was placed on the judgment of the Apex Court in State (Delhi Administration) Vs. Laxman Kumar and Others, wherein reliance has been placed on observations in earlier

ruling in *Dalip Singh v. State of Punjab*, AIR 1973 SC 1173 to the effect that though a dying declaration recorded by a police officer is admissible u/s 32 of the Indian Evidence Act in view of the exception provided in Sub-section (2) of the Section 162 of the Code of Criminal Procedure, yet it is better to leave such dying declaration until and unless the prosecution satisfies the Court as to why it was not recorded by the Magistrate or by the doctor. It has been observed in this judgment that the practice of the Investigating Officer himself recording dying declaration during the course of investigation should not be encouraged. In our opinion, the Trial Court had, therefore, rightly discarded the dying declaration (Exh. 69) which the deceased had given on account of presence of her husband and even Head Constable who had recorded the same was not satisfied with the veracity of the same due to which he had called Executive Magistrate to record dying declaration.

8. The dying declaration (Exh. 67) which was recorded by RW. 7 on 27.10.19.93, was also discarded by the Trial Court. The Trial Court found that this dying declaration (Exh. 69) was not recorded in the presence of Medical Officer and there is no endorsement of the Medical Officer to show that the deceased was in a fit condition to give the statement. It is also not understood as to why P. W. 7 had recorded the said dying declaration (Exh. 67) after the dying declaration of the deceased had been got recorded through the Executive Magistrate (P.W. 5). The recording of this dying declaration was an exercise in futility under the circumstances of the case. Though there has been delay in registering the offence, yet in view of the categorical dying declaration (Exh. 63) recorded by the Executive Magistrate (RW. 5) on 25.10.1993, the delay in the circumstances is inconsequential. This dying declaration otherwise on material particulars substantially supports the dying declaration (Exh. 63).

9. We shall now deal with the dying declaration (Exh. 63) which was recorded by the Executive Magistrate (P.W. 5). P.W. 9, Dr. Avinash has stated that he received requisition from the Executive Magistrate. He examined the deceased who was fully conscious and able to give statement. According to him/the Executive Magistrate recorded the dying declaration in his presence and after the completion of the dying declaration has again made endorsement on the same. Executive Magistrate (P.W. 5) Devidas Ingole has stated that Medical Officer examined the patient and made endorsement that the deceased was in a position to give statement. He then recorded the statement of the deceased which was read over to her. She admitted the same to be correct and thereafter he obtained thumb impression of her right hand on the statement. Thereafter he signed the same and obtained further endorsement from Dr. Lavale. He denied the suggestion that the entire hand of Rekha was bandaged. He also denied that Rekha was not in a position to put her thumb impression. Learned Advocate for the appellant submitted that the deceased had suffered 97 percent burns and her skin was burnt as a result of which it would not be possible to obtain her thumb impression. We do not find any merit in his submissions in the light of categorical statement of Executive Magistrate (P.W. 5). We do not find any reason

whatsoever to discard this dying declaration which was accepted by the Trial Court. The report of the Chemical Analyser shows that the test on the partly burnt clothes and earth for kerosene residues was positive which shows that kerosene was thrown on the deceased which also fell on earth. The ruling of the Apex Court on which reliance has been placed by the learned Advocate for the appellant does not help the case of the appellant since in the said case the facts and circumstances it was found that the four dying declarations were inconsistent; that there was evidence to show that her husband had come and rescued her and there was evidence that the occurrence could be due to accident.

10. Learned Advocate for the appellant had also urged before us that the contents of the dying declaration (Exh. 63) were not specifically put to the appellant. We do not find any force in this submission of learned Advocate for the appellant since dying declaration (Exh. 63) was specifically put to the appellant in his examination and he stated that the same was not true.

11. In view of the above, we do not find any merit in this appeal, since the judgment of the Trial Court is based upon evidence on record , the two dying declarations have been rightly discarded by the Trial Court. The Trial Court has rightly placed reliance on the dying declaration (Exh. 63) recorded by the Executive Magistrate (P.W. 5) which does not suffer from any legal infirmity. Accordingly, the appeal is hereby dismissed. The conviction and sentences imposed on the appellant by the impugned judgment is hereby upheld and maintained.