

(2013) 04 BOM CK 0176
In the Bombay High Court
Case No : Criminal Appeal No. 121 of 1993

Prakash Sadu Raut

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 01-04-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 326
Evidence Act, 1872 — Section 32
Penal Code, 1860 (IPC) — Section 302, 326, 34

Citation : (2013) 3 ABR 1073 : (2013) ALLMR(Cri) 2511 : (2013) 3 Crimes 49

Hon'ble Judges : Abhay M. Thipsay, J

Bench : Single Bench

Advocate : Jyoti Menon instructed by Mr. M. Janardhan, for the Appellant; V.S. Mhaispurkar APP, for the Respondent

Final Decision : Allowed

Judgement

Abhay M. Thipsay, J.—The appellant and two others were prosecuted on the allegation of having committed an offence punishable u/s 302 of the Indian Penal Code (IPC) read with Section 34 thereof. The learned Additional Sessions Judge, Brihan Mumbai, after holding a trial, acquitted the other two accused. He acquitted even the appellant with respect to the charge of an offence punishable u/s 302 of the IPC read with Section 34 thereof, but held him guilty of an offence punishable u/s 326 of the IPC read with Section 34 thereof, and sentenced him to suffer Rigorous Imprisonment for three years and to pay a fine of Rs. 5,000/-, in default, to suffer Rigorous Imprisonment for 3 months. Being aggrieved by his conviction and the sentence imposed upon him, the appellant has approached this court by filing the present appeal. The prosecution case before the trial court was as follows:

Ranjana alias Sakhubai had been residing at Sonubai Chawl, since the year 1984. She had gone to reside there with her two minor sons, after the death of her husband. The appellant, who was staying in the same chawl, developed intimacy

with Ranjana, and started staying with her as her husband. The sons of Ranjana grew up. They then compelled Ranjana to sever her relations with the appellant. This was disliked by the appellant, and he, therefore, with the help of his sister Nanda (original accused no. 3), and Nanda's husband - Shashikant (original accused no. 2) started harassing Ranjana for compelling her to continue her relationship with the appellant. On 16.2.1991, something happened between Ranjana and her sons on one hand, and the mother of the appellant on the other hand, as a result of which, both parties lodged some reports with the police.

On 17.2.1991, in the morning, the appellant and the other two accused went to the house of Ranjana and started quarreling with her. During the quarrel, they poured kerosene from the kerosene can (that was in Ranjana's house) over the clothes of Ranjana and set her on fire with a match stick. Ranjana rushed out of the room from the rear door. The neighbours came, poured water on her person and extinguished the fire. That, when Ranjana had shouted, the appellant and the other accused had run away. One of Ranjana's sons-Deepak (PW2) - and Kamala (PW3) took Ranjana to Cooper hospital. Ranjana had already told her son Deepak, before she was removed from the house, that appellant and other accused had set her on fire. The same version was given by Ranjana, after she was taken to the hospital, to the Constable on duty there. Ranjana's statement was recorded by P.S.I. Narayan Upasani (PW10), which was treated as the First Information Report (FIR). One Special Executive Magistrate (S.E.M.) - Vasant Waghia (PW11) - who was called for, also recorded the statement of Ranjana. Ranjana, who had sustained 95% burn injuries succumbed to the injuries early in the morning of 22.2.1991. In the course of investigation, the appellant and other accused came to be arrested and were prosecuted as aforesaid.

2. During the trial, the prosecution examined thirteen witnesses. The record of the dying declarations made by Ranjana to P.S.I. Upasani and to the S.E.M. Vasant Waghia was tendered in evidence. A number of other relevant documents were also tendered in evidence. The trial, as aforesaid, resulted in conviction of the appellant, not with respect to offence punishable u/s 302 of the IPC, but with respect to offence punishable u/s 326 of the IPC, and acquittal of the other two accused.

3. I have heard Ms. Jyoti Menon, the learned counsel for the appellant, and Ms. V.S. Mhaispurkar, the learned APP for the State. With the assistance of the learned counsel, I have gone through the entire evidence adduced during trial. I have also carefully examined the impugned judgment.

4. In addition to the oral arguments, the learned counsel for the appellant has filed "gist of arguments" in writing. I have taken the same into consideration.

5. Before proceeding further, it may be observed that the State has not challenged the acquittal of the appellant and the other accused with respect to the offence punishable u/s 302 of the IPC read with Section 34 thereof.

6. The learned Additional Sessions Judge has found it unsafe to rely on the dying

declarations made by Ranjana, which undoubtedly implicate the appellant and even the other accused. The dying declaration of Ranjana recorded by P.S.I. Upasani (PW10), which is the FIR, and the dying declaration recorded by S.E.M. Vasant Waghia (PW11), though are consistent in so far as they implicate the appellant and the other accused, have not been believed by the learned Additional Sessions Judge.

7. Before proceeding to discuss the appreciation of evidence, as done by the learned Additional Sessions Judge, and his reasoning in coming to the conclusion of the appellant being guilty of an offence punishable u/s 326 of the IPC read with Section 34 thereof, the evidence adduced during the trial may be briefly examined.

8. The first witness Narayan Aroskar (PW1) is a resident of the room adjoining the room of Ranjana. He is the one, who had, on feeling the heat coming from the adjoining room and on hearing some shouts, gone there, and poured water from a handa - not on Ranjana, but "on a saree" which according to him he saw burning. It is interesting to note that he said that "he did not know whether the saree over which he poured water was worn by any woman or was just kept in the room." He also stated that when he went out, he saw Ranjana lying in front of the door of her other neighbour.

9. The second witness Deepak (PW2) and the fourth witness Vijay (PW4) are the sons of Ranjana who have stated that the appellant was residing with their mother, as her husband. They have deposed about the original accused no. 3 picking up quarrels with Ranjana. They have also stated that in the evening of 16.2.1991, Ranjana had told them not to sleep in the house, as she apprehended that the appellant would cause some harm to them, and that, therefore, they had gone to sleep elsewhere - at two different places. According to Deepak, at about 8.00 a.m. in the morning, he learnt about Ranjana having caught fire and rushed home, when Kamala (PW3) was already there. His evidence shows that a rickshaw was arranged for, and Ranjana was taken to Cooper hospital by him and Kamala.

10. Vijay (PW4) was told by somebody about his mother having caught fire, but when he went home, he found that his mother had already been taken to hospital. He then went to the hospital, met his mother, who told him that the appellant and the other two accused had set her on fire.

11. Kamala Kadam (PW3) stated that on hearing shouts, she went out and after going to the room of Ranjana, found her lying near the door of her other neighbour, having sustained injuries, with part of the burnt clothes on her body. According to her, water was dripping from Ranjana's body. Kamala covered Ranjana with a shawl, brought her inside the house, and when Deepak came there, she removed Ranjana to Cooper hospital.

12. Sunil Kundle (PW8) stated that he learnt on 17.2.1991, from a young boy, that mother of Vijay had caught fire, and he, therefore, went to the house of

Vijay's mother - Ranjana. He helped Deepak and Kamala to send Ranjana to Cooper hospital. According to him, he did not inquire as to how Ranjana had sustained burn injuries and nobody told it to him.

13. Kunda Gurav (PW6) is another neighbour of Ranjana. According to her, that on 17.2.1991 at about 8.00 a.m., she heard some shouts and when she came out of her room, noticed that Ranjana was lying near the door of her neighbour, having burn injuries, with water dripping from her body. She also spoke about having smelt of kerosene at that time. According to her she had seen the appellant filling a blue plastic bucket with water and pouring water over Ranjana. She also stated that appellant thereafter dropped the bucket there and ran away. According to her, her neighbour - Nirmala Gurav (PW7) was standing outside her door at that time.

14. Nirmala Gurav (PW7) also stated that on 17.2.1991 she heard her neighbour shouting that there was a fire and that, when she looked out of the rear door of her room, she saw that "clothes of Ranjana had caught fire." Nirmala Gurav saw that Ranjana was in passage and the appellant poured water over her from a bucket, then dropped down the bucket and ran away. She then speaks that Kamala came there, and thereafter covered the body of Ranjana, and on Deepak coming there, took her to hospital.

15. The evidence of Swapnil Kamble (PW9), a constable on duty at Cooper hospital shows that Ranjana was brought to the hospital at about 8.30 a.m. in the morning by Deepak and neighbour Sunil, and that, Ranjana was in a condition to speak. That, on inquiries, he learnt that the appellant and the other two accused (Shashikant and Nanda) had poured kerosene over her and set her on fire. That, Ranjana was admitted in the hospital. The relevant entry in the Emergency Police Register, was produced and got proved through him.

16. The evidence of P.S.I. Sunil Wadke (PW5) shows that two complaints were lodged on 16.2.1991 at the Airport Police Station which were registered as non-cognizable complaints. He refers to the complaint lodged by the mother of the appellant against the sons of Ranjana and the complaint lodged by Ranjana against Nanda, the original accused no. 3.

17. The evidence of Vijay Chavan (PW12), a Police Constable, who at the material time was attached to Sahar Police Station, shows that the appellant and the other accused were arrested on 19.2.1991.

18. S.E.M. Vasant Waghia (PW11), stated about having recorded the dying declarations of Ranjana. The record thereof was produced before the court at Exhibit 29b.

19. P.S.I. Upasani (PW10) also stated about going to Cooper Hospital and recording the statement of Ranjana (Exhibit 28), after obtaining a certificate from the doctor about Ranjana being in a fit state of mind to make a statement.

20. The evidence of P.I. Yashwantrao Sawant (PW13) shows that he had gone to

Cooper Hospital, after receiving information left at Police station by P.S.I. Upasani, and that the S.E.M. Vasant Waghia recorded the dying declarations. He has then stated about the various steps taken during the investigation.

21. While judging the correctness or otherwise of the ultimate conclusion arrived at by the learned Addl. Sessions Judge, the process of reasoning by which he came to the ultimate conclusion, would need examination. For that, what were the points for determination framed by him, and what were the findings recorded by him thereon, needs to be seen.

22. The learned Judge first considered whether the injured had made statements i.e. dying declarations at all and concluded that, that, she had made such statements, had been proved. He then considered whether such dying declarations were worthy of being relied upon as a basis for conviction and recorded a negative finding. He then considered as to what extent the dying declarations were corroborated by the "evidence and the other circumstances" and opined that the dying declarations were corroborated "to the extent of accused no. 1 (appellant) having common intention to cause burns." He then considered whether the death of Ranjana was homicidal and answered the same in affirmative. Interestingly, while considering what offences the accused persons were proved to have committed, he held that the accused no. 1 i.e. the appellant, had committed an offence punishable u/s 326 of the IPC read with Section 34 of the IPC, but that, the original accused nos. 2 and 3 were entitled to be acquitted by giving them benefit of doubt.

23. Since the learned Additional Sessions Judge has not found the dying declarations made by Ranjana reliable, and since the State has not challenged the order of acquittal of the appellant and the other accused with respect to the offence punishable u/s 302 of the IPC read with Section 34 thereof, I do not find it necessary to discuss in details the appreciation of this evidence by the learned Additional Sessions Judge. The learned Judge has considered the matter from all the angles, and though, he had rejected some of the contentions advanced by the defence with respect to unreliability of the version reflected in the dying declarations, he had, for sufficient reasons, found it difficult to place full reliance on those dying declarations. The learned Judge was of the view that, that no statement was made by Ranjana, as suggested by the defence, could not be accepted. Thus, though the learned Judge held that statements were indeed made by Ranjana, which were admissible as her dying declarations under the provisions of Section 32 of the Evidence Act, he was unable to hold that such statements were truthful, or that, they (or any of them) could be safely accepted as true and acted upon. As aforesaid, it is not necessary to discuss in detail the appreciation of evidence with respect to the dying declarations, except observing that the learned Judge found it difficult to place reliance on the dying declarations by comparing the same with the rest of the evidence. He observed that the version of Narayan Aroskar (PW1), Kunda Gurav (PW6) and Nirmala Gurav (PW7) was not in conformity with the record of the dying declarations at

Exhibit 28 and Exhibit 29b. After discussing the legal position with respect to the value of a dying declaration as a piece of evidence, and on examining the dying declarations in the present case, the learned Judge formed an opinion that the dying declarations in this case fell in the category of evidence which would be partly reliable and partly unreliable. In such a situation, he concluded that the dying declarations could not form the basis of conviction.

24. The learned Judge held part of the dying declarations to be corroborated by some other evidence, the first being, that the injured had died due to burn injuries. He then discussed the general position - viz. - burns could be sustained in three contingencies: firstly - accidental, secondly - in an attempt to commit suicide, and thirdly - in an attempt to homicide. He ruled out the first possibility from the panchnama of the scene of offence - Exhibit 21. Out of the other two possibilities spoken about by him, he believed that "the injuries could be attributed to an attempt to commit suicide." This belief he formed, by resorting to a very lengthy inferential process, the correctness of which is open to doubt.

The conclusions arrived at by the learned Judge from the evidence of the dying declarations and the other evidence and the process of coming to the said conclusions, both are rather interesting. The learned Judge concluded:

- (i) that Ranjana had been doused with kerosene inside the room,
- (ii) the absence of smell of kerosene and stains of kerosene on the floor and some kerosene remaining at the bottom of the can indicated the possibility of Ranjana having doused herself with kerosene in the course of quarrel. That, this possibility indicated that part of dying declaration alleging pouring of kerosene by the appellant, improbable,
- (iii) if the appellant had poured kerosene on the person of Ranjana, the kerosene can would not have been at its general place, and would have been lying on the way and would have been totally empty. (The finding as to where the can was, was arrived at by the learned Judge from the spot panchnama.)
- (iv) the dousing of clothes of the injured by kerosene by herself would not necessarily indicate that she attempted to commit suicide and there existed a possibility of Ranjana having doused herself with kerosene to threaten the appellant and other accused of committing suicide.
- (v) Though Ranjana had poured kerosene on herself, the fire had not been caught by her act. It is because, if she herself had set her on fire, by striking a matchstick, the match box would have been found in the vicinity, but such match box was found on the scene of the offence.
- (vi) there was no possibility of anybody having removed the match box, as such a person, if any, would be ingenuous enough to remove the match box for falsely implicating someone, he would not have left the kerosene can at its usual place, but would have thrown it on the floor to corroborate the intended version of the offender having setting fire to the clothes of Ranjana.

(vii) the burns, therefore, could not have been either accidental or suicidal, but were necessarily homicidal.

25 The learned Judge then went on to consider as to who was the person who set fire on the clothes of the injured. After noting that the version in the dying declarations was that the appellant poured kerosene over her and the original accused no. 2 set fire to the clothes of Ranjana, and that the accused no. 3 threw a stone at her, the learned Judge observed that throwing a stone by original accused no. 3 towards her, was on the face of it, improbable. He was of the view that in the course of quarrel by three against one woman, a woman, who was quarreling with the support of other two men, would never throw a stone at the woman, who was quarreling. He also concluded that the act attributed to the original accused no. 2, namely, of setting Ranjana on fire, was also not probable, as he is said to have run away from the front side. The person who had set fire to the clothes of Ranjana would have been nearest to her, and therefore, would have been the last person to run away, but Narayan Aroskar (PW1) had said that the original accused no. 2 was the first, who was seen running away and the appellant was seen running away later on. The learned Judge also observed that the appellant poured water over her while her clothes were aflame and this had been stated not only by Kunda Gurav (PW6) and Nirmala Gurav (PW7), but had also been confirmed by the appellant himself in his examination u/s 313 of the Code of Criminal Procedure. The learned Judge therefore concluded that the appellant was with the injured till the last possible moment during the incident, and therefore, there was no possibility of the original accused no. 2 having set fire to Ranjana's clothes. The learned Judge then observed as follows:

It is seen that in all probability, injured had doused herself with kerosene to threaten the three accused of dire consequences if they continued to harass her with the demand of money. That possibility, coupled with the fact that the can was not totally empty and was found at its usual place, makes the possibility of accused no. 1 having poured kerosene on the clothes of the injured, improbable. As already considered, that if a third person is pouring kerosene on another, that person is bound to make an attempt to avoid it and under those circumstances, the kerosene would leave stains on the floor where it was poured on the person. Absence of stains and smell of kerosene in the room thus rules out the possibility of it having been poured by a third person. Thus, it is seen that the act which the injured committed herself was attributed by her to accused no. 1 with an intention to involve accused no. 2 falsely in the act of setting her clothes on fire. As it is seen that the clothes must have been set on fire by a third person, the only person who could have done so, is shown to be accused no. 1.

26. In spite of this conclusion, the learned Judge did not hold the appellant guilty of an offence of murder, or of culpable homicide not amounting to murder. According to him, Ranjana had a quarrel with the appellant and in order to frighten and threaten him, she poured kerosene on herself. The appellant did not

have any intention to set fire to the clothes of Ranjana, but he lighted match stick and took it close to the clothes of Ranjana for frightening her. This act, viz:- that of taking the lighted matchstick near her clothes, "which were doused by kerosene was an intentional act, which was imminently dangerous and which the appellant knew was likely to set fire to the clothes of Ranjana, resulting into causing grievous hurt to her." On this reasoning, he held the appellant to have committed an offence punishable u/s 326 of the IPC.

27. The entire reasoning and the conclusions arrived at by the learned Judge are totally unacceptable. The finding has been arrived at solely on the basis of conjunctures and surmises, and not on the basis of evidence.

28. The learned counsel for the appellant is right in saying that the case of the prosecution was that the appellant poured kerosene on the victim, the original accused no. 2 lit the fire and the original accused no. 3 threw a stone on the victim. The learned Judge substituted a new case for the prosecution, to the effect that Ranjana, in a quarrel, poured kerosene on her clothes to frighten the appellant by threatening to commit suicide, and the appellant, in order to frighten her, but without intending to cause any injury to her, lit a matchstick and drew it near to her clothes, which caught fire.

29. It was not open for the learned Judge to have invented and substituted a new case for the prosecution, which was neither alleged, nor spoken about, by any of the witnesses, and which was not borne out from the evidence on record; and then to hold the appellant guilty on the basis of such newly substituted case. The inferences drawn by the learned Judge on facts, are far fetched and nothing but pure conjunctures and surmises. The learned Judge did not believe the prosecution version at all, and infact, came to the conclusion that Ranjana herself had poured kerosene over her person, but concluded that the setting of fire must not have been done by her, only on the basis that no match box was found in the room. That no match box was found in the room was held only on the basis of the spot-panchnama, and it was dangerous to draw the conclusions in question, only from the fact of non-mention of a match box in the spot panchnama. In the first place, the panchnama was drawn about four hours after the incident and there is nothing to indicate that in the meantime, the room was guarded, and that the position at the time of panchnama had remained unchanged, since the time of the incident. Moreover, the learned counsel for the appellant is quite right in submitting that when Ranjana sustained 95% burn injuries, there was every possibility of the match box also having caught fire, fully burnt and got destroyed.

30. The learned Additional Sessions Judge was clearly in error, firstly, in inventing a story which was different from the prosecution version and which was not spoken about by any witnesses, or was not borne out from the evidence on record, by pure conjunctures and surmises; and secondly, in feeling certain about certain conclusions from such invented story by similar conjunctures and surmises. This was absolutely impermissible. The oral evidence of witnesses is to

be judged in the context of the allegation against an accused, and to ascertain whether the facts as alleged by the prosecution are proved or not. It is not that the evidence is to be examined for inventing an allegation to be made against an accused. Secondly, even if some facts which are not spoken about by any witnesses, and which are not borne out from the evidence on record are believed to have existed, it would be extremely dangerous to draw only a specific particular conclusion on the basis of such belief of existence of such facts as if other possibilities did not exist at all. It is because human conduct and human reactions cannot be fitted in any mathematical formula. What the learned Judge has held as proved is that Ranjana had poured kerosene on herself, and that the fire was however, not set by herself. These are the only two conclusions drawn by the learned Judge from the whole mass of evidence, and the only basis for excluding the possibility of Ranjana having set herself on fire, (though she had according to the conclusion of the learned Judge, poured kerosene on herself) is that no matchstick was found in the room of Ranjana when the spot panchnama was drawn. As discussed earlier, there were other possibilities which were overlooked by the learned Addl. Sessions Judge, apart from the fact that he should not have felt so confident about the fact of match box not being found there at all, solely on the basis of what was mentioned in the spot panchnama drawn four hours after the incident.

31. The impugned judgment of conviction is untenable and bad in law. After disbelieving the prosecution evidence and after discarding the entire prosecution case (as was put forth) as unreliable, the learned Judge, by a queer process of reasoning, believed the same evidence to hold the appellant guilty of an offence punishable u/s 326 of the IPC. The reasoning of the learned Judge cannot be accepted as the same is not based on evidence. The process of reasoning is also not consistent in itself.

32. This was a case where, since the evidence of dying declarations was not believed, the appellant should have been acquitted.

33. The appeal is allowed.

34. The impugned judgment and order of conviction recorded by the learned Additional Sessions Judge is set aside.

35. The appellant is acquitted.

36. His bail bonds are discharged. Fine if paid, be refunded to him. It is, however, clarified that, if from the amount of fine, Rs. 2,000/- each have been paid to Deepak Raut (PW2) and Vijay Raut (PW4), then no steps for recovery of the said amount from them, shall be taken by the trial court.