
(2015) 01 BOM CK 0186

In the Bombay High Court

Case No : Criminal Revision Application No. 211 of 2001

Pravin

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 08-01-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 302, 323, 34, 494, 498A

Citation : (2015) ALLMR(Cri) 1118 : (2015) 2 BomCR(Cri) 586 : (2015) 3 DMC 585

Hon'ble Judges : V.M. Deshpande, J.

Bench : Single Bench

Advocate : R.C. Patil, for the Appellant; V.P. Kadam, APP, Advocates for the Respondent

Final Decision : Dismissed

Judgement

V.M. Deshpande, J.—This is a Revision questioning correctness of the judgment and order of acquittal, passed by the learned Additional Sessions Judge, Amalner on 26.4.2001 in Sessions Case No. 31 of 1999, whereby the learned trial court acquitted respondent Nos. 2 to 7 original accused for the offences punishable under Sections 494 and 302, 498A, 323, 504 and 506 r/w 34 of the Indian Penal Code. During the pendency of the present Revision, respondent No. 4 Pratap Deoram Patil was reported to be dead, and therefore, by order dated 26.11.2014 the proceedings against him were disposed of as abated.

2. Though the accused persons were acquitted by the learned trial court, the State chose not to prefer any appeal against such acquittal. It is the present applicant, the brother of Ushabai, who was also examined as P.W. 1 during trial, approached this court by filing the present Revision.

3. Time and again the matter was adjourned for one reason or the other. It appears that nobody represented the applicant on one earlier date also, though the applicant is represented by the learned counsel. Today also, the counsel for

the applicant did not turn up for hearing of the present application, nor there is any request on his behalf for adjournment. Therefore, the court proceeded further with the hearing of the Revision. Shri Vinod Patil, learned counsel represented respondent Nos. 2 to 7/original accused and Shri V.P. Kadam, learned Additional Public Prosecutor represented respondent No. 1/State. With the able assistance of learned counsel for the accused/respondents and learned Additional Public Prosecutor for the State, I have gone through the record and proceedings including the notes of evidence and exhibited documents.

4. The charge was framed against the accused persons in Sessions Case No. 31 of 1999 by the learned Additional Sessions Judge, Ambalner on 22.2.2000. The accused persons were charged for committing the offences punishable under Sections 302, 498A, 323 r/w 34, 494, 504 and 506 of the Indian Penal Code. All the accused persons abjured their trial.

5. In order to bring home the guilt of the accused persons, the prosecution examined in all 12 witnesses. The statements of accused persons were recorded by the learned trial court under Section 313 of the Criminal Procedure Code. No defence witness was examined on their behalf.

6. After appreciating the prosecution case, the learned trial court passed the order of acquittal as observed in the opening paragraph of this judgment. The record shows that basically the case of the prosecution rests on two written dying declarations. Those are at Exhs. 52 and Exh.81. Apart from these two dying declarations, the prosecution before the trial court also submitted its case on the basis of oral dying declaration made to PW 1 Pravin and PW 2 Digambar.

7. Learned counsel for the accused persons vehemently submitted before this court that they cannot be held responsible as the prosecution has failed to prove marriage between accused No. 2 Ajay and deceased Ushabai. Respondent No. 2 is the husband of deceased Ushabai; whereas respondent No. 3 is the wife of brother of respondent No. 2; whereas respondent Nos. 6 and 7 are the brothers of respondent No. 2 Ajay and respondent No. 5 is the mother of respondent No. 2. The deceased respondent No. 4 was the husband of respondent No. 5 and father of respondent No. 2 Ajay.

8. Since the charge under Section 494 of the Indian Penal Code was also framed, the learned trial court bestowed a thoughtful consideration on the said charge on the basis of the available evidence.

9. PW 9 is one Kavita. Her evidence would disclose that her marriage was performed with respondent No. 1 Ajay on 18.4.1994. Her evidence would reveal that she was subjected to cruelty at the hands of her husband Ajay, and therefore, she started residing separately in her parental house. The prosecution could not bring any material on record to show that there was any divorce between PW 9 Kavita and respondent No. 2 Ajay.

10. Thus, the learned Judge of the court below has correctly recorded a finding

that the marriage between PW 9 Kavita and Ajay was still subsisting. The court below has observed that there is no material to show that there was a legal marriage between deceased Ushabai and respondent No. 2 Ajay, and therefore, rightly the learned Judge of the court below acquitted the accused persons for the offence punishable under Section 494 of the Indian Penal Code.

Merely because the accused persons are acquitted for the offence punishable under Section 494 of the Indian Penal Code, that does not mean and they can be absolved from the charge under Section 302 of the Indian Penal Code.

The burden to bring home the charge under Section 302 of the Indian Penal Code against the accused persons firmly rests on the shoulder of the prosecution. It is the duty of the prosecution to prove the case against the accused persons beyond reasonable doubt. If any doubt is appearing in the prosecution case, then obviously the benefit has to be extended in favour of the accused persons.

11. As observed above, the case of the prosecution rests on two written dying declarations. Let us examine the two dying declarations so as to reach to the conclusion as to whether the prosecution was able to bring home the guilt of the accused persons.

12. Before entering into the discussion in respect of the dying declarations, it will be useful to peruse the medical case record of deceased Ushabai. Same is at Exh.76. Perusal of Exh.76 reveals that Ushabai was admitted in the hospital at Chopda on 7.5.1999 at 4.45 a.m. The said document clearly shows that she was admitted in the hospital by Ajay Pratap Patil the respondent No. 2. This document is duly proved by PW 11 Dr. Bhanudas Savale. Perusal of the said document and the evidence of Dr. Savale reveals that at the time of admitting Ushabai in the hospital, he examined Ushabai. Worth to note are the observations appearing in Exh.76. Those are reproduced as under:-

"The patient unable to speak as the whole face, eyes, even mouth have burns. She is unable to speak. The pulse not palpable." 13. Thus, it is crystal clear that at the time of admission, the doctor noticed that the mouth of Ushabai was completely burnt and she was unable to speak. Further, the pulse was not palpable. Ushabai died on 7.5.1999 at 12.00 noon. Thus, it is clear that she was alive in the hospital for about eight hours. Exh.76 the medical papers show that at the time of her admission, the doctor found that she suffered 100% burns.

14. In the context of above, now let us examine the two dying declarations.

15. Exh.81 the written dying declaration is first in point of time. The said written dying declaration is proved by PW 12 Sangle. He was attached to Chopada City police station on 7.5.1999 as Police Sub-Inspector. After receipt of the telephonic message, he visited Cottage Hospital, Chopda. His evidence would reveal that deceased Ushabai has made a statement to him. His evidence does not show about his satisfaction that prior to recording of the dying declaration he was satisfied about the fitness of deceased Ushabai and that she was able to speak.

For that, he has relied upon the advise of Dr. (PW 11) Bhanudas Savale. His evidence does not reveal that prior to recording of the dying declaration (Exh.81). Doctor examined Ushabai and was satisfied about the fact that she was able to give statement. In that context, it would be useful to have a glance to the evidence of Dr. Bhanudas Savale. In his evidence, he has stated that after initial treatment given to the patient Ushabai, he reported the matter to the police. Police came to the hospital and recorded the statement of Ushabai. His evidence would reveal that he put his endorsement on the statement of patient recorded by the police. The evidence of the doctor does not reveal that prior to recording of the statement by P.S.I. PW 12 Sangle, he examined the patient Ushabai and was satisfied about her fitness. Thus Exh.78, which is an endorsement of the doctor that, "the patient is able to state" is obviously recorded after Exh.81 was scribed. Certification from the doctor that, "the patient is fit to give the statement" is not a precondition, however, the scribe must himself be satisfied about the patient being able to give the statement. That is a dictum of the Constitutional Bench of the Hon'ble Apex Court in the case of Laxman Vs. State of Maharashtra, .

16. Further, in cross-examination PW 12 Sanjay Sangle has admitted that the dying declaration (Exh.81) is in the hand writing of Police Constable Mahajan. Thus, the scribe is not Sanjay Sangle (PW 12) as sought to be canvassed by the prosecution, but from the admission of PW 12 Sangle himself, scribe of Exh.81 was Police Constable Mahajan. This scribe Police Constable Mahajan is not examined by the prosecution. Further, there is no explanation offered by the prosecution as to why prosecution was unable to examine Police Constable Mahajan. In absence of the evidence of the scribe, the contents of Exh.81 remained to be proved. In that view of the matter, there is no option for the court to keep aside Exh.81 from the consideration and accordingly the dying declaration (Exh.81) is hereby rejected.

17. Now, another dying declaration is Exh.52. The scribe of this dying declaration is PW 3 Aadhar Sandanshiv, who, at the relevant time, was the Awal Karkoon in Tehsil office at Chopda and was also discharging his duties as the Executive Magistrate. On 7.5.1999 at 6.00 a.m., a Police Constable came to his house and informed him that Ushabai is admitted in the Cottage Hospital, Chopda and requested him to record her dying declaration. Accordingly, he proceeded to the hospital. There he went to the female ward and since he was intending to record the dying declaration of Ushabai. He inquired with the medical officer as to whether Ushabai is in conscious and fit condition to speak. The doctor told him that Ushabai was conscious and was in fit condition to speak. His evidence would reveal that thereafter he recorded her statement. Perusal of dying declaration Exh.52 shows that there is only one endorsement of the doctor. The said endorsement reads as under:-

"Patient is able to speak" It is dated 7.5.1999 at 6.30 a.m. This endorsement is proved by PW 11 Bhanudas Savale and it is at Exh.78. In this behalf, it will be

useful to reproduce the evidence of PW 3 Aadhar Sandanshiv from his examination-in-chief, which reads as under:-

"The Medical Officer was also present there. Medical Officer read that statement and put his endorsement that patient is conscious and is able to speak." Thus, it is crystal clear that Exh.78 endorsement is written after the statement was scribed by PW 3 Aadhar Sandanshiv. There is no evidence available on record that PW 3 Aadhar himself was satisfied about the fitness of Ushabai. On the contrary, he was falling back on the advise of PW 11 Dr. Bhanudas Savale.

18. Further, it is to be noted that in cross-examination PW 3 Aadhar has clearly admitted that the fingers of Ushabai were burnt. Curiously enough, if we peruse Exh.52, the left hand thumb impression which is appearing on Exh.52 clearly shows ridges and curves. If the fingers of Ushabai were completely burnt, then the appearance of ridges and curves of the thumb impression is one of the suspicious circumstance appearing in the prosecution case. Further if both the dying declarations are perused minutely, then it is clear that in Exh.52 only allegations are against the mother respondent No. 5; whereas in Exh.81 Ushabai has ascribed role to each and every accused person. Thus, both the dying declarations are contrary to each other on material aspect. All these aspects were considered by the learned court below and has rightly rejected the dying declarations.

19. In so far as oral dying declarations are concerned, PW 2 Digambar Patil has admitted in his cross-examination that the police did not ask him and he did not disclose the said fact to the police. If the oral dying declaration was made to PW 2 Digambar Patil, it was expected from him to disclose such an important aspect immediately to the police who was present. Further, in view of the noting appearing in the case papers (Exh.76) wherein the doctor has specifically recorded that the mouth of the deceased was completely burnt, it is hard to believe that in such condition Ushabai will state anything to any of the witness. All these aspects have properly been considered by the courts below. The scope of the Revision is very limited. The State has not preferred the appeal, it appears rightly in view of the available evidence in the prosecution case. From perusal of the memo of the Revision, it is clear that there is no ground by which it could be ascribed that there is any perversity in the judgment of the learned trial court. In that view of the matter, the Revision fails and it is dismissed.