

(1996) 04 BOM CK 0041
In the Bombay High Court
Case No : Criminal Appeal No. 64 of 1994

Raju Vithal Pawar

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 10-04-1996

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 162
Penal Code, 1860 (IPC) — Section 302, 498A

Citation : (1996) 2 DMC 332

Hon'ble Judges : Vishnu Sahai, J;R.G. Vaidyanatha, J

Bench : Division Bench

Advocate : B.R. Patil, for the Appellant; M.P. Galeria, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

R.G. Vaidyanatha, J.—This is an appeal directed against the judgment dated 20th December, 1993 in Sessions Case No. 332 of 1993 on the file of Additional Sessions Judge, Pune. We have heard the learned Counsel Mr. B.R. Patil for the appellant and Mr. M.P.Galeria, the learned A.P.P. for the State of Maharashtra.

2. The appellant was prosecuted by the police alongwith his mother for offences under Sections 302, 498A, 323 and 504 read with Section 34, I.P.C. The prosecution case, stated briefly, is as follows :

The appellant is the husband of the deceased Kavita. The marriage had taken place about one year prior to the date of incident viz, 18th March, 1993. According to the prosecution, after some time after the marriage the husband and in-laws were ill-treating the deceased and were demanding her to bring more money from her parents, which she could not bring since her parents were poor. Then the ill-treatment continued.

It is the prosecution case that on the fateful day i.e., 18th March, 1993, at about 9.30 a.m. when Kavita was inside the kitchen, the husband entered the kitchen

and bolted the door of the kitchen from inside and then poured kerosene on the person of Kavita and set her on fire. As a result, Kavita's Saree caught fire and she sustained burn injuries. She was shouting for help. Then appellant's father rushed and extinguished the fire. Some neighbours also came there. Then injured Kavita was shifted to Sasoon Hospital at Pune. Sub-Inspector Dattatraya P.W. 8 after getting information rushed to the Hospital and after enquiring with the doctor that the patient was in a fit condition to give the statement, he questioned Kavita and recorded her statement as per Ex. 33. This Ex. 33 has been treated as FIR by the police and on that basis a criminal case came to be registered.

The doctor on duty who attended on the injured also questioned the injured and came to know history of the burns. In the meantime, on the requisition sent to him, the Special Judicial Magistrate P.W. 4 Subhash came to the hospital and recorded the formal dying declaration of the injured Kavita. The police also visited the house where the incident and taken place in the presence of Panchas and prepared a spot panchanama as per Ex. 20. Some witnesses came to be examined during investigation.

Unfortunately, Kavita succumbed to her injuries and died at about 5.15 p.m. on 19.3.1993.

After completing the investigation, a charge-sheet was filed against the appellant and his mother for the offences mentioned above.

3. The defence of the appellant is that he has not committed any such offence and it is a case of bursting of stove as a result of which Kavita sustained the burn injuries accidentally.

4. The prosecution examined eight witnesses. Appellant entered on defence and examined two witnesses. After trial, the learned trial Judge accepted the prosecution case and rejected the defence theory of accidental burning. He held that it is a case of homicidal burning and held that the appellant poured kerosene on his wife and set her on fire. Accordingly, the learned trial Judge convicted the appellant (first accused) u/s 302, I.P.C. and sentenced him to suffer life imprisonment and to pay a fine of Rs. 2,000/- in default to suffer S.I. for two months. The appellant was further convicted u/s 498-A, I.P.C. and sentenced to suffer R.I. for three years and a fine of Rs. 2,000/- or in default to suffer S.I. for two months. Both the substantive sentences were ordered to run concurrently. The appellant's mother viz., the second accused came to be acquitted.

5. Being aggrieved by the conviction and sentence, the original first accused has come up with the present appeal.

6. The learned Counsel for the appellant contended that evidence regarding dying declaration is not reliable and there is no other evidence to connect the appellant with the crime in question. He, therefore, argued that the judgment of the Trial Court is erroneous and liable to be set aside. On the other hand, the

learned Additional Public Prosecutor supported the impugned judgment.

7. The fact that Kavita died as a result of burn injuries is not in dispute. It is common-ground that Kavita died as a result of burn injuries. But the dispute is whether it was a case of homicidal burns or a case of accidental burns.

We also have the evidence of P.W. 3 Dr. Rajesh who treated the injured Kavita in hospital and found that she had sustained 100% burns.

The post-mortem report has been produced and marked as an exhibit in this case. It also reveals that there were burns to the extent of 100% on the dead body.

We need not consider the medical evidence in detail on this point since it is common ground that Kavita died as a result of burn injuries. Admittedly, there are no eye witnesses to the occurrence. The prosecution depends entirely on oral and written dying declarations made by Kavita after the incident and prior to her death.

8. As far as the oral dying declaration is concerned, we have the evidence of parents of Kavita who are P.Ws. 5 and 6, who have stated before the Court that their daughter told them that she was set on fire by her husband. Since they are interested witnesses we may not attach importance to the same at present since there is other evidence on record to prove the prosecution case about other dying declarations.

As already stated immediately after the incident Kavita was admitted to the hospital. She was questioned about the history of burns by Dr. Rajesh Jain who is examined as P.W. 3. He has told the Court that the patient told him that her husband poured kerosene and tried to burn her due to some family problems. He has clearly stated that this history was given by the patient and he has recorded the same in the medical papers. The doctor is also fair to the defence since he admits that some persons who had accompanied the patient gave the history as accidental burns and he has also recorded the same. This shows that the accused has tried to build up his defence from the stage of admission of Kavita to the hospital. The doctor's evidence clearly shows that the patient was conscious and was talking. His evidence about the history given by the patient Kavita which is also recorded in the case papers cannot be doubted at all. We do not find any reason to doubt or disbelieve the evidence of the doctor that the patient herself gave the history of her husband setting her to fire. Then we have the statement of the injured recorded by the Sub-Inspector Dattatraya P.W. 8 as per Ex. 33 which has been treated as F.I.R. in the case. It is well settled that the F.I.R. of the injured can be treated as dying declaration when once the informant or the complainant dies. The Sub-Inspector has told the Court that after satisfying himself by questioning the doctor that the injured is in a fit condition to give the statement, he questioned the injured Kavita as to what happened and recorded her statement as per Ex. 33. We have carefully gone through the evidence of Sub-Inspector and find that his evidence has not been shaken in cross-

examination in any manner. A perusal of the FIR shows that the injured has given a history of assault by the husband and in-laws and then she has also stated about the incident on 18.3.1993 when her husband set her on fire after pouring kerosene on her at about 9.30 a.m. In our view, there is no reason to doubt or disbelieve the contents of the F.I.R. which has been proved by the Sub-Inspector P.W. 8.

9. Then we come to the formal dying declaration which is marked as Ex. 25. This has been proved by P.W. 4 Subhash, the Special Judicial Magistrate. The witness has deposed before the Court that on getting police requisition, he came to the hospital. He enquired with the doctor and was satisfied that the patient was in a conscious and fit condition to give the statement. Then he recorded the dying declaration of the injured Kavita in question and answer form. He has further stated that none of the relatives were present in the ward when he questioned the patient. That the patient was well oriented and she could understand the questions put to her. Then he has also stated that Kavita told him that on the day in the morning at 9.30 a.m. her husband poured kerosene and set her on fire. The witness is an independent witness and there is no reason for him to make a false record if really Kavita had not made such a statement. We have perused his evidence and find that his evidence has not been shaken in cross-examination. He has denied some suggestions in cross-examination.

A perusal of the dying declaration Ex. 25 clearly shows that it was the husband and husband alone who poured kerosene on Kavita and set her on fire.

10. As against this defence version is that it was a case of accidental burns due to bursting of the stove. This is sought to be made out from the admissions of P.W. 7 and the evidence of D.W. 2. The learned Counsel for the appellant pressed into service the depositions of P.W. 7 and D.W. 2 in support of his contention that it is a case of accidental burns. We will presently examine their defence.

P.W. 7 Hasimbai is a neighbour. She says that after hearing some sound and commotion she ran to the house and saw Kavita lying on the ground being covered by a cloth. She says that on being questioned, Kavita told her that while lifting the pot her Saree accidentally caught fire. The witness was declared hostile and was cross-examined by the prosecution with the leave of the Court. In the cross-examination by the prosecution, the witness denied having made a statement before the police as per "A". Then in the cross-examination made by the defence she accepts all the suggestions made by the defence regarding accidental fire.

For one reason P.W. 7 has been declared hostile by the prosecution and has contradicted herself with earlier statement before the police. Naturally, being a neighbour she must have been won over by the defence. We are not prepared to give any credence to her evidence.

11. The only other witness who speaks on this point is D.W. 2 Ganpat who also is a neighbour. His evidence is that after coming to know of the incident, he came

to the house of the deceased. Then in his presence one of the neighbours Hasimbai who is P.W. 7 questioned Kavita and learnt from her that due to high flames of the stove she caught fire. Then he also says that Kavita was sent to the hospital. In cross-examination, he admits that his statement had been recorded by the police as per his narration. Unfortunately, the prosecution could not confront him with his earlier statement before the police since he was not examined as a prosecution witness but was examined as a defence witness. He further admits that for the first time he is now stating before the Court that relatives of Kavita abused accused No. 1 in the hospital. Naturally, the prosecution is deprived of the opportunity of testing the witness with reference to his earlier statement before the police of 19.3.1993. The learned Additional Public Prosecutor brings to our notice that in fact the witness has not made such a statement about accidental burns in his earlier statement before the police on 19.3.1993. As already, stated, the prosecution could not prove the earlier statement since the witness did not appear as a prosecution witness but appeared as a defence witness. The witness admits that daily he meets the accused and is a neighbour. Therefore, he may be obliged to the accused and has come to give evidence which is contrary to the earlier statement made by him before the police on 19.3.1993. In our view, no reliance can be placed on the version given by D.W. 2 particularly when we have the formal written dying declaration given by the deceased Kavita before the Special Judicial Magistrate. This is further strengthened by two other dying declarations viz. one statement made before the doctor by Kavita which is recorded in the case history and the other statement made before the Sub- Inspector which is recorded in the form of F.I.R. We, therefore, give more importance to these three written dying declarations which are sufficient to show that Kavita was set on fire by no other than her husband, the appellant.

The other witness examined by the defence is D.W. 1 whose evidence is not relevant for our present purposes regarding the question of homicidal death.

12. The learned trial Judge who recorded the evidence of witnesses has accepted the prosecution case regarding dying declaration and after re- appreciating the evidence we do not find any reason to take a different view. Hence we hold that the prosecution has proved that Kavita was set on fire by her husband by pouring kerosene on her.

13. As far as the offence u/s 498-A is concerned, there is a statement of the injured Kavita in her dying declaration about ill-treatment by the husband. Then there is also the evidence of parents of Kavita who are P.W. 5 Nivrutti and P.W. 6 Kadubai who have deposed that the husband was ill-treating Kavita and demanding more dowry. The learned Trial Judge has accepted the evidence on this point and has rightly convicted the appellant u/s 498-A, I.P.C. also. We do not find any infirmity in the findings of the learned trial Judge. No ground is made out for interfering with the impugned judgment. Hence in our view the appeal has no merit and has to fail.

14. In the result, the appeal is dismissed. The conviction and sentence of the appellant are confirmed.