
(2015) 09 BOM CK 0287
In the Bombay High Court
Case No : Criminal Appeal No. 158 of 2014

Rambhau Laxman Uikey

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 30-09-2015

Acts Referred:

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

Citation : (2015) 09 BOM CK 0287

Hon'ble Judges : B.R. Gavai and P.B. Varale, JJ.

Bench : Division Bench

Advocate : Mir Nagman Ali, Advocate, for the Appellant; S.B. Ahirkar, Additional Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

B.R. Gavai, J.—Being aggrieved by the judgment and order passed by the learned Additional Sessions Judge, Nagpur in Sessions Trial No. 251/13, thereby convicting the appellant for the offence punishable under Section 302 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for life and to pay a fine of Rs. 500/- and in default to suffer further imprisonment for one month, the appellant has approached this Court by way of the present appeal.

2. The case of the prosecution as could be gathered from the material placed on record is thus:--

"That the deceased Durga was initially married to one Ramesh Uikey. She was blessed with one son, namely Arjun from the said wedlock. However, since there was a matrimonial discord between her and her first husband, the deceased Durga got divorced herself from her first husband. Thereafter she got married to the accused. They were blessed with one son, namely, Rakesh. The deceased Durga along with her son Rakesh and the accused were residing in the house at Gujarkhedi Zopadpatti, Tq. Saoner, District Nagpur. P.W. 4 Janubai - the mother

of the deceased was also residing near the house of the deceased. It is the prosecution case that the accused under the influence of liquor used to ill-treat the deceased Durga. It is further the prosecution case that on 17.3.2013, a quarrel took place between the accused and his son P.W. 3 Rakesh but deceased Durga intervened. Thereafter, the accused quarrelled with deceased Durga but Rakesh did not pay attention as it was an usual happening. Then Rakesh left the house for Saoner."

3. It is further the prosecution case that on the same day at about 5.30 p.m. there was again a quarrel between the deceased Durga and the accused. Accused told her to leave the house and in a fit of anger poured kerosene on the person of Durga and set her on fire. After the incident, the accused left the spot. Deceased Durga came out of the house in burning condition. The neighbours gathered at the spot and one neighbour Kausalyabai Durve took the deceased Durga in auto to Public Health Centre at Saoner. Dr. Bhagat examined the deceased and found her to have 80 to 90% burns. She was, therefore, referred to Government Medical College for further treatment. P.W. 3 Rakesh on coming to know about his mother's hospitalization went to the said hospital. Three dying declarations of the deceased were recorded. On the basis of information given to P.W. 8 H.C. Devidas Hajare, FIR came to be registered for the offence punishable under Section 307 of the Indian Penal Code vide Crime No. 47/13.

4. Upon completion of investigation, charge-sheet came to be filed against the present appellant in the Court of learned J.M.F.C., Saoner. Since the case was exclusively triable by the Court of Sessions, the learned J.M.F.C. committed the case to the Court of learned Sessions Judge. The learned trial Judge framed the charges. The accused pleaded "not guilty" and came to be tried. At the conclusion of the trial, the learned trial Judge passed the order of conviction and sentenced as aforesaid. Being aggrieved by the order of conviction and sentence, the present appeal is filed.

5. Shri Mir Nagman Ali, learned Counsel appearing for the appellant, submits that the learned trial Court has grossly erred in passing an order of conviction and sentence. The learned Counsel submits that the case rests basically on three dying declarations. He submits that in all the three dying declarations a stereotyped version is given. He further submits that the dying declarations are full of lacunae and the conviction on the basis of the same could not be sustainable in law. The learned Counsel relies on the various judgments of the Apex Court in support of the said proposition.

6. The learned Additional Public Prosecutor on the contrary submits that the perusal of the dying declarations would reveal that the dying declarations clearly implicate the present appellant. It is further submitted that the written dying declarations are corroborated by the oral dying declarations given to P.W. 3 Rakesh & P.W. 4 Janubai. The learned Additional Public Prosecutor further submits that the Chemical Analyzer's report would also support the prosecution case, inasmuch as the kerosene is found on the clothes worn by him.

7. With the assistance of the learned A.P.P. and the learned Counsel for the appellant, we have scrutinized the entire evidence on record.

8. The prosecution case mainly rests of three dying declarations. They are recorded, first one by P.W. 7 Devshankar Sarayuprasad Gupta, second one by P.W. 2 Pramod Bansod and third one by P.W. 1 Pallavi Tabhane, the Executive Magistrate. No doubt that a conviction can be awarded on the basis of dying declarations. The only requirement in law is that they must be found to be true, cogent and reliable and which inspire confidence in the mind of the Court.

9. The first dying declaration is recorded by P.W. 7 Devshankar Sarayuprasad Gupta, which is at Exh. 30. In the said dying declaration, the deceased states that on the day of incident she was at home. Her son had gone to Saoner. Her husband was also at home. It is further stated in the said dying declaration that he asked her to go out and as such, a quarrel took place between them. He poured kerosene on her person and set her on fire with a matchstick. That her face, neck, chest, both the legs sustained burn injuries. Initially she was brought to Saoner hospital and thereafter she was brought to Mayo Hospital, Nagpur by her son and her mother. The perusal of the said dying declaration would reveal that that the said dying declaration contains the thumb impression of the deceased. The perusal of the evidence of P.W. 7 Devshankar would reveal that before recording the statement of deceased Durga, he did not make enquiry with the doctor in the ward. He further states that while recording the dying declaration, mother of victim Durga was present in the ward. In view of non-certification by a doctor regarding the mental and physical status of the deceased to make the dying declaration, the said dying declaration cannot be made a basis for conviction of the appellant.

10. The second dying declaration is recorded by P.W. 2 Pramod Bansod. The second dying declaration is also identical with the first one. The said dying declaration is recorded at 7.45 p.m. on the same date. The perusal of the dying declaration would reveal that in the margin, there is an endorsement that the patient is fit to give statement. However, perusal of the said dying declaration would reveal that at the end of the declaration there is no endorsement by the Medical Officer that the dying declaration was given in his presence and that the maker of the declaration was physically and mentally fit to give the dying declaration. On the said dying declaration, there is an impression of the right great toe of the deceased. It would be seen that whereas in the dying declaration which is below Exh. 30 there is an impression of the thumb, in the dying declaration below Exh. 15 there is an impression of right great toe.

11. In so far as the third dying declaration is concerned, the same is recorded by P.W. 1 Ms. Pallavi Tabhane. The perusal of the dying declaration would reveal that the version given in the said dying declaration is also similar. In the said dying declaration which is below Exh. 13 again the impression of right thumb of the deceased is mentioned. No doubt that in the beginning of the said dying declaration, there is a certification by the doctor and the Medical Officer P.W. 10

Dr. Jaiswal has also been examined in support thereof. However, it is to be noted that in the said dying declaration an endorsement to the effect that the same was read over and explained to her is missing. The Apex Court in the case of Shaikh Bakshu and Others Vs. State of Maharashtra--> has observed thus:--

"There is no mention in the dying declaration that it was read over and explained to the deceased. The Trial court and the High Court concluded that even though it is not so stated, it has to be presumed that it was read over and explained. The view is clearly unacceptable."

In view of the law laid down by the Apex Court, in the absence of such an endorsement the said dying declaration also will have to be held to be not satisfying the requirements of the valid dying declaration.

12. It could thus be seen that in so far as the first dying declaration is concerned, there is no certification by the doctor that the patient was in a mentally and physically fit condition to give the dying declaration. Apart from that, the same is recorded in the presence of the mother of the deceased. The same is containing the impression of the right hand thumb. In so far as the second dying declaration is concerned, there is no endorsement at the end by the Medical Officer that the maker of the declaration was in a physically and mentally fit state of mind to make the declaration. The same is containing the impression of right great toe. In so far as the third dying declaration is concerned, the same is not having an endorsement that it was read over and explained to the maker of the declaration and she admits of the same to be as per her version. We, therefore, find that the aforesaid dying declarations cannot be said to be one which satisfy the test of reliability and trustworthiness. It is further to be noted that the prosecution has not explained as to how the first and third declarations are having the thumb impression, whereas the second declaration is having the impression of right great toe. It is further to be noted that as per the medical evidence and the P.M. report, both the hands and the legs of the deceased were burnt. Further, the perusal of the dying declaration would show that in the thumb impression ridges are present. This creates a doubt regarding the genuineness of the dying declaration. Reliance in this respect could be placed on the judgment of the Apex Court in the case of in the case of The State of Punjab Vs. Gian Kaur and Another, .

13. That leaves us with the two oral dying declarations allegedly given to P.W. 3 Rakesh and P.W. 4 Janubai. The said witnesses are the son and the mother of the deceased. We find that on uncorroborated version of the oral dying declaration to these witnesses, it will not be safe to convict the accused.

14. We are, therefore, of the considered view that it will not be safe to maintain the order of conviction on the basis of the aforesaid dying declarations, which cannot be said to be free from doubt. We find that the accused is entitled to benefit of doubt.

15. Hence, the following order:--

"The Criminal Appeal is allowed. The judgment and order of conviction and sentence passed by the District Judge-5 & Additional Sessions Judge, Nagpur dated 20.02.2014 in Sessions Trial No. 251/13 is hereby quashed and set aside. The appellant is acquitted for the offence punishable under Section 302 of the Indian Penal Code. The appellant shall be set at liberty forthwith, if not required in any other case. The amount of fine, if any paid, be returned to him.

The fees payable to the learned Counsel appointed for the appellant are quantified at Rs. 5,000/- (Rs. Five Thousand)."