
(2004) 07 BOM CK 0102
In the Bombay High Court
Case No : Criminal Appeal No. 588 of 1992

Ramesh Babu Desai

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 30-07-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 273
Penal Code, 1860 (IPC) — Section 302, 313

Citation : (2004) CriLJ 4593 : (2004) 2 DMC 488

Hon'ble Judges : R.S. Mohite, J; R.M.S. Khandeparkar, J

Bench : Division Bench

Advocate : R.V. More, Absent, for the Appellant; D.S. Mhaispurkar, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

R.M.S. Khandeparkar, J.—Heard the learned A.P.P. for the respondent-State. Neither the appellant nor his Advocate present. Bearing in mind the decision of the Apex Court in Bani Singh and others Vs. State of U.P., we perused the entire the entire records including the judgment passed by the Court below with the assistance of the learned A.P.P.

2. This appeal arises from the judgment and order dated 24-9-1992 passed in Session Case No. 121 of 1991 by the Addl. Sessions Judge, Sangli. By the impugned judgment the appellant/accused has been held guilty of offence of murder of one Surayya, Punishable u/s 302 of the Indian Penal Code and sentenced to suffer life imprisonment and to pay a fine of Rs. 5,000/- and in default to suffer imprisonment for six months.

3. The accusations against the appellant were that on 16-3-1991, at about 9:00 p.m., he had a quarrel with one Surayya in her room in Diwate Chawl at Yashwantanagar, Vita, for having arranged her bed on the floor, instead of the cot in the room. The quarrel lasted for few minutes and half-an-hour thereafter the neighbours gathered near the said room consequent of the shouts from Surayya

for help. The door of the room was found closed and it was forcibly opened whereupon Surayya came out of the room in a condition where the clothes on her body were seen to have caught fire and as soon as she came out of the room, she collapsed on the ground. The fire on her body was then extinguished and she was taken to Primary Health Centre, Vita, where consequent to the advise of the Medical Officer at the Center, she was taken to the Civil Hospital at Sangli, after being provided with first-aid at the Centre. In the hospital she succumbed to her burn injuries around 6:00 p.m. on 17-3-1991, However, prior to that her dying declaration was recorded wherein she disclosed about the quarrel with the accused and the reason for the quarrel as well as the fact that the accused had poured kerosene on her body and set her on fire. Consequent to recording of the dying declaration, crime was registered under No. 48/91. On conclusion of the investigation, the appellant was prosecuted for the offence punishable u/s 302 and after being tried was sought to be punished by the impugned judgment as stated above.

4. Perusal of the impugned judgment discloses that the learned Addl. Sessions Judge has held the death of Surayya to be homicidal and the accused had been held to be guilty of her murder mainly on the basis of her dying declaration, the presence of the accused in the room at the relevant time and the false defence sought to be raised by the accused as well as the statement made by the accused to the Special Executive Magistrate while the accused was admitted in the hospital along with the deceased Surayya on account of the burn injuries sustained by the accused to his hands. the learned Addl. Sessions Judge has held that though the prosecution witnesses had turned hostile, the dying declaration of Surayya inspires confidence as the records disclose that the entire formalities required to be followed before and after recording of the dying declaration were duly complied with. Added to this, the fact that the deceased was conscious to give her statement is proved from the testimony of PW-6, the Medical Officer and that mere absence of endorsement in that regard on the dying declaration would not render the declaration to be untrustworthy. Considering the defence that Surayya received burn injuries in the course of cooking, it has been held that the same is contrary to the defence raised by the accused regarding his absence in the room at the time of the incident as well as the contents of the at the time of the incident as well as the contents of the panchnama in relation to the room which was in occupation of Surayya, which was confirmed by PW-3 Ashok Patil by admitting his signature on the panchnama and which disclosed that the utensils and the stove which were found in her room did not disclose any sign of having been used at the relevant time and therefore it was unbelievable that Surayya might have suffered burn injuries in the course of cooking and that there were no visible signs in relation to the act of cooking at the relevant time by the deceased. Added to this, it is the accused himself who had accompanied the deceased to the hospital which establishes the presence of the accused at the relevant time, apart from the fact that he was seen at the entrance door at the relevant time by PW-1. The fact of quarrel between the accused and the

deceased has also been established by the testimony of PW-1 and the same was not even challenged. Considering these factors to be sufficient to establish the chain of events and relying upon the dying declaration, the Addl. Sessions Judge has held the accused to be guilty of the offence punishable u/s 302 of the I.P.C.

5. Perusal of the evidence discloses that the prosecution examined Mangal Tapole (PW-1) and Ganpat Tikole (PW-1) being the persons who had rushed to the spot immediately after hearing the shouts from Surayya for help. Both these witnesses were declared hostile. Nevertheless, the testimony of Mangal discloses that she was the resident of a room in the neighbourhood of the room in occupation of Surayya in Diwate Chawl at the relevant time. It also discloses that on the relevant day the accused had come to the room of Surayya at about 9:00 p.m. and had a quarrel with Surayya with fist blows and it was Mangal who rescued her on the said occasion. Thereupon Surayya went to her room and the witness also proceeded to her house. She had also stated that the quarrel took place on account of Surayya arranging her bedding on the floor of the room instead of sleeping on the cot. she has further deposed that the accused used to occasionally stay in the room of Surayya. However, after about half-an-hour she heard Surayya shouting for help and when she came out of her house, she saw many persons having gathered near the room of Surayya. The door of Surayya's room was closed and somebody opened it forcibly whereupon Surayya came out of the room while the clothes on her person were still burning and at that time, the accused was standing outside the door of the room. She has also deposed that the accused had not married with Surayya and she used to quarrel with the accused on that count asking him to perform the marriage with her. In cross-examination, she has stated that while the commotion was going on near the room of Surayya, the accused came there from the western direction and immediately started extinguishing the fire on the body of Surayya with his bare hands and in the result received burn injuries to his hands. she has further stated that Surayya fell unconscious on the ground.

6. The deponent Ganpat (PW-2) has stated that when he heard the commotion near the room of Surayya, he rushed to the spot and saw some flames and smoke coming out of the room of Surayya and the door of the room of Surayya was open and Surayya was already lying on the ground in front of the room in burning condition.

7. PW-3 Ashok is a panch witness and was declared hostile. He has confirmed that in the room of Surayya, a carpet of gunny bag was found in burning condition. A match stick, a can of kerosene, a match box and stove near the cot were also found there. There were also utensils which were used for cooking, and the panchnama drawn discloses his signature. He has, however, stated that the panchnama was not read over to him and in cross he had stated that he had not noticed whether the utensils used for cooking were clean and were kept in the cupboard or not.

8. PW-4 Shirish Kulkarni was the Medical Officer in the Primary Health Centre at

Vita at the relevant time and he has stated that Surayya was brought to the Centre on 16-3-1991 at about 11:00 p.m. in burning condition and she was unconscious. She was not able to speak or give any statement and she had suffered nearly 70-75% burns. Her condition was serious and therefore he referred her to Civil Hospital, Sangli for treatment after giving her first aid. In cross, he has stated that she was brought to the clinic by the accused, and the pulse rate of Surayya was high and she was in a feeble condition and her blood pressure could not be recorded.

9. Smt. Salama Shirolkar (PW-5), the Special Executive Magistrate at Sangli at the relevant time, has deposed that consequent to receipt of Yadi from the Market Yard Police Station on 17-3-1991, at about 1:00-2:00 a.m. in relation to necessity of recoding the dying declaration of one Surayya Ramesh Desai, who was admitted in the Civil Hospital, Sangli, due to burn injuries, she visited the hospital and recorded her dying declaration, after enquiring with the doctor as to whether she was in a condition to give the declaration and the doctor having examined her and certified that she was in condition to give statement. she has also stated that a part from the doctor, no other person was present at the time of recording her declaration. She has further stated that after recording the said declaration she recorded the statement of Ramesh Desai, who was also admitted in the burns ward and the said statement was sealed in an envelope and was handed over to the police along with the sealed envelope containing the dying declaration of the deceased. She has confirmed the signature of the deceased as well as her signature on the dying declaration which was admitted in evidence as Exhinit-22. She has further stated that she could not say whether the fingers of the hands of Surayya were burnt or not.

10. Dr. Vishwanath Bndgar (PW-6), the Medical Officer in the Hospital at Sangli has stated in his testimony that Surayya, who was admitted in the burns-ward on 17-3-1991 during the night hours was in condition to give her statement and that at about 2:30 a.m. he had made necessary endorsement to that effect before recording of the dying declaration and that he was present till the conclusion of recording of the dying declaration. He has further stated that "the deceased was not having any pain and she was almost in a calm condition" and he left the ward around 3:10 a.m. to proceed to his residence. He further stated that he had not ascertained the exact name of the patient from her case papers. He has further denied that on account of burns a patient must suffer pain.

11. Pradip Bhosale, PSI, (PW-7) was the investigating officer in the case in hand and he has produced on record the chemical examiner's report in relation to the articles seized in the matter and confirmed about recording of various panchnamas in the matter. In his testimony he stated that a message was received from Dr. Kulkarni of the Primary Health Centre, Vita that one Surayya was severely burnt and was being referred to Civil Hospital, Sangli. The message was received by P.S.O. Suryavanshi at about 11 O'clock in the nigh and in the morning when the witness came to the police station, he learnt about the said

message and went to the scene of offence and in the presence of two panchas recorded the panchnama of the scene of offence, and that the utensils in the room were found kept in the cupboard and they were clean. After receiving the copy of the dying declaration of Surayya, he registered the offence as C.R. No. 48/91 on the same day and thereafter went to the spot and recorded the statements of the witnesses. In the cross, he stated that the message was received on phone by the P.S.O. to the effect that Surayya Ajmuddin Shaikh was severely burnt and being in a serious condition was referred to the Civil Hospital, Sangli. The P.S.O. then immediately sent one police constable Bhosale to do the needful. He further stated that the P.S.O. had not sent anyone to the place of offence immediately during the night hours and for the first time the police went to the place of offence during the morning hours. He further admitted that he had not visited the deceased on the next day and further that the Market Yard Police Station had not registered any crime as it was stated as accidental death and the inquest was recorded around 9:00 p.m. on 17-3-1991. He has further stated that except the quilt and cane no other articles were smelling with kerosene and the burnt pieces of the skin of the lady were also not smelling with kerosene to have been spread on the floor of the said room. He has further stated that he did not seize any utensil.

12. The post-mortem report (Exhibit-A) which came to be admitted in evidence with no objection on the part of the defence on 27-8-1992 discloses "the cause of death being shock due to burn 70%".

13. The analysis of the evidence on record undoubtedly establishes that (i) Surayya succumbed to the burn injuries received by her to the extent of 70%; (ii) those injuries were suffered by her while she was in her room at Diwate Chawl, Yashwantanagar, Vita on 16-3-1991 during late night hours; (iii) that the accused had suffered burn injuries to both his hands in an attempt to extinguish the fire on her body; (iv) she was taken to the Primary Health Centre as well as to the Civil Hospital at Sangli by the accused; (v) both were admitted to the civil hospital, Sangli in the night between 16/17-3-1991; (vi) on the relevant day around 9:00 p.m. the accused had been to Surayya and they had a quarrel on account of Surayya having arranged her bedding on the floor of the room; (vii) in the course of quarrel, she was assaulted by the accused and at that time she was rescued by Mangala. (viii) after having so rescued from the assault, Surayya went to her room to sleep. (ix) Surayya came out of the room in a condition when her body was already engulfed with fire; (x) the door of the room of Surayya had to be opened forcibly to enable her to come out of the room; (xi) hearing the commotion the accused came to the room when Surayya had already come out of the room when Surayya had already come out of the room in burning condition and the accused had to extinguish the fire on her body; (xii) Surayya was taken to the Primary Health Centre in unconscious condition.

14. None of the witnesses speak about the presence of the accused in the room of Surayya at the time Surayya came out of the room after forcible opening of

the door of her room. On the contrary, PW-1 as well as the PW-2 have categorically stated that the accused was seen outside the room at the time when Surayya came out of the room as well as when Surayya was found lying on the ground after having come out of the room. Undoubtedly, the dying declaration of Surayya alleges that the accused had come to the room after having drunk and after having quarreled with her, he poured kerosene on her body and set her on fire between 9-9:30 p.m. She has also stated that when the people tried to extinguish the fire, she loudly told the public that the accused had poured kerosene on her body and had set her on fire. However, the witnesses, on their part, have deposed that as soon as the accused saw the deceased engulfed with fire, he himself tried to extinguish the fire with his bare hands and consequently suffered burn injuries to both his hands, the fact that the accused had suffered burn injuries to both his hands is also confirmed by the doctor and from the fact that he was also admitted in the hospital for treatment along with the deceased. The deceased, however, in her dying declaration nowhere stated about any attempt on the part of the accused to extinguish the fire on her body though she claimed in the dying declaration about the attempt by the members of the public to extinguish the fire on her body which claim does not find any support from any of the witnesses. Undoubtedly, PW-1 and PW-2 were declared as hostile witnesses. However, merely because they were declared as hostile, their entire testimony cannot be discarded. The Apex Court in recent decision in *Lella Srinivasa Rao v. State of Andhra Pradesh*, reported in AIR 2004 SCW 1254 has clearly ruled that the fact that the witness is declared hostile does not by itself result in automatic rejection of his evidence and even the evidence of hostile witnesses, if it finds corroboration from the facts of the case, the same may be taken into account while judging the guilt of the accused. The law on the point in issue is well-settled. The evidence of these witnesses in relation to the presence of the accused outside the room at the relevant time and the attempt on the part of the accused to extinguish the fire on the body of Surayya is corroborated by the medical evidence on record. There is no evidence on record to disclose that the accused had come to the spot having drunk. the prosecution has not been able to establish the said claim of the deceased in her dying declaration by producing either medical evidence or even the oral testimony of any of the members of the public who were present at the site. Added to this, the fact that the deceased had some grudge against the accused on account of refusal on his part to marry her also gets confirmation from the testimony of PW-1 who has clearly stated before the Court that the deceased used to quarrel with the accused while insisting for performance of marriage with her and the accused had shown no interest to marry her. The fact that the accused was already a married person having three children is also confirmed by the deceased herself in her dying declaration. On material aspect of the case, the cogent evidence on record does not support any of the allegations in the dying declaration. Added to this, the prejudiced mind of the deceased against the accused on account of refusal to marry her has been clearly established. In the circumstances, the dying declaration does not inspire confidence and on the

contrary raises serious doubts about the genuineness of the allegations therein.

15. The finding of the learned Addl. Sessions Judge that the utensils were found in a clean condition in the cupboard and that the stove was in the cupboard and that therefore it cannot be believed that the deceased might have caught fire while she was cooking is not at all borne out from the records. First of all, it is not the defence of the accused that the deceased had suffered burn injuries in the process of cooking. On the contrary, the specific defence was about his absence at the relevant time and having come to the spot after hearing the shouts. Even in the 313 statement the accused had specifically stated that on the day of the incident he was not present in the house of Surayya and after hearing the commotion, he rushed to the said place from his house and having found Surayya lying on the ground in burning condition, he tried to extinguish the fire and in the process received the burn injuries to both his hands. Besides, the finding about the utensils having been found in a clean condition placed along with the stove is based solely on the statement in that regard by the investigating officer, without any corroboration by the panch witness or any other evidence whatsoever. Undisputedly, the panch witness PW-3 Ashok Atmaram Patil apart from confirming his signature on the panchnama has not corroborated the contents of the panchnama and on the contrary has contents of the panchnama and on the contrary has categorically stated that the panchnama was not read over to him before it was signed by him. He was declared hostile by the prosecution. The prosecution has not bothered to examine the other panch who was stated to have been present at the time of recording of the said panchnama and there is no explanation for not producing the said panch before the Court. Besides, mere production of panchnama on record with the confirmation of the signature of one of the panchas thereon cannot amount to confirmation either of the contents thereof nor about the truthfulness of the contents of the panchnama. It is necessary for the panchas to broadly state in their substantial evidence, it not minutely, the facts which they might have noticed prior to the recording of the panchnama and such evidence should be disclosed from the testimony of the panch recorded in the Court. In the absence of such substantial evidence being found on the record, mere placing of the panchnama on record by itself would not be considered as a corroborative evidence. That apart, merely because the utensils were found to have been cleaned and accordingly kept in the cupboard, that would not justify the finding that there was no possibility of Surayya receiving burn injuries in the course of cooking. It is to be noted that the incident is stated to have occurred around 10:00 p.m. or so and till the next day morning the room of Surayya was accessible to the strangers after she was taken to the hospital. The investigation officer has clearly admitted that they had not gone to the site till the morning of 17-3-1991. There is no evidence to show that any guard was posted at the scene of offence or any steps were taken to ensure that nobody interferes with the articles in the room of Surayya during the relevant period. In the circumstances, it is quite possible that a neighbour or some other member of the public might have entered the room of Surayya and

might have cleaned the utensils and kept them in the cupboard. Such a possibility, in the facts and circumstances of the case, cannot be ruled out. Being so, merely because the utensils were clean and kept in the cupboard when the panchnama was drawn on the next day of the incident, it would not lead to the conclusion that Surayya had no occasion to receive burn injuries in the process of cooking on the previous day. Besides, if the kerosene was poured on Surayya by the accused as has been alleged by the deceased, then certainly some kerosene would have fallen on the floor and during the panchnama of scene of offence the investigation officer would not have missed to notice it. But, in the case in hand, the investigation officer, in his testimony, has categorically stated that no signs of kerosene having fallen or spread on the floor was noticed.

16. The finding of the learned Addl. Sessions judge regarding information to the doctor by the accused about preparation of meal by Surayya and having met with the fire accident in the process of preparation of meal is also totally contrary to the materials on record. Neither the testimony of Dr. Kulkarni (PW-4) discloses any such information having been given to him by the accused nor the Exhibit-38 reveals any such statement. In fact the statement of the accused on 17-3-1991 in relation to the stove burning was a the residence of the accused while his wife was cooking food and not in the room of Surayya while Surayya was cooking food. This also discloses non-application of mind by the learned Addl. Sessions Judge to the materials on record, the incident of stove bursting which was disclosed by the accused had no relation whatsoever with the incident of catching fire by the clothes on the body of the deceased in her room on the relevant day. Likewise, in relation to the utensils being clean and neatly kept in the cupboard, there being no cogent evidence on record in that regard, the same could not have been the basis to arrive at the finding about false defence by the accused and, that too, when the accused has not raised any such defence either in the course of cross-examination of witnesses or in the statement u/s 313.

17. The evidence on record, therefore, undoubtedly discloses Surayya having succumbed to her burn injuries and the burn injuries having been received by her while she was in the room on the relevant day and time. However, the evidence nowhere discloses the presence of the accused at the time she had suffered the burn injuries. On the contrary, the evidence discloses the accused having reached the spot after Surayya had suffered burn injuries and he had even tried to extinguish the fire on her body with his bare hands and having taken Surayya for medical aid, without any delay. The evidence apparently discloses grudge on the part of the deceased against the accused for having refused to marry her. the prosecution has not been able to establish link between the act of catching fire by the clothes on the body of Surayya and any act on the part of the accused. Neither anything is disclosed or reveal any false statement or contention having been raised by the accused in the matter, which can be used as a missing link in the matter.

18. As regards the finding by the learned Addl. Sessions Judge about the

statement of the accused that Surayya met with the fire accidentally having been made to the Special Executive Magistrate, it is apparent that the same has been arrived at on the basis of Exhibit-38. At the outset, it is to be noted that Exhibit-38 was not produced in the course of recording of the evidence. It was taken on record by the learned Addl. Sessions Judge on 24-9-1992 i.e., after conclusion of recording of the prosecution evidence. It is not in dispute that the testimony of the last prosecution witness PW-7 was recorded and concluded on 21-9-1992. Various documents were sought to be placed on record and exhibited by the investigating officer in the course of his testimony. After conclusion of the said testimony, the learned A.P.P. submitted before the Addl. Sessions Judge a precise on 21-9-1992 to the effect that "The oral evidence of the prosecution in this case is over." Surprisingly, thereafter a statement called the dying declaration of the accused recorded on 17-3-1991 was taken on record as Exhibit-38 by the learned Addl. Sessions Judge with his noting thereon "As admitted during cross exam and even in chief exam by witness, be exhibited.". The endorsement is above the initial of the Addl. Session Judge with the date "24/9/92". It was totally contrary to the rule of evidence and against the well-established principle of law relating to recording of evidence engrafted in Section 273 of the Cr.P.C. It is to be noted that Exhibit-38 was recorded as the dying declaration of the appellant when he was admitted in the hospital along with Surayya on 17-3-1991. Moment the appellant was able to get the injuries treated effectively and having survived, any such statement would cease to be the dying declaration. Besides, PW-5 was an Executive Magistrate and not a Judicial Magistrate. When such statement happens to be of the person who is accused in the case, then whether it can be treated as a statement u/s 164 of the Code of Criminal Procedure would be yet another question, however, the same need not be gone into in the case in hand. In the facts and circumstances of the case, it is apparent that the procedure adopted by the learned Addl. Sessions Judge for admitting the document on record was totally unknown to law and certainly it discloses total non-application of mind to the provisions regarding admissibility of documents in evidence as well as an act which can result in miscarriage of justice for having allowed the evidence on record in contravention of the provision of Section 273 of the Cr.P.C.

19. Considering the evidence on record in proper perspective, therefore, the finding of the Addl. Sessions Judge about the involvement of the accused in the alleged crime cannot be sustained and the evidence on record does not justify the conviction of the accused for the alleged offence. On the contrary, the same does not disclose any involvement of the accused in the alleged offence and the same entitles him for acquittal of the charges leveled against him.

20. The appeal, therefore, succeeds and is allowed. The impugned judgment and order is hereby quashed and set aside. The accused/appellant is hereby acquitted of the offence for which he was tried. The bail bond is hereby cancelled. The appeal accordingly stands disposed of.