
(2014) 02 BOM CK 0314
In the Bombay High Court
Case No : Criminal Appeal No. 956 of 2011

Sagar Balwant Patil	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 21-02-2014

Acts Referred:

Penal Code, 1860 (IPC) — Section 161, 302

Citation : (2014) 02 BOM CK 0314

Hon'ble Judges : P.V. Hardas, J;A.S. Gadkari, J

Bench : Division Bench

Advocate : Arfan Sait, Advocates for the Appellant; S.D. Shinde, APP, Advocates for the Respondent

Judgement

A.S. Gadkari, J.—The appellant, who stands convicted for an offence punishable under Section 302 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs.500/-, in default of which to undergo rigorous imprisonment for six months, by the Additional Sessions Judge, Kolhapur in Sessions Case No. 95 of 2009, by its judgment and order dated 12 July 2011, has questioned the correctness of his conviction and sentence by the present appeal.

2. The facts in brief which can be summerised from the record and as are necessary for the decision of this appeal may briefly be stated thus:

(i) PW-8 Dhondiba Gundu Khandekar, head constable then attached to Juna Rajwada police station, Kolhapur on 9.6.2009 was on duty at CPR Hospital Police Chowki, Kolhapur and his duty hours were 8pm to 8am till next day. On 9.6.2009, he received written intimation from the Medical Officer of CPR Hospital about the admission of the patient Sarika Sagar Patil who had sustained burn injuries. He accordingly effected entry of the said information in the register kept for the said purpose. Thereafter he met the concerned Medical Officer and the patient in the casualty ward. He asked the concerned Medical Officer as to whether the patient was mentally and physically stable to give statement. The

Medical Officer answered in affirmative and stated that the patient is physically and mentally fit to give statement. He thereafter recorded the statement of the injured Sarika in the presences of the said Medical Officer. The Medical Officer is PW-6 Dr. Sandesh Baburao Bagadi. He accordingly recorded the statement of Sarika.

(ii) In her said statement dated 9.6.2009, injured Sarika has stated that on 9.6.2009 at about 8.45 pm her husband i.e. the appellant hereinabove, after consuming liquor came to home and when Sarika questioned him about the same, he picked up quarrel with her, shut the door of house from inside and poured kerosene on her person and set her ablaze. She therefore sustained burn injuries. Sarika had further stated to PW-8 Khandekar that she then opened the door and came out of the house and at that time neighbours extinguished fire by pouring water on her person. PW-8 police head constable Khandekar thereafter read over the said statement to Sarika and Sarika thereafter signed on the same. PW-8 Khandekar also countersigned the said statement. PW-6 the Medical Officer who was present at that time has given endorsement to the effect that the victim was physically and mentally stable to give the statement. The said statement dated 9.6.2009 of deceased Sarika is in the form of dying declaration. The said statement is at Exhibit 33 on record.

(iii) PW-8 Police Head Constable Khandekar theater issued a letter and requested the Executive Magistrate, Karvir to record the dying declaration of the said Sarika Sagar Patil. The said letter is at Exhibit 38 on record. Simultaneously PW-8 also sent the statement recorded by him which is at Exhibit 33 to Panhala police station within whose jurisdiction the said offence had occurred, for further investigation.

(iv) PW-9 Abdul Bashir Mahaboob Patel, police inspector then attached to Panhala police station, Kolhapur on 10.6.2009 received one report from the police head constable Khandekar (PW-8) along with statement of Sarika Patil and written intimation of the Medical Officer, CPR Hospital and a letter written by PW-8 Khandekar to the Executive Magistrate, Karvir. After receiving the said papers, station officer Shri Gavit took the entry of the same in the station diary and registered the crime vide CR No. 46 of 2009. The investigation was thereafter handed over to PW-9 Abdul Patel. During the course of investigation, PW-9 Police Inspector Abdul Patel visited CPR hospital and also met the victim Sarika Patil. He thereafter visited the spot of incident and in presence of panchas prepared spot panchanama which is at Exhibit 18 on record. PW-9 Police Inspector Abdul Patel thereafter recorded statements of witnesses including PW-4 Rajaram Dnyandeo Salokhe i.e. father of victim Sarika. In pursuance of the letter addressed by police head constable Shri Khandekar to Executive Magistrate, Karvir recorded the dying declaration of Sarika on 10.6.2009 which is at Exhibit 36 on record. PW-7 Dr. Wasim Mehboob Mulla has given endorsement on the said dying declaration. A copy of the said dying declaration was thereafter sent by the Executive Magistrate to the Panhala police station. During the course of

investigation, the Investigating Officer collected postmortem report.

(v) It appears from the record that at about 2.00 am on 13.6.2009, Sarika succumb to injuries. The Investigating Officer during the course of investigation recorded the statements of various witnesses and after completion of investigation, he submitted chargesheet before the competent Court having jurisdiction.

(vi) After committal of case to the Court of Sessions, the Trial Court framed charge below Exhibit 10 under Section 302 of the Indian Penal Code. The said charge was read over to the accused to which he denied and claimed to be tried.

(vii) The learned Trial Court by its judgment and order dated 12.7.2011 convicted the appellant as stated hereinabove. The said judgment and order dated 12.7.2011 is impugned in the present appeal.

3. Mr. Arfan Sait, the learned Counsel for the appellant has submitted that the two written dying declarations which are at Exhibits 33 and 36 respectively do not constitute legally admissible evidence as those are hit by the settled principles of law. The learned Counsel for the appellant has further submitted that there is a vast variance in the three oral dying declarations and they do not lead to a certain hypothesis and therefore on that count the said oral dying declarations cannot be relied upon. In the absence of any other evidence, the appellant is entitled for acquittal. Mrs. S.D. Shinde, the learned APP has supported the judgment and order of the learned Trial Court and prayed for dismissal of the appeal.

4. In order to assess the evidence adduced by the prosecution, and with a view to effectively deal with the submissions advanced before us by Shri Arfan Sait, the learned Counsel for the appellant and Mrs. S.D. Shinde, the learned APP, it would be useful to refer to the evidence of the prosecution witnesses.

5. PW-1 Tanaji Dagadu Shinde, the uncle of deceased Sarika, has stated in his testimony that Sarika was given in marriage to the appellant. He has stated that the appellant was addicted to liquor and on this count there used to be disputes between the deceased Sarika and the appellant. On 9.6.2009, at about 8.30 pm, the deceased Sarika had given a phone call to his elder brother and had informed him that the appellant after consuming liquor had threatened her to kill. He has stated that at that relevant time he was present in the house. He has further stated that on the same day at about 9.45 pm one unknown person gave a phone call to his elder brother and informed him that Sarika was admitted to CPR hospital in burnt condition. He has further stated that he along with his brother Shivaji Dagadu Shinde i.e. PW-3 and others went to the CPR hospital, Kolhapur. He has further stated that after reaching the hospital, he went to the ward where Sarika was admitted and met her. At that relevant time Sarika disclosed to him that her husband i.e. the appellant herein poured kerosene on her person and set her ablaze on the count that the persons with whom the appellant used to drink are more dearer to him than the deceased Sarika. He has further stated

that Sarika had sustained 90 to 96% burn injuries and Sarika succumbed to the said injuries on 13.6.2009.

This witness was cross-examined at length by the appellant wherein an omission has been elicited that, while recording his statement he had stated to police that on 9.6.2009 at about 8.30 pm deceased Sarika had given a phone call to his brother Shivaji Shinde and she had stated to him that the appellant after consuming liquor had been to the house and given threats to kill her by pouring kerosene. The said statement is not finding place in his statement under Section 161. He has further admitted in the cross-examination that on 9.6.2009 when he reached the hospital at about 10.10 pm when Sarika was already admitted. He has further admitted that on that particular day till 12 o'clock in the midnight he was present in the CPR hospital. He has further admitted that on that particular day he was present near the deceased Sarika till 12 o'clock in the midnight. He has further admitted that during the said period, Sarika narrated the incident to the police. He has further admitted that when he reached to the hospital, the doctor asked this witness to bring the police to record the statement of Sarika, and accordingly he went to call the police personnel who were present in the hospital premises. He has further admitted that police came in the ward where Sarika was admitted. It is pertinent to note here that this PW-1, in unequivocal terms has admitted that when the police reached to the ward where Sarika was admitted, the police asked other persons except him i.e. PW-1 and his brother i.e. PW-3 to go outside the ward. He has further admitted that the police recorded her statement. He has further admitted that when the statement of Sarika was being recorded by the police, he himself and his brother i.e. PW-3 were present at the said place.

It is to be noted here that the said statement recorded by the police is at Exhibit 33. The said Exhibit 33 is recorded by PW-8 police head constable Dhondiba Gundu Khandekar.

6. PW-2 Ramchandra Dhondi Nandgaonkar is grand-uncle of Sarika. PW-2 Nandgaonkar in his testimony stated that Sarika was the grand-daughter of his sister. He has further stated that Sarika was given in marriage to the appellant. The appellant initially treated Sarika well, however, after lapse of some period the appellant was addicted to liquor. He has further stated that he came to know about the admission of Sarika to the hospital on 10.6.2009 at about 8 am and thereafter he rushed to CPR hospital at about 10 am. He has further stated that when he reached the hospital, he saw Sarika sustained burn injuries, however, she was able to speak. PW-2 has further stated that on making an inquiry with Sarika, Sarika disclosed to him that she had given understanding to the appellant for not drinking the liquor. However, the appellant got annoyed and told Sarika that his friends are more dearer to him than Sarika. She further told to PW-2 that at that time the appellant closed the door of the house, raised the volume of TV set and poured kerosene on the person of Sarika and lit her on fire. Sarika further told him that at that time she opened the door and came out of the house

when the persons in the vicinity came to her rescue and brought her to hospital. He has further stated that after about four days of the incident, Sarika succumbed to injuries.

7. PW-2 Ramchandra Dhondi Nandgaonkar has been cross-examined by the appellant at length. PW-2 has admitted in his cross-examination that when he reached to CPR hospital on 10.6.2009, PW-1 Tanaji and his PW-3 Shivaji were already present in the hospital. He has further admitted that on that day, he was present in the hospital till 1 to 1.30 pm.

8. PW-3 Shivaji Dagadu Shinde, the brother of PW-1 Tanaji, in his testimony has stated that the marriage of Sarika was solemnized with the appellant. Initially Sarika was treated well by the appellant, however, later on the appellant used to ill-treat Sarika after consuming liquor. He has further stated that the appellant was addicted to liquor and on this count there used to be disputes between them. He has further stated that on 9.6.2009 at about 8.30 pm he was present at his house when Sarika gave him a phone call and disclosed to him that her husband has consumed liquor and was threatening her to kill. This witness has further stated that at that time he explained Sarika that not to make quarrel with him and on the next day he will be at her residence to give understanding to the appellant. He has further stated that thereafter within 15 minutes at about 8.45 pm he received a phone call from an unknown person who had informed him that Sarika has sustained injuries and had been admitted to CPR hospital, Kolhapur. This witness has further stated that on receiving the information, he along with his brother PW-1 Tanaji, and Maruti Davang went to CPR hospital, Kolhapur and met Sarika. This witness has further stated that after making enquiry with Sarika, she disclosed to him that the appellant along with his friends used to consume liquor and therefore she expressed her dissatisfaction about it and gave an understanding to the appellant and the appellant got annoyed because of the said understanding and told Sarika that his friends are more dearer to him than her and poured kerosene on her person and set her ablaze. This witness has further stated that Sarika also told him that at that time the appellant closed the door of the house, raised the volume of the TV set and poured kerosene on her person and lit her on fire. This witness has further stated that Sarika had further disclosed to him that she opened the door and people from the vicinity poured water on her person and extinguished the fire. She was thereafter admitted in the hospital.

This witness has been cross-examined at length by the appellant. This witness has admitted in his cross-examination that on 9.6.2009 at about 10.30 pm he reached to the CPR hospital when Sarika was already admitted. He has further admitted that after he reached to the hospital till her death he was present with the deceased Sarika in the said hospital. He has further admitted that PW-1 Tanaji his brother was also present in the hospital till 1 am of 10.6.2009.

9. PW-4 Rajaram Dnyandeo Salokhe is the father of deceased Sarika. This witness did not support the prosecution case and was declared hostile. In his

examination-in-chief, he has stated that Sarika committed suicide by setting herself ablaze. The learned APP has cross-examined this witness at length. However, it appears that no fruitful information or material has been elicited in the cross-examination. This witness was further cross-examined by the learned Advocate for the appellant wherein this witness has admitted that prior to the present incident, Sarika had attempted to commit suicide on three occasions and each time the appellant had saved her. This witness has further admitted in the cross-examination that when he reached the hospital on 9.6.2009 at about 11 pm, Sarika was not in a position to speak. He has further admitted that since 11 pm of 9.6.2009 till the death of Sarika, he himself along with his wife Balabai were with Sarika.

10. PW-5 Dattatraya Baburao Patil is the neighbor of Sarika. This witness did not support the prosecution case and was declared hostile. This witness was cross-examined at length by the learned APP. However, no fruitful material was elicited in his cross-examination.

11. PW-6 is Dr. Sandesh Baburao Bagadi. PW-6 has stated in his testimony that on 9.6.2009 he was attached to CPR hospital's Casualty department as a Medical Officer and his duty was from 9 pm to 9 am till next day. He has stated in his deposition that on 9.6.2009 at about 9.30 pm a patient by name Sarika Sagar Patil was brought to the hospital. He has stated that after giving primary treatment to her in the casualty department, the said patient was shifted to burn ward of the hospital at about 10.30 pm. The written intimation was given to the police. He has further stated that at that relevant time the said patient was conscious and was able to speak. This witness has further deposed that on receiving the said intimation, the police came in the hospital for recording the statement of said patient Sarika. He has further deposed that initially the police met him and after getting certificate from him that the said patient is able to speak, in his presence the police personnel recorded statement of Sarika Sagar Patil. After recording her statement, the same was read over to the said patient and after admitting the same as true and correct, the patient i.e. Sarika Patil signed the said statement. He has further stated that the police personnel who recorded her statement had also countersigned the same and thereafter he has recorded the certificate below the said statement about the mental and physical fitness to give statement by the patient and had signed the same. He has identified the said statement which is at Exhibit 33.

This witness has been cross-examined by the appellant. In his cross-examination, this witness has admitted that the written intimation given to the police at Exhibit 17 is not signed by him. He further admitted that he does not have any record to show that the said written intimation Exhibit 17 was in fact received by the police. This witness has further admitted that when Sarika was brought to the hospital, she had sustained 90% burn injuries. He has admitted that though he had taken all the necessary measures for determining the physical and mental fitness of the patient after conducting certain examinations

to measure like blood pressure, pulse and other related tests, he did not maintain any record about the same. It is to be noted here that the Exhibit 33 which is the first dying declaration recorded by PW-8 is proved at the instance of this witness i.e. PW-6.

12. PW-7 is Dr. Wasim Mehboob Mulla. This witness in his testimony has stated that he was M.B.B.S. graduate and was doing his DNB in general surgery and in the month of June 2009 he was attached to CPR hospital, Kolhapur as Medical Officer. He has further stated that on 10.6.2009 he was present in the said hospital. He has further stated that on that day at 1.10 pm, the Executive Magistrate had been to the said hospital and met him in connection with recording dying declaration of the patient Sarika. He has further stated that he thereafter along with said Executive Magistrate went to the burn ward of the hospital where Sarika was admitted. He has further stated that in the presence of the said Executive Magistrate, he examined the patient namely Sarika Sagar Patil and found that the said patient was mentally and physically stable to give statement. He accordingly recorded his opinion on the paper and signed the same over which subsequently, in his presence the Executive Magistrate recorded the dying declaration of Sarika Patil. He has stated that the said dying declaration was recorded in question and answer form and after recording the dying declaration the said Executive Magistrate read it over to Sarika Patil and after she admitted the contents thereof, the said patient Sarika had put her thumb impression thereon in his presence. He has further stated that thereafter he again certified by endorsing that the patient Sarika was mentally and physically stable to give statement and signed the same. He has identified his signature on the said dying declaration. The said dying declaration is at Exhibit 36.

This witness has been cross-examined at length. However, except an admission that this witness did not maintain separate record with regard to the examinations of the patient prior to and immediately after recording of her dying declaration, no other fruitful material could be elicited from the cross-examination.

13. PW-8 is Dhondiba Gundu Khandekar, police head constable then attached to Juna Rajwada police station. This witness in his testimony has stated that the dying declaration which is at Exhibit 33 has been recorded by him. He has stated that on the basis of the statement recorded by him, the crime was registered. The abstract of the deposition which has come in the testimony of this witness has been narrated in the forgoing paragraph 2(i) of the present judgment.

This witness has been cross-examined at length by the appellant. In his cross-examination, he has admitted that initially the statement was read over to Sarika and after the correction with respect to the time of the dying declaration was effected in the said statement which is at Exhibit 33, Sarika signed the said statement. He has further admitted in his cross-examination that the alteration with respect to the time put on the dying declaration is effected on the next day.

14. PW-9 is police inspector namely Abdul Bashir Mahaboob Patel who was then attached to Panhala police station. This witness has conducted the investigation of the said crime and had filed the chargesheet in the matter.

In his cross-examination, an omission has been proved on behalf of the appellant to the effect that while recording the statement of PW-1 Tanaji, the said witness had not stated to him that on 9.6.2009 at about 8.30 pm deceased Sarika had given a phone call to his brother Shivaji Shinde (PW-3) and Sarika had stated to him that the accused after consuming liquor had come to the house and given threats to kill her by pouring kerosene. He has further admitted in his cross-examination that PW-1 Tanaji has not stated to him while recording the statement that one Shivaji Balkrishna was accompanying Tanaji in CPR hospital.

15. Thus, it is clear that the present case is based on multiple dying declarations given by the deceased Sarika. The first set of dying declarations are written dying declarations which are at Exhibit 33 and 36 recorded by PW-8 police head constable Khandekar and PW-10 Sharad Vasantora Patil the Nayab Tahasildar, Karvir, respectively. As far as first dying declaration which is at Exhibit 33 is concerned, PW-1 Tanaji in his cross-examination has clearly admitted that when the police reached to the ward where Sarika was admitted, the police asked other persons except him i.e. PW-1 and his brother i.e. PW-3 Shivaji to go outside the ward. He has further admitted that when the statement of Sarika which is at Exhibit 33 was being recorded by the police, he himself along with his brother PW-3 Shivaji were present at the said place. Thus, in our considered view, the possibility of tutoring the witness at the hands of the nearest relatives cannot be ruled out.

16. Mr. Arfan Sait, the learned Counsel for the appellant has relied upon the judgment of the Division Bench of this Court in the case of Dhanraj Jairam Patil Vs. The State of Maharashtra [2012 ALL MR (Cri) 162] wherein one of us (Shri P.V. Hardas, J.) was a member, wherein it has been held that the prosecution has to prove beyond reasonable doubt, that the dying declaration was true, voluntary and not influenced by any extraneous consideration. It is further held that if the dying declaration is not free from doubt about truthfulness as well as voluntaries, then the accused is entitled for benefit of doubt. In view of the admission given by PW-1 Tanaji in his cross-examination he along with his brother PW-3 Shivaji were present when the first dying declaration which is at Exhibit 33 was recorded, the dying declaration loses its sanctity as there is every possibility of tutoring the witness as aforesaid and the same cannot be relied upon.

17. As far as the second dying declaration dated 10.6.2009 which is at Exhibit 36 is concerned, the same was recorded by PW-10 Sharad Patil, the Nayab Tahasildar, Karvir Division. In his examination-in-chief, this witness has stated that the said dying declaration which is at Exhibit 36 was scribed by his clerk as per the say of the patient Sarika and thereafter he obtained her left hand thumb impression over the same. He has further admitted that after the doctor certified

about the mental and physical condition of the victim Sarika and signed the said dying declaration, he only signed the said dying declaration.

18. It is pertinent to note here that the prosecution has failed to examine scribe of the dying declaration which is at Exhibit 36. In the absence of the testimony of the scribe stating that he himself as per the narration of the facts of victim Sarika recorded the said dying declaration which is at Exhibit 36, the same cannot be relied upon at all as the same suffers from legal infirmity .

19 Thus, taking into consideration the legal infirmities which have emerged from the testimony of the aforesaid witnesses, in our considered view, these two dying declarations which are at Exhibit 33 and 36 cannot be relied upon at all.

This takes us to the three oral dying declarations allegedly given by the victim Sarika to PW-1 Tanaji, PW-2 Ramchandra and PW-3 Shivaji. PW-1 Tanaji in his testimony has stated that he along with his brother PW- 3 Shivaji went to the hospital when Sarika narrated the facts about the appellant setting her ablaze. It is pertinent to note that PW-3 Shivaji in his testimony has stated the facts which are not consistent with the testimony of PW-1 Tanaji. PW-2 Ramchandra who is the grand uncle of the deceased Sarika in his testimony has stated different facts about oral dying declarations given by Sarika to him. Thus, there is a lot of variance in these three dying declaration given to these three witnesses by Sarika.

20. The learned Counsel for the appellant has relied upon the judgment of the division bench of this Court in the case of Suresh s/o Arjun Dodorkar (Sonar) Vs. State of Maharashtra [2005 ALL MR (Cri) 1599] to which one of us (Shri P.V. Hardas, J.) was a member, wherein it has been held that in case where there are multiple dying declarations and acceptance of one dying declaration falsifies the other, the dying declarations have to be necessarily rejected. It has been further held that the dying declaration has to pass all the tests of reliability as the declarant is not available for cross-examination.

21. Thus, taking into consideration the ratio laid down by the Division Bench in the aforesaid judgment, bare perusal of the three oral dying declarations revealed that there are inter se variance and therefore according to us no reliance can be placed on the said three dying declarations allegedly given by Sarika to the said three witnesses, as the acceptance of one oral dying declaration necessarily would render the others as false. Merely because the overt act attributed to the appellant is consistent in two oral dying declarations i.e. the oral dying declarations given to PW-1 and PW-3, both dying declarations would not make them reliable piece of evidence. It is settled position of law that the dying declaration has to pass all the tests of reliability as the declarant is not available for cross-examination. In cases where there are multiple dying declarations and acceptance of one dying declaration falsifies the other, the dying declarations have to be necessarily rejected. In our humble opinion, therefore, no reliance can be placed on the alleged oral dying declarations given to the said

three witnesses.

22. After giving our anxious consideration to the material on record, according to us the prosecution has not been able to establish the offence against the appellant beyond any reasonable doubt and particularly on the touch-stone of the trustworthy legal evidence adduced by the prosecution, and hence the appellant is entitled to be acquitted.

23. Accordingly, criminal appeal is allowed and the conviction and sentence of the appellant is hereby quashed and set aside and the appellant is acquitted of the offence with which he was charged and convicted. Fine, if paid by the appellant, be refunded to him. Since the appellant is in jail, he be released forthwith, if not required in any other case.