
(2019) 12 BOM CK 0041
In the Bombay High Court
Case No : Criminal Appeal No. 697 Of 1997

Sanjay Baburao Randive

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 09-12-2019

Acts Referred:

Indian Penal Code, 1860 — Section 302
Code Of Criminal Procedure, 1973 — Section 313, 437(A)
Evidence Act, 1872 — Section 32(1)

Citation : (2019) 12 BOM CK 0041

Hon'ble Judges : S.S. Shinde, J; Prithviraj K. Chavan, J

Bench : Division Bench

Advocate : Satyam H. Nimbalkar, Harshad Nimbalkar, V.B. Konde Deshmukh

Final Decision : Allowed

Judgement

Prithviraj K. Chavan, J

1. Challenge in this appeal is to the judgment and order of conviction rendered by Additional Sessions Judge, Pune under section 302 of the Indian Penal Code (for short 'I.P.C') sentencing the appellant to undergo life imprisonment for allegedly committing murder of his concubine.

2. Shorn of unnecessary details, facts germane for decision of this appeal are as follows:-

The appellant was paramour of deceased Anita Ransingh. On 10th April, 1996, around 3.00 p.m, the appellant demanded money for consuming liquor from deceased Anita. As Anita refused to pay money, the appellant started quarreling with her and thereafter poured kerosene on her person and set her ablaze. The appellant thereafter tried to extinguish fire by embracing Anita and while doing so, he too suffered burn injuries to the extent of 30%. Anita succumbed to burn injuries which were about 91%. However, before she succumbed to the burn injuries, her statement came to be recorded by P.W.4- Head Constable-Dilip

Jadhav. The said statement was treated as dying declaration of the deceased wherein the deceased alleged to have stated before P.W.4-Dilip Jadhav that when she refused to part with the money for consuming liquor, the appellant poured kerosene on her person and set her on fire. Her statement also indicates that after her clothes and person was engulfed with fire, the appellant tried to extinguish the same by embracing her due to which, he too sustained burn injuries.

3. An offence came to be registered against the appellant on the basis of dying declaration of the deceased with Bundgarden Police Station, Pune, vide C.R. No.94 of 1996.

4. Investigating Officer recorded statements of the witnesses, drew a spot panchanama, collected the plastic can and certain partially burnt pieces of the saree of the deceased and other articles along with a match box by drawing a seizure panchanama Exhibit 15 in the presence of Panch witnesses. Autopsy report is proved at Exhibit 16. As per the Autopsy report, death of the deceased was due to shock as a result of burn injuries. After the investigation, a charge-sheet was filed in the Court of J.M.F.C, Pune. After committal of the case by the J.M.F.C, Court Room No.3, Pune on 5th June, 1996, the appellant appeared before the learned Sessions Judge, Pune on 5th September, 1997. A charge was framed under section 302 of the I.P.C. It was explained to the appellant to which he pleaded not guilty and claimed a trial.

5. The defence of the appellant is one of denial of the commission of the offence alleged. When it was asked, during his statement under section 313 of the Cr. P.C., as to whether he wants to add anything, the appellant stated that at the relevant time, he was sitting with daughter of the deceased Sunita-P.W.1 while Anita was cooking food in the house. Anita suddenly came running out of the house as she had caught fire. The appellant embraced her to extinguish the same. She fell down and said that she had committed a wrong. The persons in the neighbourhood took her to the hospital. She was not in a position to speak. No defence evidence has been adduced on his behalf.

6. The learned trial Court after going through the evidence of the prosecution witnesses, more particularly, the dying declaration of the deceased, believed the prosecution case by accepting the evidence on record and convicted the appellant as above. In short, the learned trial Court observed that only because the dying declaration is recorded by a Police man, though the Police man could have requisitioned the services of a Special Judicial Magistrate, that could not be the reason to discard the dying declaration which came to be recorded after duly certifying the condition of the deceased by a medical officer. The learned trial Court, in order to substantiate his findings, placed reliance on a judgment of the Supreme Court in the case of Ramavati Devi Vs. State of Bihar, AIR 1985 Supreme Court, 164.

7. With the assistance of Mr. Nimbalkar, the learned Counsel for the appellant, we

have meticulously gone through the evidence of the prosecution witness, more particularly, the testimony of the daughter of the deceased P.W.1-Sunita aged about 12 years and the dying declaration Exhibit-19.

8. P.W.1-Sunita who was aged about 12 years and the daughter of the deceased Anita deposed that the appellant Sanjay daily used to visit her mother and he was addicted to liquor. On the day of the incident, P.W.1-Sunita was playing outside the hut. A quarrel was going on between her mother and the appellant. Her mother came out of the hut who had sustained burn injuries. The neighbourers gathered and moved her to the hospital. The appellant accompanied her mother to the hospital. According to P.W.-1 Sunita, the appellant was demanding money for consuming liquor from her mother which she refused and, therefore, there was a quarrel. P.W.1-Sunita, however, testified that her mother caught fire as the stove blasted which is against the prosecution case and what has been stated by the deceased in her dying declaration. However, in her next breath, she again changed her version by stating that the appellant was demanding money from her mother for consuming liquor. However, her mother refused and, therefore, the appellant poured kerosene on her person and set her on fire.

9. Her evidence further indicates when her mother caught fire, she was outside the hut and so also the appellant. Her mother started shouting when she came out of the hut and was running. The appellant ran towards her and embraced her to extinguish the fire. The appellant asked her mother as to why she did it to herself, meaning thereby, the appellant perhaps asked the deceased that why she had set herself on fire, upon which deceased replied that she committed a wrong. Thereafter, the deceased fainted and fell down. She was moved to Sassoon Hospital by the appellant and the neighbours. Grandfather of this witness took her to Sassoon Hospital.

10. At the Hospital, her mother was unable to speak. Herself and her real father Sambhaji along with her grandfather were sitting beside the deceased for the whole day. The Police arrived at the Hospital and recorded the statement as narrated by Sambhaji. Thereafter, impression of her thumb was obtained over the said statement. Her evidence further indicates that Sambhaji i.e father of P.W.1-Sunita asked his wife (deceased) that he had given the statement and she should put her thumb impression over it.

11. Even though permission was granted to the prosecutor to cross-examine this witness as she had resiled from her statement; during her cross-examination, the prosecution has failed to shatter her version given on oath which is totally against the prosecution case. She denied that the appellant poured kerosene on the person of her mother. There are no other suggestions given to this witness and, therefore, we do not find any reason to disbelieve the child witness who had been duly examined by the trial Court after ascertaining that she understood the sanctity of oath. She being a child witness aged 12 years at the relevant time was intelligent enough to give correct account of the incident.

12. Since the prosecution has not challenged the substantive part of the evidence of P.W.1-Sunita, it is unsafe to rely upon the dying declaration of the deceased without any corroboration. P.W.1-Sunita, testified what she, in fact, witnessed at the relevant time.

13. P.W.2- Arun Athawale, who is the neighbour of the deceased testified that when he noticed gathering of some people opposite his house, he went towards the house of the deceased and found that she had caught fire. The appellant was trying to extinguish it. P.W.2-Arun Athawale took a blanket and covered the body of the deceased. It was this witness who took the deceased along with the appellant to Sassoon Hospital in Rickshaw. After declaring him hostile, the prosecution could not elicit anything from his mouth which would be of any help to the prosecution case. However, it has been brought on record that the appellant had sustained burn injuries over his hand and abdomen while extinguishing the fire.

14. Thus, this witness materially corroborated the testimony of P.W.1-Sunita. There is no reason for this witness to lie, for, he has no axe to grind against the appellant. Furthermore, it is an undisputed fact that the appellant had sustained burn injuries on the front portion of his chest and hands. It is also an undisputed fact that the deceased had sustained 91% of burn injuries as is evident from autopsy report Exhibit 16. Column No.17 of the postmortem report indicates that the deceased had sustained 4% injuries over her head, neck and face, 17% over anterior trunk, 16% over posterior trunk, right upper limbs 9% , left upper limbs 9%, right lower limbs 18% and left lower limbs 18%.

15. If there were 9% injuries over the upper left and right limb that means it was difficult for the expert, P.W.5- Dr. Sanjay Jadhav or for that matter, to P.W.4-Dilip Jadhav, Head Constable, to obtain her thumb impression on the dying declaration.

16. The fact that the appellant tried to extinguish fire of the deceased as per the evidence of P.W.1-Sunita as well as P.W.2-Arun Athawale, it would be a mitigating circumstance, so as to say that, had the appellant been responsible for setting the deceased on fire after pouring kerosene on her person, ordinarily, he would have escaped from the spot instead of risking his life in attempting to save his concubine. His conduct is, therefore, relevant.

17. P.W.5- Dr. Sanjay Jadhav was attached to Sassoon Hospital at the relevant time who examined the deceased on 10th April, 1996 when she was brought to the Burn Ward. As per the request of the Police, he allowed P.W.4- Dilip Jadhav to record her dying declaration since there was no Special Judicial Magistrate available and, therefore, P.W.4-Dilip Jadhav recorded the Dying Declaration of the deceased. P.W.5-Dr. Sanjay Jadhav had also examined the appellant and issued a certificate which is proved at Exhibit 25. He deposed that the appellant had sustained 18% burn injuries.

18. Before that, it is testified by P.W.5-Dr. Sanjay Jadhav that when he examined the patient, she was conscious and oriented as well as mentally fit to give the

statement. Thereafter, P.W.4-Dilip Jadhav recorded her statement which was read over to the patient over which she put her thumb impression. Thereafter, P.W.5-Dr. Sanjay Jadhav made an endorsement which is proved at Exhibit 24.

19. In the cross-examination, P.W.5-Dr. Sanjay Jadhav admits that there were many persons including the Police when the patient was admitted in the Female Burn Ward and he was the only Doctor. He admits that the burn ward was over crowded and if the burns are 50%, the cases are normally serious. That being so, how this witness would remain present throughout when the dying declaration of the deceased came to be recorded by P.W.4- Dilip Jadhav? He admits that he was quite busy on that day. He is unable to testify the time at which the deceased was admitted in the hospital. Interestingly, P.W.5-Dr. Sanjay Jadhav while giving evidence in the trial Court came without papers and testified only on the basis of his memory. It would be, therefore, unsafe to rely on the evidence of this witness who testified only on the basis of what he remembered while adducing evidence. He was unable to state whether the patient had sustained 91% of burns as he did not possess papers, however, he admits that the patient having 91% burn injuries is considered to be serious. He admits that normally a person sustaining 91% burn injuries is likely to be in shock. It depends upon person to person. He further admits that patient in shock may talk irrelevantly. He was unable to testify for want of papers as to whether the deceased was in shock.

20. It is admitted by this witness that he did not issue a certificate as regards condition of the patient before recording her dying declaration which means that there is no evidence on record of an expert as to whether before commencing the dying declaration, the deceased was well oriented with time, place and person.

21. Turning to the testimony of P.W.4-Dilip Jadhav, Head Constable who recorded dying declaration of the deceased, it reveals that after examination of the patient by the Doctor, he made inquiries with her in the presence of the Doctor and then recorded her statement as per her version. After recording the same, it was read over to her. Thereafter, she put her thumb impression over it. The Doctor certified the statement of the deceased. Dying declaration is at Exhibit 19. This witness had also recorded statement of the appellant in the presence of the Doctor which is at Exhibit 21.

22. When he was cross-examined by the learned Counsel for the appellant, this witness candidly admits that his statement had not been recorded by the Investigating Officer. He admits that he did not inquire as to whether anybody had supplied the information about the incident. When he first went to the Hospital, the deceased was admitted in General Female Ward No.27. There were several cots. According to him, the deceased was groaning. Surprisingly, he admits that he did not feel it necessary to call the Magistrate to record her dying declaration. It necessarily means that ordinarily he ought to have summoned a Magistrate who would have been a proper person to record a dying declaration of the deceased. This witness not being an expert in understanding the niceties and

importance of dying declaration had not taken due care and caution and followed guidelines which are required to be observed while recording the dying declaration. He admits that he did not record the dying declaration in question and answer form though the deceased had suffered 91% of injuries and must have been in severe pains. He also admits that he did not obtain the certificate of the Doctor before recording her statement which results in creating a room for doubt as to whether she was in a fit state of mind or in other words, well oriented with time, place and person to give her statement. This witness had also not ascertained whether there was any tutor to the deceased before recording her statement in the light of the fact that P.W.1-Sunita unequivocally testified that her father Sambhaji and her grandfather along with her were sitting near her mother for the whole day and the statement was given by Sambhaji. These are the material lacunae which would definitely affect the credibility of this witness and would ultimately go to the root of the prosecution case.

23. Interestingly, P.W.4-Dilip Jadhav did not ascertain whether the deceased was conscious and was in a position to speak and put her thumb impression. If the deceased had sustained 91% injuries over her right and left upper limb, it would be difficult to obtain her thumb impression. This renders the dying declaration doubtful, as to whether it was a genuine document tendered by the prosecution on record. P.W.4-Dilip Jadhav testified that he cannot tell whether speech of the deceased was affected. If this part of the evidence is accepted then entire dying declaration is shadowed with doubt, more particularly, in the light of the fact that the appellant tried to extinguish fire.

24. Exhibit 19 is the dying declaration qua the deceased which, on its face appears to be merely a statement recorded by P.W.4-Dilip Jadhav in a narrative form. It is pertinent to note that though the deceased had stated that the appellant picked up a quarrel with her as she refused to fulfill his demand of money to consume liquor, he poured kerosene on her person and set her on fire, but she further stated that after she caught fire, it was the appellant who embraced her and tried to extinguish the same. The statement of the deceased shall have to be read conjointly together with true scope of what she meant coupled with the evidence of P.W.1- Sunita.

25. Thus, in view of the overall circumstances, facts and evidence on record, it is quite difficult to place implicit reliance upon the dying declaration of the deceased.

26. There is no requirement of law that dying declaration must necessarily be made to a Magistrate and when such statement is recorded by a Magistrate, there is no specific form for such recording. Dying declaration is a statement made by a person as to the cause of his or her death or as to any of the circumstances resulting in his death. It becomes relevant under section 32 (1) of the Indian Evidence Act, 1872 (for short 'Evidence Act') which is an exception to the rule of hearsay evidence and makes it admissible as a statement of the deceased whether his death is homicidal or suicidal provided the statement

relates to the cause of death or the circumstances leading to the death.

27. From the attending circumstances as discussed hereinabove, it would be unsafe to accept the said statement as truthful one. The evidence of Medical Officer is too vague to accept as regards the mental and physical state of the deceased.

28. In his statement under section 313 of the Cr. P.C., the appellant had stated that at the relevant time he was sitting with P.W.1-Sunita outside the house while Anita was cooking food in the house. She came out of the house running engulfed with fire. When he saw Anita, he embraced her to extinguish the fire. She fell down and told him that she committed a wrong. He had stated that she was not in a position to speak. To a considerable extent, he supported the testimony of P.W.1-Sunita. As already stated, even in the dying declaration, the deceased had stated that the appellant extinguished the fire. In that view of the matter, it would not be safe to accept the dying declaration of the deceased as a truthful version relating to her cause of death.

29. The learned trial Judge unnecessarily stretched the testimony of P.W.4-Dilip Jadhav ignoring the evidence of P.W.1-Sunita and P.W.2-Arun Athawale. The judgment is based on surmises and conjectures by improperly appreciating the evidence on record. We are, therefore, of the view that the impugned judgment is devoid of merits and, therefore, needs to be quashed.

Consequently, we pass the following order.

:ORDER:

[1] The Appeal is allowed.

[2] The order of conviction and sentence passed by the Additional Sessions Judge, Pune in Sessions Case No. 202 of 1996 on 24th October, 1997 is quashed and set aside.

[3] The Appellant is acquitted of the offences punishable under section 302 of the Indian Penal Code.

[4] The bail bond of the Appellant stands cancelled.

[5] Fine amount, if recovered, be refunded to the Appellant.

[6] The order as regards disposal of Muddemal Property is maintained.

[7] The Appellant shall furnish a fresh bail in the sum of Rs.15,000/- with one surety in the like amount to the satisfaction of the Registrar (Judicial) of this Court in view of Section 437(A) of the Cr. P.C.

[8] The Appeal stands disposed of.