
(2013) 10 BOM CK 0141
In the Bombay High Court
Case No : Criminal Appeal No. 1061 of 2009

Sanjay Sakharam Ahire

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 24-10-2013

Acts Referred:

Citation : (2013) 10 BOM CK 0141

Hon'ble Judges : P.V. Hardas, J;P.N. Deshmukh, J

Bench : Division Bench

Advocate : Niteen Pradhan and Ms. S.D. Khot, for the Appellant; H.J. Dedhia, APP, for the Respondent

Final Decision : Allowed

Judgement

P.V. Hardas, J.—The appellant, who stands convicted for an offence punishable under Sections 498A and 302 of the Indian Penal Code and sentenced to RI for two years and to pay a fine of Rs. 1000/-, in default of which to undergo further RI for three months and imprisonment for life and to pay a fine of Rs. 2000/-, in default of which to undergo further RI for six months, by the Additional Sessions Judge-2, Malegaon, by judgment dated 14/10/2009, in Sessions Case No. 76 of 2008, by this appeal questions the correctness of his conviction and sentence. Facts in brief as are necessary for the decision of this appeal may briefly be stated thus:-

PW 4-Dr. Vikram Vaidya, who, since 2003, was running a private hospital at Malegaon, examined injured Pratiksha, wife of the appellant on 30/12/2007 at about 5.15 p.m. with alleged history of burns. He accordingly admitted her as an indoor patient and started treating her. Since the injured Pratiksha had sustained 100% burn injuries, he telephoned the Chhavani Police Station at about 8.30 p.m. for making arrangements for recording the dying declaration of Pratiksha. The letter sent by him is at Exh. 43.

PW 6-PSI Dharm Singh Pardeshi, who, on 30/12/2007 was attached to the Satana

Police Station and was on patrolling duty, was informed by the Police Station about admission of Pratiksha in the hospital of PW 4-Dr. Vaidya. He accordingly proceeded to the Satana Police Station and recorded an entry in the station diary and proceeded to Malegaon. Upon reaching the hospital of PW 4-Dr. Vaidya, he requested the Medical Officer to ascertain the fitness of Pratiksha for giving her statement. The requisition is at Exh. 45. PW 4-Dr. Vaidya opined that Pratiksha was in a fit condition to give her statement and accordingly recorded her statement at Exh. 53. In the said statement, Pratiksha had stated that her husband had quarreled with her and thereafter had poured kerosene on her and set her ablaze. On the basis of the statement of Pratiksha at Exh. 53, PW 6-PSI Pardeshi, accordingly, recorded an offence vide Crime No. 219 of 2007. He carried out further investigation in the said crime.

He, thereafter, proceeded to the scene of the incident and in the presence of panchas drew scene of the incident panchanama at Exh. 54. From the scene of the incident, he seized partly burnt pieces of saree, beads of mangalsutra, two burnt matchsticks and a match box. From the first floor, he seized a kerosene can containing one and half liters of kerosene. Thereafter, a sketch of the scene of the incident was drawn at Exh. 55. The clothes of the accused were seized under seizure memo at Exh. 56 and the accused was then arrested. Statements of witnesses were recorded and the medical certificates of Pratiksha were collected from Dr. Vaidya which are at Exhs. 43 and 44. The seized articles were thereafter referred to the Chemical Analyzer, Nashik, on 22/1/2008 under a requisition at Exh. 57.

Since Pratiksha succumbed to her injuries on 27/1/2008 at about 6.30 a.m., Section 302 of the IPC came to be added. The dead body was referred for postmortem examination and further to the completion of the investigation, a charge-sheet against the appellant was submitted.

Postmortem on the dead body of deceased Pratiksha was conducted by PW 5-Dr. Murlidhar Peshattiwar, who found that deceased Pratiksha had sustained 100% deep burns. He, therefore, opined that Pratiksha had died due to cardio respiratory arrest due to septicemia due to 100% deep burns. The postmortem report is at Exh. 51.

2. On committal of the case to the Court of Sessions, trial court vide Exh. 16 framed charge against the appellant for offence punishable under Sections 302 and 498A of the IPC. The appellant denied his guilt and claimed to be tried. Prosecution, in support of its case, examined six witnesses, while the accused in his defence examined three witnesses. Trial court accepted the evidence of the prosecution and convicted and sentenced the appellant as afore-stated.

3. In order to effectively deal with the submissions advanced before us by Mr. Niteen Pradhan, learned counsel for the appellant and the learned APP, it would be useful to refer to the evidence of the prosecution witnesses.

4. PW 2-Latabai, aunt of deceased Pratiksha, states that Pratiksha was married

to the appellant in the year 1999 at village Pade, Taluka-Kalwan. Her husband, the appellant, was a medical practitioner, who had his private hospital. Latabai further deposes that the appellant used to suspect the character of Pratiksha and used to abuse and assault her. Latabai deposes that they had attempted to convince the appellant to behave properly with Pratiksha. Latabai further deposes that the engagement ceremony of the younger sister of Pratiksha was scheduled on 30/12/2007 and all the relatives were awaiting the arrival of the appellant and Pratiksha. At about 4.30 p.m. Latabai and other received a message that Pratiksha had sustained burns. The relatives, accordingly, rushed to the village Lohaner in a private vehicle. On reaching the Lohaner, they learnt that Pratiksha had been shifted to Dr. Vaidya's hospital at Malegaon and, therefore, proceeded to Dr. Vaidya's hospital at Malegaon. On reaching the hospital, they noticed that Pratiksha was completely burnt, but she could talk clearly. On being asked the reasons for the burn, Pratiksha had disclosed that the appellant, who was suspecting her character, was assaulting her on that day from morning. Pratiksha further disclosed that when she had requested about proceeding for attending the engagement ceremony, at about 4.15 p.m., the appellant brought a kerosene can from the house, poured kerosene on her and set her ablaze. Pratiksha further disclosed that the neighbours and the patients from the hospital came and extinguished the fire. Pratiksha had also disclosed that the appellant had admitted her in the hospital at Malegaon and had threatened that she should state that she had sustained injuries due to explosion of gas stove.

In cross-examination, she has admitted that she had not lodged any report in respect of the harassment and ill-treatment meted out to Pratiksha. She has further admitted that in respect of the ill-treatment disclosed by Pratiksha to her from 1999 till 2008, she had not informed anyone as to what was disclosed to her by Pratiksha. She has admitted that since beginning she was knowing that the accused was suspecting the chastity of Pratiksha. Latabai admits that she had informed the parents of Pratiksha about the ill-treatment, which was given to Pratiksha, by the accused. She has denied the suggestion that after the arrival of Balasaheb, relatives of Pratiksha had insisted for recording a fresh statement of Pratiksha. She has also denied the suggestion that in their presence the police had recorded the statement of Pratiksha. She has, however, admitted as true that the parents of Pratiksha were with her continuously till her death.

5. Prosecution has examined PW 3-Sudam Gangurde, father of deceased Pratiksha, who states that she was married to the accused in the year 1999. He further deposes that he was in the service of police department as a police constable. He states that after marriage, Pratiksha was initially treated well for about 5 to 6 months. Thereafter, Pratiksha used to complain that the accused was abusing and assaulting her since he was suspecting the character of Pratiksha. He states that Pratiksha used to sent back to the house of the accused after giving necessary understanding to Pratiksha. He has admitted that Pratiksha had given birth to two children from the accused. Sudam deposes that

he along with his wife and the other relatives had often visited the house of the accused and had requested him to treat Pratiksha sell. He states that about eight days prior to Diwali Pratiksha had been to their house at Kawat accompanied by her children and at that time Pratiksha had complained that the accused was suspecting her character and was assaulting her and had driven her out of the house. Pratiksha had stayed at the house of PW 3-Sundam for about 10 to 12 days. Pratiksha was thereafter taken back to the house of the accused. He further deposes that on 30/12/2007, the had waited for Pratiksha and the accused to arrive for attending the engagement ceremony. At about 4.30 p.m. the accused had telephoned and had informed that Pratiksha had sustained burns. He states that accordingly they had gone to the house of the accused, but learnt that Pratiksha had been shifted to the hospital at Malegaon. On enquiring from Pratiksha, Pratiksha had disclosed that the appellant, who was suspecting her character, poured kerosene on her and had set her ablaze. Pratiksha had further disclosed that the neighbour had extinguished the fire. Pratiksha further disclosed that the accused had asked her to disclose that she had sustained the burns due to the explosion of gas stove.

In cross-examination, he has admitted that when Pratiksha had complained about the accused suspecting her character, at that time, Pratiksha had not given birth to any children. He has admitted that during last eight years he had not lodged any report. He has also admitted that none of his other relatives lodged any report against the accused regarding the ill-treatment of Pratiksha. He has admitted that Balasaheb Sonawane is the brother-in-law of his maternal aunt. He has also admitted as correct that the house warming ceremony of the house of the accused was attended by Sudam and is wife. He has admitted as correct that the Clinic is situated in the residential house of the accused. He states that even after the conversation with Pratiksha, he did not learn that statement of Pratiksha had been recorded earlier. He has denied the suggestion that Dr. Vaidya was pressurized into giving a requisition for recording fresh statement of Pratiksha.

6. PW 4-Dr. Vaidya has admitted in the cross-examination that his hospital has 60 beds and there is no separate burns ward in his hospital. He has admitted that one Dr. Gulecha and another doctor were the resident medical officers in his hospital. He has admitted that the accused had brought Pratiksha and had admitted her in the hospital. He states that since Pratiksha had sustained burns, he had directed for immediate treatment of Pratiksha. He has admitted that as per the history narrated by Pratiksha, she had sustained accidental burns due to the explosion of stove. He states that after Pratiksha was admitted in the hospital between 6 to 7 p.m., the police had come to his hospital and dying declaration of Pratiksha was recorded by the Executive Magistrate, Malegaon, i.e. Mr. S.P. Bhate. He has admitted that the dying declaration, which was shown to him, bears the endorsement about physical and mental fitness of Pratiksha by Dr. Gulecha. He has admitted that the said dying declaration was recorded at 7 p.m. He has admitted that when the statement of Pratiksha was recorded by the

Executive Magistrate-Mr. S.P. Bhate, Pratiksha was conscious from the beginning till the recording of her statement. He has admitted as true that all the fingers, including thumbs, of Pratiksha were burnt. He has further admitted that at 7 p.m., the relatives of Pratiksha came to the hospital and were in the room where Pratiksha had been admitted. He has also admitted as correct that the relatives were in the same room throughout the night. He has also admitted as true that the parents and relatives of Pratiksha had insisted on making arrangements for recording another dying declaration of Pratiksha. He has admitted that the parents were in the room of Pratiksha throughout the night. He has admitted as correct that the letter at Exh. 43 had been given to the police at the insistence of the relatives of Pratiksha. He has admitted that when the letter Exh. 43 was issued, the condition of Pratiksha was serious. He has admitted that he was not present during the recording of the statement of Pratiksha by the police. He has also admitted that there was over-writing in respect of the time mentioned in Exh. 45. He has further admitted that burn injuries, like the burns sustained by Pratiksha, were also possible in an accident.

7. Perusal of Exh. 43 shows that PW 4-Dr. Vaidya had forwarded this letter to the Chhavani Police Station requesting that another dying declaration be recorded, as the relatives and the patient want to give a dying declaration. This letter further indicates that Pratiksha was in a serious condition.

8. PW 5-Dr. Peshattiwar, who had conducted the postmortem on the dead body of deceased Pratiksha, had found that Pratiksha had sustained 100% burns. He has opined that the burns were ante mortem in nature. He has, therefore, opined that cause of death of Pratiksha was due to cardio respiratory arrest due to septicemic due to 100% deep burns. In cross-examination, he had admitted that each and every part of the body of Pratiksha was burnt, including eyes. He has further admitted that since it was a case of 100% burns, he did not mention the percentage of burns of each and every part.

9. Accused in his defence has examined Subhash Bhate as DW 3. DW 3-Subhash Bhate was the Resident Nayab Tahsildar, who was attached to the Tahsildar Office at Malegaon. He states that on 30/12/2007 at about 6.30 p.m. he had received a requisition of Chhavani Police Station for recording the dying declaration of Pratiksha. The original requisition is at Exh. 80. On receipt of the requisition at Exh. 80, he proceeded to the Vaidya Hospital and after reaching there, met DW 2-Dr. Jitendra Gulecha and Dr. Vaidya. He along with Dr. Gulecha went to the burn ward, where injured Pratiksha was being treated. He states that Dr. Gulecha medically examined Pratiksha and thereafter opined that she was in a fit condition for recording her statement and he accordingly recorded the dying declaration of Pratiksha at Exh. 81. He further states that the aforesaid statement was read over to Pratiksha and Pratiksha had admitted the contents to have been correctly recorded and thereafter the thumb impression of Pratiksha was obtained. In the dying declaration at Exh. 81, Pratiksha had clearly stated that she had sustained the burns on account of flaring of the stove. In the dying

declaration at Exh. 81, there is no reference to the explosion of the stove but Pratiksha states that she had sustained the injuries on account of sudden flaring of the stove. DW 3-Subhash Bhate has been cross-examined on behalf of the prosecution. Nothing of substance has been elicited in the cross-examination to doubt that DW 3-Subhash Bhate had gone to the Vaidya Hospital pursuant to the receipt of the requisition at Exh. 80 and after verifying the fitness of Pratiksha to give her statement, had recorded the statement of Pratiksha at Exh. 81. The aforesaid statement of Pratiksha at Exh. 81 was read over to her and she had admitted the contents to have been correctly recorded and thereafter her thumb impression was obtained.

10. The accused has examined DW 2-Dr. Jitendra Gulecha, who states that on 30/12/2007 he was attached to the Vaidya Hospital at Malegaon as a Medical Officer. He states that on 30/12/2007, in the evening, a patient by name Pratiksha was admitted in the hospital due to burns. After Pratiksha was admitted in the hospital, the treatment was commenced and intimation of admission of Pratiksha was given to the police. Pursuant to the said intimation, the police had come as well as a Special Judicial Magistrate Mr. Bhate. He states that at the request of DW 3-Bhate, he had examined Pratiksha and had found that Pratiksha was conscious and well oriented and accordingly endorsed on the dying declaration. He states that thereafter DW 3-Bhate recorded the dying declaration of Pratiksha. After conclusion of the statement, DW 2-Dr. Gulecha had again examined Pratiksha and had found that Pratiksha had been conscious and oriented. Dr. Gulecha states that he had accordingly made an endorsement to that effect. In cross-examination on behalf of the prosecution, he has denied the suggestion that he had issued certificate that Pratiksha was conscious without actually examining Pratiksha. He has admitted that he knew the appellant since last 7 to 8 years. He has also admitted that at the time of admission of Pratiksha, the appellant and the other villagers were present in the hospital. He has, however, admitted that after arrival of DW 3-Bhate, all the relatives were asked to remove themselves from the burn ward. Thus, nothing of substance has been elicited in the cross-examination, which would in any manner affect his deposition that Pratiksha was fit and conscious to give the statement.

11. In the dying declaration, which is recorded at Exh. 53, which is subsequent to the dying declaration at Exh. 81, Pratiksha does not state that she was made to give a statement about accidental burns either because of threat of coercion of the appellant. The aforesaid statement is absent in the subsequent dying declaration at Exh. 53. The first dying declaration given by Pratiksha was to PW 4-Dr. Vaidya at the time of admission of Pratiksha in the hospital. The second dying declaration was recorded at Exh. 81 by DW 3-Bhate, Special Executive Magistrate. The third dying declaration, which is recorded, is at Exh. 53 by PW 6-PSI Pardeshi. In the third dying declaration at Exh. 53, as pointed out by us, Pratiksha had not made any declaration about obtaining her earlier dying declaration because of threat or coercion. Admittedly, the dying declaration at Exh. 53 had been recorded at the insistence of the relatives of deceased

Pratiksha, who had come to the hospital after the dying declaration at Exh. 81 was recorded. The dying declaration at Exh. 53, therefore, could be as a result of tutoring by the relatives of Pratiksha, who had insisted that a second dying declaration be recorded. Curiously, in the evidence of PW 2-Latabai and PW 3-Sudam, a statement is made that Pratiksha had disclosed to them that the dying declaration at Exh. 81 had been obtained from her by threatening her. The aforesaid statement, however, is absent in the dying declaration at Exh. 53. According to us, therefore, it is apparent that the possibility that the dying declaration at Exh. 53 was given by Pratiksha as a result of tutoring by her relatives cannot be ruled out.

12. In any even, since the accused has established that a dying declaration at Exh. 81, which was first in the point of time, has been duly recorded by DW 3-Bhate, cannot be left out of consideration while appreciating the evidence of the prosecution. In cases resting on multiple dying declarations, the dying declarations should be consistent in material particulars. If the dying declarations are at variance, it would not be open for the court to pick and choose any one dying declaration which would suit the prosecution and to base a conviction on the said dying declaration. In this regard a reference may usefully be made to the Division Bench judgment of this court in Suresh Dodorkar (Sonar) Vs. State of Maharashtra, . The Division Bench, at paragraph 9 of the said judgment, has held thus:-

...It would thus be seen that in respect of the incident there is a major variance though there is a common thread in both the dying declarations that it was the appellant who had set her ablaze. In cases resting on multiple written dying declarations, the Courts cannot pick and choose anyone dying declaration. All the dying declarations have to be consistent in respect of material aspects of the incident. According to us, consistency is expected in multiple dying declarations in respect of the names and the number of accused, the prelude to the incident and the incident itself. In these two dying declarations there is consistency in respect of the name and the number of accused. However, in respect of the prelude to the incident, there is variance. There is also variance in respect of the incident itself. The variance is apparent on perusal of the dying declarations and can be discerned from the perusal of the same. Therefore, according to us, no reliance can be placed on the two written dying declarations at Exhs. 24 and 27, as acceptance of any one dying declaration necessarily renders the other as false. If in the dying declaration the truthfulness of the narration itself is rendered doubtful, no reliance whatsoever can be placed on the dying declaration. Merely because the overt act attributed to the accused is consistent in both the dying declarations would not make the dying declarations a reliable piece of evidence. 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 opinion, therefore, no reliance can be placed on the dying declarations at Exhs. 24 and 27.

13. In the present case, the dying declarations at Exhs. 81 and 53 are conned apart. In the dying declaration at Exh. 81, Pratiksha states that she had sustained the burns on account of the sudden flaring of the stove. In the dying declaration at Exh. 53, Pratiksha states that the appellant had poured kerosene on her and had set her ablaze. The second dying declaration at Exh. 53 had been recorded at the insistence of the father of Pratiksha and which is subsequent to the dying declaration at Exh. 81. Thus, we had two dying declarations which are written record of the oral narration of Pratiksha and both the dying declarations are contradictory. Acceptance of any one dying declaration would necessarily falsify the other. In the light of the contradictory dying declarations and the fact that there are contradictory dying declarations, in our opinion, the appellant would be entitled to be given the benefit of doubt. It would not be open for the court to pick and choose one dying declaration for basing a conviction of the accused when particularly the other dying declaration has been proved by the accused. There is nothing on record to even remotely indicate that the dying declaration at Exh. 81 was not the truthful narration of Pratiksha or that Pratiksha was not in a fit condition to give her statement. In that light of the matter, therefore, in our opinion, the appellant would be entitled to be given the benefit of doubt. The possibility that the subsequent dying declaration at Exh. 53 was as a result of tutoring of Pratiksha by her relatives cannot be ruled out. That background, therefore, impels us to allow the appeal and give benefit of doubt to the accused. 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.