
(2015) 09 BOM CK 0282

In the Bombay High Court

Case No : Criminal Appeal Nos. 170, 182, 187 and 207 of 2007

Sau. Anjali and Others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 15-09-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 147, 148, 302, 307, 34

Citation : (2015) 09 BOM CK 0282

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

Bench : Division Bench

Advocate : R.M. Daga and P.V. Navlani, Advocates, for the Appellant; K.S. Joshi, APP, for the Respondent

Final Decision : Allowed

Judgement

P.B. Varale, J.—By the present appeals, the appellants are before this Court challenging the judgment and order passed by the learned Ad-hoc Additional Sessions Judge, Amravati in Sessions Trial No. 138/2003.

2. The brief facts giving rise to the present appeals can be summarized as follow:

One Sapana Raikwar approached the Police Station, Nagpurigate in the midnight of 2-3-2003 and 3-3-2003 at about 00.45 Hrs. informing that some persons of the locality caused burns to her mother Shobha @ Rani Raikwar and she is admitted in Irwin Hospital, Amravati. PSI Khan was attached to the Police Station at the relevant time and found Shobha admitted in burn condition. Shri Khan recorded her statement. In the statement, Shobha stated that at about 9.00 p.m. her daughter Sapana went to medical shop for purchasing some medicine and at that time, the persons of her locality (accused/appellants) reached her house and asked her to withdraw the case lodged against them by her. Shobha refused for withdrawal of the case. The accused persons poured kerosene on her person and accused Kokila by lighting a match stick set her on fire. When Shobha raised hue and cry, the accused persons flee away from the spot. On the

basis of the statement of the Shobha, PSI Khan registered the crime bearing No. 29/2003 under Section 307 read with Section 34 of the Indian Penal Code. On the next date, as the investigation agency was set in motion on registration of the crime, Shri Khan, PSI proceeded with the formalities of investigation on 3-3-2003. Shri Khan by visiting the spot of incident along with Sapana drew spot panchanama. He collected the material found on the spot namely, empty kerosene container, match box and semi burn gown. The material was seized by Shri Khan. As intimation was received by the police chowky situated in the hospital premises, requisition letter was sent to the Executive Magistrate for recording the declaration of Shobha. Executive Magistrate attended the hospital and by making enquiry with the Medical Officer about the condition of Shobha, recorded her dying declaration. Shri Khan meantime recorded the statements of witnesses including statement of Sapana. The investigation thereafter was handed over to Shri Bhagat, API. Shri Bhagat on 6-3-2003, again recorded statement of Shobha. Shobha made a detailed statement. Arrest of accused persons was effected. During the course of treatment, Shobha succumbed to burn injuries on 10-4-2003. In view of the fact of death of Shobha, offence was altered into an offence punishable under Section 302 of the Indian Penal Code. The necessary formalities of investigation were carried out, such as, drawing inquest panchanama and forwarding the body to the Medical Officer for conducting autopsy. The opinion of Medical Officer was sought. In the post mortem report, it was opined that death was caused due to shock and septicemia due to extensive burn injuries. On completion of investigation, charge-sheet was filed against the accused persons under Section 147 , 148 , 302 of the Indian Penal Code in the Court of Judicial Magistrate First Class, Amaravati. The learned Magistrate, on finding that the offences are exclusively triable by the Court of Sessions, committed the case to the Court of Sessions. Charge was framed against the accused persons. The accused persons pleaded not guilty and claimed trial. The defence of the accused persons was of total denial. The learned Ad-hoc Additional Sessions Judge on appreciation of the evidence held the accused guilty for commission of offence punishable under Section 302 read with Section 34 of the Indian Penal Code and by judgment and order dated 26-4-2007 awarded conviction and sentence to the accused to suffer imprisonment for life along with fine in default to suffer R.I. for 3 months.

3. Shri Daga and Shri Kukde, learned counsel for the appellants vehemently submitted that the case of prosecution wholly rest on the circumstantial evidence in the nature of dying declarations. Learned counsel submit that though the prosecution claims three dying declarations of the victim, the dying declarations suffer from basic infirmities and inconsistencies. They further submit that each dying declaration differs in material aspect with another dying declaration. They submit that in such situation, it is unsafe to rely on the so called dying declarations and in that event, the appellants are entitled to claim benefit of doubts and this vital aspect is completely lost sight by the learned trial Court. They further submit that the prosecution for the reasons best known to it

withhold the material witnesses and if these witnesses could have been examined by the prosecution, there was every possibility that they would have thrown some light on the actual incident thereby the appellants could have established their innocence. Learned counsel Shri Daga in support of his submissions placed reliance on judgment of this Court as well as judgment of the Apex Court.

4. Per contra, Smt. Joshi, learned Additional Public Prosecutor submits that though there are multiple dying declarations, these dying declarations are consistent and a common thread of role played by these accused is reflected in these dying declarations. She submits that the learned trial Judge committed no error on placing reliance on the dying declarations and supports the judgment and order passed by the learned trial Court.

5. With the assistance of learned counsel for the appellants as well as learned Additional Public Prosecutor, we have gone through the material on record.

6. Insofar as the factum of death of victim is concerned, there is no serious dispute raised by the defence about the death of the victim. On the backdrop of the case of the prosecution that the victim died homicidal death, it will be necessary to refer to the material evidence in the form of an expert, namely, the Medical Officer, P.W. 3 Dr. Kiran Wathodkar. Perusal of the testimony of this witness show that on 11-4-2003, he was discharging his duty as Medical Officer at General Hospital, Amravati. He deposed that dead body of one Shobha Raikwar was forwarded to him for post mortem examination. He further deposed that in the external examination, he found infected burn injuries on head, neck, chest - 6 %, Chest abdomen - 11%, upper limb right - 5%, left - 5%, lower limb-right - 9% & left - 10% and back and buttock - 1%, total 47% burns. The burns were anti mortem nature. There were dead sore of 10" in diameter on buttock. Then he states about internal examination such as brain was pale and coverings were intact, both the lungs were pale with multiple caseating modules on both sides and on section lungs were pale and cassation was pale. On examination of heart, he noticed right chamber while containing blood clots and left chamber was empty. Other internal organs were pale. On examination, he arrived at conclusion that death was due to shock and septicemia due to extensive burn injuries. Nothing is elicited from this witness in the cross-examination to shatter the version of witness. The inquest panchana is the document admitted by the defence and the perusal of the said inquest panchanama shows that major part of the body of the victim was affected by burn injuries. As the inquest panchanama is admitted by the defence and nothing is suggested in the cross-examination of this witness P.W. 3 Dr. Wathodkar about the death being accidental one, in our opinion, the prosecution has proved the factum of death of the victim being homicidal one.

7. We now turn to the crucial aspect about the complicity of the accused persons in the said crime. Though the prosecution has examined as many as six witnesses, P.W. 1 Sukhdeo Wankhade, a neighbour, who turned hostile and is of

no help to the prosecution. As the case of prosecution rest on the dying declarations, the material witnesses are P.W. 2, Executive Magistrate, P.W. 4 PSI Agakhan, P.W. 5 Dr. Gopal Belokar and P.W. 6 API Bhagat. The version of P.W. 4 PSI Agakhan assumes much importance as he recorded the dying declaration which is first in point of time. The perusal of version of P.W. 4 Agakhan reveals that on receiving information through Sapana, he immediately rushed to Irwin Hospital and found victim Shobha @ Rani Raikwar was admitted in Ward No. 4. Exhibit 147 is the declaration which is first in point of time recorded by P.W. 4 Agakhan. Victim states that she asked daughter Sapana to bring some tablets from medical shop, as such, at about 9.00 p.m., Sapana had been to the medical shop. Then she refers that Kokila, Sheela, Manoj, Subhash and Deepak entered in the house and on account of criminal case and asked her to withdraw the case. On her refusal, all the accused persons caught hold her, poured kerosene and accused Kokila by lighting match stick, set her on fire. When she made hue and cry, accused persons fled away from the spot. She then states that before her daughter reached home, by pouring water on her person, she extinguished the fire. She then states that her daughter Sapana and a boy from locality Arif Khan admitted her in the hospital. P.W. 4 states in examination-in-chief stated that when he recorded statement of Shobha, she was in conscious condition and he asked the Doctor about her condition. He then states that he got satisfied about her condition. In the cross-examination, P.W. 4 admits that Exhibit 147 do not bear the endorsement and signature of Doctor about fit condition. He then states that he was not aware about the Medical Officer who provided medical treatment to Shobha. He further admits that he had not recorded the statement of the Medical Officer of the ward in which Shobha was admitted. He further admits that there is a police chowky in the hospital and police are available there. He also admits that the time of the recording of the statement is not mentioned at Exhibit 147.

8. The second dying declaration is recorded by Executive Magistrate, P.W. 2 Shri Gajanan Kalaskar. Shri Kalaskar deposed that on receiving requisition, he approached the Medical Officer attached to Irwin Hospital at Ward No. 4. He made enquiry with the Medical Officer about the fitness of the patient to give statement. He obtained the certificate of Doctor and started recording the statement. He deposed that victim stated that at 9.00 p.m. on 2-3-2003, Manoj Kale, Subhash Gade, Sheela Thorat and Deepak Metange entered in her house and by pouring kerosene, they set her on fire. She states that nobody was there in her house at that time. She then states that the neighbours admitted her in the hospital. In the cross-examination, an omission was brought on record that on conclusion of the statement, the same was not read over to the victim. On the backdrop of this dying declaration, Exhibit 135, it will be useful to refer to evidence of P.W. 5 Dr. Gopal Belokar. He deposed that at the relevant time, he was working as Medical Officer at General Hospital, Amravati. In the cross-examination, the witness admits that from the admission of the victim till her death, he had not provided treatment to her. He also admits that the

endorsement on Exhibit 135 do not refer to his capacity as Medical officer attached to the hospital. He states that at the relevant time, his status was Emergency Medical Officer. He then states that as the rubber stamp was not available at the time, the impression is not available below his signature.

9. The third dying declaration is recorded by P.W. 6 API Shri Bhagat. P.W. 6 deposed that on 6-3-2003, investigation was handed over to him and he recorded statement of Shobha. Insofar as this dying declaration is concerned, it is a detailed statement alleging that Kokila is keep of accused Manoj. She then states that one of the accused is under influence of liquor, she was under impression that the accused were cracking jokes and as such, she did not raise any shout etc. and as she is in talking terms with one Rama and Sudhir, accused Kokila and Manoj were carrying grudge against her. The said declaration was kept out of consideration by the learned trial Court observing that it is not prudent to base conviction on dying declaration made to Investigating Officer particularly, it is not signed by the declarant or the witness. We see no reason to place reliance on this dying declaration. The improved version in the dying declaration, Exhibit 155 with added allegations and altogether a new story do not inspire confidence. The learned Judge was justified in keeping the said dying declaration out of consideration. Now, considering the two dying declarations on record, namely, Exhibit Nos. 147 and 135, we find that these two dying declarations differ in material aspects and also suffer from basic infirmities. In the first dying declaration, Exhibit 147, though P.W. 4 Agakhan admits that he approached the Medical Officer and ascertained the fitness of the victim from Medical Officer, there is no endorsement of the Medical Officer to that effect in the said dying declaration. It is also useful to note that in the declaration, Exhibit 147, the victim refers to presence of Kokila and role played by her. In the said declaration, Exhibit 147, she then states that she was admitted in the hospital through her daughter Sapana and a boy from locality Arif Khan. It is also useful to note that no time is mentioned in the said declaration. It is useful to note that in the second dying declaration, Exhibit 135, the victim is silent on the presence of accused Kokila. In the dying declaration, Exhibit 135, she states that some neighbours admitted her in the hospital. It is also interesting to note that the dying declaration refers to the requisition received by the Executive Magistrate. Requisition of the Executive Magistrate refers to the timing i.e. 8.00 a.m. whereas the endorsement of the Doctor certifying the fitness of the victim refers the timing as 7.55 a.m. Thus, on an assessment of these dying declarations, we find that the dying declarations suffer from basic infirmities and there is a variance on the material and vital aspects in these two dying declarations. It is now settled position of law that the sole dying declaration can be a basis of conviction provided the same inspires confidence. In case of multiple dying declarations, the Apex Court as well as this Court in plethora of judgments cautioned that the multiple dying declarations are to be scrutinized thoroughly and if there are material variance and inconsistencies, it will be unsafer to base conviction on such dying declarations.

10. On the backdrop of facts of the present case, it will not be out of place to refer to the judgment dated 17-6-2013 of this Court in which one of us (Justice B.R. Gavai) was a party. In the judgment in Criminal Appeal No. 151/2013 (Mohammad Shafi Mohammad Hanif Vs. State of Maharashtra). This Court observed in paragraph 5 of said judgment that:

5] Insofar as the dying declaration is concerned, the same is recorded by the Investigating Officer. Perusal of the dying declaration would reveal that there is no endorsement by the Doctor at the beginning of the dying declaration to the effect that he has examined the deceased and that she was mentally and physically fit to make the statement. Insofar as the endorsement at the end of the dying declaration is concerned, there is some endorsement to the effect that the patient is fit after giving dying declaration and patient is conscious and oriented. The apex court in the case of State of Himachal Pradesh Vs. Jai Lal and Others, has held that the report of an expert witness cannot be accepted as it is. It has further held by the apex court that unless an expert witness has been examined, the certificate given by the medical expert cannot be read into evidence. The apex court has also held that the medical witness stands an expert witness and his evidence stands of different pedestal than an ordinary evidence. For the reasons best known by the prosecution, prosecution has not examined the medical expert, who allegedly has given the said certificate.

This Court further observed in paragraph 7 as under:

7] No doubt that the conviction can be based only on the basis of the dying declaration. However, by now, it is a settled law that the dying declaration, which is not found to be credible, cannot be the basis for conviction, unless there is corroborative evidence. Reliance in this respect could be placed on the judgment of the apex court in the case of Surinder Kumar Vs. State of Haryana, . In the present case, we find that the dying declaration is highly suspicious in nature and as such could not have been relied by the learned trial Judge.

11. We also find merits in the submissions of learned counsel Shri Daga on the backdrop of judgment of the Apex Court in the case of Mehiboobsab Abbasabi Nadaf Vs. State of Karnataka, on which he placed reliance. The Apex Court on the backdrop of the multiple dying declarations having inconsistencies in these dying declarations observed thus:

7. Conviction can indisputably be based on a dying declaration. But, before it can be acted upon, the same must be held to have been rendered voluntarily and truthfully. Consistency in the dying declaration is the relevant factor for placing full reliance thereupon. In this case, the deceased herself had taken contradictory and inconsistent stand in different dying declarations. They, therefore, should not be accepted on their face value. Caution, in this behalf, is required to be applied,

(emphasis supplied)

12. Thus, in view of the above referred facts, we are of the opinion that the prosecution failed to establish the complicity of the accused in the commission of crime. No reliance can be placed on the dying declarations to base the conviction against the appellants. In the result, we pass the following order.

(i) The appeals are allowed.

(ii) The order of conviction and sentence of the appellants is quashed and set aside.

(iii) Appellant - Manoj Punjabrao Kale, who is in prison, be set at liberty forthwith, if he is not required in any other case,

(iv) The bail bonds of rest of the appellants and of their sureties stand discharged.

(v) Fees of the appointed Counsel in Criminal Appeal No. 182 of 2007 is quantified at Rs. 5,000/-.