

(2018) 02 BOM CK 0007
In the Bombay High Court
Case No : 651 of 2005

Sau. Asha w/o Indrajit Wankhade

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 01-02-2018

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#) - Power to examine the accused

[Indian Penal Code, 1860](#), [Section 302](#) - Punishment for murder

Citation : (2018) 02 BOM CK 0007

Hon'ble Judges : R. K. Deshpande, M.G.Giratkar

Bench : Division Bench

Advocate : R. M. Daga, J. Y. Ghurde

Final Decision : Allowed

Judgement

1. The appellant assailed the judgment of conviction in Sessions Trial No. 88/2000 passed by learned Sessions Judge, Amravati by which she is sentenced to suffer imprisonment for life and to pay a fine of Rs. 1000/- in default to suffer rigorous imprisonment for one month for the offence punishable Section 302 of the Indian Penal Code.

2. The case of the prosecution against the appellant in short is as under:-

(i) The appellant was the wife of the deceased Indrajit Wankhade. She always used to come to her mother at Nerpingalai. Her husband was residing at Shimbhora. On

the day of incident, deceased Indrajit went to fetch appellant from her mother's house at Nerpingalai. Deceased was accompanied by his cousin brother Shankar Wankhade.

(ii) Deceased - Indrajit requested the appellant to return back with him to Shimbora. But, appellant /wife informed him that whenever she wish, she will come. Deceased Indrajit compelled her to come with him. It was about 11.00 p.m. in the night. At that time, the appellant poured kerosene on the person of deceased - Indrajit and set him on fire. Deceased - Indrajit sustained burn injuries. He was brought to Primary Health Center, Ner Pingalai.

(iii) Dr. Shriram Sonone informed about the patient to Shri Rangnath Jagtap, P.S.I. Police Station Shirkhed. Shri Jagtap, P.S.I. went to the Primary Health Center. There he reduced the report in writing of deceased - Indrajit. On the basis of report, crime was registered against the appellant.

(iv) Deceased - Indrajit was serious and he was shifted to the Civil Hospital, Amravati where Special Executive Magistrate recorded his dying declaration on 03.07.1999. In the said dying declaration deceased stated before the Special Executive Magistrate that the appellant and her mother both set him on fire. Charge-sheet was filed after complete investigation. As usual, charge-sheet was committed to the Court of Sessions.

3. Learned Sessions Judge framed charge at Exhibits-29 and 30 against appellant and her mother.

4. The prosecution has examined the following witnesses:-

(i) PW-1, Dr. Shriram Sonone, at Exhibit-13.

(ii) PW-2, Narendra B. Chinche, at Exhibit-14

(Panch Witness).

(iii) PW-3, Rangnath Jagtap, P.S.I. at Exhibit-18.

(iv) PW-4, Sudhir E. Deshpande, at Exhibit-24.

5. The learned trial Court recorded the statement of appellant under Section 313 of Criminal Procedure Code.

She has denied material incriminating evidence against her.

After hearing the prosecution and defence, the learned trial Court relied on the dying declaration at Exhibit-14 and convicted the appellant for the offence punishable under Section 302 of Indian Penal Code. Learned trial Court acquitted mother of appellant by discarding Exhibit-24.

6. Dr. Shriram Sonone (PW-1) was working as a Medical Officer at Primary Health Center, Nerpingalai. He has stated in the evidence that on 02.07.1999 at about 11.30 p.m. one patient was brought due to burn injuries. The patient was admitted in the Hospital. He informed the Police Station, Shirkhed. He inquired with the patient. Patient stated that his wife poured kerosene and set him on fire. He has further stated that Shri Jagtap, P.S.I. came to Primary Health Center and obtained his certificate for recording dying declaration.

7. Shri Narendra B. Chinche (PW-2) not supported to the prosecution He was declared hostile. During the cross-examination, Spot Panchanama and Seizure Panchanama at Exhibits-16 and 17 got proved.

8. Shri Jagtap, P.S.I. (PW-3), has stated in his evidence that on 02.07.1999 in the midnight at about 12.00, he went to Primary Health Center, Nerpingalai. He asked the Doctor whether he can record the statement. Doctor

informed him that he is conscious and he is in a position to give statement. Thereafter, he recorded the statement of deceased - Indrajit.

9. Deceased Indrajit stated him that "his wife always come to her parents" house. He went to fetch her. He asked her to come with him but, she refused to come and told that she would come as per her wish. Then, he compelled her to come with him. Thereafter, she poured kerosene from can. Thereafter, she set him on fire by matchstick. Therefore, he sustained burn injuries. The people adjacent to the area brought him to to the Hospital."

P.S.I. Jagtap (PW-3) has further stated that patient was thereafter, referred to Irwin Hospital, Amravati. He went to Police Station, Shirkhed, and registered crime for the offence punishable under Section 307 of Indian Penal Code against the appellant/Accused.

10. Shri Sudhir Deshpande (PW-4), has stated in his evidence that on 03.07.1999, he was working as a Special Judicial Magistrate, Amravati. At 09.25 a.m., he received requisition to record the dying declaration of the deceased - Indrajit. He went to Irwin Hospital, Amravati at about 09.30 a.m. He requested Doctor to ascertain whether patient was in a position to give statement. Thereafter, Doctor examined him. Doctor certified that the patient was conscious and he is able to give dying declaration. Thereafter, he started recording dying declaration. He asked him his name and residence. On inquiry, deceased stated about the incident. Exhibit-26 was proved by the Sudhir Deshpande (PW-4).

11. Learned Trial Court relied on the dying declaration at Exhibit-14 recorded by the P.S.I. Jagtap (PW-

3), and came to the conclusion that the appellant committed murder of her husband. There is no dispute about the death by burning. The Post-Mortem report at Exhibit-22 is admitted by the defence.

12. Two dying declarations are on record. First dying declaration at Exhibit-14 shows that he along with his cousin brother, Shankar Wankhade went to fetch the appellant. The appellant was not ready to come with him. Deceased - Indrajit insisted her to come with him therefore, appellant poured kerosene and set him on fire.

13. In the first dying declaration deceased not stated anything about his mother-in-law. In the second dying declaration at Exhibit-26, deceased - Indrajit stated before Sudhir Deshpande (PW-4). That, "when he went to fetch his wife/appellant, she was not ready to accompany with him. There was quarrel between them. In the quarrel his wife /appellant poured kerosene and her mother Sushila set him on fire".

14. Initially charge was framed against appellant only vide Exhibit-9. But, later on, again charge was framed against mother of the appellant vide Exhibit-29.

15. Heard learned Advocate Shri R. M. Daga for the appellant. He has pointed out the material contradiction in dying declaration at Exhibits-14 and 26. Learned Advocate has submitted that both the dying declarations are contradictory therefore, cannot be relied. Learned Advocate has submitted that cousin brother of deceased was with him at the time of incident, but he was not examined by the prosecution. Evidence of Dr. Shriram Sonone, (PW-1) and Shri Jagtap, P.S.I. (PW-3) are not reliable therefore, the

appellant is entitled for acquittal.

16. Heard learned Additional Public Prosecutor Shri J. Y. Ghurde. He has submitted that learned Trial Court rightly convicted the appellant relying on the dying declaration at Exhibit-14. There is no merit in the appeal. Hence, the appeal is liable to be dismissed.

17. There is no dispute about the death of deceased due to burn injuries. Exhibit-22 post-Mortem report admitted by the defence.

18. Now, it is settled law that the conviction can be awarded on the basis of dying declaration, provided it should inspire confidence of the Court. Keeping this principle in mind, the Court has to decide whether the dying declaration is reliable or not. Dying declaration is to be scrutinized very carefully because, the dead person cannot be called for cross-examination to verify the truthfulness of the statement made by the deceased person.

19. Oral dying declaration stated by Dr. Shriram Sonone (PW-1) is not reliable. Dr. Shriram Sonone (PW-1) was Medical Officer. It was his duty to record history of the patient in the record of Hospital. He did not record any history in respect of the statement made by the deceased. He informed about the condition of deceased to Shri Jagtap, P.S.I. (PW-3). Dr. Shriram Sonone (PW-1) denied about the presence of the brother of the deceased in the Hospital. Dying declaration at Exhibit-14 itself shows that deceased was accompanied by his cousin brother namely Shankar Wankhade. Shri Jagtap, P.S.I. (PW-3) has admitted in his cross-examination that when he reached to the Primary Health Center, he came to know that Shankar Wankhade

was in the Hospital. Therefore, it is clear that the possibility of tutoring by Shankar Wankhade cannot be ruled out.

20. It is pertinent to note that in first dying declaration allegations are made against the appellant stating that the appellant poured kerosene and set the deceased on fire. Exhibit-14 itself shows that deceased was accompanied by his cousin brother Shankar Wankhade. Shankar could have saved deceased. Deceased would have run away when appellant thrown (poured) kerosene on his person. Moreover, Shankar Wankhade was the material witness for the prosecution. Prosecution has not examined Shankar Wankhade, thereby, suppressed the material evidence from the Court.

21. Exhibit-14 is contradictory to Exhibit-26 recorded by Shri Sudhir Deshpande (PW-4). In Exhibit-14, deceased has stated that appellant poured kerosene and set him on fire, whereas, in Exhibit-26, he has stated that there was a quarrel between deceased (Indrajit) and appellant. Appellant poured kerosene and her mother Sushila set the deceased on fire by igniting matchstick. The learned Trial Court rightly acquitted the mother of the appellant. But not considered the contradictory version of deceased - Indrajit in both the dying declarations while convicting appellant.

22. When the dying declaration is not truthful then it cannot be relied on. Learned Trial Court ought to have considered the contradictory statement made by the deceased - Indrajit in dying declarations. Dying Declaration at Exhibit-14 is relied on by the Trial Court and wrongly convicted the appellant. In Exhibit-14, he has specifically stated that he was accompanied by his brother but his

brother was not examined by the prosecution. Material fact is suppressed by the Court by not examining the brother of the deceased. Moreover, it is matter of common sense that when wife (appellant) poured kerosene on the person of deceased (Indrajit), deceased could have ran away. That time his brother Shankar Wankhade could have saved him. In Exhibit-26, deceased has stated a different version stating that his wife/appellant poured kerosene and his mother Sushila set him on fire. Both the dying declarations are contradictory. There is no other evidence to corroborate any of the dying declarations. Hence, only on the basis of dying declaration, the accused/appellant cannot be convicted.

23. As per catena of judgment of the Hon"ble Apex Court, that when dying declarations are not reliable and it creates doubt about the incidence then there should be corroboration by other evidence. In catena of judgment of Hon"ble Apex Court observed that that accused can be convicted only on the basis of dying declaration, provided it should inspire confidence of the Court. In the present case, Exhibit-14 which is relied by the trial Court does not inspire confidence of the Court. It is contradictory to Exhibit-26. The presence of Shankar Wankhade at the time of recording Exhibit-14 could not be ruled out. Dr. Shriram Sonone (PW-1) stated that Shankar Wankhade was not present, but P.S.I. Jagtap (PW-3) has stated in his evidence that Shankar Wankhade was present in the Hospital. All these evidence clearly show that dying declaration Exhibit-14 is not reliable. Learned trial Court wrongly convicted the appellant/wife of the deceased only on the basis of dying declaration at Exhibit-14, which is not corroborated by any other evidence.

Moreover, it is contradictory to another dying declaration at Exhibit-26. Hence, we pass the following order:-

(I) The appeal is allowed.

(ii) The impugned judgment is hereby quashed and set aside.

(iii) The appellant is hereby acquitted of the offence punishable under Section 302 of Indian Penal Code.

(iv) The appellant is on bail. Her bail bond stands canceled.

(v) Fine, if any paid by the appellant, be refunded.

(vi) R. and P. be sent back to the Trial Court.