

(2021) 10 BOM CK 0147

In the Bombay High Court

Case No : Criminal Appeal No.634 Of 1997, 257 Of 1998

Sau. Premkaur Premsing Bawani And Others

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 29-10-2021

Acts Referred:

Indian Penal Code, 1860 — Section 34, 302, 307, 498A

Evidence Act, 1872 — Section 32(1), 80, 106

Code Of Criminal Procedure, 1973 — Section 313

Citation : (2021) 10 BOM CK 0147

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

Bench : Division Bench

Advocate : Devyani Kulkarni, Rahul Kate, Tejasweeta V. Bhosale, Pallavi N. Dabholkar

Final Decision : Allowed

Judgement

Sadhana S. Jadhav, J

1. The challenge in this appeal is to the judgment passed by the Additional Sessions Judge, Pune in Sessions Case No.340 of 1996 by which the appellants - Accused Nos.2, 3, 4, 6 and 7 herein are convicted for the offence punishable under sections 302 r/w 34 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay a fine of Rs.1000/- each in default to pay fine each of them to undergo further R.I. for 6 months for offence punishable under section 302 r/w 34 of IPC. Accused Nos.2, 4 and 5 are convicted for the offence punishable under section 498A r/w 34 of IPC and sentenced to undergo R.I. for one year and to pay a fine of Rs.1000/- each in default of payment of fine each of them sentenced to undergo R.I. for 3 months for offence punishable u/s. 498A r/w 34 IPC. Hence, these Appeals.

2. Such of the facts necessary for the decision of these Appeals are as follows :-

(i) Tirathkaur Bhond (P.W.4) is the grandmother of the deceased Azadkaur.

Azadkaur was married to Takdarsing (who happened to be a Juvenile-in-conflict with law at the time of incident). Hence, his case is separated. On 22nd June 1996, P.W.4 lodged a report at the Police Station alleging therein that at the time of marriage of Azadkaur her son had paid Rs.10,000/- towards dowry. He had spent a sum of Rs.20,000/-. That, her grand-daughter was treated properly for few days. Thereafter, all the family members were insisting upon her to fetch money to enable her husband Takdarsing to start a new business. The deceased had complained to her grandmother about the same. Her in-laws were insisting upon P.W.4 to give an amount of Rs.20,000/- as a capital for new business. On 20th June 1996, Azadkaur had been to the house of P.W.4 and had complained that she is subjected to starvation and harassment since she is unable to fetch Rs.20,000/-. On 22nd June 1996, P.W.4 had visited the house of the deceased. At that time, she saw her in-laws quarreling with Azadkaur. P.W.4 intervened, pacified the in-laws of Azadkaur and returned to her home. At about 5.00 pm, she visited the house of Azadkaur to ensure the safety of Azadkaur but she saw that she was being assaulted. P.W.4 attempted to give an understanding to the in-laws. The same continued upto 8.00 pm. The in-laws caught hold of Azadkaur, Takdarsing doused her with kerosene and set her ablaze. P.W.4 saw the incident of Azadkaur being set ablaze and rushed to her house to inform her son Rupsing i.e. father of Azadkaur. Then her family members rushed to the house and they saw Azadkaur in flames and took her to the hospital. On the basis of her report, Crime No.158/1996 was registered at Parnakuti Police Chowky for the offences punishable under sections 498A, 307 r/w 34 of IPC.

(ii) On 22nd June 1996, at about 11.30 pm, the statement of the injured Azadkaur was recorded by Special Judicial Magistrate. She disclosed to the Magistrate that she was set ablaze by her husband. She succumbed to the burn injuries on 24th June 1996 and hence, section 302 of IPC was added.

(iii) At the trial, the prosecution examined as many as 6 witnesses to bring home the guilt of the accused. The prosecution mainly rests on the evidence of P.W.1 - Dr. Shivdas Chavan who examined the injured in Sasoon Hospital on 22nd June 1996 and had given treatment to her, P.W.2 - Ulhas Koranne, Special Judicial Magistrate who recorded dying declaration (Exh.44) of the victim, P.W.3 - Dr. Shrikant Chandekar who performed autopsy on the dead body of Azadkaur, P.W.4 - complainant, P.W.5 - Latakaur, mother of the deceased.

3. The deposition of P.W.4 - Tirathkaur is in consonance with the allegations made by her in the FIR. According to her, on 22nd June 1996, her grand-daughter had complained to her about the ill-treatment meted to her for not fulfilling the demand of Rs.20,000/-. P.W.4 - had been to the house of the accused and persuaded them not to give ill-treatment to her grand-daughter. Azadkaur was beaten by her in-laws in the presence of P.W.4. P.W.4 was in the house of the accused from 5.00 pm to 8.00 pm. Accused Nos.4, 5, 6 and 7 had caught hold of Azadkaur and had coerced the accused No.1 - Rupsing to set her ablaze. The said incident had taken place in the presence of P.W.4. When she

tried to go towards Azadkaur she was pushed away by the accused and therefore, she returned to her house to inform her family members about the same. By the time she returned with her family members, the accused had fled from their house and Azadkaur was lying in a burnt condition. She was admitted in Sasoon Hospital and therefore, she had lodged the report which is at Exh.30. It is elicited in the cross-examination that the house of the accused Tirathsing is in slum area which is situated between Ashok Nagar and Maniknagar. It is denied that the mother of accused nos.6 and 7 is her younger sister. In another breath, P.W.4 has stated as follows :-

"I cannot state how many years younger than me is Roshan Kaur."

4. It is admitted that Roshankaur happens to be the mother of accused Nos.6 and 7. It is admitted by P.W.4 that she and her husband are in the business of sale and purchase of pigs and that they have huge business. It is also admitted that although they were fully aware that Azad Kaur is being harassed and being assaulted she and her son had not brought Azadkaur. It is also admitted by P.W.4 that she was standing in front of the door when Azad Kaur was set ablaze and at that time, no one had come forward to extinguish the flames. That, Azad Kaur had not attempted to rescue herself after kerosene was poured on her. That, P.W.4 also had not made any attempts to interfere. There was no fire inside the house. She has feigned ignorance as to whether there was a smoke inside the house and that the roof had blackened. It appears that the house of P.W.4 was close to the house of the accused since according to her, she took hardly five minutes to reach her house and informed her husband about the incident and thereafter, they returned in five minutes. She has further stated that Azadkaur was lying inside the house on the ground. She was in a fully burnt condition. It is further admitted that she along with her four sons are being prosecuted in a case in which it is alleged that they had kidnapped Papadsing. She has specifically denied that there was any stove or wooden plank at the scene of offence and that there was a washing place inside the house. She has denied that she has shown the open space 15 ft. away from the house of Azad Kaur to the Police. There are inherent omissions in the evidence of P.W.4. She has specifically denied that accused no.3 happens to be her sister. She was confronted with the family photograph in which she is seen with her three sisters, brother and his wife. But she has identified accused no.3 in the photograph. According to her, she was in the house of the accused and Azad Kaur from 10.00 am to 1.00 pm and thereafter, had revisited at 5.00 pm. That, when Azadkaur was caught hold by the accused, she had learnt of their intention to set her ablaze.

5. Upon perusal of the scene of offence panchanama which was recorded on 23rd June 1996, it appears that the scene of offence was shown by P.W.4. The scene of offence is in Ashok Nagar slum area. It appears to be residential house of Azadkaur. There is a washing place in the said house. There were burnt pieces of Saree in the house. That, Azad Kaur had rushed out of the house in order to rescue herself. She went on the road after she was set ablaze and then the

people had extinguished the flames by pouring water. The place where the injured had fallen is about 50 ft. from her house. On the way, there were burnt pieces of red cloth. The house is in a densely populated area and is surrounded by huts.

6. The prosecution has also placed reliance upon the dying declaration of the deceased Azad Kaur which was recorded by P.W.2 Ulhas Koranne. According to P.W.2, upon receipt of requisition, he had been to the Sasoon Hospital for recording the statement of the injured. He inquired with the patient about her health. Thereafter, he had recorded the statement during the period 11.20 pm to 11.30 pm. Since her thumbs and fingers of both the hands were burnt he had taken the toe impression of the right leg and had endorsed upon the statement as taken in his presence. The statement was recorded in presence of the medical officer. It is elicited in the cross-examination that the injured was kept in mosquito net and that only her face was visible. He has denied any overwriting in the figure 9 pm. It is admitted that on the dying declaration, it is specifically mentioned that since the fingers of left hand are burnt he has taken thumb impression of the right hand and it is denied that both her hands were burnt. In re-examination, P.W.2 has clarified that inadvertently he had stated in the examination- in-chief that he has taken the impression of right toe. It is clear that P.W.2 was confused and could not assertively stated before the Court as to whether the thumb impression was taken or not.

7. P.W.1 - Dr. Shivdas Chavan had given treatment to the injured in the Hospital. He has placed on record the original case papers. It is stated that the injured had sustained 100% burns superficial to deep, however, she was conscious and well-oriented when she was admitted in the Hospital. That, he had endorsed upon the dying declaration after it was recorded and the said endorsement is at Exh.19. The injured had survived for two days and died on 24th June 1996 at about 8.10 pm. According to P.W.1, the treatment had started only after recording of the dying declaration. That, forearm and both thighs were totally charred. That the dying declaration was recorded in his presence.

8. The fact that P.W.2 has stated that he has recorded the dying declaration which is marked at Exh.44 can only go to prove that the statement of the injured was indeed recorded. However, it does not prove the contents of the dying declaration. P.W.2 has not vouchsafed about the allegations levelled against each of the accused.

9. P.W.2 has, in fact, not proved the contents of the dying declaration. At this stage, it would be trite to place reliance upon the judgment of this Court in the case of Laxmibai and Ors. vs. State of Maharashtra 2010(3) Crimes 308 (Bom.). The Court while considering as to whether dying declaration is a substantive evidence and whether mere exhibition of the documents is sufficient to place implicit reliance upon it, placed reliance upon the judgment in the case of King Emperor vs. Mathura Thakur, wherein the Court has observed as follows:-

"As Taylor, J. in the case of King Emperor v. Mathura Thakur, supra, rightly observed that what is made admissible by Section 32(1) of the Evidence Act is the verbal statement made by the dying man to the Magistrate and not the document prepared by the Magistrate. The document made by the Magistrate does not amount to a deposition or record of evidence so as to attract the presumption under Section 80 of Evidence Act. Therefore, what is admissible in evidence is the statement made by the dying man as to who was responsible for causing his death and not the paper on which dying declaration is recorded. For these reasons therefore, Section 80 of the Evidence Act cannot be invoked in respect of presumption to be drawn in respect of dying declaration recorded by a Magistrate or even an officer authorized by a law to take evidence. As a sequel or our finding about inapplicability of it or presumption under Section 80 of Evidence Act, we further hold that the Magistrate or the person who records a dying declaration have to testify and prove who was named as offender by the dying person before Court where trial proceedings against accused are held."

10. P.W.5 - Lata Kaur happens to be the mother of the deceased. According to her, there was a persistent demand of Rs.20,000/-. As far as the incident is concerned, it is the contention of P.W.6 that she and her husband had returned from Pune at about 7.30 pm and within a short-while thereafter, her mother-in-law had rushed home crying that Azadkaur was set ablaze. P.W.5 rushed to the house of her daughter and saw her lying in a burnt condition in the house and thereafter, she was taken to the Hospital by her and her mother-in-law i.e. P.W.4. She was not sure as to whether the accused no.3 was elder or younger sister of P.W.4. That, there is no cordial relations between the accused No.3 and P.W.4.

11. P.W.6 - PSI Bhagwan Hinge happens to be the scribe of Exh.30. He had conducted preliminary investigation and that by 18th August 1996, investigation was almost completed and after that he was sent for duty as a Coastal Guard at Raigad. The said investigation was handed over to PSI Bankar. That the FIR was registered at 2.30 am on 23rd June 1996. P.W.6 had conducted the scene of offence panchanama as well as the inquest panchanama. He has proved the omissions of P.W.4.

12. The learned counsel appointed for the appellants has vehemently submitted that the prosecution has not proved the case inasmuch as firstly, the evidence of P.W.4 does not inspire confidence. Her conduct at the time when her grand-daughter was set ablaze and thereafter, does not appear to be natural. It cannot be believed that she would rush home to call her son instead of rescuing her grand-daughter seems to be unnatural. Secondly, no implicit reliance can be placed on the dying declaration since P.W.2 has not deposed before the Court the contents of the dying declaration. All that would be established is that he had recorded a statement of the deceased. That, no specific question in respect of the dying declaration was put to the accused under section 313 of Cr.P.C., since the Magistrate had not deposed about the same. That, recording of a statement under section 313 of Cr.P.C. is not an idle formality. That, in fact, dying

declaration would be most clinching and incriminating evidence against the accused and he has not been confronted with the same while recording his statement under section 313 of Cr.P.C. The evidence of P.W.4 is also criticized on the ground that she has denied to have any relation with original accused no.3 - Mankaur despite the fact that she happens to be her sister. It is in view of this that no specific question about the evidence of P.W.2 was asked to the accused under section 313 of Cr.P.C.

13. The learned counsel appointed for the appellants has placed reliance upon the judgment of the Supreme Court in the case of Shaikh Maqsood Vs. State of Maharashtra 2009(6) SCC 583 , wherein the Apex Court has held as follows :-

"The importance of observing faithfully and fairly the provisions of section 313 of the Code cannot be too strongly stressed. It is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material substance which is intended to be used against him. The questionings must be fair and couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused is not illiterate, his mind is apt to be perturbed when he is facing a charge of murder. Fairness, therefore, requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand."

14. It is lastly argued that in any case, the allegations against the present appellants is that they had coerced the accused no.1 to set Azadkaur ablaze and that the overt act is attributed only to accused no.1 who is not before the Court.

15. The circumstances speak for themselves. Although P.W.4 claims that the whole incident had occurred in the house and the victim made no attempts to rescue herself. The scene of offence panchanama speaks for itself. The trail of burnt pieces of the Saree of the deceased upto 50 ft. from her house and the evidence that the injured had collapsed on the road falsify the evidence of P.W.4. The Court would not hesitate to draw an inference that P.W.4 is not an eyewitness to the incident.

16. As against this, the learned APP has strongly supported the judgment of the Sessions Court and it is submitted that the prosecution has proved the guilt of the accused beyond reasonable doubt. That, the incident had taken place in the house of the accused and there is no plausible explanation under section 106 of the Evidence Act and the judgment of the trial Court calls for no interference.

17. Upon perusal of the testimony of the witnesses and the documents proved by the prosecution, it can be safely stated that P.W.4 is not a reliable witness. That, the dying declaration is not proved by the prosecution in accordance with law. The most clinching and incriminating circumstances were not put to the accused while recording his statement under section 313 of Cr.P.C. That, the evidence on record is not sufficient to uphold the conviction and sentence recorded against

the accused. It is true that the incident has occurred in the matrimonial house of Azadkaur and it was incumbent upon the inmates of the house to give an explanation about the death of Azadkaur by burn injuries. The onus is upon the prosecution to prove that at the relevant time, all the appellants were at home and had coerced and facilitated the accused no.1 to set his wife ablaze. The Supreme Court in the case of Nagendra Shah Vs. State of Bihar Passed on 14.9.2021 in Criminal Appeal No.1904/2019 (Hon'ble Supreme Court), in paragraphs-17 and 21 has held thus :-

"17. In this case, as mentioned above, neither the prosecution witnesses have deposed to that effect nor any other material has been placed on record to show that the relationship between the Appellant and the deceased was strained in any manner. Moreover, the Appellant was not the only person residing in the house where the incident took place and it is brought on record that the parents of the Appellant were also present on the date of the incident in the house. The fact that other members of the family of the Appellant were present shows that there could be another hypothesis which cannot be altogether excluded. Therefore, it can be said that the facts established do not Rule out the existence of any other hypothesis. The facts established cannot be said to be consistent only with one hypothesis of the guilt of the Appellant.

21. When a case is resting on circumstantial evidence, if the Accused fails to offer a reasonable explanation in discharge of burden placed on him by virtue of Section 106 of the Evidence Act, such a failure may provide an additional link to the chain of circumstances. In a case governed by circumstantial evidence, if the chain of circumstances which is required to be established by the prosecution is not established, the failure of the Accused to discharge the burden Under Section 106 of the Evidence Act is not relevant at all. When the chain is not complete, falsity of the defence is no ground to convict the Accused."

18. It is admitted by P.W.5 that her daughter Azadkaur was lying in the house in a burnt condition when she reached there. However, evidence on record more particularly, the scene of offence panchanama would establish that the body of the injured was lying on a road in burnt condition. There is interpolation in the dying declaration. The medical case record would show that Fortwin was rather administered to the injured. It is admitted by P.W.1 that Fortwin happens to be a sedative. Moreover, accused no.1 who had doused his wife with kerosene and had set her ablaze happens to be the juvenile in conflict with law. The evidence on record would show that the direct evidence in the form of the testimony of P.W.4 cannot be relied upon. Similarly, the dying declaration is not proved in accordance with law and the fact that the accused was not given an opportunity to explain the allegations levelled in the dying declaration at the time of recording of his statement under section 313 of the Cr.P.C., constrain us to hold that the prosecution has not proved its case beyond reasonable doubt. In view of the above discussion, the appeals deserve to be allowed. Hence, the following order :-

ORDER

(i) Appeals are allowed;

(ii) The conviction and sentence imposed upon the accused vide judgment and order passed by the learned Additional Sessions Judge, Pune in Sessions Case No.340 of 1996 is hereby quashed and set aside. The appellants be acquitted of all the charges levelled against them;

(ii) Bail bonds stand cancelled;

(iii) Fine amount, if paid, be refunded;

(iv) Appeals are disposed of on above terms.

19. Before parting with this judgment, we record our appreciation for the efforts put in by the learned counsel Ms. Devyani Kulkarni appointed to espouse the cause of the Appellants. Ms.Devyani Kulkarni, learned counsel be paid professional fees for working out these Appeals as per Rules.