
(2014) 07 BOM CK 0004
In the Bombay High Court
Case No : Criminal Appeal No. 322 of 1998

Sd. Musa Sd. Amir

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 10-07-2014

Acts Referred:

Evidence Act, 1872 — Section 32(1)

Penal Code, 1860 (IPC) — Section 306, 323, 34, 376, 452

Citation : (2014) ALLMR(Cri) 4087

Hon'ble Judges : M.L. Tahaliyani, J

Bench : Single Bench

Advocate : A.S. Agrawal and P.B. Patil, Advocate for the Appellant; R.S. Nayak, A.P.P, Advocate for the Respondent

Judgement

M.L. Tahaliyani, J.—The appellant has been convicted for the offences punishable under Sections 452, 376 and 306 of the Indian Penal Code by learned Additional Sessions Judge, Buldana by his order dated 29th August, 1998 in Sessions Case No. 45 of 1998. The appellant, along with accused Nos. 2 and 3, were charge sheeted by Bramhapuri Police after investigation of F.I.R. No. 0/97 of Buldana. The appellant was charge sheeted for the above stated offences and other accused were charge sheeted for the offences punishable under Sections 323 r/w 34, 504 r/w 34, 506 r/w 34 of the Indian Penal Code. The appellant was also charge sheeted for these offences in addition to three charges mentioned above against his name. The appellant and accused Nos. 2, and 3 were acquitted of the offences punishable under Sections 504 r/w 34, 323 r/w 34 and 506 r/w 34 of the Indian Penal Code.

2. The appellant has preferred this appeal on the ground that he has been falsely implicated by husband of the deceased by manufacturing false dying declaration of the deceased. The case against the appellant is mainly based on the dying declaration of deceased Mrs. Ashabai. The deceased and her husband were neighbours of the appellant and other accused. There used to be frequent

quarrels between the family of the deceased and the appellant and other accused.

3. Husband of the deceased had gone to Buldana on account of his job of being assistant to Mason. He was not at home when the incident had occurred. It is alleged that there was a quarrel between the deceased on one hand and appellant and other accused on the other hand, as usual. It is further alleged that after the quarrel was over, the appellant had committed house trespass at the house of the deceased and had committed rape upon her. The deceased set herself on fire because she felt humiliated on account of the alleged rape committed by the appellant. She was immediately shifted to hospital by the neighbours. She had sustained more than 90% burn injuries. Her statement was recorded by Buldana Police as she was admitted in Buldana hospital. An offence punishable under Sections 452, 376, 323, 504 and 506 was registered against the appellant and other accused. It appears that later on the investigation was handed over to Bramhapuri Police within whose jurisdiction the incident had occurred.

4. During the course of investigation, police had recorded statements of witnesses and had visited the spot. The deceased died on 29th December, 1997. The incident had occurred on 27th December, 1997 at about 18.00 hrs. Dead body of the deceased was subjected to post mortem examination. Medical Officer, after examining dead body, had opined that the deceased had died due to shock due to 92% burn injuries. After completion of investigation chargesheet was filed against the appellant and other accused for the offences mentioned hereinabove.

5. The learned trial Court framed charge accordingly and proceeded further. In all nine witnesses were examined by the respondent to substantiate the charges levelled against the appellant and other accused.

6. P.W. 1 was panch witness. He has not supported the prosecution case. He was cross-examined by the learned Additional Public Prosecutor. P.W. 2 was present when the inquest panchnama of the dead body was drawn. P.W. 3 is husband of the deceased. He has stated that he was not at Bramhapuri and had gone to Buldana for work. He rushed to hospital after receiving intimation that his wife had been admitted to hospital. Mother of P.W. 3 was present near the deceased. It is stated by P.W. 3 that the deceased had disclosed to him that the appellant had entered their house and had committed rape upon the deceased. The deceased, therefore, felt humiliated and poured kerosene on herself and set herself on fire. This statement was made to P.W. 3 by the deceased on the night intervening 27th and 28th December, 1997. In his cross-examination this witnesses has admitted that he did not ask his mother as to how did the deceased sustain burn injuries. Nor his mother had disclosed to him about the same.

7. P.W. 4 is neighbour and he has not supported the prosecution case. P.W. 5 is Police Head Constable who had recorded statement of the deceased. It is stated

by him that he had recorded statement of the deceased after obtaining medical certificate from the doctor. P.W. 9 in his evidence has stated that he had certified that the patient was in a condition to make a statement. His endorsement had been identified by this witness at Exh. 58. He made one more endorsement after completion of the statement which is at Exh. 59.

8. P.W. 5 has not stated in his evidence as to what statement was made by the deceased before him. He has produced dying declaration at Exh. 35 in which the deceased had stated that the appellant had entered her house and abused her. It was further stated by the deceased that she poured kerosene on herself as the appellant had committed evil act. It appears that the learned trial Court has read the contents of the dying declaration though P.W. 5 had not stated in his evidence as to what statement was made by the deceased. It appears that the dying declaration Exh. 35 has been accepted as substantive piece of evidence in view of the judgment of the Full Bench of this Court (2011 (4) Mh.L.J. (Cri.) 535) that once the dying declaration is proved, it is not necessary for the witness to reproduce the dying declaration in his oral evidence. In the cross-examination, this witness has admitted that he had not issued any letter to the Executive Magistrate for recording dying declaration of the deceased. It is explained by the witness that he had bad experience of Magistrates of not attending the hospital despite repeated requisitions. He, therefore, himself recorded the statement of the deceased.

9. P.W. 6 is Medical Officer, who had opined that the deceased had died due to 92% burn injuries. P.W. 7 is Police Officer who had carried out further investigation of this case. He had visited spot of the incident during the course of further investigation. P.W. 8 is Police Officer who had recorded First Information Report No. 0/1997 on the basis of dying declaration recorded by P.W. 5.

10. As such, the prosecution case was mainly based on the dying declaration of the deceased. There were two questions before the learned trial Court. Prime question before the learned trial Court was, as to whether the dying declaration was believable? Second question before the trial Court was, as to whether the conviction for the offence punishable under Section 376 of the Indian Penal Code could have been recorded on the basis of the dying declaration?

11. As far as first question is concerned, the learned trial Court has failed to appreciate that the police had not taken any steps to get dying declaration of the deceased recorded by the Executive Magistrate or the Special Judicial Magistrate. No doubt, there is no rule of law that dying declaration should necessarily be recorded by the Magistrate. Conviction can even be based on the oral dying declaration made to a relative, doctor or any visitor to the deceased. No hard and fast rule in this regard can be laid down. Whether a particular dying declaration should be accepted or not depends upon the facts of each case. The Court has to analyze the evidence and to examine whether in the facts and circumstances of the case the dying declaration, on which reliance has been placed by the prosecution, is acceptable or otherwise. In the present case, what

is pertinent to note is that the mother-in-law of the deceased Mrs. Purnabai has not been examined though she was the only relative who was present near the deceased when husband of the deceased had reached the hospital. In fact, if the deceased wanted to make any statement of the nature made to the husband she could have made similar statement to her mother-in-law. The prosecution has failed to give any explanation as to why a very important witness was not examined. In normal course Mrs. Purnabai must have asked the deceased as to how she sustained burn injuries and what was the cause. She could have disclosed the facts to her son on his arrival to the hospital. This failure on the part of Mrs. Purnabai creates a serious doubt about correctness of the evidence of P.W. 3 that the deceased had made any statement to him.

12. Genuineness of the dying declaration, recorded by P.W. 5, also appears to be highly questionable inasmuch as the respondents have failed to convince the Court as to why the services of the Executive Magistrate were not requisitioned. The evidence of P.W. 5 that he had bad experience of magistrates cannot be rejected. There could not have been any issue if P.W. 1 had recorded statement of the deceased before arrival of the Executive Magistrate. Once P.W. 5 had secured statement of the deceased it was obligatory on his part to make attempts to call the Executive Magistrate also. Had he failed to secure the attendance of the Magistrate, inspite of his attempts, the situation would have been different. What is pertinent to note is that inspite of recording of statement of the deceased, P.W. 5 or any other Police Officer did not make any attempt to call Magistrate for recording statement of the deceased.

13. As such, in my opinion, since the evidence of P.W. 3 is found to be not reliable and since the evidence of P.W. 5 is also equally unreliable it is difficult to say that the deceased had made any statement to P.W. No. 3 or P.W. No. 5. As already stated, the deceased, in the first place, would have made statement to her mother-in-law Smt. Purnabai.

14. Once the dying declaration of the deceased is found to be not reliable, the issue regarding examination of second question, in fact, does not arise. However, it may be mentioned here that a statement of the deceased is relevant under Section 32(1) of the Evidence Act, when the statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death in cases in which cause of that person's death comes into question. In the present case, as far as offence punishable under Section 306 of the Penal Code is concerned, it is possible to say that the dying declaration was a relevant fact. However, it is highly questionable whether the statement could be relevant for convicting the appellant for the offence punishable under Section 376 of the Indian Penal Code.

15. Apart from this, on facts also it can be seen that the deceased had nowhere stated in her dying declaration reduced to writing by P.W. 5 that she was raped. What she had stated is that some "evil act" was committed by the appellant. When a criminal liability of offence of rape is to be fastened upon the accused the

trial Court could not have taken a risk of equating the word "rape" with the word "evil act". It is difficult to ascertain as to what the deceased wanted to mean by "evil act". In fact, it was the duty of P.W. 5 to get further explanation from the deceased when she uttered the word "evil act". For all these reasons I find that the judgment of the learned trial Court is based upon unreliable evidence. It needs to be set aside. Hence, I pass the following order.

The judgment and order passed by the learned Additional Sessions Judge, Buldhana, dated 29th August, 1998, in Sessions Case No. 45/1998 is set aside.

The appellant is acquitted of the offences punishable under sections 452, 376 and 306 of Indian Penal Code.

The bail bond shall stand cancelled.

Fine amount, if any, paid by the appellant shall be refunded to him.

Appeal stands disposed of accordingly.