
(2015) 08 BOM CK 0221
In the Bombay High Court
Case No : Criminal Appeal No. 45 of 2013

Shalik and Others

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 14-08-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 294, 302, 307, 34, 498-A

Citation : (2015) 08 BOM CK 0221

Hon'ble Judges : A.B. Chaudhari, J;P.N. Deshmukh, J

Bench : Division Bench

Advocate : Anil Mardikar, Senior Advocate, for the Appellant; N. Mehta, APP, Advocates for the Respondent

Final Decision : Allowed

Judgement

P.N. Deshmukh, J—This appeal takes exception to the judgment and order dated 1st of January, 2013 passed by learned Sessions Judge, Washim in Sessions Case No. 71 of 2011, thereby appellant/accused No. 1 Shalik Yadao Pawar and appellant/accused No. 2 Yadao Kaman Pawar came to be convicted for the offence punishable under Section 302 of the Indian Penal Code and are sentenced to suffer life imprisonment and to pay fine of Rs. 3000/-each and in default of payment of fine, to suffer rigorous imprisonment for three months. Both the accused are acquitted of the offence punishable under Section 498-A of the Indian Penal Code.

2. Briefly, it is the case of prosecution that deceased Dubarabai was initially married to one Govinda Chavan. About four years prior to the incident, which occurred on 26th of March, 2011, she was at village Sawargaon Barde where her maternal house is also situated, and was residing with accused No. 1 Shalik as his wife. On the day of incident at 6.00 p.m., absconding accused Madinabai (her sister-in-law) visited house of deceased Dubarabai as guest when, accused No. 1 Shalik accused No. 2 Yadeo and absconding accused Pacharibai (her mother-in-law) consumed liquor in the liquor shop. However, while returning home only

accused No. 1 Shalik and Pacharibai came back to the house leaving accused No. 2 Yadao Pawar in the Wine Shop and therefore, deceased Dubarabai went to bring him back, and brought him to house holding his hand. On seeing them, Pacharibai and accused No. 1 Shalik got annoyed saying to the deceased as to whom she prefers; whether to her husband -accused No. 1 Shalik or her father-in-law - accused No. 2. On this count, her mother-in-law Pacharibai gave two stick blows to her while accused No. 1 Shalik closed the door of the room. Her sister-in-law Madinabai (absconding accused) caught her and appellants/accused Nos. 1 and 2 poured kerosene on her person and set her on fire with the help of match stick. Dubarabai came out of the house in flames raising shouts on which her parents arrived and extinguished her fire and took her to Civil Hospital, Washim in an auto rickshaw. It is the case of prosecution that accused persons provided ill treatment and harassment to Dubarabai on the count that she could not produce a child from accused No. 1 Shalik.

3. Information of admission of Dubarabai in Civil Hospital, Washim was given to Police Station Officer, Washim, who issued requisition letter dated 27th of March, 2011 vide Exh. 20 to PW 4 Rajesh Jagannath Vajeere, Executive Magistrate, requesting him to record statement of Dubarabai. The Executive Magistrate reached in the hospital at 2.35 a.m. and on getting physical and mental condition of Dubarabai certified from PW 5 Dr. Santosh Sarda, Medical Officer, recorded statement of Dubarabai as per Exh. 21 wherein Dubarabai had involved both the appellants and abscond accused to be responsible to set her on fire. On the basis of said statement offence came to be registered vide Crime No. 116 of 2011 by Police Station, Washim for the offence punishable under Sections 307, 294 read with Section 34 of the Indian Penal Code which was investigated by PW 8 Sandip Patil, the Investigating Officer, during the course of which he visited Government Hospital Washim to record the statement of Dubarabai Pawar and after verifying physical and mental condition of Dubarabai, recorded her statement. Thereafter, injured was shifted to Civil Hospital, Akola for medical treatment. While under medical treatment Dubarabai succumbed to her injuries on 31st of March, 2011 at 9.05 a.m. and accordingly accidental death came to be registered vide Exh. 22 by H.C. Rajput and inquest panchanama came to be drawn vide Exh. 25 by Gowardhan, ASI, who forwarded dead body for Post Mortem, which was performed by Medical Officer, Government Medical College, Akola and issued Post Mortem Notes as per Exh. 27 which is not disputed by the defence. According to the Post Mortem report, cause of death is certified to be that of septicemia due to 83% superficial to deep burns.

4. Accused No. 1 Shalik Pawar came to be arrested on 27th of March, 2011, and accused No. 2 Yadav Pawar came to be arrested on 31st of March, 2011 under arrest panchanama vide Exhs. 35 and 36, respectively. The offence was converted to Section 302 of the Indian Penal Code. Seized muddamal was forwarded to Chemical Analyzer for analysis under requisition vide Exh. 37. From the statements of witnesses, since there was ample evidence, charge sheet came to be filed against both the appellants showing accused Madinabai and accused

Pacharibai absconding, in the court of learned Judicial Magistrate (F.C.), Washim. In the course of time, case came to be committed for its trial to the learned Sessions Judge, Washim.

5. The Charge was framed against the accused vide Exh. 5 for the offence punishable under Sections 302, 498-A read with Section 34 of the Indian Penal to which they denied and claimed to be tried. Defence of accused is of total denial.

6. Learned Sessions Judge, on considering the evidence and documents on record, convicted both the appellants for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code and acquitted of the offence under Section 498-A of the Indian Penal Code. Hence, this appeal.

7. Heard Shri Anil Mardikar, learned Senior Counsel for the appellants and Ms. N. Mehta, learned Additional Public Prosecutor for the State.

8. To effectively evaluate the submissions advanced by learned Advocates for both the sides, with their assistance, we have scrutinized the evidence on record.

9. Learned counsel for the appellant has stressfully submitted that the case of prosecution is based on two Dying Declarations of deceased Dubarabai which, according to the learned counsel, are totally inconsistent to each other and has also contended that neither of these documents can even otherwise be relied upon as there is nothing to establish that said documents were read over and explained to its maker, who admitted it to be recorded as stated by her. It is thus contended that appeal needs to be allowed on this count alone. In support of his submission he relied upon judgment delivered by the Division Bench of this Court in the case of Raju Rambhau Patile and anr..vs.. State of Mah. (Criminal Appeal No. 13 of 2008), decided on 18th of September, 2012 and has prayed that the present appeal be allowed.

10. As against this, learned Additional Public Prosecutor supported the impugned judgment and order and has urged that there is due compliance of above requirement and has also contended that as Dying Declarations recorded bear thumb impression of deceased, there is no need to read over its contents to its maker. She, therefore, prayed for dismissal of appeal.

11. Having considering the fact that the case of prosecution is based on dying declarations, we have first chose to consider evidence of PW 4 Rajesh Jagannath Vajeere, Executive Magistrate, who has recorded first dying declaration vide Exh. 21 dated 27th of March, 2011 at about 2.45 a.m. According to his evidence, at that time he was serving as Naib Tahsildar cum Executive Magistrate at Washim and on receipt of requisition vide Exh. 20 from P.S.O. Washim, reached General Hospital, Washim at 2.35 a.m. and after getting medical endorsement about fitness of injured, recorded her statement. PW 4 Rajesh has stated that when he enquired with deceased about the incident, she disclosed that her father-in-law, mother-in-law and husband consumed liquor, then her mother-in-law and her

husband by leaving her father-in-law in liquor shop, returned home. Therefore, she had brought her father-in-law to the house, thereupon her mother-in-law and her husband, suspecting her character abused and beat her by sticks and in the course of same transaction her mother-in-law, husband and father-in-law had poured kerosene on her person and her husband after lighting his bidi threw burning match stick on her person and set her ablaze. The incident has taken place on 26th of March, 2011 at 8.30 p.m.

PW 4 Rajesh has further stated that he read over statement to its maker and thereafter had obtained her thumb impression and also signed the same. He thus proved this dying declaration as per Exh. 21. In his cross-examination, PW 4 Rajesh has admitted that medical certificate issued by Dr. Santosh Sarda is in a prescribed form and he has filled the same. He has admitted that injured had sustained 100 per cent burn injuries and that he has not asked the injured about the place where the incident has occurred.

12. So as to appreciate the dying declarations relied by prosecution and to satisfy ourselves if they are consistent to each other, we have thus scrutinized evidence of PW 8 Sandip Patil, PSI, Investigating Officer, who has recorded second dying declaration vide Exh. 30 after the first dying declaration was recorded. He has stated that on visiting Government Hospital, Washim he contacted PW 5 Dr. Santosh Sarda and asked him if she was in a position to make a statement and after PW 5 Dr. Santosh endorsed to that effect as per Exh. 30, he recorded her statement wherein Dubarabai stated that her father-in-law, sister-in-law and mother-in-law caught hold her and her husband poured kerosene on her person and lit her with the help of match stick. He admitted Exh. 30 as he was confronted with the same. On considering the contents of both these documents, we find that there are material inconsistencies in both these statements, as according to dying declaration (Exh. 21) recorded by PW 4 Rajesh, Executive Magistrate, its contents are to the effect that after deceased brought accused No. 2 Yadav (her father-in-law) in the house by holding his hands, her mother-in-law, accused No. 1 Shalik, accused No. 2 Yadav poured kerosene on her person and her husband after lighting his bidi with the help of match stick threw the same on her person and she got ablazed. Contrary to above contents, in her subsequent dying declaration (Exh. 30), deceased is said to have stated that her father-in-law (accused No. 2), mother-in-law, sister-in-law (both absconding accused) caught hold her and her husband (accused No. 1) poured kerosene on her person and lit her with the help of match stick. In the light of above inconsistent statements on record recorded by prosecution, we do not find it safe to rely upon either of them, as law relating to appreciation of evidence in the form of more than one dying declaration is well settled. It is not the plurality of the dying declarations, but the reliability thereof that adds weight to the prosecution case. If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without any corroboration. The statement should be consistent throughout. If the deceased had several opportunities of making such dying declarations, that is to say, if there are more

than one dying declaration, they should be consistent. However, if some inconsistencies are noticed between one dying declaration and the other, the Court has to examine the nature of the inconsistencies, namely, whether they are material or not. While scrutinizing the contents of various dying declarations, in such a situation, the Court has to examine the same in the light of various surrounding facts and circumstances. Therefore, the discrepancies in the dying declarations make them doubtful.

Moreover, it is also material to note that in the first dying declaration (Exh. 21), PW 4 Rajesh Vajeere, Executive Magistrate, has made a bare endorsement to the effect that "read over and is correct". From this endorsement it cannot be said that the contents of statement recorded by him were read over, explained to its maker which she admitted to be true. So also, in the subsequent dying declaration (Exh. 30), similar endorsement is made below the statement by PW 8 Sandip Patil, Investigating Officer, to the effect that "statement is as stated by her read over and is correct". Having considering above evidence and endorsements made on dying declarations, we find that the learned Senior Counsel for the appellants has rightly relied upon the judgment of this court in the case of Raju Patile (supra), wherein one of us was Member (A.B. Chaudhari, J.) and in the cited judgment had referred to para No. 13 in the case of Shivaji Tukaram Patdukhe..vs.. State of Mah. reported in 2004 ALL MR (Cri) 3220 , wherein Division Bench of this Court declined to make such dying declaration as foundation for sustaining the conviction which view was thereafter confirmed by the Hon"ble Apex Court in the case of Shaikh Bakshu and Others Vs. State of Maharashtra . In this case, the Apex Court highlighted the importance of reading over and explaining the dying declaration to the deceased and that the said fact cannot be made subject matter of presumption. Para No. 13 of the judgment in Shivaji's case (supra) reads thus:

"The dying declaration at Exh. 24, according to us, cannot be relied upon as the statement was never read over to deceased Durgabai and there is no endorsement to that effect. When the declaration was not read over to Durgabai and she had not admitted the contents thereof to be correct, according to us, the dying declaration cannot be made foundation for sustaining the conviction."

13. In the light of above view taken earlier on the basis of above said judgment and having considering the fact that case of prosecution is based on dying declarations and as there is no other evidence to support the case of prosecution which is based on dying declarations alone, appeal is liable to be allowed. Hence, we pass the following order.

ORDER

Criminal Appeal No. 45 of 2013 is allowed.

Conviction and sentence of appellant No. 1 Shalik Yadao Pawar and appellant No. 2 Yadao Kaman Pawar for the offence punishable under section 302 of the Indian Penal Code is hereby quashed and set aside.

Appellants are acquitted of the offence with which they were charged and convicted.

They be set at liberty if not required in any other crime.

Fine, if any, paid by the appellants be returned to them.