
(2013) 01 BOM CK 0011
In the Bombay High Court
Case No : Criminal Appeal No. 532 of 2006

Smt. Rashida Abdul Gani Khairadi	Vs	APPELLANT
State of Maharashtra		RESPONDENT

Date of Decision : 04-01-2013

Acts Referred:

Citation : (2013) 5 ABR 593 : (2014) ALLMR(Cri) 244

Hon'ble Judges : V.K. Tahilramani, J;Sadhana S. Jadhav, J

Bench : Division Bench

Advocate : Uday P. Warunjikar, for the Appellant; P.S. Hingorani, APP, for the Respondent

Judgement

Sadhana S. Jadhav, J.—The appellant herein is convicted for the offence punishable u/s 302 of the Indian Penal Code and is sentenced to suffer imprisonment for life and to pay fine of Rs. 500/-, in default to suffer R.I. for one month by the Additional Sessions Judge, Solapur by a judgment and order dated 3rd May, 2006. Being aggrieved by the said judgment and order of conviction, the appellant has preferred the present Criminal Appeal. Such of the facts, which are necessary for decision of this appeal, are as under:--

The case of the prosecution is that the appellant herein has a brother namely Eliyas Khairadi. Eliyas got married to Ameena (since deceased) sometime in June, 2005. All the three were residing jointly. In the last Week of November, Amina had been to her maternal house at Village Boramani. While returning back to her matrimonial abode, she forgot to bring the petticoat. It is the case of the prosecution that the appellant Rashida got annoyed over the said issue and quarrelled with Amina intermittently for forgetting to bring the petticoat. That on 5th October, 2005 at about 12.30 p.m., Amina had sustained bum injuries. Upon hearing her cries, the neighbours and relatives had gathered. Eliyas rushed home and admitted his wife Amina at Civil Hospital, Solapur. Since it was a medical case, an intimation about admission of Amina was given to the Begum Peth Police Station. Head Constable Kavathekar and PSI Vishnu Pawar (PW-5) went to

the Hospital. Kavathekar was deputed to summon the Magistrate for recording the statement of the burnt patient. PW-5 Vishnu Pawar approached the Medical Officer to ascertain the state of mind of Amina. Upon receiving the answer in the affirmative, he recorded her statement. The statement was recorded at 14.15 hrs.

Amina disclosed to the PSI Pawar that one week prior to the incident, she had been to her maternal house and while returning she had forgotten to bring the petticoat and, therefore, her sister-in-law namely Rashida was harassing her and quarrelled with her. She further disclosed that on 5.10.2005 at about 12.30 p.m. when she was at home along with her sister-in-law, her sister-in-law Rashida raised the quarrel and then she poured kerosene on her from the can, set her ablaze and fled from the house. According to her, her husband came home after some time and admitted her in the Hospital. On the basis of the said statement, Crime No. 319 of 2005 was registered against Rashida for the offence punishable u/s 307 of IPC.

At about 2.30 p.m., PW-3 Prasad Saudikar, who was officiating as Judicial Magistrate, First Class, Solapur, received a requisition letter for recording the statement of Amina in the Civil Hospital. He also obtained the opinion of the medical officer and recorded the statement of Amina between 2.40 p.m. to 2.45 p.m. It is alleged that Amina disclosed to PW-3 about the incident and informed him that she was set ablaze by her sister-in-law. The said statement was handed over to the police.

Amina succumbed to the burn injuries on the same day in the evening. Autopsy was performed on the dead body of Amina. The postmortem notes are at Exhibit 27. Amina had sustained 98% burn injuries and the cause of death was shock due to 98% burn injuries. The offence was then converted to Section 302 of IPC. Rashida was arrested on the same day i.e. on 5.10.2005 at about 10 p.m. and is in jail till today.

2. The investigation was completed and the charge-sheet was filed on 27.12.2005. The case was committed to the Court of Session and registered as Sessions Case No. 15 of 2006. The prosecution examined five witnesses to bring home the guilt to the accused. The case of the prosecution mainly rests upon two dying declarations which are at Exhibits 20 and 26 and one oral dying declaration allegedly made to PW-2 Hafija Chitapure.

3. PW-1 Kausar Rachbhare who resides in the neighbourhood of the accused and the deceased. PW-1 happens to be the close relative of deceased Amina. PW-2 is a panch for the spot panchnama which is at Exhibit 9. She has deposed before the Court that she lives in the neighbourhood of Elias. On 5.10.2005, she was summoned by the police to act as a panch. When she went in the house, she saw one plastic Can of kerosene, broken pieces of bangles and other articles. A curtain was also burnt. The police had seized the articles from the spot. In the cross-examination, she has admitted that there were black patches in the house of Elias. The cot was not burnt. The ceiling fan was also intact. The cardboards

which were fixed below the tin sheets of the roof were also not burnt. It is pertinent to note that she has admitted in the cross-examination that the door of the house was broken. She has also admitted that Hafija is the sister of the deceased and resides close by. It is an admitted position that Amina had sustained burn injuries in her residential house. She had died due to burn injuries. The fact that the witness has deposed before the Court on oath that the door of the house was broken, it is clear that Amina was alone at home and no one had outguessed from the said house.

4. PW-2 Hafija Chitapure is the sister of the deceased. She has deposed before the Court that there were only four houses between her house and the house of the deceased Amina. She has stated that her sister Amina had disclosed to her that accused Rashida had raised quarrels with her since she had forgotten to bring petticoat from her maternal house and, therefore, Amina had requested her to ask someone to fetch the petticoat. She has further deposed that on 5.10.2005, at about 12.30 p.m., when she was rolling bidies in her house, she heard commotion and saw that people had gathered behind the house of Amina. She therefore rushed to the house. There she saw Rafique Abdul Gani, brother-in-law of Amina. He pushed the door of the house. Hafija did not enter inside. However, her husband entered into the house. The door was pushed because it was noticed that fumes of fire were emitting from the house. Amina was seen in a burning condition and, therefore, her husband extinguished the fire by pouring water on her person. PW-2 claims to have enquired with Amina about the incident and she disclosed that her sister-in-law had poured kerosene on her and set her ablaze. Amina was then taken to the Civil Hospital by Eliyas and the husband of PW-2. In the cross-examination, she has stated that smoke was emitting from the house of Amina and, therefore, the door was opened. She has further stated in the cross-examination that Rashida was engaged in rolling bidies for Factory No. 12 which is at Sakerpet and the said factory is at a distance of ? hour by walk from the house of Rashida. The timing for depositing bidies is from 12 noon to 3 p.m. and one has to stand in a queue for depositing bidies and thereafter taking entries in the register. She has admitted in the cross-examination that at that time Rashida went to deposit bidies.

5. PW-2 has further affirmed in the cross-examination that at about 2 p.m., her parents, brothers and other relatives reached the hospital and were there till the death of Amina. She has further affirmed that Rashida did not like her visiting Amina and hence raised quarrel with her and, therefore, she was annoyed with Rashida. PW-2 has further admitted that M.L.A. Adam Master had directed the police to file a case. He was present in the Court Hall when the deposition of PW-2 was being recorded and that they had taught PW-2 how to depose. Hence, it is clear that PW-2 is a tutored witness.

6. It is pertinent to note that the Public Prosecutor re-examined PW-2 and in the re-examination, she stated that she did not accompany Amina to the Hospital, but went to the hospital in another auto-rickshaw. Thereafter, the Prosecutor has

cross-examined PW-2 and in the cross-examination by the State, PW-2 has deposed that Rashida had fled from the house after setting her ablaze and had concealed herself in another lane. That Rashida had been to Bidi Factory after setting Amina on fire. It is pertinent to note that she has also stated that the door of the house of Amina was broken since beginning. That Amina was raising cries and was being instructed by Eliyas not to name Rashida, but to say that she had poured kerosene on herself. PW-2 has further stated that they had no talk with Amina till arrival of the police. The witness was further cross-examined by the defence and in the cross-examination of the Prosecutor are found to be material omissions, specially that Rashida had concealed herself in another lane and that Eliyas had instructed Amina not to name Rashida. The material omissions go to the root of the matter.

7. PW-3 is Prasad Saudikar, J.M.F.C., Solapur, who recorded the dying declaration of Amina which is at Exhibit 20. He has not deposed before the Court the narration of facts disclosed to him by the deceased Amina and has simply stated that he had recorded the statement of Amina. He has further stated that initially she could not put her thumb impression properly and therefore he obtained second thumb impression.

8. We have perused Exhibit 20, which is the dying declaration recoded by PW-3. We find two thumb impressions. However, both the thumb impressions have not been attested by PW-3. The endorsement of the doctor is in the margin which is at the top of the page and PW-3 has admitted the said position. PW-3 has admitted that it is not mentioned in the dying declaration that the statement was read over to the deponent and on verification, she has affirmed it to be true and correct.

9. The requisition letter received by PW-3 was shown to him and he has admitted that he had learnt from the requisition letter. He came to know that Amina had poured kerosene on her person and set herself on fire. The requisition letter is marked at Exhibit 19. He has also admitted that although the police station is at a distance of 10 feet from the OPD of the Hospital, he had not verified whether any statement of the injured was recorded prior in time. He had not sealed the said statement of Amina and had simply placed it in a packet provided by the police and handed it over to the police.

10. The learned Counsel appearing for the appellant has submitted that there are several infirmities in recording the dying declaration and, therefore, it should not inspire the confidence of the Court. Since the case rests upon the dying declaration, it is necessary to evaluate the said document with abundant care and caution and ascertain whether the said statement is voluntary, truthful and therefore would inspire the confidence of the Court.

11. First and foremost, the Judicial Magistrate, First Class, has admitted that before recording the dying declaration, he had been informed that Amina had attempted to commit suicide. However, the source of this information has not

surfaced. Secondly, we find that there is no endorsement to the effect that the statement was read over to the deponent. In fact, to rule out any remote infirmity, it is necessary that there has to be an endorsement that the contents were read over and admitted to be true and correct. The said exercise cannot be treated as an empty formality. We cannot be oblivious of the fact that the deponent of the said statement is not available for verification or cross-examination. Hence, it is an inherent infirmity in the dying declaration and therefore inspires confidence of the Court. It is apparent that the statement was never read over to the deceased and therefore there is no endorsement to that effect.

12. The Apex Court in the case of Shaikah Bakshu and Others Vs. State of Maharashtra, has held as follows:--

There was no mention in the dying declaration that it was read over and explained to the deceased. The trial Court and the High Court concluded that even though it is not so stated, it has to be presumed that it was read over and explained. The view is clearly unacceptable.

Moreover the thumb impressions of the deponent are not attested by the Magistrate although he has stated in the substantive evidence that he has followed the procedure. It is not sufficient that the Magistrate would state in his substantive evidence that he has followed the procedure contemplated for recording of the dying declaration. Proof of recording of dying declaration is one thing and evidentiary value and truthfulness is another thing. Whether the dying declaration is correctly recorded is not to be considered. The contents of the dying declaration needed to be admitted as per the say of the deponent. All possible efforts should be made by the prosecution to see that there is no room for suspecting the veracity of the dying declaration and that it should inspire the confidence of the Court.

12A. PW-4 is Dr. Pradip Karyakarte was working as medical officer in the Civil Hospital at the relevant time. He has given his endorsement about the fitness of the patient for recording the dying declaration at Exhibits 20 and 26. He has deposed before the Court that he had examined Amina and found her to be conscious and well-oriented and, therefore, had certified her fitness. It is clear from the record that the medico legal case papers of the patient are not produced on record.

13. PW-5 is PSI Vishnu Pawar, who was attached to Begum Peth Police Station on 5.10.2005, he has deposed before the Court that on that day, an intimation was received from the Civil Hospital that the patient viz. Amina Khairadi was admitted with 90% burns. The said intimation was received by the Head Constable Kavathekar whom he had deputed for requisitioning the services of the said Magistrate for recording the dying declaration. He had stated before the Court that when he went to the Hospital, there was huge crowd. Eliyas informed him that Amina had burnt herself. He then obtained the opinion of the medical officer

and recorded the statement of Amina. It is pertinent to note that he has also not deposed before the Court stating the narration of facts disclosed to him by the injured. PW-5 has proved the omissions in the evidence of PW-2 Hafija. Hence, the oral dying declaration allegedly made to Hafija cannot be relied upon.

14. It is elicited in the cross-examination of PW-5 that on 5.10.2005, Head Constable Irabatti was on duty at the Civil Hospital Police Station. The medical officer had given information to Head Constable Irabatti, who intimated to the police station as per the information received by him. PW-5 has further admitted that Head Constable Irabatti had intimated that Amina Khairadi had poured kerosene on her person at 12.30 p.m. and set herself on fire and in that course, she sustained 90% burns. In fact, an entry to that effect is taken in the hospital register which is entry No. 802 of 2005. PW-5 claims to have knowledge about the said entry. However, an extract of the said register is not filed on record.

15. PW-5 has further admitted that the house in which Amina sustained burn injuries was situated in a thickly populated area. However, he has not recorded the statements of the immediate neighbours, but has recorded the statements of the close relatives of Amina. He has also admitted that he has not recorded the statement of Eliyas and has not noted down the information provided by Eliyas in the case diary. He has recorded statement of Head Constable Kavathekar and H.C. Jawale, who had taken the entry in the register of the Hospital.

16. PW-5 has further deposed that Amina was totally burnt. Her face was burnt. At Exhibit 26, he had not signed below the thumb impression of Amina. On perusal of Exhibit 26, it is clear that the thumb impression is not attested, but PW-5 has signed as a witness who has recorded the statement.

17. There are glaring infirmities in the dying declarations which are at Exhibits 20 and 26. On evaluation of the evidence adduced by the prosecution, it appears that the dying declarations cannot be said to be voluntary, truthful and hence would not inspire confidence of the Court for the following reasons:--

(i) Although the incident has occurred in the day time in a thickly populated area, there is no evidence on record to show that the accused Rashida was seen in her house or close to her house before the incident or after the incident.

(ii) The door of the house was broken. The people had not rushed to the said house on hearing cries, but had pushed open the door because they had seen fumes emitting from the said house.

(iii) The information which was received at the Civil Hospital Police Station was that Amina had attempted to immolate herself. Entry No. 802 of 2005 is not placed on record although admitted in substantive evidence by PW-5.

(iv) The parents, brothers and relatives of Amina had reached the Hospital at about 2 p.m. The statement which is at Exhibit 26 was recorded at about 2.15 p.m. Hence, possibility of tutoring cannot be ruled out. PW-5 has not attested the thumb impression of Amina.

(v) PW-3 JMFC, Solapur, has recorded the statement of Amina at Exhibit 20. He has not read over the statement to the deponent. He has not attested both the thumb impressions of the deponent. The statement recorded by him was not sealed and handed over to the police. The statement was recorded by PW-3 at 2.40 p.m. just half an hour after recording of the first statement. It is not mentioned in Exhibit 20 that the statement of the deponent was recorded earlier.

(vi) The fact that PW-2 has stated that she was taught what to depose in the Court is sufficient to hold that the oral dying declaration of Amina allegedly made to PW-2 has to be left out of consideration. There are material omissions in the depositions of PW-2 which are proved by PW-5.

Hence, for all the aforementioned reasons, the accused deserves to be acquitted of all the charges levelled against her. There is no cogent and convincing evidence to confirm the judgment of the Sessions Court. Therefore, we pass the following order:--

The appeal is allowed. The conviction and sentence of the appellant-accused under the impugned judgment and order dated 3rd May, 2006 passed in Sessions Case No. 15 of 2006 is quashed and set aside. The appellant shall be set at liberty forthwith, unless she is required in any other case. Fine, if deposited, be refunded to the appellant.