
(2014) 06 BOM CK 0128
In the Bombay High Court
Case No : Criminal Appeal No. 379 of 2010

Sou. Bismilla Ismail Mulani	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 11-06-2014

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 304-B, 307, 34, 498-A

Citation : (2014) ALLMR(Cri) 2750

Hon'ble Judges : P.V. Hardas, J; Anuja Prabhudesai, J

Bench : Division Bench

Advocate : Ujwal R. Agandsurve, Advocate for the Appellant; H.J. Dedhia, APP, Advocate for the Respondent

Final Decision : Dismissed

Judgement

P.V. Hardas, J.—The appellants, Original Accused No. 2-Sou. Bismilla Ismail Mulani and Original Accused No. 3-Mansub Ismail Mulani, who stand convicted for offence punishable u/s 302 read with Section 34, 498-A read with Section 34, 304-B read with Section 34 of the Indian Penal Code and sentenced to imprisonment for life and each accused to pay a fine of Rs. 1000/- in default of which to undergo further RI for three months, RI for one year and each accused to pay a fine of Rs. 500/-, in default of which to undergo further RI for one month and RI for seven years and each accused to pay a fine Of Rs. 500/- in default of which to undergo further RI for one month respectively, with a direction that the substantive sentences shall run concurrently, by the Additional Sessions Judge, Malshiras, by judgment dated 18/4/2010, in Sessions Case No. 83 of 2004, by this appeal question the correctness of their conviction and sentence. At the out-set, learned counsel for the appellants has tendered before us the death certificate of appellant no. 1-Sou. Bismilla Ismail Mulani, which is taken on record and marked "X" for the purpose of identification. In the light of the said certificate, therefore, the appeal filed by the appellant no. 1-Sou. Bismilla Ismail Mulani is dismissed as abated on account of death of appellant no.

1-Sou. Bismilla Ismail Mulani.

2. Facts in brief as are necessary for the decision of this appeal may be stated thus:-

The Investigating Officer, who had initially conducted the investigation i.e. API Chaugule, was not examined by the prosecution. It appears that on the basis of the report of the victim-Rehana, wife of accused no. 3-Mansub, an offence punishable under Sections 498-A, 307 read with Section 34 of the IPC was registered by the Velapur Police Station vide Crime No. 6 of 2004. During the course of investigation, a scene of the incident panchanama was drawn and from the scene of the incident, one plastic can containing kerosene, one match box and a red coloured stove was seized. Injured Rehana had been admitted in the Civil Hospital at Solapur. On 27/2/2004, PW5-Shivraj Mangule, Special Judicial Magistrate, received a communication from the Sadar Bazar Police Station for recording the dying declaration of Rehana. He accordingly went to the Civil Hospital and contacted the Medical Officer and requested him to ascertain the condition of Rehana to give her statement. The Medical Officer accordingly examined Rehana and opined that she was fit to give her statement and made an endorsement to that effect. PW5--Shivraj Mangule thereafter recorded the dying declaration of Rehana at Exh. 55. In the said dying declaration at Exh. 55, Rehana had disclosed that she had been married to original accused no. 3-Mansub six months prior to the incident. Rehana further disclosed that her mother-in-law, appellant no. 1, used to harass and ill-treat her and also used to assault her. Rehana also complained of assault by her husband, accused no. 3. About 15 days prior to the incident the husband of Rehana had left her at the house of her parents. Father of Rehana thereafter had taken Rehana to the house of the accused on 26/2/2004. At about 2 p.m. Rehana had been set ablaze after she was assaulted. On hearing her cries, her neighbours had extinguished the flames and Rehana had been admitted in the hospital at Velapur. According to her the entire incident was brought about by her parents-in-law and her husband. The dying declaration was read over to Rehana and Rehana had admitted the contents of the dying declaration to have been correctly recorded and thereafter a thumb impression of Rehana was obtained. On the next day Rehana succumbed to her injuries and an inquest panchanama was drawn in the presence of panchas at Exh. 67. The dead body of Rehana was referred for postmortem. Postmortem on the dead body of Rehana was conducted by the Medical Officer of General Hospital, Solapur. The postmortem report is at Exh. 68. The cause of death is shock due to 88% burns. Further to the completion of investigation, a charge-sheet against the three accused was filed. Original Accused No. 1--Ismail Aziz Mulani died during the pendency of the trial and, therefore, the trial was dismissed as abated as against him. During the pendency of this appeal. Original Accused No. 2 (appellant no. 1)--Sou. Bismilla Ismail Mulani also died and, therefore, the appeal has been dismissed as abated as against appellant no. 1-Sou. Bismilla Ismail Mulani.

3. On committal of the case to Court of Sessions, trial court, vide Exh. 20 framed charge against the accused for offence punishable under Sections 498-A read with Section 34 and 302 read with Section 34 as well as u/s 304-B read with Section 34 of the IPC. Prosecution, in support of its case, examined six witnesses. The defence of the accused was of denial. The trial court upon appreciation of the evidence convicted and sentenced the accused as afore-stated.

4. In order to effectively deal with the submissions advanced before us by the Mr. Agandsurve, learned counsel for the appellant and the learned APR, it would be useful to refer to the evidence of the prosecution witnesses.

5. Though prosecution has examined PW1-Satish, a witness to the scene of the incident panchanama, no reliance can be placed on his testimony as he did not support the prosecution and was declared hostile. PW2-Asha, a neighbour of father of Rehana deposes about Rehana being married to accused-Mansub and Rehana thereafter complaining about being assaulted by the appellant-Mansub on account of demand for a gold ring. Asha also deposes that Rehana had shown her the marks of injuries sustained by Rehana. Rehana stayed at the house of her father for about 15 days and thereafter went back to the house of her husband. On the next day, the father of Rehana was informed that Rehana was serious and therefore, PW2-Asha, along with other ladies, went to the hospital for seeing Rehana. Rehana had disclosed to her that all the accused had poured kerosene on her and her husband had held her, while her mother-in-law set her ablaze. Asha has been cross-examined and in the cross-examination she has admitted as true that when Rehana initially came to the house of her father, after her marriage, she did not complain against the accused. It has also been elicited in the cross-examination that when Asha had gone to the hospital, the accused as well as the parents of Rehana were present in the hospital. Apart from this, there is no effective cross-examination as regards the oral dying declaration made by Rehana to PW2-Asha.

6. Prosecution has examined PW3-Maula Shaikh, father of deceased Rehana, who also deposes about Rehana being married to accused-Mansub and also about Rehana residing with him about 15 days prior to the incident. He further deposes that Rehana had come to his house on three occasions after her marriage and was complaining about being assaulted by appellant-Mansub because of a demand for a gold ring. PW3-Maula also deposes that Rehana had disclosed to him that Rehana was starved by the accused and was not provided with proper food. He further deposes that about 15 days prior to the incident, the accused had assaulted Rehana and had brought her to his house. Rehana had informed him that she had been assaulted on account of a demand for a gold ring. On 26/2/2004 i.e. a day prior to the incident, PW3-Maula had taken Rehana to the house of her husband and had cautioned the accused not to harass Rehana. On 27/2/2004 at about 2.45 p.m. he had received a telephone call, informing him that Rehana was serious and was admitted in the hospital. PW3-Maula, therefore,

along with his wife and son went to the house of the accused, but found the house of the accused to be locked. He was informed by the neighbours that Rehana had been admitted in the Government Hospital at Velapur. He, therefore, went to the Government Hospital at Velapur and noticed Rehana with burns. Rehana had disclosed to him that the accused had poured kerosene on her, while she was being held by appellant-Mansub and her mother-in-law-Sou. Bismilla had set her ablaze. On hearing her cries, the neighbours had extinguished the fire. The Medical Officer at the hospital at Velapur advised PW3-Maula to shift Rehana to the Civil Hospital and, therefore, Rehana came to be admitted to the Civil Hospital at Solapur. Rehana succumbed to her injuries on the next day i.e. 28th February, 2004.

7. In cross-examination, he has admitted as true that the accused are in a better financial position than him. Though this witness has been cross-examined at length, nothing of substance has been elicited in his cross-examination which would in any manner affect the oral dying declaration of Rehana or the disclosures of ill-treatment made by Rehana to him.

8. PW5-Shivraj deposes about recording of the dying declaration of Rehana at Exh. 55. Again, despite being cross-examined, nothing has been elicited in the cross-examination which would affect the credibility of his evidence. The prosecution has examined PW6-Dr. Avinash Ghorpade who deposes about examining Rehana and endorsing about fitness of Rehana to give her statement. In cross-examination, Dr. Ghorpade has admitted as true that both the hands of Rehana were burnt, but were superficial to deep burns. He has admitted that when the dying declaration of Rehana was being scribed, apart from him and the Magistrate, no one else was present. He has admitted to have examined the blood pressure, temperature, pulse of the patient before opining that Rehana was in a fit condition to give her statement.

9. Mr. Agandsurve, learned counsel for the appellant, has urged before us that the dying declaration at Exh. 55 is completely contrary to the earlier dying declaration recorded by the police and which was treated as the First Information Report. It is, therefore, the submission of the learned counsel for the appellant that appellant-Mansub is, therefore, entitled to be given the benefit of doubt. The learned APP has urged before us for the dismissal of the appeal and has also urged that the so called first dying declaration of Rehana, which was registered as the FIR, has not been proved and consequently the recitals therein cannot be read in evidence. The learned APP has urged before us that the prosecution has clearly established and proved the dying declaration at Exh. 55, which proves the offence against the appellant beyond reasonable doubt.

10. The prosecution made no attempts at examining the police officer who had scribed the FIR which was based on the statement of injured Rehana. The accused also made no attempts at proving the said dying declaration, though, according to the accused, the contents of the dying declaration were supporting the defence of the appellant. Since the said dying declaration has not been

proved, no reliance can be placed and the recitals of the said dying declaration cannot be read in evidence. Prosecution has proved the scribing of the dying declaration at Exh. 55 by examining PW5-Shivraj who deposes about scribing of the dying declaration after obtaining the opinion of the Medical Officer regarding the fitness of Rehana to give the statement. PW5-Shivraj also deposes about reading over the dying declaration to Rehana and Rehana admitting the contents of the dying declaration to have been correctly recorded. Though Shivraj has been cross-examined at length, nothing of importance has been elicited in his cross-examination which would in any manner affect his credibility and render the dying declaration inadmissible in evidence. No other circumstances have been brought on record which would in any manner affect the dying declaration and consequently implicit reliance can be placed on the dying declaration at Exh. 55. Prosecution has also examined PW6-Dr. Ghorpade, who has deposed about examining Rehana and thereafter certifying that Rehana was in a fit condition to give her statement. The recitals of the dying declaration clearly point out that it was the appellant who had assaulted Rehana and thereafter had set her ablaze. The oral dying declaration made to the witnesses to that limited extent also corroborated the dying declaration at Exh. 55, though such corroboration is not necessary in law as we have found that implicit reliance can be placed on the dying declaration at Exh. 55. 11. The evidence of PW2-Asha and PW3-Maula clearly established the ill-treatment and the ingredients of the offence punishable u/s 304-B of the IPC. Deceased Rehana was ill-treated soon before her death because of demand for the gold ring. Despite cross-examination, the accused has not been successful in making any dent in the evidence of PW3-Maula regarding the ill-treatment and the demand for dowry. Thus the prosecution, according to us, has proved the offence against the appellant beyond reasonable doubt. The present appeal, which is devoid of any merit, therefore, deserves to be dismissed. Accordingly, Criminal Appeal No. 379 of 2010 is dismissed, confirming the conviction and sentence of the appellant.