
(2006) 12 BOM CK 0039
In the Bombay High Court
Case No : Criminal Appeal No. 291 of 1991

State of Maharashtra

APPELLANT

Vs

Harunbeg and Others

RESPONDENT

Date of Decision : 07-12-2006

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Penal Code, 1860 (IPC) — Section 201, 302

Citation : (2007) 2 DMC 382

Hon'ble Judges : K.J. Rohee, J;C.L. Pangarkar, J

Bench : Division Bench

Advocate : A.D. Sonak, app, for the Appellant; V.K. Gulhane, for the Respondent

Final Decision : Dismissed

Judgement

C.L. Pangarkar, J.—The respondents were acquitted by the Second Additional Sessions Judge, Wardha of the offences punishable under Sections 302, 201 of the Indian Penal Code. The State of Maharashtra, therefore, has preferred this appeal. The respondents shall hereinafter be referred to as the accused.

2. The facts giving rise to this appeal are as under:

Khairunissa - the deceased was married to accused No. 1 - Harunbeg. She has two children. She was living with accused Nos. 1,2 and 3 at village Ashti. One Tarannum Parveen the daughter of sister of the deceased was also living with the deceased on the date of the incident. On the date of the incident, accused No. 1 had gone to Talegaon to buy eggs. Since he did not get eggs, he came back home. After taking meals he went to the field. The complainant Tarannum Parveen, who was then aged 7 years also had her lunch with accused No. 1. After accused No. 1 went to the field, the accused No. 2 asked the deceased as to why she had prepared an omelet. She abused her in filthy language and said that she would burn her. Complainant Tarannum and the children of the deceased were playing in the house. When the deceased came near the water tank in the

courtyard the accused No. 2 fell her down and said that she would set her on fire. Accused No. 3 Raisabi caught hold of the legs of the deceased and juvenile offender Mussa caught hold of her hands. Accused No. 2 brought kerosene from the house and poured it on the person of the deceased and set her on fire. The deceased started shouting. The persons around came to spot. They put a quilt around the deceased and extinguished the fire. Thereafter, accused No. 2 went away to the field. Accused No. 1 came home and he told complainant Tarannum that if police come she should tell that the deceased caught fire while preparing tea on the stove. Later Tarannum Parveen went along with her grandmother to Nagpur. In the meanwhile, one Abdul Khalil (PW-1) had informed the police that Khairunissa had died due to burns. On this, a case of accidental death was registered. But after recording the statement of Tarannum Parveen, offence u/s 302 of the Indian Penal Code was registered by the police. The police recorded the statements of other witnesses. They had sent the body for post-mortem examination and on completion of investigation, charge-sheet was filed against the accused persons.

3. After committal of the case, the learned Sessions Judge framed the charge. The accused pleaded not guilty. Upon consideration of the evidence tendered before him, the learned Sessions Judge found that the prosecution had failed to bring home the guilt to the accused. He, therefore, acquitted all the accused. It is against this order of acquittal that this appeal has been preferred.

4. We have heard the learned Additional Public Prosecutor for the appellant/State and the learned Counsel for the respondents/ accused and have also perused the record.

5. The Courts have to be very slow in upsetting the judgment of acquittal. It is only if the conclusions of the Trial Court are found to be unreasonable, perverse or unsustainable that it can interfere with the order of acquittal.

6. In the present case, as many as thirteen witnesses were examined by the prosecution. The defence too has examined two witnesses.

7. It is the case of prosecution that the accused persons and one Mussa-the juvenile offender had collectively set the deceased to fire. In F.I.R. (Exh. 52) itself it is clearly mentioned that accused No. 1 had gone out and was not at home when the alleged incident took place. Even PW-10 - Tarannum Parveen deposes that accused No. 1 had gone to the field and was not at home. Thus, as far as accused No. 1 is concerned, we need not consider any other evidence. His absence at the time of the incident is amply proved.

8. The only witness, who claims to have actually seen the incident of setting fire to Khairunissa - the deceased is PW-10 -Tarannum Parveen. She was 11 years old on the date of recording her evidence. It appears that the learned Sessions Judge had questioned Tarannum and then administered oath to her. Her statement u/s 164 of Cr.P.C. was also recorded by the Judicial Magistrate a few days after the incident. She was then only seven years old. In any case she is a

child witness. Her evidence, therefore, needs to be considered with caution. While dealing with the child witness, the Court must see if there is a possibility of witness having been tutored or was any allurement offered to the witness. The children can be easily tutored and can be said to be susceptible to the allurement offered. Bearing this in mind, the evidence of PW-10 - Tarannum has to be dealt with.

9. PW-10 Tarannum has testified that on the date of incident she was at home and accused No. 1 had gone to Talegaon to bring eggs but since he did not get eggs, he came back. She states that he asked his wife Khairunissa to prepare tea and send it to the field and left for the field. It is in her evidence further that accused No. 2 - Khatunbi abused the deceased Khairunissa and went away and again came back to the house. She states further that Khairunissa-the deceased went to prepare the tea when accused Nos. 2 and 3 fell her down and Mussa Beg caught her legs. It is also stated that accused No. 2 then brought the kerosene Can, poured it on the person of deceased, lighted a match stick and set her on fire. She has stated further that Khairunissa was set to fire near the water tank in the court-yard and she was running helter-skelter. She states that she then raised cries and people gathered and one of them put a quilt around the person of Khairunissa and gave water to drink, Thus, the witness by her evidence is implicating only three persons. We have seen that the statement of witness u/s 164 of Cr.P.C. was recorded by the Judicial Magistrate on 13.8.1987. The incident is dated 9.7.1987. It is stated by PW-10 - Tarannum that the deceased was set on fire near the water tank. The said water tank is in the southern open courtyard. The spot Panchanama (Exh. 30) shows that the deceased was found dead in the open courtyard. But the contents of Exh. 30 - spot Panchanama falsify the statement of Tarannum. It is mentioned clearly that there was kerosene on the floor in the kitchen. One room in the kitchen was partly burnt and the pieces of burnt clothes were also found in the kitchen. These observations clearly show that the deceased was burnt in the kitchen and not in the courtyard at all. There are lot many omissions which amount to contradiction in her testimony. She was confronted with her two statements which were recorded i.e. one by Magistrate and other by Police. She had failed to tell the police while recording the statement that accused No. 2 had gone out and had come back again. She had also failed to tell so in the statement recorded by the Magistrate. She had further failed to tell the police as well as the Magistrate that she was asked by Khairunissa to play near the sewing machine. She admits that she did not tell Police while recording statement that after Khairunissa was burnt, she raised cries and people came. Further, she says that she had told the police and the Magistrate that accused No. 1 had said to her that Khairunissa had caught fire due to falling of the stove burner on her person. She was unable to assign any reason why such thing is omitted from her statements. She also denies to have told the Magistrate while recording the statement that one Ramu had given an allurement of award and she stated before the Magistrate as told by him. She stated that portion mark "A" in her statement u/s 164 of Cr.P.C. to the

above effect is not correct. All these omissions have been proved and the contradictions in the statement before the Magistrate need not be proved as that statement is exhibited. It is, therefore, apparent that the witness has given the improved version and contradicts her own statements before the Magistrate as well as the Police.

10. She has admitted in cross-examination that Babamiya, Sk. Nazir, Habibmiya, Ramu Wankhade and Rupla had come with her to Arvi when she was produced before the Magistrate for recording her statement. The fact that these persons v/ere with her and it is in her statement before the Magistrate that Ramu had given her allurements of reward definitely suggests that she was offered reward for making a particular statement before the Magistrate. This clearly shows that the witness was influenced by these people and she has at their instance implicated the accused persons. Precisely for this reason,, she cannot at all be safely relied.

11. There are other circumstances which suggest that the witness was not at all present at the house at the time of the incident and she is telling lies. For that, we have to look into the evidence of PW-4 - Sk. Nasir. He has deposed that he was sitting at the house of one Shaikh Bhura and the house of accused is just behind the house of Sk. Bhura. He states that he saw smoke at the house of the accused and went there. He states that he came near the back side door, knocked it and found it to be closed from inside. He further states that he, therefore, climbed the wall and took entry in the courtyard and saw the lady burning there. He further states that he, therefore, put a quilt around her to extinguish the fire and also poured water on her person. He further states that as asked by her, he gave her water to drink. He also has deposed that he did not notice anybody in the house. In cross-examination he tells that he went outside the house from the front door, which was also chained from inside and the back door was also chained from inside. This witness is not declared hostile by the prosecution. His evidence, therefore, has to be accepted as it is. If his evidence is accepted as it is, then it is clear that both doors of the house were chained from inside and none of the accused or even PW-10-Tarannum were inside. This evidence of PW-4-Sk. Nasir clearly excludes the presence of PW-10 -Tarannum on the spot. We have seen improvements made by her. We have also seen that allurements were offered to her. Her mother is the real sister of the deceased. There is, therefore, every possibility of the witness having been tutored. It appears that this Tarannum had not told anything about the deceased having been burnt to her mother PW-11-Tahirabee. Her statement was recorded by the Police immediately after the incident and she had not at that time told that the deceased was done to death. PW-11-Tahirabee's attention was, therefore, drawn to her previous statement wherein she had stated that she could not give proper statement before the Police. This particular portion was proved by P.S.I. Rajendra (PW-13) at Exh. 54. Had Tarannum seen the incident, she would not have failed immediately to disclose it to her mother. In fact, it appears that Tarannum had not told about the incident for two days to her mother. For this reason too, we find it would be absolutely unsafe to rely on her testimony.

12. The accused have examined two witnesses namely DW-1 - Laxman and DW-2 -Abdul. Though these witnesses are examined on behalf of the accused, they are very much the witnesses in the eye of law. The Courts cannot make distinction between the prosecution witness and the defence witness. The testimony of both must carry the same weight. DW-1 - Laxman has stated that accused No. 2 Khatunbi had come to his field at 9.00 a.m. for weeding operations. He states that at 5.00 p.m. one boy came to the field and told Khatunbi that her daughter-in-law was burnt. He also states that his field is two miles away. The testimony of this witness appears to be truthful for two reasons. Firstly because, PW-10 - Tarannum admits in her evidence that Khatunbi used to go to the field every day for work. If she was going every day for work in field, there was no reason for her to be at home on that particular day. The prosecution has not brought on record anything as to why accused No. 2 was at home on that day only. As far as Raisabi - accused No. 3 is concerned, DW-2- Abdul says she had come to his house of Kurankhani and she left around 3.00 p.m. The evidence of both these witnesses does inspire confidence because it has come in the evidence of PW-4 - Nasir that none of the accused was at home at the time of the incident. We have seen from his evidence that both doors were chained from inside. It is in the background of this evidence of Sk. Nasir that we do not find any difficulty in accepting the version of PW-4 as truthful. Furthermore, it is stated by Tarannum that she shouted as well as deceased shouted immediately after she was set to fire and people had gathered. If she had shouted and people had gathered immediately, it is difficult to believe that none of the accused was found at the spot. Had they really set the deceased on fire, the people would have, at least, noticed them fleeing away from the spot. None of the witnesses for the prosecution claims to have seen any of the accused near about the place of incident. There is, therefore, no evidence whatsoever to hold the accused guilty of setting the deceased to fire. On the other hand, there are circumstances which suggest that deceased must have set fire to herself. The learned Sessions Judge has rightly refused to put reliance on evidence of PW-10 - Tarannum and has in fact correctly appreciated the evidence. There is nothing to suggest that the conclusions as were drawn by the learned Sessions Judge, were unreasonable or perverse. Hence, the finding of the learned Sessions Judge that accused are not the authors of the crime is neither unreasonable nor perverse and in fact needs to be confirmed. Since the charge u/s 302 of the Indian Penal Code has failed, the charge u/s 201 of the I.P.C. must fail. There is, therefore, no substance in the appeal. It is accordingly dismissed.