

(2020) 01 BOM CK 0143
In the Bombay High Court
Case No : Criminal Appeal No. 720 Of 1999

State Of Maharashtra

APPELLANT

Vs

Kailash Sahadu Somvanshi

RESPONDENT

Date of Decision : 30-01-2020

Acts Referred:

Indian Penal Code, 1860 — Section 302, 307, 498A
Code Of Criminal Procedure, 1973 — Section 313
Evidence Act, 1872 — Section 32

Citation : (2020) 01 BOM CK 0143

Hon'ble Judges : S.S. Shinde, J, N.B. Suryawanshi, J

Bench : Division Bench

Advocate : V.B. Konde Deshmukh, Ujwal R. Agandsurve

Final Decision : Dismissed

Judgement

S.S. Shinde, J

1. The Appellant-State has preferred this appeal against the judgment and order passed by the learned Additional Sessions Judge, Niphad in Sessions Case No.31 of 1999 thereby acquitting the Respondent - Accused for the offence punishable under Sections 302 and 498-A of the Indian Penal Code (for short "IPC).

2. The Respondent - Accused has been charged for the offence punishable under Section 498-A of the IPC for subjecting Sunita, w/o Narayan Gunjal, who was brother of the wife of the accused to cruelty and harassment suspecting her chastity and further for the offence punishable under Section 302 of the IPC for committing the murder of said Sunita by setting her on fire.

3. The case of the prosecution, in brief, can be stated thus:-

Sunita was married to Narayan Gunjal, who is the brother of the wife of accused. The house of the accused is near the house of his in-laws at village Gunjalwadi. Accused Kailas used to oftenly visit the house of his inlaws and used to harass deceased Sunita and quarreling with her by suspecting her character. It is the

case of the prosecution that the accused also alleged that deceased Sunita cannot conceive a child. In the evening of 28/02/1999 at about 7.30 pm when Sunita and her mother in law Satyabhamabai were at their house, the accused went there and asked Sunita to obtain divorce as she could not conceive a child. It is alleged that in the meanwhile accused Kailas took a kerosene can and after pouring kerosene on the person of Sunita set her on fire and ran away. It is further the case of the prosecution that as soon as Sunita was set on fire, she went outside the house and extinguished the fire pouring water. She sustained 70% burn injuries. Thereafter her mother in law Satyabhama and husband Narayan called a rickshaw and carried her to dispensary of Dr. Gunjal at Vinchur. Dr. Gunjal advised them to shift her to Government Hospital, Nashik. Therefore, they hired a taxi and carried injured Sunita to Civil Hospital, Nashik, where Dr. Ashtaputre (PW-8) who was on duty at that time as a casualty officer got admitted Sunita and recorded history given by her. According to Dr. Ashtaputre, Sunita had sustained 70% burn injuries. He gave information to the police and, made arrangement to record her dying declaration. The Special Judicial Magistrate Shri Gholap (PW-11) visited the Civil Hospital Nashik and after verifying the condition of the injured recorded her dying declaration in presence of Dr. Ashtaputre, wherein deceased Sunita gave statement that her Nandoi i.e. the accused Kailas set her on fire. Thereafter on 02/03/1999 on the application of Sharad Godse, who is the brother of deceased Sunita, her second dying declaration came to be recorded by the Special Judicial Magistrate Shri Wagh (PW-12) in the presence of Dr. More (PW-9) wherein Sunita disclosed the name of accused Kailas only. Then again PSI Gavade (PW-13) also recorded the dying declaration of the deceased Sunita.

4. On the basis of first dying declaration (Exhibit 28), Crime No.30/99 came to be registered for the offences punishable under Sections 307 and 498-A of the IPC with Lasalgaon Police Station. Thereafter PSI Gavade investigated the matter, recorded the statement of Satyabhama and other witnesses and, on the same day arrested accused Kailas. During investigation, PSI Gavade seized the shirt from the person of the accused under panchanama (Exh.13), which was in partly burnt condition and having kerosene smell. Then at the instance of accused, on 04/03/1999 a kerosene can came to be recovered from the heap of stems near the house of accused.

5. On 04/03/1999 at about 12.30 noon Sunita died in the hospital. Therefore on receiving information about the death of Sunita charge under Section 307 of the IPC came to be substituted by Section 302 of the IPC.

6. The medical officer Dr. Mrs. Thakarey (PW-10) did autopsy over the dead body of Sunita and found 70% burn injuries. According to the doctor, the cause of death is, "due to septicemia due to 70% burns. Accordingly, the doctor issued post mortem notes (Exh.25) as also advance cause of death certificate (Exh.26).

7. On completion of investigation, PSI Gavade submitted the charge sheet in the Court of Judicial Magistrate First Class, Niphad. However, the charge under

Section 302 of the IPC is exclusively triable by the Court of Sessions, the learned Judicial Magistrate First Class, Niphad committed the case to the Court of Sessions.

8. Thereafter the learned Additional Sessions Judge, Niphad framed charge against the accused for the offences punishable under Sections 498-A and 302 of the IPC. The charge was read over and explained to the accused. The accused pleaded not guilty and claimed to be tried. The defence of the accused was of total denial. According to the accused, there is a dispute between him and the husband of deceased Sunita over the property of his in-laws. After the death of father in law of the accused, the accused and his wife were claiming the share of the wife of the accused in the property left by her father, and therefore, his brother in law Narayan managed to file this false case against him.

9. To bring home the guilt of the accused, during the trial the prosecution has examined in all thirteen witnesses in support of its case. The Trial Court has recorded statements of accused under Section 313 of the Criminal procedure Code. The learned Additional Sessions Judge, after considering the evidence on record and, the three dying declarations, came to a conclusion that the said dying declarations of deceased Sunita are the result of tutoring to her by her husband and mother in law. The learned Additional Sessions Judge observed that, it may be that the death of Sunita is accidental or suicidal or may be result of setting her on fire by her husband, mother in law in collusion with the accused, but on any count not by accused Kailas alone. The learned Additional Sessions Judge recorded a finding that the prosecution failed to prove beyond reasonable doubt that the death of Sunita is homicidal and further accused Kailas is responsible for her death. As stated herein above, the learned Additional Sessions Judge, by giving benefit of doubt to the accused, by the impugned judgment and order, acquitted the Respondent - accused for the offences punishable under Sections 302 and 498-A of the IPC. Hence this Criminal Appeal filed by the State against the said order of acquittal.

10. We have heard the learned APP for the Appellant - State and the learned counsel appointed for the Respondent - Accused. With their able assistance perused the grounds taken in the Appeal Memo, the evidence led by the prosecution, the documents produced on record, and the reasons recorded by the learned Additional Sessions Judge in the impugned judgment.

11. It is submitted by the learned APP that the learned Additional Sessions Judge has erred in acquitting the accused and not taking into consideration the material on record, and in discarding the evidence led on behalf of the prosecution. He submits that the learned Additional Sessions Judge has not applied his mind in appreciating the oral as well as documentary evidence on record. The learned APP further submits that the prosecution has proved the seizer of one Kerosene can. He further submits that there are three dying declarations which were recorded at different time by different persons in the presence of doctors or medical officers who were on duty at that time, and in all the three dying

declarations Sunita specifically named the accused and stated that Kailas poured kerosene on her person and set her ablaze, and therefore, the Trial Court ought not to have rejected the dying declarations on a technical ground. Therefore, the view taken by the trial court that the dying declarations are inconsistent, and they could not be relied upon, is contrary to record. He submits that as per Section 32 of Evidence act, dying declaration given by the victim on death bed is most reliable and important piece of evidence. It is submitted that the evidence of PW 4 and 5, who are the rickshaw driver and taxi driver, is reliable one as they carried the deceased to the hospital. He further submits that there is no iota of evidence to show the enmity between the husband of the deceased and the accused. The learned APP therefore submits that, the impugned judgment and order passed by the learned Additional Sessions Judge in Sessions Case No.31/1999 acquitting the Respondent - Accused from the offence punishable under Sections 302 and 498-A of the IPC is erroneous and is liable to be quashed and set aside. He further submits that the Appeal filed by the Appellant/State against the acquittal of the Respondent/Accused may be allowed.

12. The learned counsel, who has been appointed to represent the Respondent - Accused submits that, the prosecution has failed to bring home the guilt of the accused. It is also submitted that the dying declarations on which reliance was placed by the prosecution, are not corroborated by the cogent and sufficient evidence, and therefore, the trial Court has rightly refused to take into consideration the said dying declarations. He further submits that the Respondent - Accused has been falsely implicated in the commission of alleged offence as there is dispute between the accused and the husband of deceased Sunita over the property of in-laws of the accused. He submits that the PW Nos.4 and 5 are interested witnesses, and therefore, the Trial Court has rightly discarded their evidence. The learned counsel for Respondent - Accused further submits that the Respondent - Accused cannot be convicted on the basis of the said dying declarations which are not corroborated by the sufficient evidence. He also submits that there are contradictions and omissions in the evidence led by the prosecution to prove its case. The learned counsel for the Respondents - Accused submits that the learned Additional Sessions Judge after considering the evidence and material on record has rightly acquitted the accused. In support of the said contentions, the learned counsel for the Respondent - Accused sought to place reliance on the judgment of the Hon'ble Supreme Court in the case of State of Punjab v/s. Praveen Kumar (2005) 9 SCC 769 and Bapu (Nandu) Prabhu Koli @ Raut v/s. The State of Maharashtra 2019 ALLMR (Cri) 242. He lastly submits that the impugned order passed by the learned Additional Sessions Judge is well reasoned order and needs no interference at the hands of this Court. He therefore submits that the Appeal filed by the State may be dismissed.

13. In order to prove the guilt of the accused, the prosecution has examined thirteen witnesses. According to the prosecution, the three dying declarations of deceased Sunita are sufficient to prove the guilt of the accused because in all the three dying declarations Sunita specifically named the accused and stated that

Kailas poured kerosene on her person and set her ablaze. At this juncture, it is necessary to mention that the whole prosecution case is based on the said dying declarations given by the deceased Sunita in Civil Hospital to three different persons at three different time, when she was on the verge of death. According to the prosecution, the said dying declarations are corroborated by the prosecution evidence.

14. It is required to be noted that there are three dying declarations of Sunita (deceased). They are at Exhibits 28, 33 and 38. The first dying declaration of Sunita (Exhibit 28) was treated as FIR. The first dying declaration at Exhibit 28 was recorded by the Special Judicial Magistrate Mr. S S Gholap, the second dying declaration at Exhibit 33 was recorded by the Special Judicial Magistrate Mr. R W Wagh, and the third dying declaration was recorded by Police Sub Inspection of Lasalgaon Police Station. The first dying declaration at Exhibit 28 was recorded on the date of incident i.e. on 28/02/1999 at 11.30 pm. The second dying declaration at Exhibit 33 was recorded on 02/03/1999 at 6.20 pm, and third dying declaration at Exhibit 38 was recorded on 02/03/1999 at 8.00 pm. Except these three dying declarations, the prosecution has not brought on record any convincing and cogent evidence. The three dying declarations also do not inspire confidence for the following reasons. Firstly in the first dying declaration (Exhibit 28) Sunita stated that husband of her sister in law i.e. the accused always used to quarrel with her and used to say that she has extra marital relationship and therefore a divorce should be given to her. In the said dying declaration she further stated that her mother in law has not given any ill-treatment to her. She stated that the incident had taken place at about 7.30 pm. She stated that when the accused set her ablaze, at that time her mother in law was standing outside the house, and when she was set on fire, her mother in law came running and poured water and quilt on her person. She stated that at the relevant time, her husband was not available in the house. She is issueless. In so far as third dying declaration (Exhibit 38) is concerned, in the said dying declaration Sunita stated that Kailsash came to her house and stated that since Sunit is not able to conceive a child i.e. to give a birth of child, she should take divorce, and accordingly he quarreled with her and he poured kerosene on her person and set her ablaze. She stated that as her saree, blouse, and parkar (petticoat) were caught fire, she got burnt and therefore she ran away out of the house and poured water on her person from a jugs which was in the bathroom, and thereafter her mother in law Satyabhamabai Rangnath Gunjal and husband took her to taxi stand by a rickshaw, and from there she was taken to the hospital. It is important to note that in the first dying declaration (Exhibit 28) she stated that accused told her that she has extra marital affair outside and therefore a divorce should be given to her. Secondly she stated that the husband was not present at the relevant time in the house, and mother in law was standing outside the house, and she came running and poured water on her person to extinguish the fire. She also stated that the mother in law has not given any ill-treatment to her. However, in third dying declaration (Exhibit 38) she has given totally

different version, inasmuch as she stated that the accused said her that she is not able to conceive a child i.e. to give birth to a child, and she should take divorce. She further stated that the accused poured kerosene on her person and set her ablaze, and she ran out of the house, took water from the water jugs by a tin and poured water on her person. In the next breath she stated that her husband and mother in law took her to taxi stand by rickshaw and from there to the civil hospital. In so far as first dying declaration is concerned, she stated that husband was not present. She also stated in the first dying declaration that her mother in law came to extinguish the fire. However in the third dying declaration she stated that she poured water on her person to extinguish the fire. There is therefore material variance in the said two dying declarations.

In so far as dying declaration (Exhibit 33) is concerned, the said dying declaration was recorded by Special Judicial Magistrate in question and answer form. In the said dying declaration (Exh.33) she did not state what was the reason for pouring kerosene on her person and setting her ablaze by her brother in law i.e. the accused Kailash. She stated that when accused Kailash poured kerosene on her person and set her ablaze, at that time she came out of the house and she tried to extinguish the fire by taking the water from jugs i.e. water pot. However, in the said dying declaration (Exhibit 33) she stated that there was severe ill-treatment by her mother in law before the incident in question. In the said dying declaration she did not state the presence of her husband at the relevant time. She stated the presence of her mother in law only. As already discussed herein above, there is material variance in all three dying declarations.

15. Now coming the evidence adduced by the prosecution to prove its case. In the examination in chief the Special Judicial Magistrate Mr. S S Gholap (PW 10) stated that while recording the dying declaration, he asked the relatives of the patient as well as the doctor to go out side the ward. Normally while recording a dying declaration, presence of doctor is necessary so as to find out health condition of the patient, or whether the patient is conscious and is in a position to give dying declaration or not.

16. The prosecution has examined Dattu B Shinde - the taxi driver as PW No.4. In his deposition, PW-4 stated that Sunita told that her sister's husband (Nandoi) set her on fire by pouring kerosene. However, in his cross examination, PW-4 stated that at the relevant time he did not talk with the patient (Sunita), and secondly he stated that her health condition was not good. Therefore the evidence of PW 4 is of no use to the prosecution.

The prosecution has examined Ramesh Pandurang Salgude (PW 5). In his examination in chief, PW 5 deposed that on inquiry, Sunita told him that accused Kailas set her ablaze. However, in his cross examination he stated that he has not stated before the police while recording his statement that in the hospital at Vinchur Sunita told him that accused Kailas set her on fire. In that view of the matter, the evidence of PW-5 is also of no use to the prosecution so as to

corroborate the dying declarations of Sunita through this witness.

17. It is required to be noted that the prosecution claims that the brother of deceased Sharad insisted for recording of dying declaration of Sunita and on his application dying declaration (Exhibit 33) was recorded. However, surprisingly Sharad has not been examined by the prosecution. So also the husband of Sunita has not been examined.

18. The prosecution has examined Bhagirathabai Chandrakant Godse as PW-7, who is the mother of Sunita. In her deposition she stated that Sunita got married with Narayan of Gunjalwadi before three years. Sunita lastly had been to her house about eight days prior to the date of incident. That time Sunita demanded Rs.5,000/- from her saying that her husband asked her to bring amount from her (PW 7). However this witness (PW 7) showed her inability to pay the amount. Thereafter her daughter Sunita returned back to her matrimonial house. After eight days, in the night at about 8 pm Dilip Salgude of Gunjalwadi came to her house and told her that her daughter Sunita sustained burns and she is shifted to civil hospital, Nashik. Thereafter immediately she herself and her sister Punjabai Godse and Suresh who is the younger brother of her husband and her son Sharad went to civil hospital, Nashik. In the hospital she saw Sunita having burns all over her body. She asked the mother in law of Sunita, who was present there, as to how Sunita sustained burns but she did not reply and directly told her (PW-7) that she set her on fire and she (PW 7) may do whatever she can. Thereafter on inquiry with her daughter Sunita, Sunita told her that her husband, mother in law and Nandoi (i.e. husband of her brother's sister) set her on fire. Thereafter the mother in law, husband and the sister of the husband of her daughter left the hospital and went away. PW 7 stayed near her daughter in the hospital for three days. Sunita died in the hospital after three days at about 7 pm. She carried the dead body of Sunita to her village and performed last rites of Sunita. PW-7 further deposed that police recorded her statement in the hospital at Nashik after the death of her daughter.

In the cross examination, PW-7 stated that, when she went to the hospital, the mother in law of Sunita quarreled with her, asking her as to what she would have done, if she would not have brought injured Sunita to hospital.

She stated that when she went to the hospital her daughter was conscious and she was slightly talking. PW-7 admitted that there was dispute between herself and the persons of her village on one side, and the husband, mother in law, on other side. PW-7 further stated that the husband and mother in law of Sunita are responsible for her death. This witness volunteers that the husband, mother in law, husband's sister and the husband of sister of husband, they all are responsible. She waited for the husband and mother in law of Sunita for her funeral but they did not come. They also did not attend the 10th as well as 13th day of her ritual rites. It is important to note that in her cross examination, she stated that, "It is true that police asked me to disclose the name of accused Kailas and therefore I am saying name of accused Kailas"

It is evident from the evidence of PW-7 that police asked her to disclose the name of accused Kailas and therefore she disclosed the name of accused Kailas. She was not declared hostile. She is the mother of deceased Sunita. As already observed, in all alleged three dying declarations, the version of Sunita is inconsistent. There is no corroboration to the said dying declarations. PW-7 has completely demolished the case of the prosecution. It is surprising to note that at the time of incident i.e. 7.30 pm nobody saw the accused entering in the house of Sunita or coming out of the house of Sunita, and when Sunita came out of house by running, no any other person was present there, except her mother in law. As stated herein above, the mother in law of Sunita has not been examined by the prosecution.

19. In its entirety the prosecution case does not inspire confidence. It appears that the incident in question had taken place in the kitchen of the house of Sunita. Therefore the possibility of suicidal or accidental death cannot be ruled out. The accused in his defence stated that there was civil dispute between the parties which gave rise for falsely implicating the name of the accused by Sunita.

20. The Trial Court in depth has scrutinized the evidence adduced by the prosecution in support of its case and reached a conclusion that the alleged dying declarations do not inspire confidence. We have noticed that the Trial Court has meticulously dealt with the entire evidence of the prosecution and reached to a correct conclusion. The law is well settled that the view taken by the Trial Court thereby acquitting the accused cannot be lightly interfered into, unless the Appellate Court on re-appreciation of evidence comes to a conclusion that the findings recorded by the Trial Court are perverse and the view taken was not plausible at all.

21. In the light of the discussion made in the foregoing paragraphs, we are of the considered view that the Trial Court has taken a plausible view and has rightly acquitted the Respondent - accused. No case is made out for interference in the impugned judgment and order. There is no merit in the Appeal. Hence the following order:-

ORDER

a) Criminal Appeal No. 720 of 1999 stands dismissed. Bail bonds of the Respondent / Accused, if any, stands cancelled.

b) We appreciate the able assistance rendered by the appointed Advocate Mr. Ujwal R. Agansurve to espouse the cause of Respondent / Accused. We quantify his fees at Rs. 10,000 (Rupees Ten Thousand only) plus actual expenses borne by him. We direct High Court Legal Services Authority to pay his fees within four weeks from the date of receiving the copy of this judgment.