

(2016) 06 BOM CK 0106
In the Bombay High Court
Case No : Criminal Appeal No. 402 of 2014

Sukhchand Shambhuji Bhalavi

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 17-06-2016

Acts Referred:

Evidence Act, 1872 — Section 32 (1), 32(1)
Penal Code, 1860 (IPC) — Section 302

Citation : (2017) ALLMRCri 627 : (2016) 3 BomCR(Cri) 377 : (2016) 3 Crimes
127 : (2016) 4 MhLJCri 619

Hon'ble Judges : B.R. Gavai and V.M. Deshpande, JJ.

Bench : Division Bench

Advocate : S.M. Puranik, Advocate (appointed), for the Appellant; Mr. M.J.
Khan, Additional Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

V.M. Deshpande, J. (Oral) - Being aggrieved by judgment and order of conviction passed by the learned Additional Sessions Judge 6, Nagpur in Session Trial No.220 of 2009, by which the learned Judge of the Court below convicted the appellant for the offence punishable under Section 302 of the Indian Penal Code and directed him to suffer imprisonment for life and to pay a fine of Rs. 500/and in default of payment of fine to suffer simple imprisonment for one month, the appellant is before this Court.

2. The facts, in nutshell, which give rise to the present appeal are as under:

Deceased Kalpana was married with the appellant. Her marriage with the appellant was her second marriage, as well, the appellant's marriage with Kalpana was also second marriage. His first wife expired due to burn injuries.

Kalpana was having one daughter from her first marriage whereas, from the appellant she was having one son. The appellant used to work in Saw Mill. Marriage between Kalpana and appellant took place prior to two years of the

incident. The incident in question is dated 27th of December, 2008 in a night in between 12.00 to 1.00 a.m. Kalpana suffered severe burn injuries in the incident.

3. Suman Gedam (PW 6) is the mother of Kalpana. She was informed that her daughter is burnt. Therefore, she immediately rushed to the house of Kalpana, that time she noticed that Kalpana was in a burnt condition. She therefore made enquiries as to how the incident has occurred. That time Kalpana disclosed to her mother Suman (PW 6) that her husband, the appellant, poured kerosene from behind and set her ablaze and thereafter he ran away. When Suman was in the house of Kalpana, that time appellant was not available in the house. At 6.00 a.m. Kalpana was taken to the hospital.

4. On 28th of December, 2008, Deorao Bhokare (PW 7), Head Constable, was a Day Officer. Police Inspector informed him that a lady with burnt injuries is admitted in Mayo Hospital and her statement is to be recorded. Accordingly, Deorao gave a request letter (Exh.16) to Shri Tryambak Kamble (PW 2), A Special Judicial Magistrate, and requested him to record statement of Kalpana.

Thereafter, Deorao went to the Mayo Hospital. He contacted there attending doctor and gave him requisition (Exh.35) as to whether the patient is in a condition to give her statement. Medical Officer gave his opinion on the said letter itself and thereafter Deorao Bhokare (PW 7) went to the Ward where Kalpana was admitted. She was on Bed No.19. He recorded the statement of Kalpana who narrated the incident to him that the appellant came in a drunken condition in the night. He was served with the food by Kalpana. Thereafter, he went on cot. After some time, the appellant started giving abuses to her and again demanded food. That time, when Kalpana was taking food for him, the appellant came from behind and poured kerosene and set her ablaze. The statement recorded by Deorao of Kalpana was read over to her. The said statement is at Exh.36.

Deorao Bhokare, Head Constable, who recorded statement of Kalpana gave the same to Police Inspector, Kanhan who registered Crime No.242 of 2008 for the offence punishable under Section 307 of the Indian Penal Code. Printed FIR is at Exh.37.

5. In the meanwhile, after getting the information and after getting the requisition (Exh.16), Tryambak Kamble (PW 2), a Special Executive Magistrate also reached to the Mayo Hospital and he also recorded statement of Kalpana. The statement recorded by Tryambak Kamble (PW 2) is at Exh. 18. The said statement also reiterates that it is the appellant who poured kerosene on Kalpana and set her ablaze. During the investigation of Crime No. 242 of 2008 spot panchanama (Exh.12) was drawn in presence of panchas and also under seizure memo (Exh.43) various articles were seized from the spot.

6. During the treatment Kalpana died on 1st of January, 2009. The offence was, therefore, converted to offence punishable under Section 302 of the Indian Penal Code.

7. Case was committed to the Court of Sessions by the learned Magistrate after the charge-sheet was filed in his Court, noticing that the offence is exclusively triable by the Court of Sessions. Learned Additional Sessions Judge framed the charge against the appellant. The appellant denied the charge and claimed for his trial. The prosecution examined in all nine witnesses to bring home the guilt of the appellant. The appellant also examined two defence witnesses. The defence of the appellant is that of total denial. The learned Court below after appreciating the prosecution case convicted the appellant and sentenced to suffer imprisonment for life.

8. We have heard Shri S.M. Puranik, the learned counsel appointed to represent the appellant through Legal Aid and Shri M.J. Khan, the learned Additional Public prosecutor for the State. With the assistance of both the learned counsel, we have gone through the record and proceedings.

9. The submission of the learned counsel for the appellant is that the doctor, who gave endorsement that Kalpana was fit to give her statement, is not examined and therefore, the Dying Declaration cannot be accepted.

10. From the record it appears that the doctor who gave endorsement that the patient is in fit condition is not examined. Therefore, though at first blush the argument of Shri Puranik appears to be attractive, on the closer scrutiny of the record and on the touchstone of law laid down by the Constitution Bench of Hon'ble Apex Court, reported in (2002)6 SCC 710 (Laxman v. State of Maharashtra), the said submission is required to be rejected.

11. In the present case, there are three Dying Declarations of Kalpana. The first is the oral Dying Declaration made by Kalpana to her mother Suman Gedam (PW 6). Two other Dying Declarations are written Dying Declarations. They are Exh.18 made to the Special Executive Magistrate Shri Tryambak Kamble (PW 2) and Exh.36 recorded by PW 7 Deorao Bhokare, Head Constable, which is treated as First Information Report. Admittedly, Exh.36 was recorded earlier than Exh.18.

12. Evidence of Suman (PW 6) discloses that when after getting information that her daughter is burnt, she immediately rushed to the house of Kalpana. She made enquiries as to how the incident has occurred. On that, it was informed by Kalpana that it is the appellant who poured kerosene and set her ablaze and thereafter ran away.

Inquiring with daughter Kalpana by Suman in respect of incident is most natural. Thus, there is an immediate disclosure by Kalpana to her mother that the appellant is the author for burning. Further, when Suman visited house in the late hour of night the appellant was not found to be present in his house. There is nothing on record to disbelieve Suman's version. In fact, there is no cross-examination at all on the point of oral Dying Declaration to her or non-presence of appellant in the house. The presence of the appellant at the time of incident in his house is admitted by the appellant himself if his statement recorded under Section 313 of the Code of Criminal Procedure is, while giving answer to question

No.10.

13. Evidence of Deorao Bhokare (PW 7) shows that before recording statement of Kalpana (Exh.36) he ascertained that she was in a condition to give her statement and thereafter he recorded the statement.

14. PW 2 Tryambak Kamble, Special Judicial Magistrate, after getting the information and the requisition from Police Station Kanhan to record statement of Kalpana went to Mayo Hospital at Ward No.3. He gave request letter (Exh.17) to the House Officer to examine the fitness of Kalpana. He does not stop there. He then went to the patient and introduced himself. He then asked her relations and police to leave the Ward and thereafter he put certain primary questions to Kalpana to ascertain her fitness to give statement and when he himself was satisfied that she was in a position to give statement, he recorded her statement. Exh.18, a contemporaneous document, also shows that scribe Shri Tryambak Kambale asked the relations of the patient and police to leave the Ward and in order to ascertain that Kalpana was in condition to give statement, he put about eight questions to her and when he himself was satisfied, on the basis of the answers given to the questions, that she was in a condition to give her statement, proceeded further to record her statement. Statement (Exh.18) shows that the appellant is habituated to drinks. He used to return to house at 11 O'clock in the night under the influence of liquor and he used to maltreat Kalpana. On the date of incident also he came to the house under the influence of liquor. Food was served to him by Kalpana, that time her children were sleeping and the appellant started awaking them. When, that time, she obstructed the appellant, he gave abuses in the filthiest words. Thereafter, again appellant demanded food and when Kalpana was serving the food, that time he poured kerosene and set her ablaze and then ran away. The statement further states that Kalpana then contacted Shri Dhoke who made a phone call to Waghdhare, the Saw Mill owner, and then Waghdhare informed to her mother and thereafter her mother came.

15. Suman in her evidence also states that she received information from Waghdhare about the burning.

16. The Dying Declaration recorded by PW 2 Tryambak Kamble shows that the said was read over to the declarant and the declarant thereafter admits that the contents are true and thereafter her toe impression was obtained because of burning of her both the hands. The Post Mortem report (Exh.22) clearly show that both the hands of Kalpana were completely charred.

17. There need not be multiple Dying Declarations. A singular Dying Declaration, if it is free from clouds of suspicion and if it inspires confidence, can be the basis for convicting the perpetrator of the crime. In the present case, we noticed that the Special Executive Magistrate visited the hospital and he after ascertaining that Kalpana was in condition to give statement has recorded her statement. It is to be mentioned here that Dr. Supriya M. Parkhi, Medical Officer at Indira Gandhi

Medical College and Hospital (Mayo) was called as court witness along with bedhead ticket and OPD documents in respect of Kalpana. The said bedhead ticket is at Exh.54. The recitals in the bedhead ticket clearly rules out an accidental or a suicidal burn injuries. Noting on the bedhead ticket dated 28th of December, 2008 also shows that the patient was in a conscious condition and was oriented. It is to be noted that it was recorded on 28th of December, 2008 itself.

18. After perusal of both the written Dying Declarations it is clear that both the Dying Declarations are consistent in nature. Further, there is an immediate disclosure by Kalpana to her mother that it is the appellant who has poured kerosene and set her ablaze. The evidence of all the prosecution witnesses has not shattered at all during the course of their cross-examination. Therefore, on re-appreciation of entire prosecution case, we are of the view that at the appellate stage no interference is required. Hence, the appeal is dismissed.

19. Fees to be paid to Shri S.M. Puranik, learned counsel appointed by Legal Aid to represent the appellant, is quantified at Rs. 5000/.