

(2014) 07 BOM CK 0105
In the Bombay High Court
Case No : Criminal Appeal No. 186 of 2012

Sukhdeo

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 16-07-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 32
Penal Code, 1860 (IPC) — Section 302, 304, 307

Citation : (2015) ALLMR(Cri) 2580 : (2014) 3 BomCR(Cri) 805

Hon'ble Judges : M.L. Tahaliyani, J

Bench : Single Bench

Advocate : N.A. Badar, Advocate for the Appellant; A.K. Bangadkar, Additional Public Prosecutor, Advocate for the Respondent

Final Decision : Dismissed

Judgement

M.L. Tahaliyani, J.—The appellant has been convicted for the offence punishable u/s 304 Part-II of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for ten years and to pay a fine of Rs. 1,000/-, in default to suffer simple imprisonment for one month

2. The appellant was charge-sheeted for the offence punishable u/s 302 of the Indian Penal Code for having committed murder of his son. However, after conclusion of trial, the learned trial Court has convicted him for the offence punishable u/s 304 Part-II of the Indian Penal Code.

3. The prosecution case before the learned trial Court in brief was that the applicant was earlier married to one Sunita. He had divorced Sunita and was having live-in relationship with Revati from village Kokadi. She was being treated as second wife of the appellant. The appellant had two issues from the said second wedlock. The deceased Vishal was one of them. The other issue is Master Chhotu. It was also the case of prosecution before the learned trial Court that there was a dispute between Revati and the appellant and therefore, Revati had

gone to stay with her parents. Vishal and Chhotu were staying with the appellant.

4. The incident in question had occurred on 22-1-2010 at about 3-00 to 4-00 a.m. Brother of the appellant had seen that smoke was emanating from house of the appellant. He, therefore, rushed to the spot and found that Vishal was burning and shouting. The appellant's brother extinguished the fire. The deceased Vishal was admitted at General Hospital in Gadchiroli. It is alleged that Vishal had given a statement on 22-1-2010 at about 12-10 a.m. which was recorded by the Executive Magistrate. Deceased Vishal had stated in his statement that he was set on fire by his father after pouring kerosene on him from a kerosene lamp. An offence u/s 307 of the Indian Penal Code was registered against the appellant at Armori Police Station and further investigation continued.

5. Vishal died on 23-1-2010 due to burn injuries. Post-Mortem Examination was conducted by the Medical Officer. The Medical Officer had stated in his report that the deceased had died due to shock due to 70.5% burn injuries. During the course of investigation, statements of witnesses including Uncle of the deceased were recorded and after completion of investigation, charge-sheet was filed against the appellant.

6. A Charge u/s 302 of the Indian Penal Code was framed against the appellant by the trial Court. The appellant pleaded not guilty and claimed to be tried.

7. The defence of the appellant was of total denial. I have gone through the statement of the appellant recorded u/s 313 of the Code of Criminal Procedure Code and I find that the appellant has not taken any specific defence.

8. The prosecution had examined in all nine witnesses in support of its case. P.W. 1-Purushottam and P.W. 2-Damodar are brothers of the appellant. P.W. 3-Savita is wife of P.W. 1. P.W. 4-Revati is second wife of the appellant. P.W. 5-Shashikant Channawar is the Executive Magistrate who recorded statement of the deceased. P.W. 6-Dr. Tushar Ghodeswar is a Medical Officer who had examined dead body of deceased Vishal. P.W. 7-Govind Madne is the Police Officer who had recorded the First Information Report. P.W. 8-Vijay Deshmukh is the Investigating Officer and P.W. 9-Madhuri Weake is the Medical Officer who had certified the deceased to be in fit condition to give a statement of 22-1-2010.

9. P.W. 3 has been declared hostile. P.W. 1 has stated that the appellant is his eldest brother. He has further stated that the appellant had given divorce to his first wife Sunita. His wife Sunita and daughter from the said wedlock were staying at Vairagad separately from the appellant. The appellant had married Revati after two years. He has got two sons namely Vishal and Chhotu. Revati was not at home on the date of incident as she had gone to her parental house. P.W. 1 had seen that smoke was emanating from the house of appellant at about 4 O" Clock on 22-1-2010. P.W. 1 has further stated that P.W. 1 rushed to the spot and had seen that door was open and Vishal was burning. P.W. 1 had extinguished the fire and took the unconscious Vishal to the village Hospital.

Thereafter he was taken to Hospital of village Armori. Later on he was admitted in General Hospital Gadchiroli (a district place). The deceased Vishal died on the next date. It is further stated by P.W. 1 that the appellant was not at home when he had reached there. This witness was declared hostile by the prosecution. In fact it appears that the prosecution case was that the deceased had made a statement before this witness that he was set on fire by the appellant. This was not stated before the Court by this witness and therefore, he was cross-examined by the learned Additional Public Prosecutor with the permission of learned trial Court. The evidence of P.W. 2 corroborates the evidence of P.W. 1. This witness was also declared hostile for the reason P.W. 1 was declared hostile.

10. P.W. 3 did not support the prosecution case at all. P.W. 4 is mother of the deceased. She has stated that she was not at home on the date of incident. She was staying away from the appellant because the appellant was habitually drinking liquor and was beating P.W. 4. She had deserted the appellant about two months before the date of incident. She came to know about the incident from P.W. 1 and P.W. 2. She reached General Hospital, Gadchiroli. According to this witness, the deceased died after twenty-four hours of the incident. As far as cross-examination of this witness is concerned, there is nothing material brought on record, which can create doubt his testimony. Moreover, this witness is not eyewitness to the incident. Evidence of this witness establishes that she was not at home on the date of incident and that her two sons Vishal and Chhotu were staying with the appellant.

11. P.W. 5 had recorded statement of the deceased after obtaining certificate from the Medical Officer. According to this witness, deceased had told him that the appellant had poured kerosene on the deceased and set him on fire. This witness is clarified that the deceased used to call his father as "Dada" and that word "Dada" has been particularly used in the dying declaration. It is admitted in the cross-examination by this witness that relatives of the deceased were standing near him when he reached the hospital. He, however, has stated that they were directed to go away when he started recording statement of the deceased.

12. P.W. 6 is the Medical Officer, who had conducted Post-Mortem Examination. According to this witness, there were deep to superficial burn injuries to the extent of 70.5%. The deceased had died due to shock due to 70.5% mixed burn injuries. The Post-Mortem Report was produced at Exhibit 21 before the trial Court. There is no cross-examination of this witness.

13. P.W. 7 is the Police Officer who had recorded the First Information Report. The complaint of the complainant (P.W. 1) was produced at Exhibit 23 and First Information Report in printed proforma was produced at Exhibit 24.

14. P.W. 8 is the Police Officer who had carried out the investigation. This witness had prepared spot panchanama at Exhibit 13. According to this witness, he had seized the kerosene can, blanket, quilt, one piece of full pant and one chappal

from the spot. The spot of incident was shown by P.W. 1. The panchanama and seizure panchanamas are at Exhibits 29 to 32. Deceased died on 23-1-2010. During the course of investigation, the appellant was arrested by this witness. He had recorded statements of the witnesses and after completion of investigation, charge-sheet was filed in the Court.

15. Learned Counsel Shri N.A. Badar has submitted that since there was no eyewitness to the incident and since there is no corroboration to the dying declaration, it was unsafe on the part of the learned trial Court to convict the appellant for the offence punishable u/s 304 Part-II of the Indian Penal Code. It is submitted that though dying declaration can be basis for conviction, the court has to be on guard against the statement of the deceased being a result of torturing, prompting or product of his imagination. It is contended that the Court has ruled out the possibility of tutoring by relatives or imagination by the deceased. Shri N.A. Badar has relied upon the judgment of the Hon"ble Supreme Court in the case of K. Ramachandra Reddy and Another Vs. The Public Prosecutor, My attention is invited to paragraph 6 of the said judgment. Relevant portion of the said paragraph can be reproduced as under :-

The dying declaration is undoubtedly admissible u/s 32 of the Evidence Act and not being a statement on oath so that its truth could be tested by cross-examination, the courts have to apply the strictest scrutiny and the closet circumspection, to the statement before acting upon it. While great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person yet the court has to be on guard against the statement of the deceased being a result of either tutoring, prompting or a product of his imagination. The court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased had a clear opportunity to observe and identify his assailants and that he was making the statement without any influence or rancour. Once the court is satisfied that the dying declaration is true and voluntary it can be sufficient to found the conviction even without any further corroboration.

16. As such it is clear that the dying declaration does not need corroboration in all cases. If the court is satisfied with the correctness of the dying declaration, the conviction can be based on the basis of dying declaration only. Learned Counsel Shri N.A. Badar has submitted that there was every possibility of deceased being tutored by his relatives, particularly his mother Revati. His argument is based on the cross-examination of P.W. 9, the Medical Officer, who had given fitness certificate. It is admitted by this witness that Uncle of the deceased was present when the statement of deceased was recorded by the Executive Magistrate. Learned Counsel Shri N.A. Badar has invited my attention to cross-examination of P.W. 5 also where it was suggested that the relatives were present when the statement was recorded. If one goes through the cross-examination of P.W. 5, it can safely be said that Uncle of the deceased was

present when the statement of deceased was being recorded. However, the question, which arises for determination, is as to whether presence of uncle by itself will vitiate the sanctity of dying declaration. In my opinion, presence of relative by itself may not be sufficient to reject the dying declaration. There should be something on record that the relative of the deceased had in any manner tutored or influenced the deceased to give a particular statement. Unless there is evidence to suggest that there was interference on the part of the relative, the presence of relative itself cannot vitiate the dying declaration. In the present case, there is nothing more in the cross-examination except admission on the part of P.W. 9 that Uncle of the deceased was present when the statement of deceased was recorded. I do not think that admission on the part of P.W. 9 caused damage to the prosecution case.

17. Learned Counsel Shri N.A. Badar has also invited my attention to the dying declaration Exhibit 18. It was contended by Shri N.A. Badar that the words "Dada" and "Sukhdeo" are separate and therefore, the deceased meant to accuse brother of the appellant. I have carefully gone through the statement recorded by the Executive Magistrate and I do not think that there is any scope to accept the interpretation of the sentence in accordance with submission of the learned Counsel Shri N.A. Badar. In my opinion, the deceased had stated the word "Dada" and had specifically named his father in the dying declaration. The Medical Officer (P.W. 9) has clearly stated that the deceased was in a fit condition to make a statement. Certificate at the beginning of statement was exhibited at Exhibit 43 and certificate at the conclusion of the statement was exhibited at Exhibit 44.

18. None of the witnesses have admitted that the Uncle or any other relative had in any manner tried to influence the deceased. There was no contact between the Uncle and the Executive Magistrate. Therefore, it cannot be said that there was any attempt to tutor the deceased. There is no material on record that the deceased had given dying declaration on the basis of imagination. To my mind the dying declaration of deceased is true and voluntary version of his statement recorded by the Executive Magistrate in presence of Medical Officer. Such a dying declaration does not need any corroboration.

19. Careful examination of evidence of the Executive Magistrate P.W. 5 and careful reading of oral dying declaration reduced to writing at Exhibit 18 would establish that the appellant had poured kerosene on the deceased and had set him on fire. In fact it was a case of murder punishable u/s 302 of the Indian Penal Code. However, the learned trial Judge has opined that no father would have intention to kill his own son. It is because of this reason the learned trial Court instead of convicting the appellant for the offence punishable u/s 302 of the Indian Penal Code, has convicted him for the offence punishable u/s 304 Part-II of the Indian Penal Code. There is no appeal on the part of the State against the conviction. As such, I have come to the conclusion that the conviction of the appellant cannot be disturbed and it will have to be maintained.

20. As far as sentence is concerned, I do not find any reason for reduction in the sentence. The sentence is already in a reduced form because of conviction of the appellant u/s 304 Part-II of the Indian Penal Code instead of Section 302 of the Indian Penal. As such I do not find any reason to interfere with the order of the learned trial Court. Appeal deserves to be dismissed.

21. The appeal is dismissed.