

(2012) 12 BOM CK 0050

In the Bombay High Court

Case No : Criminal Appeal No. 885 of 2005 With Criminal Application No. 1083 of 2007 in Criminal Appeal No. 885 of 2005

Suresh Bira Kolekar Convict No. C/2391, Kolhapur Central Prison

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 06-12-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 302

Citation : (2013) 1 ABR 519 : (2013) 2 BomCR(Cri) 141

Hon'ble Judges : V.K. Tahilramani, J;A.R. Joshi, J

Bench : Division Bench

Advocate : Shekhar A. Ingawale, for the Appellant; D.P. Adsule, APP for the State, for the Respondent

Final Decision : Dismissed

Judgement

A.R. Joshi, J.—Heard rival submissions on this Criminal Appeal preferred by the appellant/orig. accused challenging the judgment and order of conviction dated 15th October, 2003 passed by the Ist Adhoc Additional Sessions Judge, Raigad-Alibag in Sessions Case No. 210 of 2002. By the said judgment and order, the appellant/accused was convicted for the offence punishable u/s 302 of IPC and was sentenced to suffer rigorous imprisonment for life and to pay fine of Rs. 5000/-, in default to suffer RI for one year. The case of the prosecution, in nutshell, is as under:-

The marriage between the deceased Sonali and appellant/accused Suresh Kumar was performed on or about 2nd December, 1999. Whereas the incident of burning the victim Sonali occurred on 6.8.2002. Sonali died of 99% burn injuries while taking treatment at Government Hospital on 10.8.2002. According to the case of prosecution, at the time of marriage appellant/accused had no job and it was decided that parents of the victim Sonali would take steps to get a job to her

husband i.e. appellant/accused. Accordingly by spending an amount of Rs. 50,000/- father of Sonali got appellant/accused employed as mathadi worker. It was also desire of appellant/accused that his brother would also be given job and for that purpose the parents of Sonali should take efforts and spend money. After the marriage though appellant/accused secured job through assistance of parents of Sonali, there used to be demands for money and for securing job to the brother of appellant. On this count, there used to be quarrels between the couple. That time, the couple was staying in one rented room along with their 1 1/2 year son. In fact the younger brother of appellant/accused also started residing with them. Under these circumstances of quarrels and ill-treatment, the fateful incident occurred on 6.8.2002. On that night appellant/accused returned from work. He was drunk. He started quarrel with his wife Sonali. He assaulted her. She asked him to take meals first and then to decide about the demand of money etc. Both of them took meal at about 11:30 p.m.. However, thereafter also appellant/accused started assaulting his wife Sonali. She requested him not to assault. However he did not listen and in stead poured kerosene on her person and set her ablaze. Sonali ran outside the house trying to save herself. So also she also tried to caught hold of her husband (appellant/accused) requesting him to save her. In that process, apparently appellant/accused had sustained some burn injuries about 6% to 7%. Unfortunately, the attempts of victim to save herself from the fire were futile. Noticing the commotion, neighbours gathered there. They extinguished the fire. Accused and one person by name Ramchandra Kale from the neighbouring place, took victim Sonali to Uran Hospital in rickshaw. She was immediately treated and then she was removed in ambulance to Navi Mumbai Municipal Corporation Hospital at Vashi. At the time of admission in the hospital at Vashi, appellant/accused gave history of suicidal burns, whereas on questioning by the attending Doctor Vivek Malpure, victim gave the history that her husband has set her on fire. As such in the medical case papers, there is an endorsement by the attending doctor mentioning both the histories-respectively given by appellant/accused and victim. The victim was immediately taken to Emergency Burn Ward for her treatment.

2. It is also the case of prosecution that initially Special Executive Magistrate PW-4 Nilam Jaysinghani attended the ward on intimation from the police and recorded dying declaration of the victim which is at Exh.30. Thereafter, according to the police PW-6 PSI Raghunath Pokale recorded another dying declaration at Exh.36. Apparently, both the dying declarations are in consonance with each other and indict appellant/accused as to pouring kerosene on the person of victim and setting her on fire.

3. The dying declaration recorded by PW-6 PSI Raghunath Pokale was treated as First Information Report and offence was registered against appellant/accused and investigation was started. PSI Nasir Khan Pathan (PW-5) took over the investigation when attached to Uran Police Station and conducted scene of offence panchnama and recorded statements of the witnesses. He also arrested appellant/accused when appellant was present in the hospital. Appellant/accused

was sent for medical examination as he had burn injuries on his person-mainly on hand. Three days after recording of the dying declarations, victim Sonali succumbed to the burn injuries in the hospital at Vashi and that time she was pregnant by five months. Inquest panchnama was conducted. Clothes on the person of victim were taken charge of. Seized articles were sent for chemical analysis. Postmortem report was obtained. After completion of investigation, charge-sheet was filed and matter was committed to the Court of Sessions which ended in conviction of the appellant, as mentioned above.

4. During the trial, total six prosecution witnesses were examined. Out of them, important witnesses are PW-3 Dr. Vivek Malpure, PW-4 Special Executive Magistrate Mrs. Nilam Jaysinghani and PW-6 PSI Raghunath Pokale. Their evidence is required to be scrutinized and dealt with in detail, in order to appreciate the arguments advanced on behalf of appellant/accused as to whether it is a case of suicide or homicide.

5. Pointing out the substantive evidence of PW-3 Dr. Vivek Malpure, PW-4 S.E.M. Mrs. Nilam Jaysinghani & PW-6 PSI Raghunath Pokale, it is strongly argued on behalf of the appellant that inter se there is variance in their evidence on the aspect as to at which places the dying declarations were recorded by Special Executive Magistrate Mrs. Nilam Jaysinghani and PSI Raghunath Pokale. It is further argued that Dr. Vivek Malpure (PW-3) had not given his endorsement at the starting of the dying declaration (Exh.30) and Exh.36 and as such it is doubtful whether the victim had given such dying declarations implicating appellant/accused (her husband). It is further argued that another factual position as to 99% burn injuries sustained by the victim is a circumstance by which reasonable doubt can be entertained whether the victim was in a position to give statement and to narrate the details as mentioned in Exh.36 (First Information Report). It is further argued that appellant/accused had also sustained about 6 to 7 % burn injuries mainly on his hand as he tried to extinguish the fire when apparently victim Sonali tried to commit suicide and in fact poured kerosene on her person, further argued.

6. While dealing with the arguments on behalf of appellant/accused as mentioned above, it can be seen that even PW-2 Shahabai Bakshi, mother of the victim has deposed regarding oral dying declaration made to her by victim Sonali. At the early hours on 7.8.2010 at about 2:00 a.m. she reached Uran and learnt that appellant/accused has taken the victim to hospital. Hence, initially she went to the local hospital at Uran and from there went to hospital at Vashi and noticed the condition of her daughter. That time, the patient was under treatment. However, she had told this witness that her husband has poured kerosene on her and set her on fire. She further told that her husband has ruined her and their son. Again according to PW-2 Shahabai Bakshi when she was at hospital at Vashi, one woman came and recorded the statement of her daughter. Apparently said woman was PW-4 Special Executive Magistrate Mrs. Nilam Jaysinghani. PW-2 Shahabai Bakshi also stated that police also came there and recorded

statement of victim. In our considered view, this is an intrinsic corroboration to the case of the prosecution inasmuch as recording of the statements by PW-3 & PW-4.

7. Again on this aspect of recording of statements of victim, the substantive evidence of PW-3 Dr. Vivek Malpure is of much importance. The evidence of said Doctor is reproduced hereunder :

The patient was brought at 2:45 a.m. Initially the husband gave the history that it was a suicidal burns at 10:30 p.m. when I asked the patient, she told me that she was burnt by the husband.

8. The medico-legal report was also brought on record which is at Exh.26 and which specifically mention the history given by present appellant/accused and also given by the victim. The entire report and contents of said medico-legal report are in the handwriting of said Dr. Vivek Malpure. In our considered view, again this evidence substantiates the case of prosecution as to appellant/accused setting the victim on fire by pouring kerosene on her person, however tried to submit that it is a case of suicide and he allegedly tried to extinguish the fire.

9. Again on the aspect of acceptance or otherwise of the written dying declarations Exh.30 & Exh.36, though it is brought on record through the substantive evidence of PW-3 Dr. Vivek Malpure that he did not give any endorsement as to the condition of the victim, on the dying declarations at the time of starting the recording, still as per the substantive evidence of PW-3 Dr. Vivek Malpure he had made such endorsement on the case papers regarding consciousness and orientation of the victim. Such endorsement given on the continuation sheet of the medical case papers of the date 7.8.2002 were identified by the witness as in his handwriting under his signature. The first endorsement is at 4:20 a.m. and second one is at 4:45 a.m.. These apparently are the timings when respectively both the written dying declarations were recorded as apparent from the substantive evidence of PW-4 SEM Mrs. Nilam Jaysinghani & PW-6 PSI Raghunath Pokale respectively. Though Ex.30 and Exh.36 do not show endorsement of the doctor at the beginning of starting of the dying declaration, that does not mean that there was no examination of the patient by the attending doctor and confirming the condition of the patient as oriented and conscious, as such endorsements are in the medical case papers and which are forming part of Exh.27.

10. During the arguments, as mentioned above, it was the defence raised on behalf of appellant/accused that it is a case of suicide. In order to ascertain the truth in the said defence, certain factual position can be mentioned : admittedly appellant/accused and his wife were staying together in the house along with their 1 & 1/2 year old son. Apparently it is not a case that small tender aged child was sleeping in another room away from the parents. Moreover it is not also the case that appellant/accused and his wife were also staying in different rooms. Then in that event, it is highly improbable that the victim Sonali while

sleeping with a small child and also with her husband in one room, all of a sudden getting up at the wee hours of the day i.e. in the midnight and pouring kerosene on her person and setting her on fire without there being no major injuries to her husband and no injuries at all to the small child. Though, it is the defence of appellant/accused that he tried to extinguish the fire and in that process received burns of about 6% to 7%, this defence is to be looked in juxtaposition of the circumstances narrated by the victim in her dying declaration that she tried to catch hold of her husband after he poured kerosene on her and set her ablaze and she tried to ask him to save her, however, he avoided and left her alone and in that process apparently he had sustained burn injuries not of huge magnitude, but only to the extent of 6% to 7%. Still another circumstance is required to be considered that there is nothing on record to show that the small child of 1 1/2 year then sleeping with parents had not sustained any injury. If the defence as to victim committing suicide is to be accepted, then definitely there would have some injuries to the small child and also probably severe injuries to appellant/accused if it accepted that he was sleeping in the same room and was unaware of the activities of his wife setting herself on fire. Another possibility as to not having much injuries on the person of appellant/accused can be visualized only when it would be the case of the appellant that he was well aware and awakened when his wife caught on fire. In that event also if allegedly it is a case of suicide then the awakened and alert husband would have tried to rescue his wife that also at the beginning of the act of suicide and in that event the victim would not have sustained 99% burns. In any way, the submission as to suicidal attempt of the victim has no merits. Otherwise also there is nothing brought on record or even during recording of the statement u/s 313 of Cr.P.C. to accept the said defence of suicide even on preponderance of probabilities.

11. Considering the effect of two written dying declarations and a oral dying declaration made to PW-2 Smt. Shahabai Bakshi and the history given by victim while her admission at the hospital at Navi Mumbai, we are of the considered view that there is sufficient corroboration to the contents of the dying declarations by substantive evidence of PW-2 Smt. Shahabai Bakshi & PW-3 Dr. Vivek Malpure. Otherwise also, there is no plausible explanation coming from the appellant/accused as to how his wife sustained burn injuries. The only hypothesis which can be gathered is the guilty of the appellant/accused for the offence of murder. In that event, we do not find any reason to interfere with the impugned judgment and order of conviction and accordingly there is no merit in the present appeal and the same is dismissed and accordingly disposed of. Criminal Application No. 1083/2007 is also disposed of as infructuous. This judgment and order be communicated to the appellant who is presently lodged in jail, through concerned jail authorities.