

(2014) 12 BOM CK 0134
In the Bombay High Court
Case No : Criminal Appeal No. 110 of 1996

The State of Maharashtra	Vs	APPELLANT
Madhukar Baliram Survase		RESPONDENT

Date of Decision : 22-12-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 302, 307, 34, 452, 498A

Citation : (2015) 1 BomCR(Cri) 563

Hon'ble Judges : S.S. Shinde, J; N.W. Sambre, J

Bench : Division Bench

Advocate : S.A. Ambad, Advocate for the Appellant; N.B. Ghute Patil h/f B.S. Ghute Patil, Advocate for the Respondent

Judgement

S.S. Shinde, J.—This appeal is filed by the State of Maharashtra, aggrieved by judgment and order passed by the 2nd Additional Sessions Judge, Osmanabad on 7th December, 1995 in Sessions Case No. 97/1993, thereby acquitting the Respondents for the offence punishable under sections 498A and 302 r/w 34 of I.P. Code and also acquitting the Respondent no.2 i.e. accused no.2 for the offence punishable under section 452 of I.P. Code.

2. The case of the prosecution, in brief, is as under :

(i) Indubai daughter of PW1 Murlidhar Dhargude r/o Mangrul was married with accused No. 1 prior to 7 years before her death. Indubai died on 12.05.1993. The house of accused No. 1 and 2 are adjacent to each other. They were having illicit relations. Indubai was knowing about the said fact. On said count, there use to be quarrel between the spouse. Accused No. 1 was asking Indubai to give divorce as he was intending to perform second marriage. Indubai was not ready for it. Indubai narrated this fact to her father. Lastly, Indubai met with her father on 25.04.1993 along with accused No. 1 at village Dhekari, where all of them went for marriage and there Indubai complained to her father that accused No. 1 is threatening to kill her by putting on fire and he is asking her to sign divorce

deed. At that time, her father told her that, he will come to their village after 56 days and will settle the matter. On 29.04.1993, Indubai came to her home from the field. She cooked food. Having worked for whole day in the field, she was tired and was taking rest as such went to sleep. At this time, accused No. 2 entered in her house, took bottle of kerosene, poured it on the body of Indubai and set her on fire. Indubai got awoken and started hue and cry. Accused No. 1 and neighbours gathered there and they extinguished the fire. She was taken to Civil Hospital, Osmanabad immediately by rickshaw. In the hospital, Dr. Janapurkar examined and admitted her. Doctor informed this matter to the Police. On this report, Head Constable Choure recorded statement of Indubai, after consulting Doctor. In that dying declaration, she narrated detail story of incident. This dying declaration was sent to Police Station Bembli under whose jurisdiction village of accused falls. On the basis of this dying declaration, Crime No. 29/1993 was registered, u/sec. 307 of I.P.C. against the accused. Its investigation was done by PSI Kondare. During the investigation, he found articles No. 1 to 8 at the place of incident. He searched house of accused No. 2 where photographs of accused No. 1 and 2 taken together, articles Nos. 9 to 11 was found. These photographs were seized vide panchanama. After the investigation was over, charge sheet was submitted against accused No. 1 and 2 u/sec. 498A, 302 r/w. 34 and 452 of the I.P.C.

(ii) Lower Court by its order dated 13.08.1993 committed this matter to the Court of Sessions. After appearance of accused before trial Court, charge was framed against them at Exhibit 7. Charge against accused No. 1 and 2 was put u/sec. 498A and 302 read with 34 of the I.P.C. and charge u/sec. 452 of IPC was also framed against the accused No. 2. Both of them pleaded not guilty. During trial, prosecution examined in all 11 witnesses. Statements of accused recorded u/sec. 313 of Cr.P.C. in which they denied evidence of prosecution.

(iii) On committal, the trial Court framed charges and after full fledged trial, the accused are acquitted. Hence this Appeal by the State of Maharashtra against the order of acquittal.

3. The learned Additional Public Prosecutor invited our attention to the Dying Declaration of Indubai (now deceased) and submits that, it is specifically stated in the Dying Declaration that, accused Subabai Pandhari Kamble came to the house of Indubai and poured kerosene from the kerosene bottle available in her house and set her on fire. It is submitted that, the said Dying Declaration is proved through the Police Officer, who recorded the same and also through the Medical officer, General Hospital, Osmanabad. The learned Additional Public Prosecutor also invited our attention to the evidence of other witnesses, spot panchanama, postmortem report and submits that, the appeal deserves to be allowed.

4. On the other hand, the learned counsel appearing for the respondents submits that, so far accused no.1 is concerned, no any overt act is attributed in the Dying Declaration. It is further submitted that, though the overact is attributed to

accused no.2 - Subabai, whether Subabai entered in the house of Indubai at the relevant time, is not stated by any other prosecution witnesses except Indubai. It is submitted that, it is not clear from the Dying Declaration that, whether Indubai saw Subabai entering in the house and pouring kerosene and setting her on fire since she was in sleep. The learned counsel further submits that, Dying Declaration alone cannot form basis for conviction in absence of corroboration to the version in the Dying Declaration. The learned counsel placed reliance on the judgment of this Court in the case of Ramesh Walsange, Suresh Walsange and Malanbai Vs. The State of Maharashtra, and submits that, the prosecution has not proved beyond reasonable doubt the Dying Declaration of Indubai, and therefore, the benefit of doubt should be given to the accused. He further placed reliance on the judgment of this Court in the case of Shakuntalabai Joshi and Manoj Joshi Vs. The State of Maharashtra, and submits that, the Dying Declaration itself cannot form basis for conviction without corroboration. He further submits that, the motive for commission of offence by the accused no.2 has not been established by the prosecution, and therefore, the accused are entitled for benefit of doubt and the trial Court has rightly acquitted them.

5. We have heard the learned Additional Public Prosecutor for the State and the learned counsel appearing for the original accused. With their able assistance, we have perused the entire evidence so as to find out whether the findings recorded by the trial Court are in consonance with the evidence on record or otherwise. It appears that, the Dying Declaration of Indubai at Exhibit - 23 is the main piece of evidence brought on record by the prosecution. So far actual incident of pouring the kerosene and setting Indubai on fire is concerned, no specific role or overt act has been attributed to the accused no.1 - Madhukar. It appears that, the alleged incident had taken place on 29th April, 1993 at about 9.30 p.m., as stated by Indubai in her Dying Declaration. Upon careful reading of Dying Declaration at Exhibit - 23, it appears that, Indubai stated that, she was residing along with her motherinlaw and husband separately from brotherinlaw. On 29th April, 1993 after completing housework she went to agricultural field for picking up remains of Hybrid crops. Her husband had gone to Tuljapur for the purpose of Bazaar. After completing the work in the agricultural field at about 5.30 p.m., she returned to the house. She cooked food for dinner. Husband returned back from Tuljapur at about 7.30 p.m. He had dinner and went outside. Thereafter, she decided to take dinner after some time as she felt exhausted on account of working for whole day as such, she slept in the house. At about 9.30 p.m. Subabai Pandhari Kamble residing in adjoining house of Indubai came to her house and poured kerosene on Indubai from kerosene bottle, which was available there in the house and set her on fire. Due to burns she got up and started making hue and cry and at that time, she saw Subabai W/o Pandhari Kamble running out of her house. The relevant and most crucial version from the Dying Declaration reads thus :

6. Upon careful reading of Dying Declaration at Exhibit - 23, it appears that, Indubai has not alleged or attributed anything against her husband so far as act

of pouring kerosene and setting her on fire is concerned. If the Dying Declaration of Indubai is carefully perused, it is not clear that, whether Indubai really saw Subabai Pandhari Kamble entering in her house, lifting the kerosene bottle available there and actually pouring kerosene and setting Indubai ablaze. As already observed, Indubai herself stated that, since she worked throughout the day, she was tired and therefore, she slept in the house. Upon careful perusal of the entire evidence placed on record by the prosecution, there is no single witness, who stated that, he/she saw Subabai Pandhari Kamble entering in the house of Indubai or going out of the house. According to Indubai, Subabai poured kerosene from the kerosene bottle, which was available in the house and set her on fire. However, there is no evidence on record showing any finger prints of Subabai on said bottle or any kerosene residues on the clothes of Subabai, so as to corroborate the version of Indubai that Subabai Pandhari Kamble entered in her house and poured kerosene from the kerosene bottle and set her ablaze and she ran away from her house. It appears from the version in Dying Declaration that, Indubai due to tiredness was in sleep at the relevant time, and therefore, same creates doubt as to whether Indubai really saw Subabai Pandhari Kamble entering in the house, pouring kerosene on the person of Indubai and setting her ablaze. There is no corroboration to the version of Indubai from any other evidence brought on record by the prosecution.

7. The motive of alleged commission of offence as has been stated by Indubai is that, accused no.1 Madhukar Baliram Survase had illicit relations with Subabai Pandhari Kamble and he wanted to perform second marriage. No satisfactory evidence has been placed on record by the prosecution that, really there were illicit relations between said Subabai and accused no.1.

8. It is true that, relatives of Indubai stated that, accused no.1 - Madhukar Survase used to harass and ill-treat Indubai on account of illicit relations with accused no.2, however, there is no convincing and sufficient evidence brought on record to prove the said illicit relations. It is true that, Investigating Officer recovered three photographs from the house of accused no.2, which were seized vide Article 9 to 11. Its panchanama at Exhibit - 25 was drawn. The statement of adjacent house owners were also recorded. The prosecution did not examine father of Indubai on ill-treatment though he stated in his evidence that, accused no.1 i.e. husband was asking her to give divorce. However, upon careful perusal of the Dying Declaration, nowhere it is stated by Indubai that, accused no.1 was involved in pouring kerosene on Indubai and setting her ablaze. There are no allegations of harassment and/or ill-treatment at the hands of husband. PW1 admitted in his evidence that, Indubai did not tell him that, accused no.1 i.e. husband poured kerosene on her person and set her on fire. If there was ill-treatment or harassment by the accused no.1 to Indubai, at least, cursory reference of such ill-treatment or harassment ought to have been stated by Indubai in her Dying Declaration. It appears that, PW6 was examined by the prosecution to establish illicit relationship between accused nos. 1 and 2. PW6 was a witness to spot panchanama at Exhibit - 21. In his cross examination he

stated that, accused no.1 and Indubai were living happily, therefore, the trial Court has rightly drawn inference that, the prosecution has failed to establish that the accused no.1 was ill-treating Indubai.

9. It is admitted position that, though Indubai survived for more than 12 days after the date of incident, Investigating Officer has not taken any steps to record her statement before Executive Magistrate. The trial Court observed that, the Dying Declaration was recorded at about 1.30 a.m. There were 60% burn injuries and in that condition, Indubai gave two pages Dying Declaration is also difficult to believe, and therefore, the trial Court observed that, it creates doubt about truthfulness of Exhibit - 23. The trial Court also observed that, from the evidence on record, it is not clear whether the death of Indubai was homicidal, accidental or suicidal. Upon careful perusal of the entire evidence on record, we are of the opinion that, the view taken by the trial Court is in consonance with the evidence brought on record. It is not necessary for us to elaborate on the evidence when we are in agreement with the findings recorded by the trial Court. Even if, it is assumed that, the Police Constable, who recorded the Dying Declaration at Exhibit - 23 and also the Medical Officer, who endorsed the same, were examined by the prosecution, there is doubt as to whether Indubai had really seen the accused no.2 entering in the house, pouring the kerosene from the kerosene bottle and setting her ablaze, and therefore, the view taken by the trial Court is a possible view. There is no other evidence brought on record by the prosecution except the Dying Declaration that, somebody saw Subabai entering inside the house of Indubai and going out.

10. Therefore, taking overall view of the matter, the view taken by the trial Court appears to be in consonance with the evidence on record. No case is made out for interference in the appeal. Hence appeal stands dismissed.