
(2012) 07 BOM CK 0097
In the Bombay High Court
Case No : Criminal Appeal No. 226 of 1999

The State of Maharashtra	Vs	APPELLANT
Natthu Thutarkar and Maroti Thutarkar		RESPONDENT

Date of Decision : 31-07-2012

Acts Referred:

Penal Code, 1860 (IPC) — Section 107, 306, 34, 498A

Citation : (2013) 2 ABR 1272

Hon'ble Judges : A.P. Bhangale, J

Bench : Single Bench

Advocate : R.A. Deshpande, app, for the Appellant; D.M. Surjuse, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Bhangale, J.—This appeal is directed against the judgment and order dt.4.5.1999 passed by the learned 2nd Additional Sessions Judge, Wardha in Sessions Trial No.133 of 1994 whereby the respondents/accused were acquitted of the offences punishable under Sections 498A and 306 of the Indian Penal Code. Heard the submissions at the bar.

2. The facts, briefly stated, are as under :

That the respondents/accused are real brothers while deceased Leelabai was wife of accused Natthu. They were married to each other prior to 19 years from the date of occurrence of the incident. Accused Maroti and Natthu were residing together. It is the case of the prosecution that deceased Leelabai was a vegetable vendor and the respondents/accused used to demand money from her as they were addicted to liquor. It is the case of prosecution that it became unbearable for the deceased to live happy married life. In the result, on 14.2.1994, at about 7.15 p.m., she poured kerosene on her body and set herself on fire. She suffered 99 % burn injuries even though her nephew by name Rupesh tried to extinguish fire and also sustained burn injures. She was removed to Rural hospital,

Hinghanghat. On the basis of her report, Crime No.32 of 1994 was registered, u/s 498A r/w. Section 34 of the Indian Penal Code against the respondents/accused and the investigation had started. It is also the case of prosecution that Head Constable Mr.Dewande (PW-8) recorded dying declaration of Leelabai as per Exh.31. Earlier PSI Sheikh (PW-7) had recorded the complaint (Exh.25) which was also treated as a dying declaration. The sum and substance of the prosecution case is that due to harassment of the respondents/accused and demand of money by me to consume liquor, Leelabai decided to end her life by setting herself on fire after pouring kerosene on her body. The incident occurred on 14.2.1994, while Leelabai died on 15.2.1994 at Medical College hospital at Nagpur. Thus, accusation u/s.306 of the Indian Penal Code was also added against the respondent/accused on the ground that because they used to quarrel with the deceased and demand money from her to consume liquor, it was unbearable for her to live happy married life and therefore, she committed suicide. The respondents were charge sheeted before the learned Judicial Magistrate, First Class, Hinghanghat, who committed the case to the Court of Sessions at Wardha. The charge was framed under Sections 498A, 306 r/w. Section 34 of the Indian Penal Code. The trial Court, after considering the evidence on record, held that the deceased Leelabai committed suicide. However, the trial Court disbelieved the prosecution case that the accused had subjected Leelabai to cruelty and furthermore that the accused abetted commission of suicide by Leelabai.

3. Ms R.A.Deshpande, learned Additional Public Prosecutor made a reference to the evidence on record and submitted that the learned trial Judge ought to have appreciated the entire evidence on record and considered the two dying declarations given by the alleged victim and also ought to have accepted the case of the prosecution on the basis of said dying declarations to convict the accused under Sections 306, 498A r/w. 34 of the Indian Penal Code. The learned A.P.P. invited my attention to two dying declarations which were recorded by PSI from Hinghanghat (as per Exh.25) and second dying declaration recorded by H.C. B.No.2780 from Medical Police Booth, Nagpur. It is the grievance of the appellants that both those dying declarations were discarded by the trial Court. The first dying declaration dt.14.2.1994 recorded at Highanghat Cottage hospital by the Police Officer begins with the endorsement as PSI Mohiddin Mehboob Sheikh (PW-7) has stated in his evidence that he gave requisition to Medical Officer to certify as to whether the patient is able to give statement. The Medical Officer examined the patient and issued the certificate that the patient is fit to give her statement and then he recorded the statement of patient Leelabai in presence of Medical Officer as per Exh.25.

4. Dr. Lalitkumar Dhanurdhari Khose (PW-10) stated that PSI Sheikh gave him requisition as per Exh.42 and he made an endorsement on it in affirmation. Though he further stated that, in the dying declaration (Exh.25), it is written that the Medical Officer examined the patient and issued certificate that the patient is fit to give her statement and he made such endorsement in the affirmative, yet

said dying declaration (Exh.25) contains only endorsement of doctor as . It may be noted that Dr. Madhav Gajananrao Raje (PW-9) deposed in support of post mortem notes (Exh.36). It does appear that the patient had died as a result of shock due to burns. Burns were 99 % total -all over head, neck, chest, abdomen, back, upper and lower limbs. Under these circumstances, when the patient had suffered 99 % burns, it is virtually impossible to believe that the deceased will give the statement as recorded in the recitals of Exh.25 in so much details mostly in the style of Marathi language ordinarily used by the policeman investigating a criminal case. There is no certificate appearing in Exh.25 to show as to whether the patient was in a fit condition to speak and give a statement, but there is mere endorsement that the statement was recorded in his presence. Dr. Khose did not give any certificate regarding fitness of the patient as claimed by Mr.M.M.Sheikh (PW-7). It appears that the dying declaration (Exh.31) bears thumb impression of the deceased, while the earlier dying declaration is claimed to have been signed by victim Leelabai. The question remained unanswered as to whether the alleged victim was able to sign. Both these dying declarations (Exh.25 and 31) are sought to be made a basis to pray for setting aside the impugned judgment and order on the ground that both the documents were discarded by the learned trial Judge.

5. It is settled legal position that the Court has to be on guard before accepting the evidence in the nature of dying declaration as it may be result of tutoring or it may be imaginary. It is surprising to see that the patients with 99% burns is giving a statement in the typical style of Marathi language of police investigating the case which itself in narrative form generates a doubt as to whether dying declaration is true and voluntary, particularly when no policeman who recorded dying declaration sought opinion of any doctor attending the patient regarding fitness of the patient to speak and give statement in the nature of dying declaration. Policeman investigating a case could have recorded dying declaration in question and answer form to eliminate any doubt as to it's genuineness. There was no reason as to why any responsible experienced person like Executive Magistrate or Honorary Executing Magistrate was not summoned to record dying declaration of Leelabai. Before the Court can accept dying declaration, it has to be satisfied that the same is voluntary, truthful and reliable and not a result of prompting or tutoring. It is necessary for the prosecution to prove that the patient concerned was conscious to give the statement and evidence of Medical Officer attending the patient is of vital importance to prove the fact that the patient was conscious and was in a fit condition to make a statement. The dying declaration is important piece of evidence and must inspire full confidence in the mind of the Court regarding its truthfulness and correctness if it has to be accepted as legal evidence. Multiple dying declarations which are inconsistent with each other would create further doubt regarding its truthfulness and as to whether the same were being made voluntarily by the patient. In such a case, if inconsistencies or discrepancies are noted in the cases of multiple dying declarations, it would not be safe to convict the appellant/accused on the basis of

such dying declarations. Therefore, in the present case, although Dr.Lalitkumar Khose (PW-10) was examined by the prosecution regarding endorsement made by him that dying declaration (Exh.25) was recorded in his presence, there is no specific certificate by the doctor to show that the patient was in a conscious and fit condition to give her statement. Dr. Lalitkumar clearly admits that, in Exh.25, he did not mention that he examined the patient and she was fit to give her statement. Under these circumstances, it is difficult to rely upon the dying declarations at Exhs. 25 and 31 on the record.

6. It is the next contention of learned A.P.P. that apart from the dying declaration there is an evidence led by the prosecution that the respondents/accused were in the habit of consuming liquor and they used to demand money from the deceased, due to which she decided to end her life. Considering the evidence on record, no material is found to attribute the acts as alleged on the part of respondents/accused so as to arrive at a conclusion that they had, by their such acts, abetted the deceased in committing suicide. Section 306 of the Indian Penal Code must be read along with definition of "abetment". u/s 107 of the Indian Penal Code -a person abets a doing of a thing, who -

First - Instigates any person to do that thing; or

Secondly -Engages with one or more person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

3) Intentionally aids, by any act or illegal omission, the doing of that thing.

The section has to be read along with two explanations which further clarifies that there has to be wilful misrepresentation or wilful concealment of material fact which a person is bound to disclose.

7. Thus, the offence of abetment has to be understood with any of above requisites on the part of offender. If the deceased, due to some stress or depression, decides to end her life on her own, in such a case, in the absence of evidence of instigation on the part of accused to urge, provoke or instigate or engage deceased to do an act, there would be no justification for convicting the accused for the offence of abetment to commit suicide because the deceased in a given case may be hypersensitive to ordinary opulence, discord or differences in domestic life which is quite common in the society. In the absence of guilty mind or evidence of mens rea as an essential ingredient for the offence of abetment of suicide, it is difficult to convict the accused for the offence punishable u/s 306 of the Indian Penal Code. There must be nexus between act or omission exhibiting the intention on the part of accused to bring about suicide by aiding or abetting the deceased to commit it. In the present case, merely because the accused were addicted to liquor and were demanding money to satisfy their habit could not be considered as adequate evidence to hold them guilty of the offence punishable u/s 306 of the Indian Penal Code. For all these reasons, no ground is made out to interfere with the impugned judgment and order of acquittal. Even

otherwise, when presumption of innocence in favour of the accused throughout the criminal trial is strengthened further by an order of acquittal then, unless there is very compelling reason for to interfere with the order of acquittal or unless the judgment and order impugned is perverse and unsustainable, there would be no justification to take another view merely because the other view is possible. For all these reasons, therefore, I do not find any reason to interfere with the impugned judgment and order. Hence, the appeal is dismissed.