
(2008) 07 BOM CK 0054

In the Bombay High Court

Case No : Criminal Appeal No. 311 of 1990

The State of Maharashtra

APPELLANT

Vs

Sanjay Apparao Raut

RESPONDENT

Date of Decision : 16-07-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 302, 354

Citation : (2008) 07 BOM CK 0054

Hon'ble Judges : P.R. Borkar, J;N.V. Dabholkar, J

Bench : Division Bench

Advocate : K.B. Chaudhary, Addl. P. P, for the Appellant; Sadhna Jadhav, for the Respondent

Final Decision : Dismissed

Judgement

P.R. Borkar, J.—This is an appeal by the State, being aggrieved by the judgment and order of acquittal passed by Additional Sessions Judge, Osmanabad, in Sessions Case No. 43 of 1989, decided on 30.8.1990, whereby present Respondent-accused is acquitted of the offence punishable under Sections 302 and 354 of the Indian Penal Code.

2. Briefly stated, the deceased Saraswatibai was the sister-in-law of present Respondent-accused Sanjay Apparao Raut. Husband of Saraswati, namely, DW-3 Dinkarrao was serving at the time of incident, at Omerga. Their marriage was performed 5-6 years before the incident that took place on the night between 11th and 12th April 1989. Saraswatibai had three children. The youngest one was four months old baby-boy at the time of incident. She had three brother-in-laws, namely, Bhaskar, Sanjay and Vijay. Since Dinkar was staying at Omerga for his services, deceased was residing with her in-laws, including the accused. On the night between 11th and 12th April 1989, after meals, Saraswatibai had gone to sleep. At about 2.00 a.m., Respondent-Sanjay is alleged to have come to her bed and requested her to allow him to have sexual intercourse. Since there was

no electricity at that time, a burning oil lamp (chimni) was kept on the cupboard. It is said that due to refusal by Saraswatibai to have sexual intercourse, Respondent-accused got enraged, took the oil lamp and threw kerosene from the same on the person of Saraswatibai and set her on fire. This is the version in FIR proved at Exh.29. Thereafter, on hearing shouts of Saraswatibai, her in-laws, neighbour Dada Sonawane and others came and fire was extinguished and she was shifted to the General Hospital at Osmanabad.

3. As per the prosecution case, Dying Declarations of Saraswatibai were recorded by Iqbal Hussain (PW-1) and Head Constable Borade (PW-4). When they recorded the Dying Declarations, Dr. Suresh Rankhamb (PW-2) was present. Prosecution desires to rely upon those two Dying Declarations and also on oral Dying Declarations made by deceased Saraswatibai before her mother Gajrabai (PW-7) and brothers Uttareshwar (PW-8) and Manmath (PW-9).

4. It is the defence of the Respondent-accused, as can be gathered from his written statement u/s 313 of the Code of Criminal Procedure, 1973, that on the fateful night, the deceased was sleeping with her three children. His mother was also sleeping near Saraswatibai. At about 2.00 a.m., there were shouts from the ground floor and, therefore, Respondent Sanjay, his brother Bhaskar and mother went to the ground floor room, which is by the side of the kitchen. The door was closed and, therefore, they gave kicks and opened the door. Saraswatiabi was on fire. They extinguished fire and took her to the hospital. Saraswatibai was mentally challenged. She was under treatment of Doctors from Solapur and Osmanabad. The Respondent stated that the Dying Declarations are false. Saraswatibai was of unsound mind and she was having 94 per cent burns and, therefore, was unable to talk. He, therefore, prayed for acquittal. In order to support his case, Respondent - accused has examined Dr.Moholkar (DW-1) at Exhibit 50, Dr.Chavan (DW-2) at Exhibit 52 and Dinkar (DW-3), husband of Saraswatibai at Exhibit 55.

5. The trial court disbelieved the Dying Declarations on the ground that they were not the Dying Declarations of a person having sound state of mind.

6. PW-1 Syed Syed Iqbal, Taluka Executive Magistrate, Osmanabad, has proved the Dying Declaration at Exhibit 23 and PW-4 Head Constable Vasant Borade proved Dying Declaration at Exh. 29. Both the Dying Declarations are almost identical. As per the Dying Declarations, when the deceased was asleep, at about 2.00 a.m., the Respondent - accused came to her bed and requested her to have sexual intercourse with her and since she refused, Respondent took a oil lamp (chimni), which was kept on the cupboard and set her on fire. She did not know who extinguished fire and took her to the hospital. Both the Dying Declarations are identical, except that in the statement before Taluka Executive Magistrate, it is stated that a burning oil lamp was thrown on Saraswatibai and as a result, she received burn injuries, whereas in the second Dying Declaration, it is said that kerosene from oil lamp was poured on the person of Saraswatibai and thereafter she was set on fire.

7. Apart from it, a serious doubt arises regarding whether really, statements of Saraswatibai were recorded by both, PW-1 Syed Iqbal and PW-4 Vasant Borade. Syed Iqbal in his deposition at Exh. 22, stated that, on 12.4.1989 at about 5.30 a.m. , he received a letter for recording a Dying Declaration. Thereafter, he reached at the general hospital at 7.00 a.m. The hospital was at a distance of about three furlong from his residence. PW-2 Dr. Rankhamb at Exhibit 25, stated that he was present at the time of both the Dying Declarations. He stated that he admitted Saraswatibai in burn condition at about 3.00 a.m. and that she had 92 per cent burn injuries. According to doctor Rankhamb, surviving chances were very less. Saraswatibai was admitted in burn ward. Dr.Rankhamb has proved endorsements made by him on both the Dying Declarations (Exhibits 23 and 29). According to him, patient was conscious and was able to give statement. He, however, stated that police recorded statement of Saraswatibai at 7.30 a.m. after the recording of Dying Declaration (by the Executive Magistrate). He was not present at the time of recording of complaint by police, but at that time, patient was conscious. He further stated that the Dying Declaration was recorded by the Executive Magistrate at 7.15 a.m. and he has written time below his endorsement, as 7./15 a.m. and not 5.15 a.m. The trial court has, however, held that the time written is 5.15 a.m.

8. In his deposition (para 1), Head Constable Borade stated that the Taluka Executive Magistrate came to the hospital at 5.30 a.m. and met the Medical Officer and went to the burn ward. Taluka Executive Magistrate recorded Dying Declaration of Saraswatibai and left the hospital. According to PW-4 Borade, after the Taluka Executive Magistrate left the hospital, he enquired about the condition of Saraswatibai and her capacity to make the statement. According to him, he completed recording of her statement between 7.15 a.m. to 7.30 a.m. He also deposed that the Executive Magistrate recorded the Dying Declaration from 7.00 a.m. to 7.15 a.m.

9. However, in his cross examination, PW-4 Borade again stated that the Executive Magistrate went to the burn ward along with Medical Officer and was in the hospital from 5.30 a.m. to 7.15 a.m. Therefore, question arises as to why there is such a discrepancy. If the Executive Magistrate had been to the hospital at 5.30 a.m.,in that case, the possibility of doctor making an endorsement at 5.30 a.m. is probable. But, in that case, question also arises as to why statement was not immediately recorded, or is it a case in which the doctor made some endorsement on the statement, without being actually present when it was recorded.

10. At Exh.26, Dada Surwase (PW-3) is examined. He is neighbour of the Respondent - accused. He deposed that, on 11.4.1989, at about 2.00 a.m. to 2.30 a.m., he heard shouts and, therefore, went to the house of Apparao. Apparao's daughter-in-law was set on fire. Initially, he stated that he tried to extinguish the fire, but subsequently denied to have extinguished the fire. In cross examination, he stated that he had accompanied the deceased to the

hospital. In cross-examination, he stated that, his mother and other women had gathered on the spot and they asked Saraswatibai as to how she caught fire, but she did not answer. He also stated that Bhaskar and other persons from the house of Saraswatibai had extinguished fire.

11. The prosecution also relied upon oral Dying Declaration made by the deceased before her mother PW-7 Gajrabai, and brothers Uttreshwar and Manmath (PWs-8 and 9). All of them have stated that on hearing news regarding burn injuries to Saraswatibai, they came to Osmanabad and met her in the hospital. According to them, Saraswatibai told them that the accused-respondent had come to her bed at night and requested to satisfy his lust and when she refused, he threw oil lamp on her person and as a result, she sustained injuries. In the cross examination of these witnesses, omissions were brought on record that they did not state in their police statements that Saraswatibai had told them that the respondent-accused had thrown burning oil lamp on her person, as a result of which she sustained burn injuries. In his cross examination, PW-8 Uttreshwar (Exh.33) has admitted that when he had been to the hospital, Saraswatibai was unconscious, but she was talking. He again repeated that Saraswatibai was talking, even though she was unconscious. So, that raises a serious question whether really Saraswatibai was in a position to make a statement.

12. In order to prove that Saraswatibai was suffering from mental illness, Dr.Moholkar (DW-1) is examined at Exhibit 50. He deposed that since 1970, he has been practising as a consulting psychiatrist at Solapur. He was shown a prescription and various receipts of purchase of medicines bearing his name as doctor who prescribed the medicines and he admitted that he had examined Saraswatibai on 22.12.1988, 2.1.1989, 16.1.1989 and 2.2.1989. He also deposed that, Saraswatibai was suffering from schizophrenic depression and was under his treatment upto 2.2.1989. It may be noted here that, the incident occurred on the night between 11th and 12th April 1989. The Doctor deposed that he had advised Saraswatibai to undergo Electro Convulsive Therapy (E.C.P.) treatment and had asked her to return 15 days after 2.2.1989. He further deposed that the person suffering from schizophrenic depression, suffers from disturbance in thinking and also in behaviour and that such patient may develop suicidal tendency. It is true that, Dr. Moholkar has admitted in his cross examination that he did not record the history of Saraswatibai in writing and that he did not maintain her separate case papers.

13. At Exhibit 52, there is a deposition of DW-2 Dr.Chavan, attached as Medical Officer to the General Hospital, Osmanabad, since 9.9.1988. He stated that the husband of Saraswatibai had brought her to him. He had examined and gave treatment to her. Dr.Chavan noticed that the patient was having history of delivery of a child 2-3 months prior to the incident. However, she was not recognizing her child nor feeding the baby and her behaviour was not normal. He concluded that she was suffering from psychosis. He gave prescription, which is

proved as Exhibit 53. Dr.Chavan stated that subsequently, Saraswatibai had contacted him in the Civil Hospital. At that time she was violent. Therefore, he diagnosed her as the patient suffering from partem psychosis and advised her to go to psychiatrist for better treatment. Dr. Chavan had issued the certificate, which is proved at Exhibit 54.

14. DW-3 Dinkar Raut, the husband of Saraswatibai, deposed that he was serving at Omerga, since 1988. He had joint family and his father was serving at Bhoom. His mother, brothers, wife and children were all residing at Osmanabad, as joint family. He has two sons and a daughter and the last issue is the male issue born in October 1988. Saraswatibai was suffering from psychosis. He deposed about the treatment taken by his wife from Dr. Chavan and Dr. Moholkar. He further stated that his wife was behaving abnormally. She was not feeding her child and was also saying that she desired to die. Dr. Moholkar had advised E.C.P. treatment to her. However, Dinkar consulted his father-in-law who refused to consent for the same. Father-in-law told him that Saraswatibai would not survive, if such treatment was given to her. DW-3 Dinkar further stated that at the time of incident, he was at Omerga and came to know about the incident on 12.4.1989 at about 10.00 a.m. and reached Osmanabad at about 12.30 p.m. He saw injured Saraswatibai, who was not in a position to talk. He proved application (Exh.56) given by him to Zilla Parishad, Osmanabad, for his transfer from Omerga to Osmanabad. The original application is at Exhibit 56, which states the mental illness of his wife as one of the grounds for seeking transfer to Osmanabad. The application is dated 14.3.1989, which is about a month prior to the incident.

15. Some of the probabilities need to be taken into consideration. In the first place, if really the respondent-accused, who is brother-in-law of Saraswatibai, had attempted to misbehave with her and that was the cause for the incident, ordinarily DW-3 Dinkar-the husband of Saraswatibai- would not have condoned such an act on the part of Respondent, although he is his brother. Dinkar would not come forward to depose as witness for the defence.

16. Secondly, Saraswatibai has a child of four month and ordinarily, the child would be with mother in the bed. But, the circumstances and evidence on record do not indicate where was the child. Moreover, the marriage of Saraswatibai has taken place 4-5 years prior to the incident and obviously, her other two children must be very young and as such, ordinarily; they would also sleep with her.

17. The panchanama of the place of offence is duly proved by PW-10 PSI Shankar Darandale (Exh.36) in his examination-in-chief, although that is not exhibited. We find that at the place of incident, which a room of 5' x 7' size near kitchen, there was a plastic glass containing some kerosene. There was also one small oil lamp with little kerosene in it and both these articles were in the second shelf of the cupboard. Nowhere, Saraswatibai had made reference to this plastic glass containing kerosene. We wonder, whether little kerosene in small oil lamp, would be sufficient to cause 92% burn injuries. It does not appear from the spot

panchanama, which is drawn on 12.4.1989 between 8.00 a.m. to 9.00 a.m., that there was any bed.

18. Smt. Jadhav, learned Counsel for the respondent-accused, relied upon Uka Ram Vs. State of Rajasthan, . In the case cited, Dying Declaration was made by deceased-wife and despite knowing that the deceased - wife was mental patient, no steps were taken by investigating agency to ensure whether the incident was suicidal or homicidal. Probability of deceased committing suicide was not eliminated. In the reported case, the Medical Officer only stated that the deceased was physically able to make statement but he did not state her mental condition. Mental condition of the deceased was held doubtful and, therefore, benefit of doubt was given to the husband-accused. The second case cited is Dandu Lakshmi Reddy Vs. State of A.P., . In that case, the father and the mother of the deceased stated that the deceased had not been mentally sound. It was observed in paragraph 22 that, a criminal court cannot ignore the said evidence. If the court has even a slightest doubt about mental soundness of the author of the dying declaration it would be unsafe to base a conviction on such a statement.

19. For all the foregoing reasons, in our opinion, it is unsafe to base conviction on the Dying Declarations, oral as well as those recorded by the Executive Magistrate and the Head Constable, especially when they are pitted against defence of unsoundness of mind of deceased Saraswatibai. The defence evidence shows that Saraswatibai was under medical treatment from December to February and required further treatment, which was not given. So, considering all these circumstances, we do not find this to be a fit case for interference with the decision of the trial court. Taking into consideration all above said circumstances, in our opinion, the view taken by the learned Additional Sessions Judge, in accepting the defence theory, cannot be said to be improbable or unreasonable.

20. In the result, appeal stands dismissed. Bail bonds of the accused stand cancelled.