

(2014) 12 BOM CK 0149
In the Bombay High Court
Case No : Criminal Appeal No. 368 of 1995

The State of Maharashtra	Vs	APPELLANT
Soma Laxman Nikam		RESPONDENT

Date of Decision : 24-12-2014

Acts Referred:

Penal Code, 1860 (IPC) — Section 302

Citation : (2015) ALLMR(Cri) 3032 : (2015) 1 BomCR(Cri) 650

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

Bench : Division Bench

Advocate : S.D. Kaldote, APP, Advocate for the Appellant; A.R. Syed and S.P. Brahme, Advocate for the Respondent

Judgement

S.S. Shinde, J.—This Appeal is filed by the State, challenging the Judgment and Order of acquittal dated 25.09.1995 passed by the 4th Additional Sessions Judge, Jalgaon in Sessions Case No. 124 of 1992, thereby acquitting the accused for the offence punishable under Section 302 of the Indian Penal Code.

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

The case of the prosecution is that the deceased [a deserted married woman] was residing with her parents at Fekari. The parents of deceased agreed to purchase a house and earnest amount Rs. 2,000/-was paid. But sale deed was not executed. Accused are related to both purchaser and seller. A serious dispute arose in between deceased and her family members and accused. Due to this, accused on 14.08.1991 around 2.30 set the deceased on fire resulting in her death. She was taken to Hospital by her grandmother and other relatives. She died on 15.08.1991. Two dying declarations were recorded; one by Police Head Constable and other by Executive Magistrate. The Sessions Judge by Judgment dated 25.09.1995 acquitted the accused of charges. The same is subject matter of challenge in this Appeal.

3. The prosecution examined 12 witnesses. The dying declarations are at

Exhibit-28 and Exhibit-35. Exhibit-28 is recorded by PW-9, Police Head Constable. Exhibit-35 is recorded by the Executive Magistrate, Bhusawal.

4. The learned Additional Public Prosecutor appearing for the State submits that, both dying declarations given by the deceased are reliable. The dying declarations are proved through Executive Magistrate and the Medical Officer. There are attending circumstances which would unequivocally indicate that, the respondent was responsible for the death of the deceased, and therefore, this Appeal deserves to be allowed.

5. The learned counsel appearing for the respondent submits that, the witnesses did not support prosecution case. PW-1 to PW-7 are declared / turned hostile. They are parents and grand mother of deceased and panch witnesses. There is no corroboration by independent evidence. It is further submitted that, there is no corroboration to the dying declarations. The medical evidence does not support the prosecution case. There are material discrepancies in dying declarations, which are as follow:

(i) Dying declaration at Exh.35 has no endorsement of read over and explained. It is not admissible in evidence.

(ii) Dying declaration at Exh.28 PW-9 completed the recording of statement within 10 minutes and return of Police Station @ 3.45 p.m. Whereas remark of fitness by PW-8 is @ 4.10 p.m. Therefore, it is also not reliable.

(iii) Exhibit-28 does not inspire confidence. The PW-8 did not physically examine the deceased. Only few questions were put to her. It is not sufficient.

(iv) PW-8 Doctor did not examine deceased before recording dying declaration at Exh.28.

(v) It's a case of 100% burn injuries. She was not mentally fit to depose anything. Both the lungs were congested. Larynx, Trachea and Bronchi were congested. Respiratory system was totally affected. Hence, the certification about the condition of deceased at said point of time by Doctor was minimum required.

(vi) The thumb impression was obtained on Exh.28. 100% burns thumb impression not acceptable.

6. It is further submitted that, the physical condition of deceased can be observed from following:

i] Inquest panchanama 100% burn injuries.

ii] P.M. report Exh.24 100% burns, all body parts congested.

iii] Column No. 20 of P.M.report both lungs congested, Larynx, Trachea and Bronchi were congested. The recording of any statement was not believable.

7. It is further submitted that, the medical history is not reliable, it states that,

her grandmother brought her to Hospital. Whereas PW-8 states that, Govind Tayade's name as close relative is noted in medical history and he brought her. Govind Tayade is not relative of deceased. It is further submitted that, the brother in law of accused was not examined. The wife of accused is also not examined by the prosecution.

8. It is further submitted that, the real maternal uncle because of some civil transaction with the parents of deceased killed his niece, cannot be accepted. There is no evidence brought to prove the motive. It is further submitted that, the following circumstances are against the prosecution:

i] The deceased was married and deserted woman.

ii] Clothes were not seized.

iii] Ramnath Pradhan brother in law of accused and wife Sonabai were not examined.

9. It is further submitted that, there is no corroboration to the Exh.28 and Exh.35. The surrounding circumstances of Exh.28 and Exh.35 are suspicious. Therefore, Exh.28 and Exh.35 cannot be relied upon. It is further submitted that, the Sessions Judge after considering the evidence on record gave detailed findings from paragraph Nos.119 to 124 and has taken a probable and possible view, therefore, it is prayed that the same may kindly be maintained.

10. We have heard the learned Additional Public Prosecutor for the Appellant State and the learned counsel appearing for the respondent, perused the original record so as to find out correctness of the findings recorded by the trial Court and the Judgments cited by the counsel appearing for the parties across the bar. The prosecution examined 12 witnesses. However, PW-1 to PW-7 turned hostile. Unfortunately, father, mother and grandmother of the deceased Sunanda also turned hostile. The prosecution case rests upon two dying declarations at Exhibit-28 and Exhibit-35. Upon careful perusal of the dying declaration at Exhibit-35, same is in question-answer form and same is recorded by the Executive Magistrate, Bhusawal. Upon perusal of the said dying declaration, there is endorsement of the Medical Officer to the effect that, patient is fit for statement. Said endorsement is given at 5.20 p.m. on 14th August, 1991. However, there is no endorsement to the effect that, the patient is conscious, oriented and able to give statement. After recording dying declarations, another endorsement by the Doctor is that, statement recorded before her, however, there is no endorsement to the effect that, throughout at the time of recording the dying declaration the Medical Officer was present, and patient was conscious, oriented and was in a fit condition to give dying declaration. In the facts of the present case, when there was 100% burns, it was necessary for the Medical Officer to give such endorsement. It further appears that, the contents of the dying declaration were not read over to the Sunanda, and she has not stated that, those are correct as per her narration. Therefore, in view of the Judgment of the Hon'ble Supreme Court in the case of Shaikah Bakshu and Others Vs.

State of Maharashtra, , no reliance can be placed on the said dying declaration.

11. There is another dying declaration at Exhibit-28, which is recorded by the Police Head Constable. Upon careful perusal of the said dying declaration, the Medical Officer has given endorsement that, patient is fit for statement. Such endorsement is given at 4.10 p.m. on 14th August, 1991. There is another endorsement by the Doctor that, statement of the deceased was recorded before her. Except these two endorsements, there is no endorsement by the Doctor that, the patient was conscious, oriented and in a fit mental condition to give dying declaration. There is also no endorsement after recording of dying declaration that, patient was conscious, oriented and in a fit mental condition to give statement during recording of dying declaration. In the present case, as already observed, Sunanda was 100% burnt. Probable death of Sunanda was shock due to extensive burns. Waman Narayan Patil was working as Head Constable at Shani Peth Police Station, Jalgaon, who recorded dying declaration at Exhibit 28. Waman Naryan Patil was examined as PW-9. He stated in his deposition that, at the relevant time, he was working as Head Constable in Police Station Bhusawal. On 14.08.1991, he was on duty at Police Station from 14.00 to 20.00 hours. On that day, at 15.30 hours memo was received from Municipal Hospital, Bhusawal that, one patient Sunanda d/o. Pandharinath is admitted in Hospital, who has sustained 100% burn injuries, and she was under treatment. He then visited Municipal Hospital. He met Medical Officer, Dr.Kavita Sontakke. He requested Dr. Sontakke whether the patient was in a position to give her statement. On that, Doctor and PW-9 went to the room where patient was admitted. Then Doctor inquired from patient about her name and other questions were put to the patient. After Doctor satisfied herself, certified that, patient was fit to make statement and then he started recording statement of the patient. He further deposed that, he asked Sunanda her name and address and then statement was recorded, and same was read over to the patient. He obtained thumb mark of the patient on the statement. He further stated that, said dying declaration bears his signature and the endorsement by Doctor about fitness of patient to give statement. The statement bears thumb mark of patient Sunanda. After returning to the Police Station, he registered Crime No. 62/1991 and then recorded the statement of other witnesses.

12. During cross examination of this witness, he stated that, when statement of Sunanda was recorded, her relatives were sitting in varandah. He further deposed that, to ascertain fitness of Sunanda for giving statement, Doctor only asked her name and other questions but no other examination was carried by Doctor. He further deposed that, then he asked Sunanda how incident took place. He further deposed that, while Sunanda was giving statement, he did not find that, she had pains from her talk. While narrating incident, Sunanda was taking pause. He further stated that, he cannot say definitely whether Sunanda was taking pause for remembering about incident or it was because of pains. Upon careful perusal of the cross examination of PW-9, it is abundantly clear that, Medical Officer except asking name and other questions to the patient, no

physical examination was conducted. It means endorsement given by the Medical Officer that, patient is fit is without actually examining the patient, and only on the basis of satisfying by asking her name and other questions.

13. Dr.Kavita Satish Sontakke, Medical Officer, Civil Hospital, Jalgaon is examined as PW-8, her evidence is at Exhibit-18. In her evidence, she stated that, she was working as Medical Officer in Municipal Hospital since 1986 to 1993. On 14.08.1991, she was on day duty. On that day, Sunanda d/o. Pandharinath Zalte was admitted in Hospital of burn injuries. At the time of her admission, she had inquired about history of the patient. The patient Sunanda disclosed that, her maternal uncle set her on fire pouring rokel at 2.30 p.m. on 14.08.1991 out of property dispute. She further stated that, history of the patient disclosed at the time of admission, was reduced by her in writing. She further stated that, the intimation was sent to the Police and after Police came to the Hospital for recording statement of Sunanda, to ascertain whether Sunanda was able to speak or not, she did ask name of the patient. She further stated that, other questions were also asked so as to find out whether the patient is oriented to time and place. Then, she found that, patient was fit to give her statement, and accordingly, she certified the dying declaration. She further stated that, throughout recording of the dying declaration, she was present. After recording dying declaration, thumb impression was taken and PW-8 endorsed same. Statement of Sunanda is recorded in her presence. After death of Sunanda, she conducted autopsy on the dead body. There were 100% burns. Hair of scalp were burnt and hair of eye brows were burnt partly. All organs were congested. She further stated that, cause of death was shock due to extensive burns. Upon careful perusal of the examination in chief of this witness, nowhere she has stated that, she physically examined patient so as to ascertain her fitness to give dying declaration. It appears that, by only asking the oral questions, endorsement is given that, patient is fit. Upon careful perusal of the dying declaration at Exh.28, there is no endorsement that, patient is conscious, oriented and in a fit mental condition to give dying declaration. Even on completion of the dying declaration, there is no endorsement that, during recording of dying declaration, the patient was conscious, well oriented and was mentally fit to give dying declaration. Without physically examining the patient, it appears from the evidence of PW-9 that, PW-8 did not examine the patient physically. Even from reading of evidence of PW-8, it is noticed that, she has not specifically stated that, patient was examined by her so as to ascertain whether patient is conscious, well oriented and in a fit mental condition to give dying declaration. This witness has also stated that, all organs were congested and there were 100% burns on the dead body.

14. In her cross examination, she stated that, on 14.08.1991, she was on duty attending casualty as well as indoor patient. She was looking after both OPD and indoor work on that day. Patient was brought by her grandmother and other relatives. Therefore, it appears that, medical history was recorded as narrated by the close relatives of the patient. She further stated that, she cannot say

whether clothes of the patient were wet at the time of her admission and clothes of patient were changed to hand over the same to the Police. She further admits that, in similar burn cases clothes of the patient are to be changed and to be handed over to Police with her observation. It is the part of her duty, as a Medical Officer. The case papers do not find reference that, clothes of patient Sunanda were handed over to Police. Before arrival of police sedative was applied to patient. The ointment was applied as soothing agent. In fact, no sedative was used. She further deposed that, she cannot say which part of the patient had burn injuries of 1st degree and which part had 4th degree. She has given details about other conditions of the patient. She admitted that, she had not recorded diastolic B.P. of Sunanda considering her systolic was 90.

15. Upon careful perusal of the dying declaration at Exhibit-28 and evidence of PW-8 and PW-9, it appears that, Medical Officer did not examine Sunanda physically so as to ascertain from her physical condition whether she is conscious, well oriented and in a fit mental condition to give dying declaration. The evidence of PW-9 unequivocally indicates that, there was no such examination by PW-8. Therefore, it appears that, PW-8 except ascertaining name and address of Sunanda, no other examination was undertaken, and therefore, dying declaration at Exhibit-28 cannot be safely relied upon.

16. Upon careful perusal of the medical report and evidence of PW-8, she stated in her evidence that, there were 100% burns and all organs were congested. The thumb mark which is appeared on the dying declaration is also not clear, and therefore, the trial Court gave benefit of doubt to the respondent accused.

17. The Supreme Court in the case of Surinder Kumar Vs. State of Haryana, , held that, if there is 100% burns, the thumb impression given by the deceased is not acceptable. In the present case also, Medical Officer has stated that, all organs of the deceased Sunanda were congested. The Sunanda was 100% burnt.

18. Therefore, upon re-appreciating the entire evidence on record, we are of the view that, the findings recorded by the trial Court are in consonance with the evidence brought on record. The view taken by the trial Court is possible view, and therefore, the acquittal order deserves no interference. Even if other view is possible, is no ground to interfere in the acquittal order if the possible view is taken by the trial Court.

19. The Supreme Court in the case of Nepal Singh V/s State of Haryana in Criminal Appeal No. 383 of 2002 decided on 24.04.2009, held that, in case of acquittal, there is a double presumption in favour of the accused-firstly, the presumption of innocence is available to him-secondly, the accused having secured an acquittal, the presumption of his innocence is certainly not weakened but reinforced, reaffirmed and strengthened by the trial court.

Yet in another judgment in the case of State of Andhra Pradesh Vs. M. Madhusudhan Rao, the Supreme Court in para 13 held thus :-

"13. There is no embargo on the appellate court to review, reappreciate or reconsider the evidence upon which the order of acquittal is founded. Yet, generally, the order of acquittal is not interfered with because the presumption of innocence, which is otherwise available to an accused under the fundamental principles of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a court of law, gets further reinforced and strengthened by his acquittal. It is also trite that if two views are possible on the evidence adduced in the case and the one favourable to the accused has been taken by the trial court, it should not be disturbed. Nevertheless, where the approach of the lower court in considering the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by the court below is such which could not have been possibly arrived at by any court acting reasonably and judiciously and is, therefore, liable to be characterised as perverse, then, to prevent miscarriage of justice, the appellate court is obliged to interfere."

20. In the light of the discussion in the foregoing paragraphs, appeal sans merit, hence dismissed.