

(2018) 01 BOM CK 0119
In the Bombay High Court
Case No : 591 of 2005

Vilas s/o. Shalik Nasre

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 22-01-2018

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#) - Power to examine the accused
[Indian Penal Code, 1860](#), [Section 302](#),
[Section 34](#), [Section 498-A](#) - Punishment for murder - Acts done by several persons in furtherance of common intention
[Evidence Act, 1872](#), [Section 114](#) - Court may presume existence of certain facts

Citation : (2018) 01 BOM CK 0119

Hon'ble Judges : R.K.Deshpande, M.G.Giratkar

Bench : Single Bench

Advocate : A.S.Manohar, ?H.N.Jaipurkar

Final Decision : Allowed

Judgement

1. Appellant has assailed the Judgment of conviction awarded by Sessions Judge, Yavatmal in Sessions Trial No.37 of 2004 for the offence punishable under Section 302 of the Indian Penal Code and sentenced him to suffer imprisonment for life and to pay a fine of Rs.500/-, in default to suffer rigorous imprisonment for 15 days. He is also convicted for the offence punishable under Section 498-A of the Indian Penal Code and sentenced to suffer imprisonment for two years and to pay a fine of Rs.400/-, in default to suffer rigorous imprisonment for 10 days.

2. The case of prosecution against the appellant, in short, is as under :

Deceased Vanita was married with the appellant in the year 1992. After marriage, appellant was ill-treating his wife. Deceased delivered two daughters and one son. At the time of incident, her daughters were aged about 12 years and 19 years and son was aged about 7 years. Before the incident, there was criminal proceeding instituted on the report of deceased. Appellant was prosecuted for the offence punishable under Section 498-A of the Indian Penal Code. There was compromise. Deceased started residing with the appellant. On the day of incident, there was religious program at the house of parents of appellant. Daughters of the appellant had been to the house of his father. Appellant had also gone for the said program. He returned back, beat his deceased wife, poured kerosene and set her on fire. Neighbours of appellant rushed to the spot and extinguished the fire. Deceased was admitted in the hospital.

3. Information was given to the father and relatives of deceased. They reached to the hospital. In the night, police informed Naib-Tahsildar Shrihari Kanhuji Thamke (PW-5) to record dying declaration. He went to the hospital at about 11.30 p.m., obtained certificate of fitness from Medical Officer Dr.Mahadeo Maroti Zalke (PW-10) and recorded the statement of deceased (Exh.50). In the same night, at about 1.00 p.m., deceased died in the hospital. After receipt of dying declaration, crime was registered against the appellant and his relatives for the offences punishable under Sections 302, 498-A r/w. 34 of the Indian Penal Code .

4. Investigating Officer Mohan Vithalrao Bakade (PW-9) investigated the crime, went to the spot of incident, prepared spot panchanama (Exh.52), recorded statements of witnesses, seized

clothes etc. and sent seized property to the Chemical Analyser. After complete investigation, filed charge sheet before the Judicial Magistrate, First Class. As the offence punishable under Section 302 of the Indian Penal Code was exclusively triable by the Sessions Court; therefore, case was committed to the Court of Session for trial.

5. Trial Court framed charge against the appellant and other accused i.e. his parents, brother and sister for the offences punishable under Sections 498-A and 302 r/w. Section 34 of the Indian Penal Code.

6. Prosecution has examined following witnesses :

- a. Pundlik Marotrao Badwaik (PW-1) (Exh.32).
- b. Uddeshan Nanaji Patil (PW-2) (Exh.33).
- c. Amar Pundlikrao Badwaik (PW-3) (Exh.37).
- d. Dr.Manjusha Suryakant Chintalwar (PW-4)(Exh.45).
- e. Shrihari Kanhuji Thamke (PW-5) (Exh.47).
- f. Dayanand Champat Sahare (PW-6) (Exh.51).
- g. Atmaram Waghujji Waghmare (PW-7) (Exh.54).
- h. Sanjay Pundlikrao Talmale (PW-8) (Exh.59).
- I. Mohan Vithalrao Bakade (PW-9) (Exh.60).
- j. Dr.Mahadeo Maroti Zalke (PW-10) (Exh.77).

7. Statements of accused were recorded under Section 313 of the Code of Criminal Procedure. Accused have denied material incriminating evidence against them. After hearing prosecution and defence, learned trial Court acquitted the parents (relatives of the appellant) of the offence punishable under Section 498-A r/w. 34 of the Indian Penal Code . The appellant is convicted for the offences punishable under Section 302 and 498-A of the Indian Penal Code and sentenced, as aforesaid.

8. Learned trial Court mainly relied on the dying

declaration (Exh.50) recorded by the Naib-Tahsildar Shrihari Thamke (Exh.47) and the oral dying declaration stated by her father and brother.

9. Heard Mr.A.S.Manohar, learned Counsel for the appellant. He has pointed out Exh. No. 48 (dying declaration dt.21.2.2004) and Exh. No.49 (Requisition Letter to Medical Officer by Executive Magistrate, Yavatmal). Learned Counsel has submitted that the Medical Officer Dr.Mahadeo Zalke (PW-10) was not present at the time of recording dying declaration. It appears that he signed the Certificate casually without examining the patient. Exh.48 shows that Medical Officer Dr.Mahadeo Zalke was busy in Casualty Ward at about 11.30 p.m. and there is a specific endorsement in that respect (Exh.48). Learned Counsel has submitted that the dying declaration recorded by Naib-Tahsildar Shrihari Thamake (PW-5) is not reliable. Patient had sustained 96 % burns. Her condition was serious.

10. Learned Counsel pointed out evidence of Dr.Manjusha Suryakant Chintalwar (PW-4) and submitted that, in her cross-examination, she has specifically stated that, in case of burns of 96 %, congestion of vital organs starts. General condition of patient at the time of admission was poor. Learned Counsel pointed out cross-examination of Amar Pundlikrao Badwaik (PW-3). In his cross-examination, he has admitted that, because of burns, Vanita was moaning. In such a situation, she was not in a position to state anything to her father Pundlik Marotrao Badwaik (PW-1) and brother Amar Pundlikrao Badwaik (PW-3).

11. Mr.A.S.Manohar, Learned Counsel has pointed out cross-examination of Investigating Officer Mohan Bakade (PW-9). He has admitted in his cross-examination that, during the investigation, it was revealed that deceased Vanita was alone at her house. His cross-examination further shows that neighbours extinguished the fire and

admitted deceased in the hospital. Their statements were recorded, but not filed on record.

12. Learned Counsel Mr.Manohar has vehemently argued that dying declaration (Exh.50) and oral dying declaration stated by Pundlik Badwaik (PW-1) and Amar Badwaik (PW-3) are not free from doubt. The dying declaration do not inspire any confidence and therefore, conviction cannot be awarded on the basis of dying declaration. There is no corroboration in respect of dying declaration. Hence, the conviction awarded by the trial Court is illegal and liable to be quashed and set aside.

13. Heard Ms H.N.Jaipurkar, learned A.P.P. for the respondent/State. She has submitted that evidence of Pundlik Badwaik (PW-1) and Amar Badwaik (PW-3) show that appellant was always beating and ill-treating his deceased wife Vanita. He is prosecuted on the report of deceased Vanita. She had filed Maintenance Petition. There was settlement. All this evidence shows that appellant always caused cruelty to deceased.

14. Ms H.N.Jaipurkar learned A.P.P. has submitted that immediately after receipt of information, Pundlik Badwaik (PW-1) and Amar Badwaik (PW-3) went to General Hospital, Yavatmal. Deceased disclosed them that appellant beat her, poured kerosene and set her on fire. Learned A.P.P. has pointed out evidence of Amar Badwaik (PW-5), Naib-Tahsildar Shrihari Thamke (PW-5) and submitted that, at about 11.30 p.m., Thamke went to hospital and requested Dr.Mahadeo Zalke (PW-10) to examine the patient and certify about her fitness. Dr.Mahadeo Zalke examined deceased Vanita and certified vide Exh.78 that she was fit to give statement. Thereafter, Shrihari Thamake (PW-5) recorded statement of deceased, in which she has stated specifically that, one day before the incident, appellant beat her. Since then he was in a fit of anger.

She has stated that, on the day of incident, at about 3 O'clock in the afternoon, her husband Vilas poured kerosene on her person and set her on fire by lighting match stick. Since her marriage, she was suffering harassment at the hands of her husband. Her husband used to consume liquor. When the incident took place, they both i.e. her husband and herself were at home. Whenever her husband was returning home after visiting his parents, brother and his wife, he used to beat her.

15. Learned A.P.P. Ms Jaipurkar has submitted that written dying declaration (Exh.50) is well corroborated by the dying declaration stated by Pundlik Badwaik (PW-1) and Amar Badwaik (PW-3). Learned trial Court has rightly convicted the appellant for the offences punishable under Sections 302 and 498-A of the Indian Penal Code. At last, submitted that the appeal is devoid of merits and liable to be dismissed.

16. Perused the evidence on record. There is no dispute that there is no eye witness of the incident. Case of prosecution is solely based on written dying declaration (Exh.50) and the oral dying declaration stated by victim's father Pundlik Badwaik (PW-1) and brother Amar Badwaik (PW-3). Whether the dying declaration stated by deceased is reliable, cogent and can form the basis for conviction is to be decided.

17. Now it is well settled law that conviction can be awarded on the basis of dying declaration provided that dying declaration shall inspire confidence of the Court. Dying declaration (Exh.50) and oral dying declaration stated by Pundlik Badwaik (PW-1) and Amar Badwaik (PW-3) is to be scrutinized so as to test about truthfulness of the dying declaration and its reliability.

18. There is no dispute that deceased died due to burn injuries. She had sustained 96 % burn injuries. As per the evidence of

Investigating Officer Mohan Bakade (PW-9), neighbours of appellant extinguished fire and admitted deceased in the hospital. As per the admission of Investigating Officer Mohan Bakade (PW-9), statements of neighbours were recorded, but not filed on record.

19. Condition of the patient is to be seen when she was admitted in the hospital. Dr.Manjusha Chintalwar (PW-4) has stated in her evidence that, on 22.4.2004, she conducted post mortem on the dead body of deceased Vanita. Vanita had sustained 96 % burns as per her opinion, cause of death was shock due to burns. Accordingly, she issued Post Mortem report (Exh.46).

20. In the cross-examination, Medical Officer Manjusha has specifically stated as under :

"It is correct that the general condition of the patient at the time of admission was poor. It is correct that general condition means physical condition as-well-as mental condition. "

21. From the perusal of evidence of Dr.Manjusha Chintalwar (PW-4), she has specifically admitted in her cross-examination that, in case of 96% burns, congestion to vital organs starts. General condition of patient (deceased) at the time of admission was poor. Her physical and mental condition was poor. This admission also supports the admission given by Amar Badwaik (PW-3) (brother of deceased). In the cross-examination, Amar (PW-3) has stated that Vanita sustained burns all over her body. Her body was covered till her shoulder. Deceased Vanita was moaning because of burns. This admission clearly shows that deceased Vanita was not in a position to talk as she was having severe pain. In such a situation, oral dying declaration stated by Pundalik Badwaik (PW-1) and Amar Badwaik (PW-3) are not reliable.

22. In respect of dying declaration (Exh.50), Naib Tahsildar Shrihari Thamke (PW-5) has stated in his evidence that, at about

11.30 p.m., he went to burn ward. He requested Medical Officer present there to examine the patient. Medical Officer examined the patient and given certificate (Exh.49) that the patient was fit to give statement. Thereafter, he started recording Exh.50. Again Medical Officer certified on the said dying declaration. Doctor was present at the time of recording the statement.

23. The dying declaration is to be scrutinized very carefully because dead person cannot be called for cross-examination. Dying declaration (Exh.50) appears to be doubtful because Dr.Mahadeo Zalke (PW-10) has given specific endorsement on Exh.48 i.e. on the request letter issued by Lady Police Head Constable as "busy in casualty". Time is mentioned as 11.30 p.m. on 21.2.2004. Therefore, whether the Medical Officer was present at the time of recording dying declaration is doubtful. Moreover, the evidence of Shrihari Thamke (PW-5) show that. after recording the dying declaration, Medical Officer certified on the said dying declaration.

24. From the perusal of evidence of Dr.Mahadeo Zalke (PW-10), it is clear that he issued Certificate Exh.78. He only endorsed of fitness of patient for giving dying declaration. After recording dying declaration, he issued Certificate (Exh.79). He certified that "dying declaration is taken in my presence." This Certificate (Exh.79) does not show that the patient was well-oriented during the time of recording dying declaration. Record of hospital not produced before the Court. It is clear from the evidence on record that, immediately thereafter at about 1.00 a.m., deceased died.

25. Evidence of Dr.Manjusha Chintalwar (PW-4) clearly shows that when deceased was admitted in the hospital, her physical and mental condition was poor. Her further admission in the cross-examination shows that, in case of 96% burns, vital organs of body start congestion The incident took place in the afternoon at about

3.00 p.m. The dying declaration (Exh.50) was recorded at about 11.30. She died at about 1 a.m. in the same night. As per the admission of Amar Badwaik (PW-3), deceased was moaning because of severe burn injuries. Endorsement of Medical Officer Zalke on Exh.48 shows that he was busy in Casualty at 11.30 p.m. In such a situation, it is doubtful as to whether deceased was in a condition to give statement before the Naib-Tahsildar Shrihari Thamke (PW-5) and to state about the incident to her father Pundalik Badwaik (PW-1) and brother Amar Badwaik (PW-3).

26. Doubt is also created in respect of the incident stated in the dying declaration. Investigating Officer Mohan Bakade (PW-9) has specifically stated as under :

"It is correct that during the statements of witnesses it was revealed that at the time of incident of burns, Vanita was alone at her house."

He has further admitted as under :

"It is correct that during enquiry it was revealed that after the incident of fire to Vanita, the neighbouring persons gathered, extinguished the fire and had then brought her at Burn Ward at Yavatmal. I have recorded the statements of all those persons who had brought Vanita to hospital at Yavatmal and also of driver of the vehicle who had brought Vanita to the hospital at Yavatmal. It is correct that the statements of all these persons recorded by me are not filed with the charge-sheet of this case. "

27. From the cross-examination of Investigating Officer Mohan Bakade (PW-9), it is clear that, at the time of incident, Vanita was alone at her house. When neighbours noticed fire, they rushed to the house of Vanita, extinguished fire and took her to the hospital.

28. Admission of Investigating Officer Mohan Bakade (PW-

9) clearly shows that he had recorded statements of all those persons/neighbours including driver who had taken deceased Vanita to the General hospital, Yavatmal. Those statements are not filed on record. Inference can be drawn u/s.114 of the Indian Evidence Act, 1872, which reads as under :

"114. Court may presume existence of certain facts.- The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. "

If those statements would have been filed on record, those statements would have supported the defence of appellant.

Prosecution suppressed the material fact from the Court.

29. Investigating Agency has not filed the statements of material witnesses who immediately rushed to the spot of incident and thereby suppressed the material evidence from the Court.

Evidence of Pundlik Badwaik (PW-1) and Amar Badwaik (PW-3) are not reliable because condition of patient was of such a nature that she was not in a position to talk properly. Amar Badwaik (PW-3) has specifically admitted in his cross-examination that deceased was moaning. Evidence of Dr.Manjusha Chintalwar (PW-4) clearly shows that when deceased was admitted in the hospital, her physical and mental condition was poor. Endorsement of Medical Officer Zalke on the requisition letter (Exh.48) clearly shows that he was busy in the Casualty room. Therefore, he did not accept the request to examine the patient. Evidence of Naib-Tahsildar Shrihari Thamke (PW-5) and Dr.Mahadeo Zalke (PW-10) are also not credit-worthy because the Certificate (Exh.79) issued by Dr.Mahadeo Zalke (PW-10) after recording of dying declaration only shows that dying declaration is taken in his presence. This Certificate does not show that the patient was well-oriented and mentally fit at the time of recording of dying declaration (Exh.50). Exh.78 also does not

specifically state that deceased Vanita was physically and mentally fit to give statement.

30. Evidence of Dr.Manjusha Chintalwar (PW-4), admission of Amar Badwaik (PW-3), admission of Investigating Officer Mohan Bakade and evidence of Dr.Mahadeo Zalke (PW-10) create doubt about statement made by the deceased vide Exh.50 or oral statement/dying declaration stated to Pundlik Badwaik (PW-1) and Amar Badwaik (PW-3). Therefore, conviction cannot be awarded on such dying declaration which is not reliable. Hence, we pass the following order.

// ORDER //

The appeal is hereby allowed.

The impugned Judgment of conviction is hereby quashed and set aside.

Appellant is hereby acquitted of the offences punishable under Sections 302 and 498-A of the Indian Penal Code.

Appellant is on bail. Hence, his bail bonds shall stand cancelled.

Seized property be destroyed after lapse of appeal period.

Record and proceedings be sent back to trial Court.