
(2016) 02 BOM CK 0153
In the Bombay High Court
Case No : Criminal Appeal No. 252 of 2014

Vishnu Hari Khopkar

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 09-02-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, Section 307

Citation : (2016) 1 AIRBomRCri 738 : (2016) ALLMRCri 1772 : (2016) 2 BomCR(Cri) 284 : (2016) 4 MhLJCrI 26

Hon'ble Judges : V.K. Tahilramani, Actg. C.J. and Dr. Shalini Phansalkar Joshi, J.

Bench : Division Bench

Advocate : Ameeta Kuttikrishnan, Appointed Advocate, for the Appellant; A.S. Pai, APP, for the Respondent

Final Decision : Dismissed

Judgement

Dr. Shalini Phansalkar Joshi, J.—1. Appellant, who stands convicted by the judgment and order dated 30.5.2013, of Additional Sessions Judge, Vasai, in Sessions Case No. 27 of 2011, for the offence punishable under Section 302 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs. 2,000/- in default to suffer rigorous imprisonment for three months, by this appeal challenges his conviction and sentence.

2. Brief facts of the appeal can be stated as follows :-

Deceased Aruna was wife of the appellant. Their marriage had taken place about 12 to 13 years prior to the incident. Out of wedlock, she had two daughters and three sons, including P.W.3 Rahul. Alongwith their children, the appellant and deceased Aruna were residing in room No. 6 at Neha Apartment, Datta Nagar Nalasopara. Her sister, P.W.1 Rekha was residing in the same Apartment in room No. 8. It is alleged by prosecution that the appellant was addicted to alcohol. He was also suspecting the character of Aruna and on that count, he used to abuse, beat and harass her.

3. On the date of incident on 25.12.2010 at about 10 p.m. P.W.1 Rekha heard clamour and shouts from the house of Aruna, hence she rushed there and found that Aruna was in flames. She extinguished her fire with bed-sheet, removed her burnt clothes and took her to Bhagwati hospital. On enquiry, Aruna told her that the appellant came to the house in drunken state, abused and assaulted her by alleging her relations with others. Thereafter the appellant poured kerosene on her and set her ablaze.

4. On the same night, statement of P.W.1 Aruna was recorded by P.W.5 ASI Wagh. On her statement Exh.23, C.R. No.666 of 2010 came to be registered against appellant, for the offence punishable under Section 307 of the Indian Penal Code. During the course of investigation, the spot panchnama (Exh.27), was made. From the spot, kerosene bottle, match box and burnt pieces of clothes of Aruna came to be seized. The statements of witnesses were recorded. On 31.12.2010 Aruna succumbed to burn injuries while taking treatment in Bhagwati hospital. Hence offence was converted to Section 302 of the Indian Penal Code. Her dead body was sent to postmortem examination which revealed the cause of her death as septicemia due to burn injuries. Hence further to completion of investigation, chargesheet was filed in the Court against appellant by P.W.9 PSI Jadhav.

5. On committal of the case to the Sessions Court, trial Court framed charge against the appellant vide Exh.4. Appellant pleaded not guilty and claimed to be tried, raising defence of denial and false implication.

6. In support of its case, prosecution examination in all 9 witnesses. Appellant also led evidence of one defence witness by name D Mattu Swamy, to prove that signature appearing on dying declaration of Aruna is different from the hand writing of Aruna on the rent receipt Exh.56).

7. On appreciation of this oral and documentary evidence, as adduced by prosecution and the defence, trial Court was pleased to hold the guilt of the appellant to be proved beyond reasonable doubt. Accordingly trial Court convicted and sentenced the appellant as aforesaid.

8. This judgment of the trial Court is challenged in this appeal by learned counsel for appellant; whereas supported by learned APP. In our considered opinion before advertting to the rival submissions advanced by them, it would be useful to refer to the evidence on record.

9. The prosecution case against the appellant is based on the evidence of eye witness P.W.3 Rahul, son of deceased Aruna and the appellant and also oral dying declaration of Aruna made before her sister P.W.1 Rekha. The main plank of prosecution case is also the dying declaration of Aruna (Exh.23), as recorded by P. W. 5 ASI Sudhir Wagh, in the form of her complaint.

10. Coming first to the evidence of P.W.3 Rahul, son of appellant and deceased Aruna, at time of incident, he was running age of 12 years whereas at the time

of giving evidence in the Court, he was 15 years of age, hence sufficiently matured to know the implication of his testimony. According to his evidence, he was residing alongwith his father the appellant, his mother deceased Aruna and his brothers and sisters at Neha Apartment. His father was addicted to liquor. On the date of incident also, his father has consumed liquor and was abusing his mother on the count that his mother looks at other persons. In the said drunken state, his father poured kerosene on his mother and lit match stick and set her on fire. As per his evidence, first three match sticks lighted by his father got extinguished and on the fourth occasion, he could get the match stick lit, then threw it on his mother. As a result, his mother was ablaze. At that time, his mother tried to run towards kitchen to extinguish her fire, however, his father caught hold of her hand and did not allow her to go to kitchen. Therefore, P.W.3 Rahul himself brought water from the kitchen to extinguish her fire. At that time, his brother Rohan also tried to extinguish the fire. However, Rohan's pant and hand caught burns due to the said fire. It is further deposed by P.W.3 Rahul that then he went outside and raised shouts. Thereafter the public gathered. His maternal aunt P.W.1 Rekha also came there. She extinguished fire of his mother. Thereafter his mother was taken to Hospital.

11. This witness is cross examined at length by learned counsel for the appellant to prove that he is a tutored witness as since the date of incident he is residing with his maternal aunt P.W.1 Rekha and even at the police station when his statement was recorded, she was very much present there. However, it needs to be asserted that the evidence of this witness is not at all shattered in cross-examination. It has remained consistent throughout. His testimony gives an impression of a truthful witness. Moreover, he does not appear to be susceptible of being tutored, considering his matured age at the time of incident and at the time of giving evidence in the Court. It does not appear probable that he will be influenced by his maternal aunt P.W.1 Rekha to depose against his own father if the incident, as stated by him, has not occurred. From the mere fact that he is residing with his maternal aunt P.W.1 Rekha, it will be far-fetched to infer that he is a tutored witness. He has uprightly denied the suggestion that he is deposing falsely against his own father at the instance of his maternal aunt. In our considered opinion, the tenor of his evidence inspires confidence in the judicial mind. His evidence also gives detailed account of the incident as it has happened including the minor details like his father lighted three match sticks before succeeding in lighting the fourth match stick which his father threw on his mother. He has also given the details about his brother Rohan sustaining burns while extinguishing fire of his mother. Further, he has also deposed about how his father prevented his mother from going in the kitchen to extinguish fire. His evidence, thus, amply proves not only the involvement of the appellant in the incident, but also intention on the part of the appellant to kill her in setting the deceased on fire.

12. This eye witness account of P.W.3 Rahul is fully supported and corroborated from the evidence of P.W.1 Rekha, who has rushed to the spot on hearing

clamour and shouts from the house of Aruna. As per her evidence, she opened the door and saw Rohan coming out of his house with flames on his pant. She extinguished fire on the pant of Rohan with her hand and then went inside the house of deceased. She saw that water was poured on Aruna. However, there was still fire to the feet of Arun. She extinguished said fire with bed-sheet, brought Aruna to her house, removed her burnt and wet clothes. She gave her gown to wear and then she took Aruna to the hospital. She also made enquiry with Aruna and as per her evidence Aruna told her that her husband came to the house in drunken state, abused and assaulted her by alleging her relations with others; thereafter poured kerosene on her and set her ablaze.

13. Evidence of P.W.1 Rekha further proves that when she went to the house of Aruna, she found that the appellant and his children were very much present in the house. At this stage it must be stated that the appellant himself has not disputed his presence at the time of incident.

14. The only ground on which her evidence is challenged is that she wanted to take Rohan in adoption for which the appellant and deceased were not ready and hence she had a grudge against the appellant, therefore, she is giving false evidence. However, her cross-examination shows that Vishal, another son of appellant and deceased, was already given in adoption to her. Therefore, it does not appeal to reason that she will insist for adoption of Rohan, and on that count she will give false evidence against the father of Rohan and Rahul and other children of her sister Aruna.

15. There is also evidence of P.W.4 Pratibha, who was residing in the same apartment and knowing the deceased and the appellant. According to her evidence also, the appellant used to consume liquor and give abuses and beating to Aruna frequently. On the night of incident, she was watching T.V., she heard shouts about someone catching fire, hence she came out of the house and went to the house of Aruna. There, she found Aruna in burnt condition. She made enquiry with Aruna and Aruna told her that her husband has set her on fire after pouring kerosene on her. According to her evidence, the appellant was very much present at the spot. She further deposed that P.W.1 Rekha changed the clothes of Aruna and took Aruna to the hospital. Again her evidence has also remained unshattered even after extensive cross-examination.

16. Lastly, there is evidence of Aruna's dying declaration, as recorded by P.W.5 ASI Wagh, in the form of her statement Exh.23 which is treated as F.I.R. and the offence was registered on it. According to his evidence, he went to Bhagwati Hospital on the receipt of information that Aruna was admitted there in burnt condition. So he confirmed from the Medical officer present there whether Aruna was in a position to give statement. Thereafter, in the presence of Medical Officer, he recorded her statement. In her statement, Aruna told him that her husband came to the house in drunken condition, started giving abuses and threatening to her. He suspected about her character and alleged that she has relations with other persons. Then, he poured kerosene on her and set her on fire. When she

shouted, her son, P.W.3 Rahul poured water on her. Her sister P.W.1 Rekha, then taken her to Vijaya Laxmi Hospital at Nalasopara and thereafter to Bhagwati Hospital.

17. This statement of Aruna (Exh.23) recorded by P.W.5 ASI Wagh, thus, clearly implicates the appellant. It is recorded immediately within few hours after the incident. It bears an endorsement of the Medical officer P.W.8 Dr. Khatib Latif that at the time of recording of her statement, Aruna was conscious, oriented and in a fit condition to give statement. There is corroborating evidence of P.W.8 Dr. Latif also to that effect, who was attached to Bhagwati Hospital and on the request of P.W.5 ASI Wagh, he has examined Aruna and found her to be conscious and oriented to give statement. As per his evidence also, after P. W. 5 recorded her statement in writing, he made an endorsement to that effect.

18. The only admission elicited in his cross examination is that he was not standing by the side of Aruna when her statement was being recorded. In our considered opinion, this admission does not make any difference as the Medical officer is not expected to remain present throughout the recording of statement. Especially in this case, considering the fact that Aruna has sustained burns only upto 45 to 50% and she has succumbed to those burns, 6 days after the incident, it necessarily follows that at the time of giving statement, she was not in a critical or serious condition to insist upon presence of the Doctor throughout recording of her statement.

19. The second ground on which the evidence of P.W.8 Dr. Latif is challenged, is that at the time of admission in the hospital, Aruna has not made any complaint against anyone. Even if it is accepted it to be so, in our considered opinion, it does not make much difference, considering the overwhelming evidence like eye witness account of her son P.W.3 Rahul and oral dying declaration of Aruna.

20. As to the signature of Aruna on the dying declaration Exh.23, the defence has challenged the same and also examined one witness D Mutthu Swamy, the landlady, to prove that signature appearing on dying declaration is different from her hand writing on the rent receipt (Exh.56). However, as admittedly Aruna was in burnt condition and also physically and mentally in different state of mind, there is bound to be some difference in her signature on the dying declaration (Exh.23) and the hand writing on rent receipt (Exh.56). It also does not become fatal in any way, in the light of evidence of P.W.5 ASI Wagh in whose presence Aruna has signed on the dying declaration.

21. The last submission advanced by learned counsel for the appellant pertains to the admission given by P.W.1 Rekha in her cross-examination that at the time of admission in the hospital, Aruna has informed to the Doctor at Manorama Hospital that she sustained burns due to flaring of the stove. However, this type of stray admission cannot demolish otherwise cogent, reliable and consistent evidence of the eye witness and dying declaration proving that the cause of her burns was not flaring of stove, but due to pouring kerosene on her and setting

her ablaze by appellant. The spot panchnama (Exh.27) proved through the evidence of P.W.6 Ravikant, panch witness and P.W.9 PSI Jadhav, also does not support the alleged admission. The spot panchnama nowhere proves presence of kerosene stove at the spot of incident. Conversely, under the spot panchnama, plastic bottle of kerosene and match box were seized with the burnt pieces of clothes. The spot panchnama also reveals that there was smell of kerosene spread in the room.

22. The Chemical Analyzer's report of Articles seized from the spot including burnt clothes of Aruna, show presence of kerosene residues which is sufficient to discard the theory of accidental burns on account of flaring of stove. Moreover, appellant would have made efforts to extinguish Aruna's fire and taken her to the hospital, if it was really a case of accidental burns. However, no such evidence is brought on record to that effect.

23. Further the postmortem report Exh.32 proved through the evidence of P.W.7 Dr. Rahul Gabra, shows that Aruna has sustained burns not only to her frontal portion, but even to posterior trunk, the left upper limbs and lower limbs. Her total burn injuries were 50%. In case of accidental burns due to flaring of stove, injuries would have been only on the front portion of the body and not to posterior part. The case of accidental burns, therefore, has to be rejected outrightly in the face of other evidence on record. In the instant case, thus, as the incident has taken place in the house of appellant when he was very much present there, it was for him to explain how Aruna has sustained burns. The case of accidental burns put up by learned counsel for appellant is not supported from any other evidence on record and accordingly is required to be held as falsified. The evidence on record clearly goes to prove that it was a case of homicidal burns.

24. A vague attempt is made to contend that in the same incident appellant has also sustained 3% burns to his left hand, as deposed by P.W.2 Dr. Dipti Gaikwad which shows that the appellant has made efforts to extinguish the fire. However, we are not inclined to accept the said plea because the burn injuries to the hands of appellant can be caused even while lighting the match stick after pouring kerosene on Aruna. That appears to be more probable in view of the evidence of P.W.3 Rahul clearly going to prove that the appellant had caught hold of the hand of Aruna so as to prevent her from entering into kitchen to extinguish fire. At that time also, possibility of appellant sustaining burns to his hands cannot be ruled out.

25. To sum up, therefore, in the instant case, we are more than convinced, on appreciation of entire evidence on record, to hold the guilt of the appellant to be proved beyond reasonable doubt. The appeal, therefore, holds no merit, hence stands dismissed.

26. The fees of Legal Aid Counsel appointed to defend the appellant are quantified at Rs. 5,000/-.