

(1999) 07 BOM CK 0007

In the Bombay High Court

Case No : Criminal Appeal No. 184 of 1995

Yeshwant Dhondiba Khule and Another

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 22-07-1999

Acts Referred:

Evidence Act, 1872 — Section 3, 32, 45, 59

Penal Code, 1860 (IPC) — Section 302, 307, 34, 498

Citation : (2000) 5 BomCR 198 : (2000) BomCR(Cri) 198

Hon'ble Judges : Vishnu Sahai, J;T.K. Chandrashekhara Das, J

Bench : Division Bench

Advocate : Mrs. Shilpa Joshi and V.B. Rajure, for the Appellant; Ms. Usha Kejariwal, Assistant Public Prosecutor, for the Respondent

Judgement

T.K. Chandrashekhara Das, J.—By the impugned judgment dated 16-3-1995 the appellants were convicted and sentenced (a) each for Rigorous Imprisonment for life and to pay a fine of Rs. 1,000/- in default R.I. for six months for the offence u/s 302 read with 34 of I.P.C. and (b) for Rigorous Imprisonment for one year and to pay a fine of 500/- in default further R.I. for three months for the offence u/s 498-A read with 34 of I.P.C., in Sessions Case No. 115/94 of the IIIrd Additional Sessions Judge, Satara.

2. The prosecution case runs as under :---

Appellants 1 and 2 are brothers. They are residing in the Tin sheds owned by one Tawaskar in Guruwar Peth, Satara, The deceased Nanda is the wife of appellant No. 1 Yeshwant Dhondiba Khule. At the time of incident, she was living in his tin sheet shed. Appellant No. 2 Hari Dhondiba Khule is residing in another tin sheet shed adjacent to the shed of appellant No. 1. His another brother Jalinder also residing another in shed which is adjacent to the former. The marriage of the deceased Nanda with appellant No. 1 Yeshwant was solemnized before three years of the incident. The parents of the deceased reside at Chopade, Taluka Sangola, Dist. Solapur. Three days before the incident, deceased Nanda went to

her maternal house to meet her ailing grandfather and in her absence, the appellant No. 1 Yeshwant shifted his residence to the aforesaid shed of Tawaskar. He was in the habit of consuming liquor and ill-treating the deceased Nanda because she could not conceive a child.

3. On 20-4-1994 deceased Nanda along with Suman, wife of appellant No. 2, and one Sarika, the daughter of her cousin brother-in-law went to Krishna Theatre at Satara to see a movie between 6.00 p.m. to 9.00 p.m. She returned to the tin shed of appellant No. 1 at 9.00 p.m. and had her dinner. The appellant No. 1 Yeshwant was present in the tin shed and he started as usual quarreling with her on account of not conceiving a child. He asked her to go away to her maternal house but she refused and therefore he started abusing her. Appellant No. 2 Hari also came there and he also joined appellant No. 1 Yeshwant in abusing her. Appellant No. 1 had threatened her saying that he would set her on fire, and thereafter he would contract a second marriage. Deceased Nanda requested the appellant No. 1 Yeshwant to reach her to her maternal house, but appellant No. 1 insisted that she must go alone. But she refused to go alone. Then suddenly, the appellant No. 2 Hari caught hold of her and appellant No. 1 Yeshwant poured kerosene from a tin on her person and lighted the match stick to her saree whereby she started burning. She shouted "save-save". Deceased Nanda was not saved by anybody and therefore she herself got poured water from the pot so as to extinguish the fire. The appellant No. 1 Yeshwant also sustained burn injury to his right hand in the heat of setting her on fire. Deceased Nanda sustained burn injury all over her body and she was taken to Civil Hospital, Satara at about 10.45 p.m. and she was treated by Medical Officer Dr. Lavande.

4. A message was sent to the police station from the Civil Hospital and A.P.I. Shri Naikwadi Fattulal Aziz went to the hospital. He recorded dying declaration of deceased Nanda at about 11.45 p.m. He sent the said dying declaration to the police station for registration of the offence and C.R. No. 118/94 u/s 307 r/w 34 of I.P.C. was registered. In the meanwhile a memo was issued to the Executive Magistrate Mr. Maske to record dying declaration of the deceased Nanda. The Executive Magistrate Mr. Maske went to Civil Hospital, Satara and he recorded dying declaration of deceased Nanda at about 12.30 a.m. on 21-4-1994. In that dying declaration also deceased repeated that the appellant No. 2 caught hold of her and appellant No. 1 set her on fire by lighting the match stick. It appears that somebody gave message to the parents of deceased Nanda and her father Nanasaheb came to the hospital on 21-4-1994 at about 4.00 p.m. Before him also deceased Nanda made oral dying declaration that she was set on fire by both the appellants. Deceased Nanda ultimately treated in the Civil Hospital, Satara in the burn ward but on 21-4-1994 at about 6.30 p.m. she succumbed to her injury. Thereafter the post mortem was conducted on her body (Exh. 23) by the Medical Officer. He opined that the death was caused due to shock due to 83% burns. The Medical Officer Dr. Lavande also issued death certificate in the matter (Exh. 24).

5. Appellant No. 1 Yeshwant also had burnt injury to his right hand and so he was also sent to Civil Hospital, Satara for examination. Dr. Lavande in the Civil Hospital examined the appellant No. 1 on 21-4-1994 at 12.30 a.m. The mother of both the appellants namely Sarubai also sustained injury of burn while extinguishing the fire on deceased Nanda and she was also sent to the hospital on 21-4-1994 at 5.00 a.m. and she was treated there. The Investigating Officer A.P.I. Naikwadi proceeded with the investigation. He prepared a panchanama of the tin shed of the appellant No. 1 in presence of two panchas. He seized burn pieces of shirt and saree, kerosene can, used match sticks and match box. He collected the sample of kerosene in a bottle; sealed it under the same panchanama. The seized articles were sent for Chemical Analyser. After the death of deceased Nanda the offence was converted into one u/s 302 I.P.C. and after completing the investigation A.P.I. Naikwadi submitted the charge sheet against the appellants before the Court of Chief Judicial Magistrate, Satara, who in turn committed the case to the Sessions Court.

6. Before the Sessions Court both the appellants pleaded not guilty and claimed to be tried. The defence suggested is that one lady by name Shalan who is the wife of their brother Mohan, who had on inimical terms with the appellants, instigated deceased Nanda and her father to lodge false prosecution against them. Appellants pleaded that they were not in the scene at the time of occurrence. Court after trial has convicted the appellants and sentenced them in the manner indicated in the opening paragraph of this judgment.

7. We have heard the learned Counsel for the parties. The trial Court had mainly relied upon the dying declaration made by the deceased Nanda before the Executive Magistrate and the doctor and to her father. Mrs. Shilpa Joshi, the learned Counsel appearing for the appellant has submitted that the dying declarations relied upon by the Court below suffers apparent inconsistency and contradictions which throw clouds of doubts about the story told by deceased Nanda. According to her it is quite unsafe to rely upon those dying declarations for convicting the appellants. She also took us through those dying declarations in detail to bring home her contentions. Before adverting to her arguments, we have to examine the evidence led by the prosecution in this case.

8. The medical case papers shows that deceased Nanda has attributed that her husband set her on fire. P.W. 6 Dr. Sudhakar Lavande in his evidence stated that on 20-4-1994 at 10.45 p.m. the deceased was brought to the Civil Hospital, Satara by her husband Yeshwant. Patient herself has given the history stating that at 7.30 p.m. on 20-4-1994 the appellants poured kerosene from the can and lit her fire. She then herself poured water on her and extinguished the fire. Doctor noticed 83% burn on her face, head neck and upper extremity left and right thorax and abdomen over the back. The doctor says that she was admitted as indoor patient and she died on 21-4-1994 at 6.30 p.m. He further says that the case was immediately reported to the police as soon as the patient was reached to the hospital. He says in his deposition that on 21-4-1994 from 12.15

a.m. to 12.30a.m. the dying declaration of the patient was recorded by Special Executive Magistrate, Satara and he was also present at that time and he had certified that the patient was conscious and she was responding to the order. He has made his endorsement to this effect and put his signature.

9. The Special Executive Magistrate in his examination stated before the Court that on 20-4-1994 at about 11.30 p.m. he received a call from Satara City Police Station reporting that a burning case in Civil Hospital and he is required to record the dying declaration. He went to Civil Hospital, Satara at 11.45 p.m. and he met Medical Officer Dr. Lavande. He enquired with the doctor whether the patient was conscious and able to speak and give statement. Then he and Medical Officer went to the room where deceased Nanda was kept. The Medical Officer then removed all the relatives of the patient outside the room and examined the patient and told the Executive Magistrate that she was conscious and she was in a position to give statement. Then he enquired with the patient about her name, her place of residence and about her marriage and she gave very coherent reply to these questions. Then he enquired with her as to how she sustained the injury. She narrated the entire incident and he recorded her narration in his handwriting and obtained her thumb impression. The statement was read over again to her and she assured that it was correct. Magistrate also obtained the signature of Medical Officer and he also put his signature and he identified his signature in the Court.

10. Then we have evidence of P.W. 11 Shri Naikwadi Fattulal Aziz, the Police Inspector in charge of the Satara City Police Station at the relevant time. He says in his evidence that on 20-4-1994 there was a message from Civil Hospital, Satara that the deceased had admitted in the Hospital in burnt condition. He immediately went to the hospital and when he met Medical Officer Dr. Lavande, who told him she was in a condition to speak. He immediately went to the burn ward and recorded the statement of Nanda in the presence of Dr. Lavande. He further states in his evidence that the statement was read over to Nanda and he obtained her thumb impression. He then sent the statement to the police station for registering the offence and Crime No. 118/94 was registered u/s 307 read with 34 of I.P.C. He also stated that on the next day he visited the spot and collected the articles such as kerosene sample, match stick etc. under panchanama. He says that he arrested the appellants on the same night and appellant No. 1 was sent to hospital because he was having a burn injury. Appellant's mother Sarubai Khule was also sent to hospital because she was also injured. He then sent collected article for C.A. report.

11. P.W. 10 Ganesh Suryawanshi is the neighbour, who saw the incident at a distance of 10 ft. He says that he was staying in adjacent shed of Tawaskar. At 10.00 p.m. he was standing outside the lodge, and there was quarrel and abuses going on between the appellants and the deceased. While hearing that quarrel one customer came and therefore he has to go inside the lodge. Thereafter he heard the shouts of Nanda "save, save". Then he came out and saw Nanda in a

burning condition and her husband Yeshwant these appellant No. 1 and his brother appellant No. 2 was just watching her. Her mother in-law tried to extinguish the fire. We see no reason to disbelieve the witness. In spite of the thorough cross examination, their testimony could not be demolished. The panch of the spot panchanama says that at the spot the residues of portion of shirt of appellant No. 1 also found. Medical evidence shows that the appellant also was having burn injury. It is therefore clinches that at the time of the incident, the appellants were present at the scene. This clinching evidence belies the contention of the accused put forth in defence that they were not in the spot at the time of the incident and that both of them had gone out. Moreover, they also contended in the defence that deceased Nanda was burnt out of an accident, according to them, the lamp was accidentally fallen on her body and she was burnt. This story of the defence also appeared to be false when the panch found that a can of kerosene containing three litres of kerosene were seen on the spot. Moreover, the panch did not see any lamp in the hut. Therefore contention of the defence is quite artificial and contrary to the evidence revealed in this case. In view of this, we do not find any credibility of the case of the defence. On the other hand the materials on record and evidence discussed above give much credence to the case of the prosecution.

12. We have to address the criticism levelled by the learned Counsel for the appellants against dying declarations relied on by the trial Court in the case. As we noted earlier, in fact, we have three dying declarations legally acceptable in this case. Besides those dying declarations, we have medical case papers which shows that she was brought to the hospital by her husband with fully conscious. The record reveals that patient herself has told that her husband and brother-in-law poured kerosene on her and set her on fire. We have no reason to discard this primary material recorded by doctor, who attended her as soon as she was admitted in the hospital.

13. Then we have dying declaration recorded by Assistant Police Officer, Satara City Police Station wherein the patient has given very comprehend and coherent declaration. She stated in the dying declaration Exh. 37 which was treated as F.I.R. that she has studied at 5th standard. Three days before she went to her maternal house to see her grand father and on 20-4-1994 she was at her residence since morning and her husband went for his work. He gave her money for going to movie and she herself and her sister-in-law Suman and the daughter of her brother-in-law Sarika went to Krishna Theatre for watching movie. Her husband had purchased 5 litres of kerosene for the house hold purpose in the afternoon. She came after watching the movie in the evening at 6 at 9. Her husband was at home. She prepared food. At that time her husband Yeshwant Khule started quarreling with her on account of not having a child. He asked her to go to her native place. When she refused to go at that time, her brother-in-law Hari Khule who was with her husband also started abusing her. Her husband threatened her that he would marry second time and that he would burn her. She told him to send her to " her maternal house. Her brother-in-law then caught her

and her husband poured kerosene on her body by opening the kerosene tin and put her saree on fire. She shouted for help but her husband or her brother-in-law did not try to extinguish the fire. Therefore she poured water on her body by taking it from the carton pot and extinguished the fire. Her husband and his brother had consumed liquor. While putting her on fire by pouring kerosene, her husband also received burn injury to his right hand. It was 9.30 p.m. Since she received burn injury on her face, head, chest, stomach and back and the same became unbearable she started shouting. Thereafter her husband and his brother brought her to Civil Hospital, Satara by rickshaw. While bringing her to the hospital, her husband and her brother-in-law changed her saree and brought her to the hospital. This statement was completed at 11.45 p.m. Yet another dying declaration is also there which the patient had given to her father about which we would discuss as little later.

14. The learned Counsel for the petitioner Mrs. Shilpa Joshi has attacked the dying declarations saying that a patient having 83% hum injury in normal course would not have given such a comprehensive and coherent statement having minute details. Such a vivid account of the incident would not have come from a serious patient like Nanda. In such circumstances, in all probability the dying declarations cannot be made the sole basis of the conviction. We cannot accept this contention. Credibility of the dying declaration is not dependent upon its lengthy description of events. It depends mainly on the attending circumstances in which it was made.

15. The next dying declaration was recorded by the Executive Magistrate Shri Mhaske. The learned Counsel for the appellant Mrs. Joshi attacked this dying declaration for its length and minute details. She criticised that from a dying patient such a detailed statement is normally expected. She further argued that endorsement of the doctor that she is conscious, was taken after the dying declaration was completed at 12.30 a.m. It should have been taken before it started at 12.15 a.m. This gives a doubt as to whether when recording of dying declaration began, patient was conscious. We do not see any logic in this argument. In the evidence of doctor and Executive Magistrate it has come out without any pale of doubt that when it was recorded, the doctor was present and the Magistrate was satisfied before starting the recording that the patient was conscious as ascertained from the doctor. The learned Counsel for the appellant cited the following Supreme Court decisions, (1) in *Khushal Rao Vs. The State of Bombay*, , (2) in *Rabi Chandra Padhan and Others Vs. State of Orissa*, and (3) in *State (Delhi Administration) Vs. Laxman Kumar and Others*, . It is profitable to examine the parameter laid down by the Supreme Court in the above decisions.

16. In *Khushal Rao's* case (supra) the Apex Court tried to Jay down the parameters for relying on dying declaration for convictions. It has been held in this case that as a general propositions it cannot be held that dying declaration cannot be made basis of conviction. It was held that if dying declaration recorded by Magistrate stands on much higher footing than an oral dying declaration. It

also held that it is better to have such dying declaration in question and answer form. In the above decision Supreme Court also held that dying declaration has to be judged in the light of the surrounding circumstances with reference to the principle of weighing evidence. In *Rabi Chandra Padhan and Others Vs. State of Orissa*, also Supreme Court observed the dying declaration may preferably be in question and answer form. The same view has been reiterated in *State (Delhi Administration) Vs. Laxman Kumar and Others*, .

17. Relying on these decisions, the learned Counsel for the appellants argued that so long as dying declarations are not in the question and answer form, they cannot be accepted. Lengthy account of the incident in a dying declaration also is fact which mitigate against the genuineness of the dying declaration. In such circumstances, dying declarations cannot be solely relied on for convicting the appellants.

18. We do not find much substance in this contention. We fail to construe that the Supreme Court in the above decisions has laid down a strict rule that wherein dying declaration if not in the question and answer form has to be discarded. What Supreme Court held in the above cases is that as far as possible recording of dying declaration shall be in the question and answer form so that it will be easy to know what extent answer have suggested by question put.

19. Ms. Usha Kejariwal the learned A.P.P. in this context submitted that merely because the dying declaration is lengthy and contains various details of the happenings, will not be a ground for rejecting the dying declarations. She cited in support of her contention a decision of Supreme Court in *Ganpat Mahadeo Mane Vs. State of Maharashtra*, . She also contended that merely because the dying declarations are not in the question and answer form, will not be a ground to reject the same as piece of evidence. In para 4 of the above judgment Supreme Court observes thus :---

"We see no force in this submission. The form by itself is not important. The statement is clear. Because of the mere fact that the entire thing is not recorded by way of separate questions and answers, the value of the dying declaration is not detracted."

In view of the above decision, we think that the trial Court was fully justified in accepting this dying declaration.

20. Here in this case we have seen in Magistrate's evidence that he was asking questions to the deceased Nanda and the answer elicited has been recorded in the statement form. We find no reason merely because dying declaration is not recorded in question and answer, it should be discarded on that ground alone. The credibility of the dying declaration has always to be tested with other surrounding circumstances, not by its form alone.

21. The learned Counsel for the appellants also attacked the oral dying declaration made by the deceased to her father Nanasaheb Laxman Babu P.W. 2.

The Counsel argued that his evidence is full of contradictions and going by his own evidence, he is not likely to reach Civil Hospital, Satara from his native place before 4.00 p.m. on 21-4-1995. Assuming that it is so, and even if we discard his evidence and oral dying declaration made by the deceased to him, we find no grounds to discard other two dying declarations. Prosecution can very well sustain on the basis of the dying declaration recorded by Executive Magistrate and other materials which corroborate the dying declaration recorded by Magistrate.

22. We have already discussed about other materials which corroborate the said dying declaration. The dying declaration recorded by Magistrate. F.I.R. recorded by P.I. and other evidence of P.W. 8 and P.W. 10 and medical evidence give sufficient assurance about the guilt of the appellants.

23. In the result, we find no merit in this appeal. No interference is called for. Appeal is therefore dismissed. The appellants are in jail. They have to serve out the entire period of sentence.

24. Appeal dismissed.