
(2014) 07 BOM CK 0174
In the Bombay High Court
Case No : Criminal Appeal No. 68 of 1999

Yuvraj	Vs	APPELLANT
The State of Maharashtra		RESPONDENT

Date of Decision : 01-07-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Evidence Act, 1872 — Section 32
Penal Code, 1860 (IPC) — Section 302, 452

Citation : (2014) ALLMR(Cri) 3455 : (2014) 3 BomCR(Cri) 367

Hon'ble Judges : C.V. Bhadang, J; B.P. Dharmadhikari, J

Bench : Division Bench

Advocate : A.S. Manohar, Advocate for the Appellant; D.B. Patel, A.P.P, Advocate for the Respondent

Final Decision : Partly Allowed

Judgement

B.P. Dharmadhikari, J.—Appellant/accused challenges judgment dated 10.02.1999 delivered by the 2nd Additional Sessions Judge, Amravati in Sessions Trial No. 87/1998, holding him guilty for the offence punishable u/s 302 of Indian Penal Code and sentencing him to suffer imprisonment for life with fine of Rs. 300/- & in default of payment of fine to suffer further R.I. for three months. He is also convicted u/s 452 of Indian Penal Code and is sentenced to suffer R.I. for three years and to pay fine of Rs. 100/- and in default to suffer R.I. for 15 days.

2. We have heard Shri A.S. Manohar, learned Counsel for the appellant/accused and Shri D.B. Patel, learned A.P.P. for respondent-State.

3. Shri Manohar, learned Counsel at the outset pointed out that the material circumstances used against the appellant/accused have not been put to him while recording his statement u/s 313 of Criminal Procedure Code, and said material circumstances being facts disclosed in the dying declarations, conviction u/s 302 or u/s 452 of Indian Penal Code cannot be sustained. He points out that surprisingly there are no eye witnesses, though the alleged incidence has taken

place in densely populated area. He submits that the deceased Ramratibai Ganeshsingh Thakur had given a statement at Exh. 58, which has been treated and acted upon as dying declaration, contrary to law. He also submits that, the said statement allegedly made to the police authorities, therefore, could not have been used at all. He further points out that there is one more dying declaration of the deceased-Ramratibai at Exh. 52, 34, 53 and 35 recorded by the Special Judicial Magistrate, Balwant Dhole. He submits that the said Special Magistrate could not remember anything about 7 to 8 other dying declarations recorded by him in the month of July, 1997 but could depose about the contents of the disputed dying declaration of Ramratibai. He further states that the medical officer who gave certificate of fitness in respect of Ramratibai, acted very casually and in absence of proper certificate and examinations, that dying declaration also was not relevant.

4. He has invited attention to evidence of P.W. 7-Prakash Ramteke, who was working with Ramratibai and used to graze her cattle. He submits that, PW-7 admitted Ramratibai in hospital by taking her in auto rickshaw. Ramratibai did not disclose anything to him. It was not necessary to declare him hostile. He has pointed out that in cross examination, said Prakash accepted that he was present in the house of Ramratibai, when she got burnt. Quarrel took place between him and Ramratibai and because of anger or frustration, she set herself on fire.

5. Learned counsel submits that Prakash earlier claimed that he was injured while extinguishing fire on the person of Ramratibai and therefore, his dying declaration was also recorded by Balwant. He points out that as per that dying declaration, Ramratibai fell down in drainage while rushing towards courtyard of house; while spot panchnama does not record existence of any such drainage. He has read out evidence of Balwant Dhole, P.W. 3-Dr. Baburao Deshmukh, who gave fitness certificate on dying declaration and P.W. 9 Investigating Officer Shri Mohan Sugandhe, in an effort to show that if time, as mentioned by these witnesses for recording of dying declarations and appearing on various documents is compared, it shows that the condition of or fitness of Ramratibai was never properly gone into by Dr. Baburao Deshmukh.

6. He states that P.W. 5-Shantabai and P.W. 6 Surajdevi did not support the case of prosecution. Attention is also invited to evidence of P.W. 2 Ismail Shah to show that few clothes were found in room where the alleged incidence took place, but the persons to whom those clothes belonged have not been traced out. He has contended that both hands of Ramratibai were burnt and therefore, her thumb impression could not have been obtained. Ridges seen in her thumb impression on dying declaration therefore, could not have come on record. Submission is, thumb impression on dying declaration is not of Ramratibai and that document is fabricated. After the burning, Ramratibai was in contact of several persons and therefore, possibility of tutoring is also not ruled out. His main emphasis is, therefore, on chronology of events which have got bearing on recording of two dying declarations or its validity. He points out that Prakash did not take

Ramratibai to Modi Hospital, which was situated in the vicinity where she could have been treated at the earliest. Prakash does not name the accused and there is no evidence on record to show appellant's presence there. No witness living in the vicinity in thickly populated area has been examined or then daughters of deceased playing outside, were also not questioned by the police authorities to show involvement of the accused in the crime.

7. He points out that according to Ramratibai, accused came to her house on 26.07.1997 and questioned her about his wife-Meena. He also threatened Ramratibai with murder, if she did not disclose her whereabouts. Accused poured kerosene on her person from the round tin container, which he had brought with him and then with matchstick, set her on fire. She had worn terricot saree which caught fire immediately and appellant/accused ran away. She rushed behind him to catch him, but fell down on the ground. People in the locality came there, but nobody helped her. Her putative brother Prakash Ramteke (P.W. 7) came and poured water and attempted to extinguish fire with his hands. He also sustained burn injuries. Shri Manohar, learned counsel submits that this story is also not proved on record by examining any independent witness. He points out that in statement to Magistrate, it is shown that Ramratibai disclosed about fleeing away of wife Meena of appellant with tenant Ravi Dongre. He contends that this fact is also not brought on record. Thus, best witnesses have been kept back or not examined. FIR has been registered after great delay and only on the basis of dying declarations, which are not admissible, conviction is ordered. He has relied upon a judgment reported at (2008) 16 SCC 328 (Ashraf Ali vrs. State of Assam), to urge that the circumstances not put to the accused u/s 313 of Criminal Procedure Code, cannot be used against him and as the facts narrated in dying declaration have not been put to the accused, he is liable to be acquitted. Other judgment reported at Basavaraj R. Patil and Others Vs. State of Karnataka and Others, taking similar view is also relied upon.

Ashraf Hussain Shah Vs. State of Maharashtra, is relied upon to show that when best witness or best evidence is not produced by the prosecution, the prosecution case cannot be believed. Shaikh Rafiq and Another Vs. State of Maharashtra, is relied upon to show sanctity of the procedure required to be adhered to while recording dying declarations. Galaveli Venkateswara Rao (A.1) and Another Vs. State of A.P., -(Andhra Pradesh High Court), is relied upon to show that incriminating circumstances contained in the dying declaration must be put to the accused, while recording his statement u/s 313 of Criminal Procedure Code. By inviting attention to paragraph No. 9 thereof, the learned Counsel appearing on behalf of the appellant submits that course or procedure condemned therein has been followed by the learned Sessions Court in the present matter. As the appellant is not aware of recording of any dying declaration, his answer in negative thereto or stand that such dying declaration is false, by itself cannot be construed as tantamounting to putting of the incriminating circumstances or material to him u/s 313.

8. Sk. Yusuf Vs. State of West Bengal, is also relied upon to submit that mere fact that the appellant was absconding by itself cannot be used as a circumstance sufficient to implicate him. The learned counsel for the appellant has invited our attention to the answer given by the accused to question No. 10 in Section 313 statement.

9. Learned A.P.P. in reply submitted that there was no reason either for the P.W. 9 Mohan or then P.W. 8 Balwant or for P.W. 3 Dr. Baburao Deshmukh to falsely implicate the appellant. He invites attention to the judgment reported at Laxman Vs. State of Maharashtra, to show the ingredients or requirements of a valid dying declaration. He submits that when all competent officers like P.W. 3, P.W. 8 were satisfied about the condition of Ramratibai, found her fit to give dying declaration, her dying declaration has been recorded voluntarily, in question answer form, has been read over & accepted to be correct by her, there is no infirmity to discard the same. In this situation, the fact that the accused was absconding, is one of the circumstance which has been looked into along with other circumstances. He also draws support from the Division Bench judgment of this Court reported at Puran Babu Chavan Vs. The State of Maharashtra, He has also invited attention to statement recorded u/s 313 to urge that it is complete & there is no lacunae in it.

10. In reply, Shri Manohar, learned counsel appearing on behalf of the appellant has taken us through the statement of appellant u/s 313 recorded on 28.01.1999 by the 2nd Additional Sessions Judge, Amravati. He submits that questions therein, like question No. 3, question No. 4, question No. 7, question No. 8 do not put the facts attempted to be brought on record vide dying declarations, and hence, both the dying declarations of Ramratibai need to be ignored. He again invites attention to a judgment of Division Bench of Andhra Pradesh High Court in case of Galaveli Venkateshwarrao vrs. State of A.P. (supra).

11. We have carefully considered the material on record. Full Bench of this Court in a judgment reported at Ramesh Kamble Vs. State of Maharashtra, has found that to prove a dying declaration and to rely on it, as sole basis for conviction, it has to pass through three stages. The first stage is to admit and exhibit the statement; second is, to prove contents thereof and the last is, to prove that the statement was voluntarily and trustworthy made by the deceased in fit state of mind. The said Full Bench in paragraph No. 21.1 has found that Section 313 of Criminal Procedure Code uses the expression "circumstances appearing in evidence". Section 32 of the Evidence Act also uses expression "statement orally or verbal". The Word "statement" therefore, includes written dying declaration. By placing reliance upon judgment of the Hon"ble Apex Court reported at Sunder Singh Vs. State of Uttaranchal, the Full Bench observes that meticulous care needs to be taken to put all incriminating circumstances to the accused. If the facts and circumstances appearing in the statement of the deceased relating to cause of death are incriminating, Court has to put those questions to the accused to enable him to explain the same. Division Bench of Andhra Pradesh High Court

in case of Malekhan vrs. State of A.P. reported at 2005 ALT (Cri.) 130, is again relied upon for this purpose.

12. When Section 313 statement recorded in present matter is looked into, vide question No. 3 examination of Ramratibai by P.W. 3 Dr. Baburao and her being in fit state to record dying declaration has been put to the accused & the accused has answered that he does not know anything about it. Question No. 4 is about examination of Ramratibai by said Doctor after recording of dying declaration was over, and again it is answered on same lines. Question No. 7 is about visit by P.W. 8 Balwant (Special Magistrate) and his recording of dying declaration. The appellant, in his answer, has stated that he was not aware. Question No. 8 is about Doctor examining Ramratibai after that dying declaration, and it has been answered by the appellant similarly. Thus, none of these questions put, to appellant/accused any material or fact disclosed by Ramratibai in her dying declaration. Fact that the accused visited her house, he was carrying kerosene can, his wife Meena was missing & he was enquiring about her, that he had threatened to kill Ramratibai, are not put to the accused at all. Fact that on the date of incident, he poured kerosene on her person and then set her on fire by lighting match stick, is again not put. This omission on the part of the trial Court becomes significant in the light of question No. 10 put to the accused in his Section 313 statement. It is about his abscondence & he has replied to it by stating that he had gone to Mumbai with his wife. Implications of this answer in the background of narration of history in her dying declaration by Ramratibai & its evaluation, may have material impact on the entire story of the prosecution. In this situation, we find that only by putting in 4 questions on dying declarations, the trial court has failed to extend requisite opportunity to the accused as per Section 313, Cr.P.C. and material prejudice has been caused to him. Material circumstances, attempted by the prosecution or needed to be used against the appellant-accused and disclosed in dying declarations ought to have been put to him.

13. Division Bench of this Court in Subhash Nagorao Junghare Vs. State of Maharashtra , has after noticing that proper questions u/s 313 of Criminal Procedure Code were not put, remitted the matter back to the trial court with directions to conduct proper examination under that provision and to afford him an opportunity to lead evidence in defence, if necessary. This judgment is followed by a later Division Bench in judgment reported at Raju Sureshsingh Thakur Vs. State of Maharashtra where again similar course was adopted.

14. Here as material circumstances appearing in the dying declarations have not been put to the appellant/accused, and hence an opportunity mandated u/s 313 is denied to him, we find that the same needs to be extended to him. We are not making any observations on other contentions of Shri Manohar, learned Counsel which we have already briefly noted above. The trial Court after extending such opportunity under S. 313 Cr.P.C. to the appellant will be required to hear the arguments & deliver judgment afresh. All these contentions therefore must be

raised before it and evaluated by it. Any comment or finding by us at this stage will un-necessarily influence trial court & eclipse that exercise.

15. We also note that the present appellant has been released on bail by this Court on 01.04.1999 and presently he continues to be on bail. We, in this situation, quash and set aside the judgment and order dated 10.02.1999 delivered by the Additional Sessions Judge, Amravati in Session Trial No. 87/1998. The said Sessions Trial is restored back to the Court of Sessions Judge, Amravati for recording statement of accused u/s 313 of Criminal Procedure Code afresh. After recording that statement, he shall be given an opportunity to lead evidence in defence, if he so desires. Thereafter, the learned trial Court shall hear arguments & deliver judgment afresh in the matter, uninfluenced by the earlier judgment dated 10.02.1999 or by any comments made by us above.

16. We direct the accused-appellant to appear before that Court on 28.07.2014. Record and Proceedings be sent back for said purpose immediately.

17. Bail bond given by the accused in obedience to orders dated 01.04.1999 of this Court shall remain valid & continue to operate until further appropriate orders are passed by the Sessions Court in this respect and during the pendency of the trial. Sessions Court shall attempt to deliver judgment afresh as early as possible and in any case by 10.10.2014.

18. Criminal Appeal is accordingly partly allowed and disposed of.