Bombay High Court
Vatsalabai Bhanudas Jadhav & Ors vs The State Of Maharashtra on 12 October, 2017
Bench: S.V. Gangapurwala

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 381 OF 2001

1. Vatsalabai Bhanudas Jadhav,
Age: 60 Years, Occu.: Agri. & Household,

2. Bhanudas Yadavrao Jadhav,
Age: 65 Years, Occu.: Agriculture

3. Shivaji Bhanudas Jadhav,
Age: 28 Years, Occu.: Agriculture

All R/o. Newasa Bk. Tal.: Newasa,
District: Ahmednagar .. Appellants

Versus

The State of Maharashtra .. Respondent

Shri V. R. Dhorde h/f Shri R. N. Dhorde, Advocate for the Appellants.
Shri D. R. Kale, A.P.P. for the Respondent / State.

CORAM : S. V. GANGAPURWALA &
MANGESH S. PATIL, JJ.

RESERVED FOR JUDGMENT ON : 1st September, 2017
JUDGMENT PRONOUNCED ON : 12th October, 2017

JUDGMENT (Per S. V. Gangapurwala, J.) :

1. The appellant No. 1 / accused No. 1 is convicted for the offence punishable under Sections 302, 498A, 34 of Indian Penal Code and is sentenced to suffer life imprisonment and to pay a fine of Rs.1,000/- for offence punishable under Section 302 of I.P.C. The accused No. 1 is also sentenced to suffer simple imprisonment for a period of 2 years and to pay fine of Rs.1,000/- in default 3 months simple imprisonment for offence punishable under Sections 498A and 34 of I.P.C. The substantive sentence are directed to run concurrently. The appellant No. 2 / accused No. 2 and appellant No. 3 / accused No. 3 are convicted for offence punishable under Sections 498-A, 34 I.P.C. and are sentenced to suffer rigorous imprisonment for a period of 2 years and to pay a fine of Rs.1,000/- each in default to suffer rigorous imprisonment for 3 months.

2. The accused No. 4 and 5 are acquitted of the offence alleged against them.

3. The prosecution case in nutshell is as under.

4. Deceased Savita is a daughter in law of appellant Nos. 1 and 2 and wife of appellant No. 3. On or about 1.10.2000 during 10:30 to 10:00 am in furtherance of their common intention these accused persons committed murder of deceased Savita near their cattle shed situated at Village - Khalwadi, Taluka - Newasa by 3 Cr. Appeal 381.2001 pouring kerosene on her person. It is the case of prosecution that deceased Savita was subjected to cruelty by all the accused on the count that she could not fulfill their unlawful demand of the amount of Rs.25,000/-. The accused were compelling her to bring Rs.25,000/- in order to purchase tempo and when she could not pay it she was subjected to cruelty i.e. the accused abused her, they threatened her, they did not provide food to her and finally killed her. The marriage of deceased Savita had taken place with accused No. 3, six months prior to the incident.

5. During the trial, the prosecution examined 8 witnesses. The case of the prosecution revolves around the alleged dying declaration which is recorded by P.W. No. 1 Naib Tahsildar and the statement of P.W. No. 2 - Narayan father of deceased Savita. There are no eye witnesses. The evidence of P.W. No. 7 Medical officer is also relied upon to show that the deceased was mentally fit to record her statement.

6. Mr. V. R. Dhorde, learned Advocate for the appellants strenuously contends that the prosecution has miserably failed to prove the case against the accused persons. As far as offence under Sections 498A read with 34 is concerned except the bald statement of P. W. No. 2 the father of the deceased no evidence is brought on record. The mother of the deceased has not been examined. P. W. No. 2 has made vague allegations. Prior to the incident no complaint of ill treatment was ever filed by P.W. No. 4 Cr. Appeal 381.2001 2 or any other person. Even married sisters were roped in without any evidence. It was also admitted by the P.W. No. 2 that there was no agreement regarding payment of Rs.25,000/- at the time of marriage and there was no complaint at the time of performance of marriage. The offence under Sections 498A, 34 of I.P.C. are not proved.

7. Learned counsel further submits that, the accused No. 1 is convicted for the offence punishable under Section 302 merely on hypothetical considerations. The Dying Declarations said to have been recorded by P.W. No. 1 is not in consonance with the statement of P.W. No. 2. The P.W. No. 2 in his

statement says that the deceased told him in the hospital that her mother in law poured kerosene on her person and set her on fire and that the father in law was standing besides her. Whereas in the dying declaration recorded by P.W. No. 1 it is no where stated that the father in law was standing at the scene of the offence. The act is attributed by the deceased to accused No. 1 only. There is material contradictions in the same. The learned counsel submits that the P.W. No. 1 has recorded dying declaration on 2nd October, 2000 at about 12:35 p.m. whereas prior to that the father, mother and the relatives of the deceased had met the deceased. There is every possibility that she was tutored. The learned counsel submits that the P.W. No. 4 in his evidence has clearly stated that he has seen the incident and deceased Savita set herself on fire and she was saying that her marriage was 5 Cr. Appeal 381.2001 performed against her will. At that time neither the mother in law nor the father in law was present, they were called subsequently, the said evidence goes against the prosecution. He is a witness to the Panchanama (Exhibit-19) also. The learned counsel submits that, the material witnesses are not examined. The one who had doused the fire on the person of deceased namely Konkane is also not examined. It is the father in law and mother in law i.e. accused Nos. 1 and 2 who had brought the deceased to the hospital. They were not present at the scene of offence as would be clear from the evidence. The mother in law- accused No. 1 had arrived at the scene of offence in a Jeep.

8. The learned counsel further submits that, the deceased was brought on 1st October, 2000 in the hospital at 13:45 hours and at the time when she was brought A.S.I. Khilari had recorded the statement of the deceased. There is an endorsement of the doctor but the said statement is not coming forth nor A.S.I. Khilari is examined. The same creates a doubt in the story of the prosecution. The said statement as it was going against the case of prosecution is deliberately withheld. The learned counsel submits that, prosecution has miserably failed to prove the guilt of the accused. When there is a contradiction in the dying declarations the dying declarations become doubtful and cannot be relied upon to convict the accused persons. The learned counsel relies on the judgment of the Apex Court in a case of Gopal Vs. State of Madhya Pradesh reported in (2009) 6 Cr. Appeal 381.2001 12 SCC 600. So also, another judgment of the Apex Court in a case of Amol Singh Vs. State of Madhya Pradesh reported in (2008) 5 SCC 468 and in a case of State of Gujarath Vs. Jayrajbhai Punjabhai Varu reported in (2016) 14 SCC 151 .

9. Mr. D. R. Kale, the learned A.P.P. for the respondent submits that, the offence under Section 302 of I.P.C. has been proved against the accused No. 1. In the dying declaration recorded by the Naib Tahsildar the deceased has specifically attributed the act of pouring kerosene and setting her on fire to the accused No. 1 mother in law. There is no inconsistency in the said statement. In the deposition P.W. No. 2 father of the deceased has also stated that deceased had told him that the mother in law has set her on fire by pouring kerosene. The P.W. No. 2 has only further stated that deceased told him that father in law was also standing their at the time of incident and the said fact was not stated in the dying declaration recorded by P.W. No. 1. However, that cannot be said to be material contradiction so as to disbelieve the dying declaration. The act attributed to the accused No. 1 is consistent in both the dying declarations. The doctor has also certified that at the time when the dying declaration of the deceased was recorded by P.W. No. 1 she was in a fit mental condition. There is no reason to disbelieve the said dying declaration. The learned A.P.P. further submits that, the dying declaration is proved by the examination of P.W. No. 1. There is no material contradictions

brought out in 7 Cr. Appeal 381.2001 the cross examination. The evidence of P.W. No. 1 is not impeached. The learned A.P.P. further submits that the case against accused Nos. 1 to 3 under Section 498A has also been proved. In the dying declaration the deceased has stated that she was ill treated so also in the evidence of P.W. No. 2 the ill treatment meeted out to deceased has been brought on record. The same would bring the case within the ambit and purview of Section 498A of I.P.C.

10. With the assistance of the learned counsel for respective parties we have gone through the evidence and the record.

11. The deceased Savita having caught fire on 1.10.2000 and brought to hospital with 80% burns at about 13:45 hours is a matter of record. The matter of debate is whether the same is a homicidal death and the act can be attributed to the accused.

12. The dying declaration recorded by P.W. No. 1 Naib Tahsildar is to the effect that the accused No. 1 poured kerosene on her and set her on fire. In the said dying declaration the place where she was set on fire is not stated. From the other evidence it transpires that the place of incidence is near the cattle shed on the road. It has also come in evidence that many persons had gathered near the scene of offence.

13. The medical papers on record show that the deceased was 8 Cr. Appeal 381.2001 admitted at about 13:45 hours on 1 st October, 2000. There is an endorsement of doctor at 15:00 hours on 1.10.2000 that the patient is fit to give statement. Even the thumb impression of Bhanudas - accused No. 2 is obtained to the effect that he is told about the serious condition of his daughter in law Savita and he has no complaint against the hospital. There is also endorsement of Dr. Reddy, that A.S.I. Khilari has recorded the statement on 1.10.2000 at 15:30 hours. The statement recorded by A.S.I. Khilari in presence of Dr. Reddy is not coming forth. The same is not produced nor prosecution has examined A.S.I. Khilari. No explanation is coming forth from the prosecution for withholding the said evidence. It appears from the evidence that villagers called accused Nos. 1 and 2 on the spot and thereafter accused Nos. 1 and 2 took the deceased Savita to the hospital and on the way stopped the Jeep and informed P.W. No. 2 about the incident and on 1.10.2000 at about 3:30 p.m. P.W. No. 2 father of the deceased went to the Civil Hospital. Prior to P.W.2 meeting the deceased, statement of the deceased was recorded by A.S.I. Khilari in presence of Dr. Reddy who endorsed that the deceased Savita was fit to give statement. In fact that was the first statement which was really relevant and material. However, the same is suppressed and withheld by the prosecution.

14. In the dying declaration recorded by P.W. No. 1 Naib Tahsildar the deceased stated that the accused No. 1 poured kerosene and set her on fire and nothing is stated about the 9 Cr. Appeal 381.2001 father in law but P.W. No. 2 - father states that deceased told him that when mother in law poured kerosene and set her on fire the father in law was standing nearby. The mother of the deceased though her statement was recorded has not been examined, whereas as per statement of P.W. No. 4 the deceased herself set her on fire. It is stated by the deceased in her Dying Declaration that one Mr. Konkane, had doused fire. The statement of one Ashok Konkane and Shivaji Konkane is recorded under section 162 of the Criminal Procedure Code, still they are not examined.

15. It is held by the Apex Court in a case of State of Gujarath (referred to supra) that the court has to examine a dying declaration scrupulously with a microscopic eye to find out whether it is voluntary and truthful. The court has to remain alive to all the attending circumstances. In case of more than one dying declarations intrinsic contradictions in those dying declarations are extremely important.

16. In the present case, following circumstances make it doubtful to rely on dying declaration so as to convict the accused No. 1 for an offence under Section 302 of I.P.C.:

I] In the dying declaration recorded by the P.W. No. 1 Naib Tahsildar, the presence of accused No. 2 at the scene of offence is not alleged. Whereas in oral dying declaration as stated to P.W. No. 2, the father in law - accused No. 2 was present at the scene of offence.

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II] In the dying declaration recorded by P.W. No. 1 it is

stated that one Konkane had doused the fire. Statement under Section 162 of two Konkanes is recorded. None of the Konkanes is examined as prosecution witness during the trial.

III] The place of offence / alleged incident is not forthcoming in the dying declaration recorded by P. W. No. 1.

IV] The first dying declaration is recorded by A. S. I. Khilari in presence of Dr. Reddy. Dr. Reddy had made an endorsement at that time that deceased is in a fit state of mind. The said statement is suppressed and is not brought before the court nor A. S. I. Khilari or Dr. Reddy are examined. No explanation is coming forth for non examination of A. S. I. Khilari and Dr. Reddy so also for not producing the statement recorded by A. S. I. Khilari. V] Adverse inference can be drawn for withholding said statement of evidence. The inference can be drawn that said statement is not favourable to prosecution.

17. Considering the aforesaid anomalies, it is difficult to rely on the dying declaration to convict accused No. 1 for the offence under Section 302 of I.P.C.

18. The evidence is too short to convict the accused persons for an offence under Section 498A of I.P.C. In the dying declaration 11 Cr. Appeal 381.2001 it is only stated that since marriage she is harassed by father in law and mother in law and since marriage three times the husband has beaten her. Even if the husband came home drunk the father in law and mother in law used to harass her and they never used to say anything to the husband. She does not allege that she was asked to bring Rs. 25,000/-, there is no whisper about the same in the Dying Declaration. Whereas in a statement of father of the deceased P.W. No. 2 he comes with the story that Rs.25,000/- were demanded for purchasing tempo and as the same was not given deceased was harassed. He also stated that for a period of 2 months deceased was treated properly whereas in dying declaration recorded by P.W.

No. 1 the same is not the fact stated. It is admitted by P.W. No. 2 that no complaint was made of what so ever nature to suggest that the deceased was ill treated. The evidence falls too short to convict the accused persons under Section 498A of I.P.C.

19. In the result, the appeal is allowed. The accused persons stand acquitted of the offence punishable under Sections 302, 498A read with 34 of I.P.C.

[MANGESH S. PATIL, J.] [S. V. GANGAPURWALA, J.] marathe/sep.17