

(2013) 01 BOM CK 0036

Bombay High Court (Aurangabad Bench)

Case No: Criminal Appeal No. 405 of 2011

Rahul

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision: Jan. 9, 2013

Acts Referred:

- Penal Code, 1860 (IPC) - Section 302, 34, 498A

Citation: (2013) ALLMR(Cri) 1686

Hon'ble Judges: S.B. Deshmukh, J; P.V. Hardas, J

Bench: Division Bench

Advocate: Satej Jadhav, for the Appellant; B.V. Wagh, Assistant Public Prosecutor, for the Respondent

Judgement

P.V. Hardas, J.

The appellant, who stands convicted for an offence punishable u/s 498-A of I.P.C. and sentenced to simple imprisonment for two years and to pay fine of Rs. 10,000/-, in default of which to undergo further S.I. for six months and imprisonment for life and to pay a fine of Rs. 10,000/-, in default of which to undergo further R.I. for one year, by the Additional Sessions Judge, Udgir, by judgment dated 30.6.2011 in Sessions Case No. 21 of 2010, by this appeal questions the correctness of his conviction and sentence. Facts in brief as are necessary for the decision of this appeal may be stated thus:-

P.W.10 P.S.I. Bhagwan Dhabadge, who on 27.10.2009 was attached to Udgir city police station was entrusted with the investigation of Crime No. 67 of 2009, which was registered on the basis of statement of deceased Priti at Exh. 64. The offence had been registered by Head Constable Dhepe. On being entrusted with the investigation of the said crime, P.W.10 P.S.I. Dhabadge proceeded to the scene of the incident and in the presence of the panch witnesses drew the scene of the incident panchnama at Exh. 45. From the scene of the incident he seized one plastic

bottle containing kerosene, match box, two burnt match sticks, burnt pieces of clothes, half burnt petticoat, half burnt banian and bed cover. An A.T.M. card and cash of Rs. 7,800/- was also seized. The seized property was thereafter referred to the Chemical Analyzer at Aurangabad. Inquest panchnama at Exh. 41 was drawn. On 5.11.2009 accused Vishnu and Gautam i.e. accused Nos. 4 & 5 were arrested. Thereafter accused Nos. 2 & 3 were arrested on 19.11.2009. Accused No. 1 who had sustained injuries was referred from the Civil Hospital, Udgir to the Military Hospital at Pune and was arrested on 25.12.2009. Statements of witnesses were recorded and on completion of the investigation, a charge-sheet against the accused was submitted.

2. P.W.6 Police Constable Suryawanshi, who on 27.9.2009 was attached to the Police Chowky of Civil Hospital at Udgir, received an M.L.C. from the Civil Hospital, Udgir at Exh. 63 regarding admission of injured Priti with 100% burns. P.W.6 Police Constable Suryawanshi, therefore, proceeded to the ward and ascertained from the Medical Officer if Priti was in a fit condition to give her statement. The Medical Officer opined that Priti was in a fit condition to give her statement and, therefore, her statement was recorded at Exh. 64. A requisition was issued to the Tahsildar for recording the dying declaration of Priti. P.W.5 Shaikh Mahemood Abrar Hussain, a Naib Tahsildar at Udgir, was informed on telephone for recording the dying declaration of Priti who was admitted in the Civil Hospital. He received the memo at Exh. 52 for recording the dying declaration. He accordingly proceeded to the Civil Hospital, Udgir and ascertained from the Medical Officer if Priti was in a fit condition to give her statement. Accordingly statement of Priti was recorded at Exh. 53.

3. Post mortem on the dead body of deceased Priti was conducted by P.W.9 Dr. Vijay Dhavle. P.W.9 Vijay Dhavle noticed that deceased Priti had sustained 91% burns and her skin was peeled at places. He, therefore, opined that cause of death was hypovolemic shock due to 91% superficial to deep burns. The post mortem report is at Exh. 78.

4. On committal of the case to Court of Sessions, Trial Court vide Exh. 33 framed charge against the appellant and other accused for offence punishable under sections 498-A and 302 read with sec. 34 of the Indian Penal Code. The accused denied their guilt and claimed to be tried. Prosecution in support of its case examined ten witnesses. The Trial Court, upon appreciation of the evidence, convicted and sentenced the appellant as afore-stated while acquitting the other accused.

5. In order to effectively deal with the submissions advanced before us by Shri Satej Jadhav, learned Counsel for the appellant and the learned A.P.P., it would be useful to refer to the evidence of the prosecution witnesses.

6. Prosecution has examined P.W.8 Kamlabai, mother of deceased Priti, who states that Priti was her elder daughter who was married to the appellant. She states that

she had given Rs. 1 Lac, two Tolas of gold and other household articles to accused No. 1 in the marriage. After her marriage, Priti resided with her in-laws and thereafter she went to reside with the accused No. 1 at the place of his service. After about three months Priti informed P.W.8 Kamlabai that accused No. 1 was consuming liquor and was illtreating her by demanding money. Priti, therefore, informed Kamlabai to send money for giving it to accused No. 1. Kamlabai, therefore, went with the younger son to Meghalaya carrying Rs. 15,000/- for paying the same to accused No. 1. On reaching there, she noticed an injury on the head of Priti and on inquiry Priti disclosed to her that accused No. 1 assaulted her with a hammer. The accused No. 1 told Kamlabai to pay him the money and not to tell about payment to Priti. Kamlabai, therefore, handed over Rs. 15,000/- to accused No. 1, who kept it in an almirah. Thereafter Priti gave birth to a daughter at the house of Kamlabai at AUSA. According to Kamlabai, accused No. 2 started illtreating Priti and Priti used to narrate about the ill treatment to Kamlabai on telephone. According to Kamlabai, accused Nos. 2 to 5 were also abusing Priti. Kamlabai further states that all the relatives tried to convince accused No. 1 not to illtreat Priti. Accused No. 1 thereafter went to attend his service at Meghalaya. Priti, meanwhile, was residing at Udgir. According to Kamlabai, accused Nos. 2 & 3 were not even providing water to Priti. They did not permit Priti to take bath in the bathroom. In the month of April, accused No. 1 returned to AUSA and informed Kamlabai that his mother was not permitting Priti to reside in their house and, therefore, told Kamlabai to purchase a plot and to give it to him. Accordingly, Kamlabai purchased a plot for Rs. 90,000/- in the name of accused No. 1. The accused thereafter demanded money to Kamlabai for the construction of the house. The amount was, therefore, deposited in the account of Priti in the Bank. The construction of the house was thereafter started and was completed upto lintel level. In respect of the incident, Kamlabai states that Balaji, son of her sister informed Kamlabai on phone that Priti had sustained burns and, therefore, requested Kamlabai to come to Udgir. Kamlabai accordingly went to the Civil Hospital at Udgir and on inquiry with Priti, Priti informed her that while she was giving kerosene to accused No. 1 for washing his hands, accused No. 1 took the bottle of kerosene and poured it on Priti and set her ablaze. The accused thereafter pushed her inside the house and closed the door. In cross-examination she has admitted that accused No. 1 has four houses. She has also admitted that accused No. 4 was residing separately. She has admitted that an account in the name of Priti was opened in the Bank after her marriage. She has admitted that Priti had an ATM card. Omission has been elicited that she had not stated in her previous statement that accused No. 1 had assaulted Priti with a hammer and had quarrelled with her for observing Ambedkar Jayanti and that Kamlabai gave Rs. 90,000/- to accused No. 1 for purchasing a plot. Omission has also been elicited that Priti had informed Kamlabai that accused No. 1 poured kerosene on her and thereafter closed the door of the room and had pushed Priti inside the room.

7. Prosecution has examined P.W.7 Anusaya, maternal aunt of Priti, who states that she was the mediator in the marriage of Priti and the appellant. Anusaya further states that accused No. 2 used to instigate accused No. 1 for demanding gold and money and, therefore, accused No. 1 used to assault Priti after consuming liquor. Anusaya states that Priti used to narrate to her the instances of ill treatment. She further states that accused No. 1 started construction of the house and demanded money to P.W.8 Kamlabai. Anusaya further states that the appellant was painting the doors and windows and accordingly had asked Priti to bring kerosene for washing his hands. When Priti handed over the kerosene container to accused No. 1, accused No. 1 took the kerosene bottle from Priti and poured kerosene on her and set her ablaze and shut the door. Anusaya has admitted that on the day of the incident she had gone to attend her work at village Mogha. She states that her son had brought her to the hospital on a motorcycle. She states that she had inquired from Priti about the incident and Priti had informed her that accused No. 1 poured kerosene on her and had set her ablaze. In cross-examination she has admitted that after six months of marriage, Priti had gone to reside with the accused No. 1 and she resided with him for about one year. Priti had thereafter come to her village as Priti was pregnant and after birth of her daughter she again went to reside with accused No. 1. She has admitted that her house is located four lanes beyond the house of accused No. 1. She has admitted that none from her house had gone to the hospital when Priti had sustained the burns. She has admitted that she had reached the hospital at about 7.30 p.m.

8. P.W.6 Police Constable Suryawanshi, who states about recording of the dying declaration of Priti at Exh. 64, has admitted in the cross-examination that he had received the M.L.C. at about 6.00 p.m. and had immediately gone to the hospital. Relatives of Priti were present in the ward. He could not state the time as to when he commenced recording the statement of Priti and also could not state the time regarding its completion. He has admitted that it required about half an hour for recording the statement of Priti. According to him, he completed the recording of the statement at 6.45 p.m. In the dying declaration at Exh. 64 Priti states that on the day of the incident at about 4.00 p.m. she and her husband (accused No. 1) were present in the house. Her husband had painted the doors and, therefore, had asked Priti to pour kerosene on his hands in order to clean his hands. After Priti had poured kerosene on his hands, accused No. 1 snatched the bottle and poured kerosene on her and set her ablaze. On hearing her cries, her mother-in-law, sister-in-law and other neighbours had extinguished the fire and had admitted her in the hospital.

9. P.W.5 Shaikh Mahemood Abrar Hussain, a Naib Tahsildar, has admitted in the cross-examination that he had received the letter for recording the dying declaration at about 6.00 p.m. Thereafter he had received a letter from the police at about 6.10 p.m. He has admitted that it required 25 minutes to record the statement of Priti and he accordingly completed the recording of the dying declaration of Priti

at about 6.45 p.m. He has admitted that saline was being administered to Priti. He has admitted that he had not mentioned in the dying declaration that it was read over to Priti and Priti had admitted the contents to be correct. He has then admitted that he was present in the ward for about 30 to 45 minutes and during that time no one had come there.

10. Shri Satej Jadhav, learned Counsel for the appellant has urged before us that the dying declarations cannot be implicitly relied upon as the dying declarations appear to have been recorded at one and the same time and the recording of two dying declarations at the same time is an impossibility. Learned Counsel for the appellant has urged before us that there is no credible evidence for sustaining the conviction of the appellant. The learned A.P.P. has supported the findings arrived at by the Trial Court.

11. Neither P.W.5 Shaikh Mahemood Abrar Hussain nor P.W.6 Police Constable Suryawanshi state that the dying declarations at Exh. 53 and 64 respectively, were read over to the declarant and the declarant had admitted the contents to be correct. Moreover, P.W.5 Shaikh Mahemood Abrar Hussain, Naib Tahsildar, who had recorded the dying declaration at Exh. 53, states that he had completed the recording of the dying declaration at 6.45 p.m., while P.W.6 Police Constable Suryawanshi also states that he had completed the recording of dying declaration at Exh. 64 at 6.45 p.m. We find that the evidence of both these witnesses is irreconcilable that both of them were recording the dying declarations simultaneously and had completed the recording at 6.45 p.m. We find this circumstance to be highly suspicious and, therefore, according to us implicit reliance on the dying declarations cannot be placed.

12. In respect of the alleged oral dying declarations made to P.W.7 Anusaya and P.W.8 Kamlabai, we find that though both of them were present in the hospital, none of them referred to the presence of each other in the hospital. Moreover, none of them had immediately lodged a report at the police station in respect of what was told to them by Priti. The accused in their defence have examined D.W.1 Prabhavati, who states that she had heard cries from the house of accused No. 1 Rahul and on hearing the cries she and Rahul and the mason had rushed towards the first floor of the house of accused No. 1. Accused Rahul had poured water on Priti and had extinguished the flames. She further states that some one had brought an auto-rickshaw and Priti was then taken to the hospital. She was cross-examined by the prosecution but nothing of substance has been elicited in the cross-examination. Statement of Prabhavati was recorded by the police during investigation. The accused have examined D.W.2 Vilas Kamble, cousin of the accused No. 1, who was owning plot at Udgir. D.W.2 Vilas states that the plot was transferred in the name of the wife of accused No. 1. He has further stated that no consideration was paid to him for transferring the plot. Again nothing of substance has been elicited in the cross-examination.

13. We, therefore, find that implicit reliance cannot be placed on either the written dying declarations or the oral dying declarations. We further find it difficult to believe that in the absence of any quarrel, the appellant would suddenly pour kerosene on Priti and set her ablaze. In none of the dying declarations does Priti even remotely indicate that there was a quarrel between her and the appellant either on the day of the incident or prior to that and, therefore, out of anger the appellant had set her ablaze. The appellant was painting the doors and windows of his house and we find it inexplicable that the appellant would suddenly pour kerosene on Priti and set her ablaze. Priti had sustained 91% burns and, therefore, the possibility that Priti was not in a proper frame of mind to give her dying declaration also cannot be ruled out. Within few hours of her admission in the hospital, Priti had succumbed to her injuries. In the background of the aforesaid facts, according to us, the appellant would be entitled to be given the benefit of doubt. Accordingly, Criminal Appeal No. 405 of 2011 is allowed. Conviction and sentence of the appellant is hereby quashed and set aside and the appellant is acquitted of the offence with which he was charged and convicted. Fine, if paid by the appellant, be refunded to him. Since the appellant is in jail, he be released forthwith, if not required in any other case.