

(2000) 11 BOM CK 0062
Bombay High Court
Case No: Criminal Appeal No. 98 of 1997

Sadashiv Dhondiram
Pandit

APPELLANT

Vs

The State of
Maharashtra

RESPONDENT

Date of Decision: Nov. 9, 2000

Acts Referred:

- Penal Code, 1860 (IPC) - Section 299, 300, 302, 304, 307

Citation: (2001) ALLMR(Cri) 69 : (2001) CriLJ 4880 : (2002) 2 DMC 241

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

Bench: Division Bench

Advocate: Mr. M.A. Patil, for the Appellant; Mr. B.R. Patil, Assistant Public Prosecutor, for the Respondent

Judgement

Vishnu Sahai, J.

Through this appeal the appellant challenges the Judgment and order dated 28th November, 1996 passed by the Additional Sessions Judge. Kolhapur, in Sessions Case No. 93/1996, whereby he has been convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs. 1000/- for the offence punishable u/s 302 of the I.P.C.

2. Shortly stated the prosecution case runs as under : The deceased Ratnamala was the wife of the appellant. The couple had a son and a married daughter. At the time of the incident they were residing in village Mohare, Taluka Panhala, Dist. Kolhapur. The appellant was addicted to liquor and used to demand money from Ratnamala for the same and when she was unable to pay he used to quarrel with her and beat her. He used to also suspect the fidelity of Ratnamala and used to beat her. Ratnamala told this to her sister Shahu Kambale P.W. 3.

The evidence of Vikas Pandit P.W. 6, the son of the appellant and the deceased, shows that on the date of the incident i.e. 25.9.95 there was a quarrel between the appellant and the deceased. The latter gave the former money to consume liquor. The same day at about 8 a.m. Vikas Pandit P.W. 6 left the house for work. At about 12 noon the appellant came to the house under the influence of liquor and demanded mangalsutra from Ratnamala. When she refused to give the same he poured kerosene from a plastic can on her person, lighted her sari with a match stick, thereafter threw water on her and ran away.

At about 2 p.m. the same day Satyappa Kale P.W. 1 and Savitri Kamble P.W. 2., both neighbours of the deceased Ratnamala, reached the place of the incident. On receiving the information that she had been burnt her sister Shahu Kambale P.W. 3 and her son Vikas Pandit P.W. 6 also reached there. When Savitri Kamble and Shahu Kambale asked her how she sustained burns she told them that the appellant had poured kerosene on her person and set her on fire.

3. The evidence of Vikas Pandit P.W. 6 shows that he thereafter sent a message to his maternal uncle. His grand mother and the wife of one of the maternal uncles came and thereafter Ratnamala was taken to P.H.C. Kodoli, in a rickshaw, where the doctor advised that she be taken to C.P.R. Hospital, Kolhapur.

4. The evidence of Dr. Jayant Patil P.W. 5. who on 25.9.95 between 1 a.m. to 9 p.m. was on duty as C.M.O. at C.P.R. Hospital, Kolhapur, shows that at about 6.10 p.m. one Ratnamala who had been referred from Rural Hospital, Kodoli, was brought to the hospital. He admitted her and informed the police. She had sustained 40% burns which was distributed between chest, neck, hands and abdomen. She was able to talk.

5. The evidence of Shantaram Patil P.W. 7 shows that Dr. Jayant Patil informed the police station to make arrangements for recording the statement of Ratnamala vide Exhibit 16. On that he gave a letter of request to the Executive Magistrate. Narasingha Upadhye P.W. 10 to record the statement of Ratnamala.

6. The evidence of Narasingha Upadhye P.W. 10 shows that on 25.9.95 at about 8.25 p.m. he received the request for recording the statement of Ratnamala and went to C.P.R. Hospital. The Medical Officer, Dr. Jayant Patil examined Ratnamala and stated that she was in a fit condition to give her statement. On the paper on which Narasingha Upadhye recorded Ratnamala's statement Dr. Jayant Patil made an endorsement that Ratnamala was conscious to give her statement. Thereafter the Executive Magistrate Narasingha Upadhye recorded her statement. It is in Marathi but since it is a crucial piece of evidence on which the conviction of the appellant is founded we are extracting its English translation, which reads thus :

"I Ratnamala Sadashiv Pandit, age 35 years R/o Mohare. Tal. Panhala, give this statement. My husband Sadashiv Dhondiram Pandit use to attend work. He was of suspecting nature. Today at 12.00 noon he poured kerosene on my person and set

me on fire. He was in the influence of liquor. He was demanding cash and Mangalsutra. I refused for It. So he became annoyed and set me on fire. He used to do labour work. After setting me on fire he extinguished the fire by throwing the water, on me, and thereafter ran away.

My above statement read over to me.

Dt. 25.9.95

L.H.T.I. of Sou. Ratnamala Sadashiv Pandit."

7. After the Executive Magistrate had recorded her statement he asked her whether she could sign, to which she replied in the negative. Thereafter the Magistrate himself signed the statement. A perusal of the said statement shows that it was recorded between 8.30 and 8.45 p.m. on 25.9.95.

8. The evidence of Head Constable Mahadev Jadhav P.W. 8 shows that he was on duty in C.P.R. Hospital at Kolhapur, from 8 a.m. on 25.9.95 till 8 a.m. on 26.9.95. After receiving the dying declaration from Police Head Constable Patil he went to the burns ward and talked to Ratnamala. He found her conscious and in a condition to give her statement. Consequently he asked the doctor to examine her. Dr. Abhay Patil P.W. 13 examined her and certified that she was in a good condition to give the statement. It is pertinent to mention that the said endorsement is contained on the paper on which the statement has been recorded. Thereafter Mahadev Jadhav P. W. 8, between 9.25 p.m. to 9.40 p.m., recorded the said statement. The said statement which is in Marathi has been tendered as a dying declaration and consequently we are extracting its English translation, which reads thus :

"I Sou. Ratnamala Sadashiv Pandit, age 35 years Occ. Household, R/o Mohare, Tal. Panhala, at present In C.P.R. Hospital, Kolhapur give statement personally.

I reside on the above address along with my husband. I pull on by doing agricultural labour work. My husband was of suspicious nature. So wherever I was on work he always accompanied me and was asking me not to look here and there. In the Influence of liquor he used to beat me.

Today on 25.9.95 we both were in the house. Without attending the labour work at 12.00 noon my husband came to the house in influence of liquor and demanded Mangalsutra however. I refused for the same. So he got annoyed and poured Kerosene on my person from the plastic can which was in the house and set me on the fire by a match stick by which my sari caught fire. He extinguished fire by throwing water on my person and then ran away. At that time my son was not in our house.

So today 25.9.95 at 12.00 noon my husband poured kerosene on my person and set me on fire, by which I sustained burn injuries on my face, left hand, back portion etc.

Hence this is my complaint.

My above statement read over to me it is correct as per my knowledge. I am conscious while signing this statement.

L.H.T.I. of Sou. R. S. Pandit at 21.25 to 21.40"

A perusal of this statement shows that it bears the endorsement of the doctor that Ratnamala was in a state to give the statement.

9. We may mention that on the statement of Ratnamala recorded by Mahadev Jadhav P.W. 8 a case u/s 307 of the I.P.C. vide C.R. No. 53/96 was registered at Kodoli Police Station.

It is pertinent to mention that the evidence of Vikas Pandit P.W. 6, the son of Ratnamala shows that she died on 25-10.95. On her death the case was converted to one u/s 302 of the I.P.C.

10. The autopsy on the corpse of Ratnamala was conducted on 25.10.95 between 8 a.m. to 8.15 p.m., and the autopsy report shows that she died on account of septicemia due to 45% burns.

11. The case was investigated in the usual manner by P.S.I. Bhagwan Patil P.W. 12 who on completing the investigation submitted the charge sheet against the appellant on 26.12.95.

12. In due course the case was committed to the Court of Sessions where the appellant was charged for an offence punishable u/s 302 of the I.P.C. to which charge he pleaded not guilty and claimed to be tried.

During trial in all the prosecution examined 13 witnesses. We may straight away mention that there is no eye-witness of the incident and the prosecution adduced evidence in the form of five dying declarations against the appellant; three of them viz. those made to Savitri Kamble P.W. 2, Shahu Kambale P.W. 3 and Vikas Pandit P.W. 6 are oral declarations, one of them is the declaration recorded by the Executive Magistrate Narasingha Upadhye P.W. 10 and one is the statement recorded by Police Head Constable Mahadev Jadhav P.W. 8.

The learned trial Judge believed the dying declarations and convicted and sentenced the appellant in the manner stated in paragraph 1.

Hence this appeal.

13. We have heard learned counsel for the parties and perused the entire evidence on record. In our view, this appeal deserves to be partly allowed. In our view as instead of an offence u/s 302 of the I.P.C. an offence punishable u/s 304(ii) of the I.P.C. is made out against the appellant.

As mentioned earlier there are five dying declarations. We make no reservations in observing that it would not be prudent to accept the oral dying declarations deposed to by Savitri Kamble P.W.2, the neighbour of the deceased and Shahu

Kambale P.W. 3 the sister of the deceased. Although the said witnesses stated in their substantive evidence that when they enquired from Ratnamala how she was burnt she told them that the appellant had poured kerosene oil on her and set her on fire, but they have not mentioned the same in their statements u/s 161 of the Cr.P.C. When they were cross-examined on this omission all what they could answer was that they had stated it to the police and could give no reason as to why it had not been mentioned in their statements.

However, we have no reservations in believing the oral dying declaration deposed by Vikas Pandit P.W. 6 (the son of the deceased). It is pertinent to mention that he stated that when he learnt about his mother being burnt from some boys he went to the village and when he asked his mother how she was burnt, she told him that her father (the appellant) had poured kerosene on her and set her on fire. It is pertinent to mention that although Vikas Pandit was subjected to extensive cross-examination but nothing could be extracted there from which could impair the reliability of this oral dying declaration. It should be borne in mind that since the appellant is his father he would not have falsely deposed about it unless his mother had really made it to him. We believe this dying declaration.

14. We also believe the dying declarations in the form of Ratnamala's statement recorded by the Executive Magistrate Narasingha Upadhye P.W. 10 and the statement of Ratnamala recorded by Police Head Constable Mahadev Jadhav P.W. 8. Earlier we have extracted their English translation in its entirety. We have also mentioned that prior to the recording of these dying declarations, both Narasingha Upadhye and Mahadev Jadhav had enquired from the doctor whether she was in a fit condition to make it. We have also earlier seen that the endorsements made by the doctors that she was conscious to make it are found on the paper on which these declarations have been recorded. A perusal of the said dying declarations show that there is no dichotomy between them. A perusal of the relevant evidence also shows that the deceased had not been tutored while making them. It is pertinent to mention that neither the Executive Magistrate Narasingha Upadhye who recorded the dying declaration of Ratnamala, nor Police Head Constable Mahadev Jadhav P.W. 8 who also recorded her statement, nor Dr. Jayant Patit who medically examined Ratnamala prior to the Executive Magistrate recording her statement, nor Dr. Abhay Pati. P.W. 13 who examined her prior to her statement being recorded by Police Head Constable Mahadev Jadhav had any rancor or ill-will against the appellant and hence would not have been parties to concocted dying declarations. In such a situation we believe these declarations.

15. This leaves us with only one question viz. whether the Trial Court was justified in convicting the appellant for the offence punishable u/s 302 of the I.P.C. As observed earlier our answer is in the negative. In our view only an offence punishable u/s 304(ii) of the I.P.C. would be made out against the appellant for the reasons stated hereinafter:-

There was no enmity between the appellant and the deceased Ratnamala, The evidence shows that they had been married for a sufficiently long time as they had a married daughter. A perusal of the dying declarations recorded by Executive Magistrate Narasingha Upadhye and the statement of Ratnamala recorded by Police Head Constable Mahadev Jadhav P.W. 8 shows that when on 25.9.95 at about 12 noon the appellant came home under the influence of liquor and demanded Ratnamala's mangalsutra and when she refused to give the same; he became annoyed; poured kerosene oil on her; set her on fire with a match stick; and after pouring water on her, ran away.

A perusal of the evidence of Vikas Pandit P.W. 6 shows that she succumbed to her burns on 25.10.95 i.e. one month later. A perusal of the autopsy report shows that the deceased did not die directly as a consequence of burns but on account of septicemia resulting from them. In such a factual matrix, in our view, the act of the appellant could not fall under any of the four clauses of section 300 of the I.P.C., the breach of which is punishable u/s 302 of the I.P.C., but would fall within the four corners of clause thirdly of section 299 of the I.P.C.. the breach whereof is punishable u/s 304(ii) of the I.P.C. In the said factual matrix, in our view, when the appellant poured kerosene oil on Ratnamala's person and set her on fire, he committed an act with the knowledge, (in terms of clause thirdly of section 299 of the I.P.C.). that her death could be possible.

16. The only question which remains is the quantum of sentence which should be awarded to the appellant for the offence u/s 304(ii) of the I.P.C. Having reflected over it we are of the judgment that a sentence of 7 years R.I., coupled with a fine of Rs. 1000 and three months R. I. in default would meet the ends of justice.

17. In the result this appeal is partly allowed. Although we acquit the appellant for the offence u/s 302 of the I.P.C. and set aside his conviction and sentence of imprisonment for life and a fine of Rs. 1000/- imposed thereunder, but we find him guilty for the offence u/s 304(ii) of the I.P.C. and sentence him to undergo 7 years R. I. and to pay a fine of Rs. 1000/- in default to undergo three months R. I. thereunder.

The appellant is in jail and shall serve out his sentence.

In case the appellant has paid the fine for the offence u/s 302 of the I.P.C. it shall stand refunded to him.